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December 2, 1981

Mr. T. M. Murphy
Hearing's Registrar
1 St. Clair Avenue West
5th Floor
Toronto, Ontario
M4V 1K7

Re: Eastern Ontario Plan Stage
Environmental Assessment
Re: Hearing CH-81-01

Dear Sir:

Further to our telephone conversation of December 2, 1981, this is to set out our concerns with respect to the Joint Board's order dated November 25, 1981, with respect to the above noted matter.

To begin with, I should advise that, as of this date, we have not received the Minister's response to our application for funding, which you will find enclosed. Although we have been advised that the Ontario Legal Aid Plan has granted the Association a Legal Aid Certificate for the purposes of the preliminary hearing in this matter, we will not know until December 9, 1981, as to whether any further Certificate will be granted. In consequence, the Association does not have at present the resources necessary to enlist the expert assistance that it will require to adequately prepare for the upcoming hearing or to meet the Board's timetable with respect to the filing of witness statements and interrogatories. A review of the transcripts of the preliminary hearing will reveal that we made our position clear in this regard. You will also note that in my application for funding to the Minister, I detailed the efforts that have been made by the Association to acquire the financial resources necessary to effect its meaningful participation in this decision making process. In our view, these efforts have represented an

....2/

expeditious attempt to pursue all available avenues of funding the Association's endeavours with respect to this hearing.

To set out the Association's position with respect to the above noted order, I have categorized its concerns into three separate areas.

The first concerns the failure of the Board's order to address various issues that were at issue during the course of the preliminary hearing. In this regard the Association made the following requests of the Board:

(i) that a copy of the transcripts of the proceedings be provided the Association at no costs, by the Board.

(ii) that a one week "turn-around" be imposed with regard to the availability of these transcripts.

(iii) that the Board state its position with respect to retaining its own experts at the nomination of the Association.

(iv) that the Board state its position with respect to providing conduct money to any witnesses that the Association might subpoena.

Unfortunately, we find that the Board's order does not address these issues. It is clear that the Board's response to items (iii) and (iv) above would be critical in terms of apprising the Association of the extent to which it must retain its own experts to assist with the preparation and presentation of its position. Further in this regard, the Association's uncertainty as to the resolution of these matters impinges upon its ability to ascertain the extent to which it would need to prepare witness statements and undermines its ability to meet the December 16, 1981, deadline in this regard.

In consequence, I would request that the Board articulate its position with respect to these matters and reconsider the December 16 deadline for the filing of witness statements by the Association.

....3/

The second general area of concern pertains to the failure of the Board's order to articulate any reasons for its decision upon various other matters that were at issue before it. Among these are the following:

(i) the manner in which evidence would be adduced by the parties, specifically the Proponent's request that it be allowed to call panels of witnesses. The Association argued this would seriously prejudice its ability to cross-examine the Proponent's witnesses. The importance, to the Association, of its right of cross-examination and the manner in which this right would be undermined if panels of witnesses are to be called was argued by its counsel.

(ii) scheduling of the hearing: again this matter was argued at some length before the Board. In this regard, the Association described its efforts to prepare for the hearing and most importantly its efforts to acquire the financial resources it would require to adequately prepare for the hearing. Further in this regard, it was the Association's view that adequate preparation would facilitate a full, fair and expeditious hearing that would avoid expense and delay during the hearing itself.

(iii) scheduling of the filing dates of witness statements, interrogatories and answers. The Association again argued that adequate time to prepare would be the precondition to avoiding a protracted hearing.

(iv) location of the hearing(s): The Association requested that a variety of locales be considered.

Although the Board's order contains reference to each of the above noted matters, it contains no reasoning whatsoever as to the basis upon which its determinations were made.

It is clear that these scheduling and evidentiary matters are fundamental to the Association's right to be heard and to have its position properly considered by the Board. It is perhaps trite to note that the underlying and major function of this hearing is to facilitate the participation of the public in this decision making process. It is our view that to make such public participation meaningful it is incumbent upon the Board to articulate reasons for its

determinations of these procedural matters that will so directly effect the quality of this public participation. Failing to do so can only undermine public confidence in this adjudicative process.

The third matter of concern requires that we direct your attention to what may be an oversight in the Board's order, namely, the absence of any provision directing the parties to provide answers to the interrogatories that are made of them. Further in this regard the scheduling as it now stands (December 28 for the filing of interrogatories - January 5 for the commencement of the hearing) would not allow the parties sufficient time to respond with its answers. It is our understanding that the proper procedure here would require that answers be given and filed before the commencement of the hearing. In this regard, we need only refer you to the remarks of Mr. B. E. Smith when, in his capacity as the Chairman of the Environmental Assessment Board, he addressed the Canadian Bar Association 1981 Annual Institute of Continuing Education.

We would request therefore, that the Board reconsider its order in this regard and direct all parties to answer any interrogatories made of them and to file these answers in advance of the hearing. In our view, this would require that the commencement of the hearing be rescheduled to accommodate this process.

Finally, we would like to express our dismay as to the dates upon which witness statements and interrogatories must be filed by the Association. I will not repeat any comments with respect to our financial constraints but would like to add these additional points. As to the matter of preparing and filing witness statements, the Board's order imposes requirements that are considerably more onerous than even those suggested by the Proponent. In this regard, I would refer you to the "Procedural Guidelines Proposed on Behalf of Ontario Hydro", which requests that all parties wishing to give evidence file with the Board and the parties its "witness statements" seven days before the scheduled date of the appearance for that party. The Association's position was

was that it would endeavour to file its witness statements before the hearing to facilitate interrogatories and answers but would require sufficient time to do so.

Failure by the Association to file its witness statements in a timely fashion may deny it the right to call evidence on matters of concern to it. Even were the Association to have at its disposal the requisite funding, it would still be extremely difficult for it to meet this December 16, 1981, deadline.

With regard to the filing of interrogatories, you are aware that proper preparation will require the assistance of a variety of experts who are familiar with the complex and technical nature of the matters that will be addressed. The majority of this work will need occur between December 16 and December 28 (being the date upon which these interrogatories must be filed). It will be extremely difficult, if not impossible, for the Association to arrange the meetings and consultations with the necessary experts during the height of the holiday season.

Again, failure by the Association to properly prepare interrogatories may prejudice its right to cross-examine the Proponent's witnesses during the hearing. While we applaud the Board's decision to implement these "discovery" procedures, we find that, because of the onerous schedule imposed, this procedure may undermine rather than assist our ability to fully and effectively participate in this hearing.

We trust that this letter will advise as to the nature of our concerns and the reasons that prompt them. We would appreciate your response as soon as possible and please do not hesitate to contact me at the following telephone numbers: office - 267-2424; home - 267-5720.

Sincerely,



STEVEN SHRYBMAN

Encl.
SS/kd

cc: Mr. Bruce Campbell
Tilley, Carson & Findlay
44 King St. W., Toronto.