

CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF:

SECTION 12(1) OF *THE ENVIRONMENT ACT*, C.C.S.M. c. E125

– and –

**MANITOBA HYDRO'S APPLICATION FOR A LICENCE FOR A PROPOSED
CLASS 3 DEVELOPMENT KNOWN AS THE
MANITOBA-MINNESOTA TRANSMISSION PROJECT**

**REPLY SUBMISSIONS OF
THE SOUTHEAST STAKEHOLDERS COALITION**

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PART I

LIST OF DOCUMENTS AND STATUTORY PROVISIONS TO BE RELIED ON

1. Transcript of Proceedings MMTP (“Transcript”), June 6, 2017, at p. 3993
2. Transcript ,May 31, 2017, at p. 3356
3. Transcript, June 6, 2017, at p. 3999
4. Transcript, May 8, 2017, at p. 145.
5. SSC IR 259; Appendix 13 to Berrien’s Report, p. 1363.
6. Participant Assistance Provisional Order No. MMTP-01.
7. Transcript, May 31, 2017, at p. 3314.
8. Transcript, June 6, 2017, at pp. 3999 – 4000.
9. Transcript, June 6, 2017, at p. 4004.
10. EIS, Chapter 1, p. 1-1.
11. Transcript, May 31, 2017, at pp. 3390 – 3391
12. Transcript, May 29, 2017, at pp. 3028 and 3030.
13. <https://www.liberal.ca/liberal-party-canada-leader-justin-trudeaus-speech-calgary-petroleum-club/>
14. Transcript, June 6, 2017, at p. 4008
15. Transcript, May 15, 2017, at p. 990.
16. <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2486442>
17. E-mail from Suzanne Charette sent at 12:17 pm on April 21, 2017 to MMTP Distribution List enclosing April 19, 2017 letter from the National Energy Board, p. 5.
18. Transcript, June 6, 2017, at p. 4009
19. *Tsleil-Waututh Nation v. Canada (National Energy Board)*, 2016 FCA 219
20. *Manitoba Hydro-Electric Board v. Consumers’ Association of Canada (Man.) Inc. et al.*, 2012 MBCA 1 at para. 142

21. *Tennenhouse v. The Law Society of Manitoba*, 2011 MBQB 73 at para. 26
22. *RJR-MacDonald v. Attorney General (Canada)*, [1994] 1 S.C.R. 311
23. Hon. Justice R.J. Sharpe, *Injunctions and Specific Performance* (looseleaf), paras. 2.413 and 2.414

PART II
OVERVIEW

1. The Southeast Stakeholders Coalition (the “Coalition”) and Manitoba Hydro made oral closing submissions to the Clean Environment Commission on Tuesday, June 6, 2017. The Coalition’s brief reply submissions are set out below.

PART III
LIST OF POINTS TO BE ARGUED

2. The Coalition’s reply addresses the following points made by Mr. Bedford in his oral submissions:

- (a) The explanation for the non-contentious routing of the MMTP from Dorsey to Anola;
- (b) Alternative routing methodologies;
- (c) Manitoba Hydro’s “but we said it first” defence to certain criticisms advanced by Bob Berrien and the Coalition;
- (d) The National Energy Board licensing process;
- (e) The availability of stays pending judicial review and appeals; and
- (f) Manitoba Hydro’s assertion that certain delays are outside of the scope of the Commission’s work.

PART IV
ARGUMENT

(a) FPR and Pre-Existing Rights of Way

3. At page 3993 of the June 6, 2017 Transcript, Mr. Bedford argues:

The route that you have been asked to review, as you have heard, parallels for its first 92 kilometres existing lines in an existing corridor. No one who spoke at this hearing seriously disagreed with that. Many who

spoke thought it was a good idea. And if you are tempted at all to write a report that finds that the EPRI methodology was hopelessly flawed, ask yourselves how you are going to explain, in so concluding, how my client got it so right for a good portion of the route that's presented to you?

4. The explanation is simple: Manitoba Hydro inadvertently respected one of the key Canadian routing criteria, namely the use of existing linear disturbances. As Berrien testified:

That follows every element of reasonable route selection, existing linear disturbance, existing high voltage transmission lines, there's a corridor that's actually owned by Manitoba Hydro that's a good section of the route, and I think it's fully approvable as it stands, at least that's my view anyway.¹

5. The considerable evidence regarding the routing methodology and process before the Commission makes clear that “credit” for that inadvertence is not attributable to the EPRI-GTC methodology.

(b) Alternative Routing Methodologies

6. At page 3999 of the June 6, 2017 Transcript, Mr. Bedford argues:

Perhaps the most significant aspect of the use of EPRI-GTC was what you did not hear. No one who spoke to you advocated for use of a different methodology, as opposed to advocating that in the past the priority in some jurisdictions has been to route away from residences.

7. None of the Canadian utilities that Manitoba Hydro consulted recommended the EPRI-GTC methodology.² In fact, one of the utilities consulted by Manitoba Hydro (AltaLink) specifically rejected using the EPRI-GTC methodology because it carries “decisions through to end and then make them defensible”.³ Alternative routing methodologies were outside the scope of the Coalition’s participation and available funding.⁴

¹ May 31, 2017 Transcript, p. 3356.

² May 8, 2017 Transcript, p. 145.

³ SSC IR 259; Appendix 13 to Berrien’s Report, p. 1363.

⁴ Participant Assistance Provisional Order No. MMTP-01.

8. In response to yet another example of Manitoba Hydro discounting landowner concerns, the Coalition reminds the Commission that section 2.3 of Berrien's Report is titled "Assessment of Canada Wide Routing Criteria". On May 31, 2017, Mr. Berrien testified as follows:

But what I can say, from the middle of page 26, is that Canada wide, we have seen the same things again and again as we found in Alberta. And I don't think that it's outside my capacity to form an opinion that avoiding residences, yards and farm buildings is probably the most important cross Canada consideration when we're routing power lines. The next one would be the least possible inconvenience to farmers. We want to use boundary lines or existing linear disturbances to site those lines and we want to avoid high quality agricultural areas.⁵

9. Manitoba Hydro had the opportunity but declined to call rebuttal evidence to refute Berrien's uncontradicted expert evidence of Canadian routing principles.

(c) Manitoba Hydro's "But We Said it First" Defence

10. In response to Berrien's comprehensive critique of Manitoba Hydro's failure to properly incorporate First Nations and Metis concerns and data into the routing process, Mr. Bedford argued:

To borrow and adapt some now well known words of our Prime Minister, I suggest to you that because it is 2017, it is not acceptable in addressing routing to ignore the interests of Indigenous people until page 53 of a 59 page report.⁶

To those who ask where First Nation information is in the Environmental Impact Statement, I say it starts on page 1. Thereafter, First Nations are mentioned over 3,000 times.⁷

11. The statement being referred to by Mr. Bedford is as follows:

This EIS is based on more than five years of planning, routing and design work, involving extensive field studies and several rounds of engagement opportunities with First Nations and Metis, local landowners, local

⁵ May 31, 2017 Transcript, p. 3314.

⁶ June 6, 2017 Transcript, pp. 3999 – 4000.

⁷ June 6, 2017 Transcript, p. 4004.

municipalities, stakeholder groups and government departments, through the Project's First Nation and Metis and Public engagement processes.⁸

12. The Coalition does not dispute that the EIS is replete with similar self-congratulatory statements. However, the Coalition does dispute Manitoba Hydro's position that simply using the phrase "First Nations and Metis" on the first page of the EIS immunizes the failures of Manitoba Hydro from criticism and challenge. The Coalition also disputes the silly position taken by Manitoba Hydro that Berrien's criticism should be discounted because it begins on page 53 of his report.

13. However, should the Commission be inclined to give any weight to such a silly argument, the Coalition reminds the Commission of the following:

- (a) Chapter 4 of the EIS is only 57 pages long and one of the shortest chapters in the EIS;
- (b) The ATK Studies are found at the very end of the EIS in Appendix A, which follows Chapter 24;
- (c) Mr. Hunter asked Mr. Berrien to confirm that "landowner input is an essential ingredient in a transmission line routing exercise" before asking any questions about "engagement with indigenous groups";⁹ and
- (d) Grand Chief Daniels made similar criticisms and Manitoba Hydro failed to ask him a single question about those criticisms or call rebuttal evidence to refute them.¹⁰

14. The Coalition respectfully submits that a more appropriate quote from Prime Minister Trudeau is the following:

Times have changed, my friends. Social license is more important than ever. Governments may be able to issue permits, but only communities can grant permission.¹¹

⁸ EIS, Chapter 1, p. 1-1.

⁹ May 31, 2017 Transcript, pp. 3390 – 3391.

¹⁰ May 29, 2017 Transcript, pp. 3028 and 3030.

¹¹ <https://www.liberal.ca/liberal-party-canada-leader-justin-trudeaus-speech-calgary-petroleum-club/>

(d) National Energy Board

15. On page 4008 of the June 6, 2017 Transcript, Mr. Bedford argued:

We cannot find any precedent for a class 3 Environment Act licence in this province being split for a project. Moreover, as Mr. Penner told you, Manitoba Hydro will not be starting construction of the MMTP until it has received National Energy Board authorization. And I suggest to you that the National Energy Board is not going to authorize just part of an international power line. And I observe that the two examples that Mr. Berrien provided from Alberta did not involve National Energy Board authorizations.

16. The testimony of Mr. Penner being referred to is as follows:

I just had a quick clarification to the construction presentation that I made on Thursday. I had a slide that showed a January 2018 construction start, and I just wanted to clarify that in light of the letter that we received from the NEB, letting Hydro know that we would expect a decision in 2018, I wanted to just emphasize that we will not start construction without both the NEB authorization and the Environment Act licence.¹²

17. The basis for Mr. Bedford's statement that the National Energy Board process is an impediment to staged licensing under Manitoba's *Environment Act* is unknown. However, in 2014, the National Energy Board agreed to consider Chevron Canada Ltd.'s drilling application in two stages.¹³ The drilling application was subsequently withdrawn but Manitoba Hydro could request a similar process to accommodate the Minister of Sustainable Development granting one or more staged licenses pursuant to section 13 of the *Environment Act*.

18. The National Energy Board's recent letter to Manitoba Hydro indicates that there is ample time to accommodate the staged licensing recommendation proposed by the Coalition:

The Board notes that there is no legislative timeline in the NEB Act for issuing a permit under section 58.11. The Board further notes that there is

¹² May 15, 2017 Transcript, p. 990.

¹³ <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2486442>

no legislative timeline in CEEA 2012 within which it must make a determination under that Act.¹⁴

19. The Commission should be aware that decisions of the National Energy Board are also subject to challenge, either by way of appeal or judicial review.¹⁵

(e) Delays & Stays

20. At page 4009 of the June 6, 2017 Transcript, Mr. Bedford argued:

Decisions by members of the Provincial Cabinet to suspend a licence, for whatever reason, decisions to ask courts to review judicially decision made by Cabinet Ministers, and I note if a court's asked to judicially review a decision, that does not necessarily halt the construction of a project that is the subject of the decision. I would suggest to you that in a majority of the cases, the court case may continue on its way, but so does construction of a project, because courts will decline frequently to halt projects while a case proceeds through the courts. In any event, such decisions and concerns and possibilities are outside the scope of your work.

21. Manitoba courts have held that the test for a stay of a decision while it is the subject of an appeal¹⁶ or judicial review¹⁷ is the tri-partite test set out in the Supreme Court of Canada's decision in *RJR-MacDonald v. Attorney General (Canada)*.¹⁸ That test requires the party seeking a stay to establish that:

- (a) There is a "serious issue to be tried";
- (b) They will suffer "irreparable harm";
- (c) The "balance of convenience" favours the stay being granted.

¹⁴ See e-mail from Suzanne Charette sent at 12:17 pm on April 21, 2017 to MMTP Distribution List enclosing April 19, 2017 letter from the National Energy Board, p. 5.

¹⁵ In *Tsleil-Waututh Nation v. Canada (National Energy Board)*, 2016 FCA 219, the Federal Court of Appeal stated at para. 77 that the issuance of international power line permits pursuant to section 58.11 can be appealed pursuant to section 22 of the *National Energy Board Act*.

¹⁶ *Manitoba Hydro-Electric Board v. Consumers' Association of Canada (Man.) Inc. et al.*, 2012 MBCA 1 at para. 142. The Public Utilities Board issued subpoenas against Manitoba Hydro compelling it to produce certain information that Manitoba Hydro resisted producing on various grounds. Manitoba Hydro sought and was granted leave to appeal. The Court of Appeal also granted a stay pending appeal.

¹⁷ *Tennenhouse v. The Law Society of Manitoba*, 2011 MBQB 73 at para. 26.

¹⁸ [1994] 1 S.C.R. 311

22. The “serious issue to be tried” is a very low merits-based threshold that is almost always satisfied. The impact of the MMTP on Southeastern Manitoba and affected landowners, along with the prospect of expropriation, constitutes “irreparable harm”.¹⁹

23. The pending completion of Bipole III and the MMTP’s primary purpose being the export of hydroelectric power at a loss to the United States of America both significantly undermine Manitoba Hydro’s position concerning the balance of convenience. As a result, it is quite likely that any Coalition request for a stay would be granted.

24. With respect to the argument that all of the different types of delay ignored by Manitoba Hydro are outside of the scope of the Commission’s work (such argument being consistent with Manitoba Hydro’s view of the Commission as a mere rubber stamp), these delays fall squarely within the Schedule Risks and should have been considered by Manitoba Hydro during the routing process.

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¹⁹ Hon. Justice R.J. Sharpe, *Injunctions and Specific Performance* (looseleaf), paras. 2.413 and 2.414.