Manitoba CLEAN·ENVIRONMENT™ COMMISSION

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Sent Via Email

August 31, 2012

All Participants

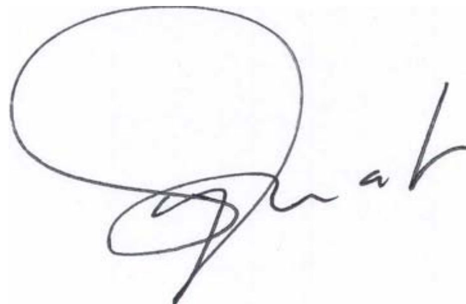
Re: Decision on Motion from Peguis First Nation, Heard August 16th, 2012

At the end of the motions hearing two weeks ago, I indicated that, at the request of counsel for the Manitoba Metis Federation, we would not release our decision on the Peguis First Nation motion until after we had heard the one from MMF, which at the time we thought would be heard on August 30th.

MMF counsel subsequently informed us that he would not be prepared to argue the motion on that date. It is now tentatively set for September 11th. In that same letter he removed his request that we hold the Peguis First Nation Decision. He did also request that our decision on the Peguis First Nation motion not prejudice his client's case. We agree to that request.

Attached is the panel's decision.

Sincerely,



Terry Sargeant
Chair

Attachment

DECISION
of the
Manitoba Clean Environment Commission
On the Motion of the
Peguis First Nation, Applicants
August 31, 2012

For the Applicant: Robert Dawson
Intervenor: Byron Williams
For the Respondent,
Manitoba Hydro: Janet Mayor

Decision

The Motion requesting an adjournment of the Hearings is dismissed.

Issue

The Applicant, by way of a motion made pursuant to Section 2.08 of the Clean Environment Commission *Process Guidelines Respecting Public Hearings*, requested an order adjourning the start of the Commission's public hearings in connection with the Bipole III Transmission Project for at least 120 days, from the scheduled start date of October 1, 2012.

Background

In December 2011, the Minister of Conservation issued a request that the Clean Environment Commission hold public hearings on Manitoba Hydro's proposal to construct the Bipole III transmission line project.

In May 2012, Peguis First Nation was granted funding under the Participant Assistance Program (PAP) and, thus, became a registered participant for the CEC proceedings.

Relevant Authority

Subsection 6(8) of *The Environment Act* allows the Commission to make rules governing its procedure.

Section 2.08 of the Clean Environment Commission *Process Guidelines Respecting Public Hearings* provides:

> The Commission will accept motions respecting procedural matters from the Proponent and those designated as Participants.
>
> ………
>
> On hearing the motion, the Commission may allow, dismiss or adjourn the motion, in whole or in part, and with or without terms.

The Supreme Court of Canada reinforced this authority in a 1989 decision:

> As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion[1]

Accordingly, the Commission does have the authority to decide whether or not to grant the requested adjournment.

The Manitoba Court of Queen's Bench, in *Candeias v. Manitoba (Residential Tenancies Commission)*, 2000 MBQB 216, considered the matter of a request for an adjournment of an administrative proceeding.

The judge quoted from a decision of the Supreme Court of Canada in identifying the principle to be followed by an administrative body in making such a decision:

> "… there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: ...
>
> "The question, of course, is what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances. ..."[2]

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[1] *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560
[2] *Cardinal et al. v. Director of Kent Institution* (1985), 16 Admin. L.R. 233 (S.C.C.)

Relief Sought

An order adjourning the start of the hearing for at least 120 days, which would allow the Crown time to discharge its duty to consult Peguis First Nation in a meaningful and adequate way and permit further consideration of the nature and extent of the First Nation's participation in the hearing process.

Applicant's Grounds

From Notice of Motion, filed August 8, 2012.

1. The Crown owes a constitutional duty to consult and accommodate Peguis First Nation in connection with, among other matters, the Bipole III Transmission Project.

2. The Crown has not discharged its duty to consult and accommodate Peguis First Nation, where such consultation would be both meaningful and adequate.

3. The Commission has the authority and obligation to consider both whether any consultation has taken place and whether such consultation has been meaningful and adequate.

4. The Commission has a further and separate obligation to consider the adverse impacts upon treaty and aboriginal rights, especially because:

   a. the Crown will entirely or partially rely upon the record of the Commission's hearing to inform its decisions relating to any duty to consult and accommodate; and,

   b. the Commission's hearing is part of the process by which the Crown would fulfil its duty to consult. This is not to say that the Commission itself has a duty to consult. The above-described obligation merely reflects the significant and central role that the Commission plays in the assessment of major environmental assessments.

5. Like any attempt by the Crown to engage in consultations with Peguis First Nation, the hearing process before the Commission has not afforded the First Nation with a meaningful and adequate means by way to participate.

6. It falls within the Commission's jurisdiction to grant relief where it finds consultation has not been adequate and meaningful.

7. While the issue of consultation could be postponed to the hearing itself, the Commission's decision at that point would be problematic for, and prejudicial to, the proponent, the parties, and even the Commission itself. It is conceivable that

the Commission could diminish its recommendation of the proposed environmental project on the ground that no meaningful and adequate consultation of Peguis First Nation has been undertaken.

8. An adjournment also is the relief that would best accord with the Canadian constitutional principle that promotes the reconciliation of aboriginal and treaty rights with the sovereignty of the Crown.

Respondent's Evidence

From Response of Manitoba Hydro, filed August 13, 2012.

1. Manitoba Hydro does not take issue with the proposition that the Crown has a constitutional duty to consult with First Nations, Metis and other Aboriginal communities and persons, where it knows that their rights may be adversely effected *(sic)* by a project.

2. With respect to the Project, the Crown has been carrying out that duty for two years through an organized and funded process involving experienced staff and consultants employed by the Province and approximately 45 parties, including First Nations, the MMF, and a number of Aboriginal Communities ("the Crown Consultation Process").

3. The Peguis First Nation is one of the First Nations that has been, and continues to be, engaged in the Crown Consultation Process. Manitoba Hydro has been informed that it has executed a work plan and budget with the Province to facilitate that consultation process and has received funding for its participation in the process, facts not disclosed in its Motion.

4. The Clean Environment Commission ("CEC") does not have jurisdiction to review the Crown Consultation Process set up by the Province with respect to the Project. The Province has not delegated to the CEC all or part of its obligation to consult with First Nations or with any other Aboriginal body. The CEC does not have any "authority" or any "obligation" to investigate whether Crown consultation is taking place or to give an opinion as to how "meaningful" or how "adequate" it has been. The CEC exists pursuant to a provincial statute and thus, whatever powers it has, must be found in the statute, *The Environment Act*, by which it exists. No provision of *The Environment Act* authorizes it the power to give either 'direction' or 'orders' to the Province with respect to the Province's Crown Consultation Process for the Project.

5. In the absence of the Crown telling the CEC that its Crown Consultation Process requires that the CEC process for the Project has to be delayed in order to facilitate

the Crown Consultation Process, there is no basis to grant Peguis First Nation's request that the CEC delay its hearing for four months.

Government of Manitoba

The Manitoba Department of Justice requested an opportunity to speak to this motion. The following was submitted:

The Crown in right of Manitoba is presently involved in consultations relating to the Bipole III project with First Nations, Metis Communities and other Aboriginal communities, one of which is Peguis First Nation. The First Nations and communities involved in the consultation processes are those that may potentially be affected by the project. The consultations are intended to provide an opportunity for the First Nations and communities to advise the Crown of any concerns about how the project may affect the exercise of Aboriginal or treaty rights of members of the First Nation or community.

Because the CEC process is a public process, the Government does not consider the CEC public hearings to be an appropriate vehicle for Crown-Aboriginal consultations. Instead consultations are being undertaken directly between representatives of the Provincial Crown and First Nations and Aboriginal communities. The Manitoba Crown considers this to be a more effective way of hearing and understanding concerns that First Nations and Aboriginal communities may have about potential effects of the project on the exercise of Aboriginal or treaty rights. First Nations and community representatives may raise issues and concerns directly with the Provincial representatives. Information provided and concerns expressed by First Nations and communities in the consultation process will be considered in making any Crown decisions related to the Bipole III project. Information provided by First Nations and communities in confidence will be protected by the Crown representatives.

The consultation process for Bipole III is being conducted by the Crown independently of the public hearing process being conducted by the Clean Environment Commission. The Crown has not delegated any authority for Crown-Aboriginal consultations to the Commission. Neither *The Environment Act* nor the Terms of Reference to the Commission for the Bipole III project provide any direction to the Commission to conduct consultations nor any authority to consider the adequacy or appropriateness of the consultation process established by the Crown.

The Province's submission included a description of the Bipole III Consultation Process.

The Crown is responsible for establishing a reasonable consultation process. This reflects the principle of "the honour of the Crown", as described in leading case law, including *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

It is submitted that the Commission is not in a position to consider the reasonableness of the consultation process established by the Crown.

Other Participants

Mr. Williams spoke to certain aspects of the law in relation to this motion.

CEC Findings

The members of the Commission have carefully reviewed the written briefs filed by the applicant, by the proponent in response and the information provided by the Province of Manitoba. We have also discussed and considered the oral arguments presented.

The applicant has put forth a number of different arguments, most of which centre on the Crown's consultation process and the applicant's views of that process.

The applicant is not arguing that the Crown's "duty to consult" falls to the Commission. In fact, counsel for the applicant specifically stated that the duty does not fall to the Commission. So, the panel will make no findings on that matter in this decision.

The core argument put forward by the applicant's counsel is that the Crown is not fulfilling its constitutional duty to consult with the Peguis First Nation and that, until the Crown does so, the Commission should postpone the start of the hearings for a period of 120 days to allow the Crown to fulfil its duty.

The panel is of the view that this is a matter that falls outside of the responsibilities of the Commission. It is not the Commission's job to tell the Crown how to conduct its business. This includes the content, the process and the timing of the Crown's consultations.

The applicant further argued that the Commission has the authority and an obligation to consider whether consultation has taken place and whether or not it has been meaningful and adequate. However, the applicant provides little to substantiate this argument. The legal authority provided by counsel *(Carrier Sekani)* highlights one paragraph:

> [61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal

> rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.[3]

No argument was presented to establish that the Clean Environment Commission is such a "tribunal that has the power to consider the adequacy of consultation".

The same case, at para. 58, states:

> [58] Tribunals considering resource issues touching on Aboriginal interests may have .... a duty to consult, a duty to consider consultation, or no duty at all.

Counsel further argued that the Commission would not be able to fulfil its mandate to provide advice and recommendations to the minister were it not to have conducted an adequacy review of the aboriginal consultations. The panel respectfully disagrees.

In the absence of any legal authority which would require the Commission to consider the nature and adequacy of Crown consultations or of directions from the Minister in the Terms of Reference, the panel is of the view that no such obligation exists.

On this same point, the applicant's counsel noted, what he perceived to be, a commitment by the chair of the panel to undertake consideration of the Crown's consultation process, made during the July 19, 2012 Pre-Hearing Meeting. He failed to note the chair's later clarification that the hearing panel would not be looking to determine that the Crown's duty had been met, but that it was being conducted. This is in keeping with past practice of the Commission.

The applicant also argued that "the hearing process before the Commission has not afforded the [Peguis] First Nation with a meaningful and adequate means by way to participate."

Counsel was not clear as to the meaning of this. If he is referring to the Crown consultation process, that, as already noted, is beyond the scope of these hearings. If he refers to the Commission's environmental review process, then the panel would disagree with this premise. Nothing in the Commission's procedures prevents Peguis First Nation from participating to whatever extent it chooses.

In dismissing this motion, the Commission is making no finding as to the nature or ultimate adequacy of the Crown's consultation process. That process is one that is on a track parallel to the Commission's environmental review, and is one over which the Commission has no authority.

[3] *Rio Tinto v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 S.C.R. 650

Disposition

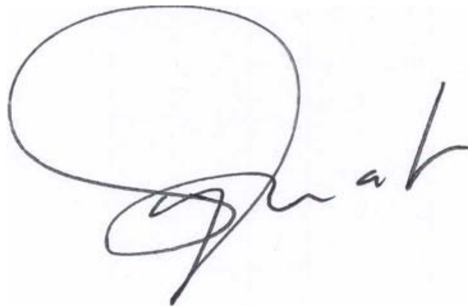
On the application for an order adjourning the start of the Commission's public hearings in connection with the Bipole III Transmission Project for at least 120 days, the decision is to dismiss.

Conclusion

Given the decision on this application, the Commission confirms that the hearings will commence on October 1, 2012.

DATED this 31st day of August, 2012.

MANITOBA CLEAN ENVIRONMENT COMMISSION



Terry Sargeant, Chair
On behalf of the Panel: Ken Gibbons, Brian Kaplan, Patricia MacKay, Wayne Motheral