

# CLEAN ENVIRONMENT COMMISSION

**IN THE MATTER OF** section 6(5)(b) of *The Environment Act*,  
C.C.S.M. c. E125;

**AND IN THE MATTER OF** a review by the Clean Environment  
Commission (“CEC”) of the Environment Impact Statement for the  
Manitoba Hydro Bipole III Transmission Line Project (the  
“Project”) pursuant to the Terms of Reference of the Minister of  
the Environment dated December 5, 2011.

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## FINAL ARGUMENT MANITOBA MÉTIS FEDERATION

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**Clean Environment Commission  
Review of the Bipole III Transmission Project  
Manitoba Métis Federation’s Final Argument  
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## Overview

- 1) This is the final argument of the Manitoba Métis Federation (“MMF”), a funded Participant in the Clean Environment Commission (“CEC”) hearings on the Bipole III Transmission Project (the “Project”).
- 2) The MMF has participated in all phases of the CEC hearing and relies on all the documentation put forth in the hearing, including the Environmental Assessment Scoping Document for the Project (the “Scoping Document”), Manitoba Hydro’s Environmental Impact Statement (“EIS”) for the Final Preferred Route (“FPR”) and the Adjusted Final Preferred Route (“AFPR”), the Information Requests (“IRs”), the evidence put forth by all Participants as well as the transcripts from the hearing for its closing submissions (collectively the “Evidence”).
- 3) Based on the Evidence, the MMF submits that the CEC’s recommendation to the Minister of Manitoba Conservation and Water Stewardship (“MCWS”) be that Manitoba Hydro **not** be granted a Class 3 license for the Project at this time. The CEC should also recommend to the Minister that Manitoba Hydro be directed to collect the information necessary to address the deficiencies and uncertainties identified within the hearing and complete a new assessment based on this additional information and best practices.
- 4) In addition, the CEC should recommend that agreements be negotiated with aboriginal communities, including the MMF, that will be impacted by the Project. This advice would be consistent with the recommendation from the Aboriginal Justice Inquiry Implementation Commission (“AJIIC”) which states:

Any future, major, natural resource developments not proceed, unless and until agreements or treaties are reached with the Aboriginal people and communities in the region, including the Manitoba Metis Federation and its locals and regions, who might be negatively affected by such projects, in order to respect their Aboriginal, treaty, or other rights in the territory concerned.<sup>1</sup>

- 5) This recommendation has been adopted by the Manitoba Government. The MMF submits that it currently stands as government policy and must be implemented in the context of Bipole III. The fundamental principle that underlies the commitment is that major projects will not be developed in the province without entering into agreements with impacted aboriginal communities.
- 6) Manitoba Hydro’s submission that a 1,300 kilometer transmission line that will affect lands and resources throughout a quarter of the province is not a “natural resource development” is illogical and untenable. This submission from the proponent highlights why there is such a disconnect between Manitoba Hydro and the impacted aboriginal communities, resulting in the Project’s vulnerable and risky state of affairs, if it is recommended by the CEC and ultimately approved by the Minister of MCWS.

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<sup>1</sup> Affidavit of MMF President David Chartrand, para. 67. [Exhibit #MMF-019]. See also CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4655-4656.

- 7) The MMF does not make these submissions lightly, but its concerns about this Project and the EIS are significant and multi-faceted. Bipole III will likely be the largest infrastructure project pursued in Manitoba in a generation; yet, the Evidence shows that the public and aboriginal engagement processes, the route selection process, and the EIS for both the FPR and AFPR are deficient.
- 8) More specifically, there is substantial uncertainty with respect to the Project's routing, the full scope and location of the Project's components (i.e., access roads, marshalling yards, borrow pits, etc.) as well as the effectiveness of the proposed mitigation measures. All of these issues lend themselves to the need for additional information and assessment to take place before any authorization could be recommended.
- 9) More importantly for the MMF, as will be further detailed in this submission, many of the impacted regions the Project will pass through are fundamental to Métis identity, culture, harvesting and way of life. Particularly, some of these areas (i.e., the Métis community's "bread basket" on the west side corridor of the Province, Gillam and the surrounding region, the Postage Stamp Province, etc.) are already under environmental stresses and constraints as well as legal claims. A map of these key areas of concern to the MMF is attached as **APPENDIX A** to these submissions.
- 10) Manitoba Hydro's EIS does not collect and assess the Project's impacts on the Métis – as a distinct aboriginal group or community – in relation to these identified areas of concern and Métis domestic use (i.e., hunting, fishing, trapping, gathering, etc.), health, socio-economics, etc. within these areas. This type of assessment was a requirement of the Scoping Document in relation to the Métis community. The EIS is fatally flawed in this respect.
- 11) Moreover, even without this Métis-specific assessment, the EIS and Manitoba Hydro's own experts acknowledge there will be impacts on aboriginal resource/domestic use and culture that cannot be mitigated. However, these residual impacts are not addressed with the impacted aboriginal communities. While the residual impacts to individual land owners, trappers, etc. are being addressed by Manitoba Hydro, the impacts to aboriginal groups and communities are ignored.
- 12) Finally, the EIS's determinations on the "significance" of these impacts do not consider or incorporate the aboriginal perspective, even though these discrete impacts should have informed an assessment as per s. 7.7 of the Scoping Document. These impacts should have been incorporated into an assessment of significance with respect to "societal value", "geography" "duration", etc., but they were not considered. It is submitted that this is a deficiency in the EIS because the requirements of s. 7.7 of the Scoping Document were not met. It is also submitted that this deficiency needs to be addressed prior to the CEC recommending the Project.
- 13) In addition to the EIS deficiencies, the CEC is aware that the Project will impact Métis rights, interests and claims; yet, these issues have not been addressed by the Crown (the Manitoba Government) or its agent (Manitoba Hydro) in any way.

14) The Evidence shows that there is presently a “shell game” going on with respect to the duty and no one is dealing with the substantive issues the Métis community has been consistently raising about the Project for over five years now.<sup>2</sup>

15) The CEC has heard and received extensive evidence on the Project’s impacts on aboriginal rights, interests and claims from the MMF as well as other aboriginal communities. It has been brought to the CEC’s attention that there is an ongoing ‘information gap’ in the Crown consultation process because sufficient information has not been produced in order to meaningfully assess rights-based impacts.<sup>3</sup>

16) The CEC has evidence before it that Métis rights, along with First Nation rights, remain unknown, unacknowledged, unassessed and unaddressed in the Crown consultation process. Similarly, Manitoba Hydro’s engagement, assessment and mitigation proposals do not address the Project’s impacts on aboriginal rights. All of the participating aboriginal communities, including, the MMF have consistently raised these concerns throughout the hearings.

17) These aboriginal concerns are significant and cannot be ignored given the fact that they must be considered and factored in as a part of a public review. Ensuring the concerns of aboriginal peoples are heard and addressed in a public process like the CEC is essential to the credibility and integrity of these types of processes.

18) Aboriginal rights are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*.<sup>4</sup> It is common ground that the Constitution is the “supreme law of Canada.”<sup>5</sup> The Supreme Court of Canada has recognized that “[t]he honour of the Crown requires that these [aboriginal] rights be determined, recognized and respected”<sup>6</sup> by government.

19) The Supreme Court of Canada has also recognized that flowing from the honour of the Crown governments have a duty to consult and accommodate where it is considering an authorization of a development that has the potential to impact aboriginal rights and interests.<sup>7</sup>

20) The CEC, by virtue of its unique vantage point of hearing and having the Evidence outlined and tested before it, is well aware that the Project will have significant impacts on Métis rights, interests and claims. Specifically, the Evidence shows that the Métis community faces the following adverse impacts, amongst others, if the Project is recommended and ultimately approved:

- the community’s “bread basket” on the west side of the province will be dissected by Bipole III threatening harvesting, access and use where constitutionally protected rights are already being infringed,

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<sup>2</sup> Affidavit of David Chartrand, MMF Letters to Ministers circa 2009 to 2012, TABS 34, 35, 38, 39, 42. [Exhibit #MMF-019]

<sup>3</sup> MMF Letter to Manitoba Minister dated March 6, 2013 [Exhibit #MMF-025]

<sup>4</sup> *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 35.

<sup>5</sup> *Ibid*, s. 52.

<sup>6</sup> *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, para. 25 (“*Haida*”).

<sup>7</sup> *Haida*, *supra*, paras. 20, 25 (“*Haida*”).

- the “blueberry patch” it has relied on for generations and which plays a fundamental role in the community’s identity, culture and economy will be irreparably damaged,
- the Project will traverse and take up or use of Crown lands that will likely be subject to future negotiations to implement the Supreme Court of Canada’s decision in *MMF v. Canada*,
- there will be collective impacts on traplines that are keep to continuing and promoting Métis culture as well as supporting the Métis traditional economy,
- there will be socio-economic impacts in Gillam and environs that will have intergenerational effects on the Métis community.

21) The CEC, as a public administrative body, cannot be complicit by recommending a project that it knows will significantly and substantially impact Métis rights, interests and claims, without having confidence that these issues will be meaningfully addressed through consultation and accommodation.

22) Based on the Evidence before it, the CEC does not have confidence or certainty that these issues will be addressed. As such, it must exercise its public function in a manner consistent with promoting the Constitution and its values by not recommending the Project at this time because issues with respect to the Project’s adverse effects on aboriginal communities and substantial infringements of aboriginal rights have not been addressed.

23) Taken together, the MMF submits that: (1) the EIS deficiencies, (2) the uncertainties with respect to the Project’s components and route, and, (3) the failure to address the Project’s impacts on aboriginal rights, interests and claims require the CEC to not recommend the Project at this time.

## The Aboriginal People: The Manitoba Métis Community

24) In the late 1700s, the Métis Nation – as a distinct aboriginal people – emerged in the historic Northwest. They developed their own collective identity, language (Michif), culture, institutions and way of life. In *Cunningham v. Alberta*, the Supreme Court of Canada described the emergence of the Métis as follows:

The Métis were originally the descendants of eighteenth-century unions between European men - explorers, fur traders and pioneers - and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta. Within a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears. In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture. The descendants of Francophone families developed their own Métis language derived from French. The descendants of Anglophone families spoke English. In modern times the two groups are known collectively as Métis.<sup>8</sup>

25) Since 1982, the Métis have been recognized as one of the “aboriginal peoples of Canada” in Canada’s Constitution. Specifically, s. 35 of the *Constitution Act, 1982*, reads,

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.  
(2) In this Act, "Aboriginal Peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

26) In *R. v. Goodon*,<sup>9</sup> the Manitoba Provincial Court recognized that there was both a historic and contemporary rights-bearing Métis community in Manitoba that possesses a constitutionally protected harvesting right, consistent with *R. v. Powley*,<sup>10</sup>

[46] The Metis community of Western Canada has its own distinctive identity. As the Metis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Metis "community" was more extensive than, for instance, the Metis community described at Sault Ste. Marie in *Powley*. The Metis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

[47] This area was one community as the same people and their families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes.

<sup>8</sup> *Cunningham v. Alberta*, [2010] 2 S.C.R. 670, par. 5. Affidavit of David Chartrand, TAB 1 [Exhibit #MMF-019]

<sup>9</sup> Affidavit of David Chartrand, TAB 12 [Exhibit #MMF-019]

<sup>10</sup> Affidavit of David Chartrand, TAB 11 [Exhibit #MMF-019]

27) In *R. v Blais*, the Supreme Court of Canada recognized the Manitoba Métis “were [Canada’s] negotiating partners in the entry of Manitoba into Confederation.”<sup>11</sup>

28) More recently, in *Manitoba Métis Federation v. Canada* (the “MMF case”), the Supreme Court of Canada elaborated on the recognition of the Manitoba Métis and the “unfinished business” that requires reconciliation with them.

[1] Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies -- United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

[2] This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups -- the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.

[3] The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises.

[4] The government policy with respect to the Métis population -- which, in 1870, comprised 85 percent of the population of what is now Manitoba -- was less clear. Settlers began pouring into the region, displacing the Métis' social and political control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*") which made Manitoba a province of Canada.

[5] This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

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<sup>11</sup> *R. v. Blais*, [2003] 2 S.C.R. 236, para. 33.



[140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.<sup>12</sup> (emphasis added)

### **The Representative of the Métis Community: The Manitoba Métis Federation**

29) The MMF represents the Manitoba Métis Community at the local, regional and provincial levels through ballot box elections held at regular intervals. It has over 52,000 members and is currently going through a re-registration process to identify Métis citizens.<sup>13</sup>

30) Both the courts and government have recognized the MMF's role in representing the Manitoba Métis Community.

31) In *Goodon*, the Court held “the Metis community today in Manitoba is a well organized and vibrant community. Evidence was presented that the governing body of Metis people in Manitoba, the Manitoba Metis Federation, has a membership of approximately 40,000, most of which reside in southwestern Manitoba.”<sup>14</sup>

32) Flowing from the *Goodon* decision, the Manitoba Government negotiated and signed a harvesting agreement with the MMF that recognizes its role in regulating the Métis harvest and identifying Métis rights-holders that share the collectively-held Métis right to harvest.<sup>15</sup>

33) In the MMF case, the Supreme Court of Canada has recognized the MMF's role in representing the Manitoba Métis – as a collective – and granted it standing as the body representing the collective interests of the Métis.

...The *Manitoba Act* provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis interest to come before the court. We would grant the MMF standing.<sup>16</sup> (emphasis added)

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<sup>12</sup> *Manitoba Métis Federation v. Canada*, 2013 SCC 14, paras. 1-5, 140. [Exhibit #MMF-028]

<sup>13</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4632-4637.

<sup>14</sup> *Goodon*, *supra*, para. 52. Affidavit of David Chartrand, TAB 12 [Exhibit #MMF-019]

<sup>15</sup> Affidavit of David Chartrand, MMF-Manitoba Harvesting Agreement, TAB 17 [Exhibit #MMF-019]

<sup>16</sup> *Manitoba Métis Federation v. Canada*, 2013 SCC 14, para. 44. [Exhibit #MMF-028]

## The Métis Community's Concerns

34) Since the first day of the CEC hearings, the MMF has expressed its deep concerns and objections about how the Project has developed and the potential impact of the Project on Métis rights, interests and claims.

35) These written submissions deal with the following issues of concern,

- the ongoing Crown consultation “shell game” between Manitoba Hydro and the Manitoba Government;
- the site selection environmental assessment (“SSEA”) [**Scoping Document, s. 8.1**];
- Métis traditional/domestic use as a “Aboriginal group”, including, fishing, hunting, trapping and gathering medicinal, and other plants and berries and fuel wood [**Scoping Document, s. 7.3.3.1**];
- socio-economic impacts on the Métis community [**Scoping Document, s. 7.3.3.1**];
- Métis heritage resources [**Scoping Document, s. 7.4.3.6**];
- Métis rights and land claims [**Scoping Document, Section s. 7.4.3.2**];
- assessing significance [**Scoping Document, s. 7.7**];
- mitigation measures [**Scoping Document, s. 7.6**];
- monitoring and follow up program [**Scoping Document, s. 10**];

## The Consultation “Shell Game”

36) The MMF submits that the Crown is playing a “shell game” with respect to the duty to consult and accommodate in relation to Bipole III.

37) While the MMF acknowledges that the CEC does not have the duty, the MMF submits it is important for the CEC to appreciate the context and nature of the duty in order to understand why it cannot, as a public administrative body, recommend the Project in its current form without having confidence and certainty that the duty will be fulfilled.

38) As a starting point it is important to emphasize that aboriginal rights are collectively-held rights. Over the last forty years, the Supreme Court has repeatedly emphasized this. An aboriginal right is “a communal right. It [the aboriginal right] inheres in the community, not the individual.”<sup>17</sup>

39) Consistent with this well-established legal principle, the Supreme Court has recognized that the Crown’s duty (or consultation and accommodation flowing from aboriginal rights) is not owed to individuals, but to the aboriginal collective.

... On the other hand, the entitlement of the trapper Johnny Sam was a derivative benefit based on the collective interest of the First Nation of which he was a member. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.<sup>18</sup>

40) Simply put, “engagement” with aboriginal individuals at a public meeting or NACCs that are comprised of both aboriginal and non-aboriginal individuals cannot fulfill the Crown’s consultation and accommodation duties.

41) In *Haida Nation v. British Columbia*, the Supreme Court explained the purpose of the duty to consult and accommodate as follows,

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. ... Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia,

<sup>17</sup> *R. v. Kapp*, [2008] 2 S.C.R. 483, para. 4.

<sup>18</sup> *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 35.

have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.<sup>19</sup>

42) Specifically, the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect these rights. The test is broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

43) The first requirement to trigger the duty is the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when an aboriginal right may be impacted. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice.<sup>20</sup> Put simply, the claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed.<sup>21</sup>

44) The second requirement to trigger the duty is there must be Crown conduct or a Crown decision that engages a potential or established Aboriginal right. What is required is action or conduct that may adversely impact on the claim or right in question. Relevant Crown conduct that engages the duty is not limited to exercise of statutory powers. Further, in *Haida*, the Supreme Court recognized that applicable Crown conduct can include higher level, strategic decisions that may ultimately have an impact on Aboriginal claims and rights.<sup>22</sup>

45) The third requirement to trigger the duty is the possibility that the Crown's conduct may affect the Aboriginal claim or right. Specifically, the "the claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights."<sup>23</sup> The significance of the potential impact correlates to the level of consultation and/or accommodation required. Most often, the adverse effect will be physical in nature (i.e., the loss of access to a part of a harvesting territory for development, the impact of a development on a lake used for fishing, the loss of land for

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<sup>19</sup> *Haida, supra*, paras. 20, 25 ("Haida").

<sup>20</sup> *Haida, supra*, para. 37.

<sup>21</sup> *Carrier Sekani, supra*, para. 41.

<sup>22</sup> *Carrier Sekani, supra*, para. 47.

<sup>23</sup> *Carrier Sekani, supra*, para. 45.

potential settlement, etc.), however, “high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources.”<sup>24</sup>

46) The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case.<sup>25</sup>

47) The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required. The level of consultation required will vary from case to case, depending upon what is required by the honour of the Crown in a given set of circumstances.<sup>26</sup> Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice.<sup>27</sup> In contrast, where a strong *prima facie* case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution, may be required.<sup>28</sup>

48) While the precise requirements of the consultative process will vary with the circumstances, the consultation required in relation to claims lying at the stronger end of the spectrum may demand the opportunity for the claimants to make submissions, to participate in the decision-making process, and to receive written reasons which demonstrate that their concerns were considered and which reveal the impact those concerns had on the decision.<sup>29</sup>

49) Other cases may fall between these two ends of the spectrum. Each case has to be examined individually in order to ascertain the content of the duty to consult in a particular set of circumstances. Moreover, the situation may have to be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light.<sup>30</sup>

50) With respect to the Project, the Evidence shows that the Crown has continued to change its position about how impacts on aboriginal rights will be assessed. For example, in some correspondence to the MMF, the Crown claims that the EIS for Bipole III “will assess project impacts, including potential adverse effects on the exercise of Aboriginal and Treaty rights,”<sup>31</sup> yet this contradicts Manitoba Hydro’s EIS and testimony in the CEC process.

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<sup>24</sup> *Carrier Sekani*, supra, para. 47.

<sup>25</sup> *Mikisew*, supra, paras. 34, 55 and 62-3

<sup>26</sup> *Haida Nation*, supra, para. 43; *Rio Tinto*, para. 36; *Taku River*, para. 32.

<sup>27</sup> *Haida*, supra, para. 43.

<sup>28</sup> *Haida*, supra, para. 44.

<sup>29</sup> *Haida*, supra, para. 44.

<sup>30</sup> *Haida*, supra, para. 45.

<sup>31</sup> Affidavit of David Chartrand, MCWS Letter dated August 9, 2010, TAB 37, p. 1. [Exhibit #MMF-019]

51) Specifically, the testimony from Manitoba Hydro’s experts confirm that aboriginal rights have not been considered within the proponent’s information, assessment or the EIS,

MR. MADDEN: But you didn't undertake an assessment on rights?

MR. OSLER: No, the environmental assessment doesn't undertake an assessment on rights.

MR. MADDEN: The Crown has to recognize those?

MR. OSLER: The Crown has to do that, yes.<sup>32</sup>

MS. PETCH: ... we told people that we were not going to be talking about rights because that was outside of our expertise.

MR. MADDEN: But it's a bit dancing on a pinhead, don't you think?

MS. PETCH: Well, we could not – we had been instructed by Manitoba that we were not to address Aboriginal rights in section 35, that we were to stay within the bounds of traditional knowledge.<sup>33</sup>

52) Further, since the Crown claims it has not delegated any procedural aspects of the duty to Manitoba Hydro, the proponent has not:

- collected the information needed to assess impacts on the distinct aboriginal communities that will be impacted,
- produced an “Aboriginal Traditional Knowledge” (ATK) study that its own expert wouldn’t call a ATK study in her own professional opinion, but it has used and continues to use this deeply flawed study to “assess” routing options and impacts on aboriginal communities,
- considered aboriginal rights or assessed impacts on aboriginal rights,
- proposed mitigation measures that address impacts on rights or even deal with the actual rights-bearing aboriginal communities that will suffer the impacts, and
- dealt with residual effects that have been identified have not been addressed or accommodated.

53) However, despite repeated requests from the MMF, the Crown consultation process has not produced the information necessary to enable an assessment of Bipole III’s impacts on Métis rights and interests.<sup>34</sup> Simply put, the Crown consultation process has a substantial “information gap” and does not have the requisite information to assess impacts on impacted aboriginal communities.<sup>35</sup>

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<sup>32</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 16, November 5, 2012, p. 3103 (lines 8-16).

<sup>33</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3443 (lines 1-10).

<sup>34</sup> Affidavit of David Chartrand, MMF Letters to Ministers circa 2009 to 2012, TABS 34, 35, 38, 39, 42. [Exhibit #MMF-019]

<sup>35</sup> MMF Letter to Manitoba Ministers re Bipole III dated March 6, 2013 [Exhibit #MMF-25]

54) The CEC has ruled that it does not have the duty to assess whether the Crown's duty has been fulfilled, but based on the Evidence presented to it the CEC knows there will be impacts on aboriginal communities that cannot be mitigated, and that residual effects have not been assessed, addressed or compensated for.<sup>36</sup>

55) The panel has heard about the impacts on Métis hunting, the "bread basket", the "blueberry patch", Métis culture, etc. It has heard that the EIS does not deal with the Métis community as a distinct group or assess impacts on the collective. It is aware that the EIS's determination of "significance" doesn't incorporate the perspectives of aboriginal community and the discrete impacts on them.

56) The panel also knows the Crown consultation process is not addressing these issues. So, if it recommends the current Project "as is" it does so being fully aware that there will be adverse impacts on aboriginal rights and interests. However, it has no confidence or certainty on whether these issues will be addressed. It is submitted that such a recommendation would be inconsistent with the CEC's public interest mandate to recommend a project that will substantially and significantly infringe aboriginal rights.

57) Unless and until the CEC has confidence that these important issues will be addressed, it would be a breach of its duty as an administrative tribunal to recommend the Project. To be clear, the MMF is not arguing that the CEC has the duty. The MMF is only arguing that in discharging its duty as a public interest administrative body, the CEC must act consistently with the Constitution and its values as set out by the Supreme Court in *R. v. Conway*,

**78** The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).<sup>37</sup>

58) With respect, the panel cannot be willfully blind or complicit with respect to its role as an advisory body to the Crown. The CEC has actual knowledge, based on the extensive Evidence before it, that aboriginal rights will be impacted by the Project as it is currently being proposed. However, because of the ongoing consultation "shell game", the CEC has no information before it on how or whether the Crown will address these issues. Based on the above, the MMF submits that it cannot recommend the Project at this time.

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<sup>36</sup> See EIS Chapter 8: Effects Assessment and Mitigation re: Loss of Plants (Domestic Use), Impairment of Aboriginal Culture, Physical Presence of Line (Domestic Use), Potential Discovery of Unknown Heritage Resources, Habitat Loss/Degradation (Domestic Use), etc.

<sup>37</sup> *R. v. Conway*, [2010] 1 S.C.R. 765, para. 78. [Exhibit #MMF-027]

## The Site Selection Environmental Assessment

59) The Evidence shows that the Site Selection Environmental Assessment (“SSEA”) did not incorporate Aboriginal Traditional Knowledge (“ATK”), as required by s. 7.1 of the Scoping Document.

60) ATK is held by aboriginal collectives. While aboriginal individuals may possess personal and community-based knowledge, it is the collective that holds and has responsibility to protect and control that knowledge.<sup>38</sup> Even Manitoba Hydro’s own expert (Virginia Petch) agreed with this well-established principle, which is enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*. This is also consistent with the recognition that aboriginal rights, which underlie the reason ATK is collected and required, are collectively-held.<sup>39</sup>

61) Ms. Petch testified that in her professional judgment Manitoba Hydro’s “ATK Study” should not have been called an “aboriginal” study. This was because the study engaged aboriginal individuals and non-aboriginal individuals.

MR. MADDEN: And professionally, and you mentioned Mr. Usher, and he consulted on the MMF's TK study. And professionally, though, do you not believe that it's a little disingenuous to hold it [Manitoba Hydro's ATK Study] out as Aboriginal traditional knowledge? Would you be personally more comfortable calling it traditional knowledge from people in the study area?

MS. PETCH: The term Aboriginal traditional knowledge had been provided to us as the term that was being used.

MR. MADDEN: I'm asking about you professionally --

MS. PETCH: I haven't finished. I personally would have preferred traditional knowledge.<sup>40</sup>

62) Ms. Petch also testified that the ATK study commissioned by Manitoba Hydro did not provide an adequate sampling of the population interviewed. She stated that “[w]e don’t like to do anything less than ten [percent of the population at issue]”, yet the Manitoba Hydro study had a participation rate of less than 5% of the population sampled.<sup>41</sup> She acknowledged that no aboriginal people (aside from translators) or aboriginal communities were involved in the development of the ATK study questions.<sup>42</sup> Further, she acknowledged that not all interviewees were asked the same questions.<sup>43</sup>

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<sup>38</sup> United Nations Declaration on the Rights of Indigenous Peoples [Exhibit #MMF-007]

<sup>39</sup> MMF Final Argument, paras. 38-39.

<sup>40</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3436 (lines 2-17).

<sup>41</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3453-3454.

<sup>42</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3458-3459.

<sup>43</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3461-3462.



63) The Evidence shows that Métis people who participated in Manitoba Hydro's ATK study feel deceived and misled by Manitoba Hydro and its consultants. While Manitoba Hydro claims "informed consent" was obtained, the evidence from interviewees tells another story.

MR. MADDEN: Did they tell you that it was going to be used to identify Metis historic sites?

MR. R. GENAILLE: No, they never said that. They just asked us what we did in this area, and so we told them what we did, we trapped, fished, and got all our stuff from there. ...

MR. MADDEN: Did they explain to you that they were going to hold and control the information?

MR. R. GENAILLE: No.

MR. MADDEN: And do you want Manitoba 1 Hydro or its consultants to hold and control that information?

MR. R. GENAILLE: No. What they said, when we had the meeting they said, okay, they are going to give us information, and they are going to give us back, they are going to mail us something. And they never mailed us nothing back on their final analysis or whatever. They never got back to us.<sup>44</sup> ...

MR. R. GENAILLE: They feel deceived because, you know, because they never got the information back, you know, like the conclusion, or a report or anything back of what they did come up with. And they always ask me. I said I don't even know, like I said, I was only there for the one day. So that's the ongoing consensus I am getting from people who participated, from the community, that they feel deceived because they don't know what's going on.<sup>45</sup>

64) Rather than engaging with the legitimate representative governments of First Nations and the Métis community on these important issues, Manitoba Hydro attempted to work around the impacted groups and engaged Northern Affairs Community Councils ("NACC") that are creatures of the Manitoba Government and have no mandate to deal with issues relating to the traditional use and practices of aboriginal communities. Métis witnesses confirmed this fact in the context of the Métis community.

MR. R. GENAILLE: No. I used to be the mayor of Duck Bay, but I'm not the mayor no more. I still work for them.

MR. MADDEN: When you were a mayor of Duck Bay, were you in a representative capacity of the Metis community?

MR. R. GENAILLE: No, I wasn't representing the Metis community. As mayor, I was just looking after the like recreation, the water, the water and the roads. I'm not representing the rights of Metis, no.

MR. MADDEN: Now in your capacity at MMF, you represent the Metis community?

MR. R. GENAILLE: Now I do, yeah.<sup>46</sup>

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<sup>44</sup> CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4559-4560. CEC Transcripts, Testimony of Clarice Genaille, Vol. 21, November 14, 2012, p. 4563.

<sup>45</sup> CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4567 (lines 4-13).

65) MMF expert Patt Larcombe provided detailed evidence about what Manitoba Hydro actually relied upon in the SSEA process with respect to ATK.<sup>47</sup> She expressed her opinion that the requirements of the Scoping Document with respect to the SSEA process and ATK had not been met.

66) More specifically, the ATK Study relied upon by Manitoba Hydro in April 2010 for the SSEA was not an “aboriginal” study, as acknowledged by its own expert.<sup>48</sup> Further, even if the CEC were to accept that Manitoba Hydro’s study had any credibility with respect to providing ATK, the Evidence showed that in April 2010 (when Manitoba Hydro determined the route that did not subsequently change) only 8 of the 15 interview workshops had been held by Manitoba Hydro, meaning that the information Manitoba Hydro had was even less than a 5% sampling of the population.<sup>49</sup> Finally, in April 2010, Manitoba Hydro had not received or reviewed any of the self-directed ATK studies from impacted aboriginal communities.

67) Further, “lands of importance” to the Métis community were not identified in the SSEA as overarching constraints. For example, lands subject to claims by the MMF in its litigation against Canada and Manitoba in the MMF case were not considered, even though TLE lands for First Nation were identified. Similarly, the importance of the west side corridor to Métis harvesting rights and use was not considered.<sup>50</sup>

68) While Manitoba Hydro’s experts testified that ATK had been “extensively relied upon” in routing and the SSEA, the facts tell another story. The MMF submits that Manitoba Hydro’s claims about the use of ATK in the SSEA are nothing more than “smoke and mirrors” when you look at what is being relied upon and how it was used by Manitoba Hydro.

69) The MMF submits that the Evidence shows that Manitoba Hydro’s EIS does not meet the requirements for the incorporation of ATK into the SSEA process pursuant to s. 7.1 of the Scoping Document.

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<sup>46</sup> CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4552 (lines 4-17). See also CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4656-4659.

<sup>47</sup> Larcombe Report, pp. 30-31. [Exhibit #MMF-011]

<sup>48</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3436 (lines 2-17).

<sup>49</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3464-3466.

<sup>50</sup> For example, the fact that existing constraints such as agricultural lands, TLE claims, etc. make current “unoccupied Crown lands” in the west side corridor increasingly important to the Métis community were not considered in the SSEA.

## Métis Traditional and Domestic Use

70) The Evidence shows that the EIS did not meet the requirements of s. 7.4.3.1 of the Scoping Document which states the following (emphasis added):

7.4.3.1 ... The EIS will provide available information on resource use as it relates to the Project including the following:

- Domestic use of resources by Aboriginal groups including fishing, hunting, trapping and gathering medicinal, and other plants and berries and fuel wood; ...

The EIS will provide sufficient level of detail in order to in order to predict, avoid and/or minimize any potential effects on resource use.

71) As previously discussed, much of the “ATK” Manitoba Hydro relied upon for the SSEA and EIS was not from “aboriginal groups”. Instead, Manitoba Hydro attempted to circumvent and undermine the collective right-holders that should have been engaged on these issues and instead engaged undisclosed ‘aboriginal individuals’ or NACCs that have no mandate to deal with these issues on behalf of the impacted aboriginal communities.

72) Through either approach, the explicit requirement in the Scoping Document with respect to collecting information from “aboriginal groups” was not met. Moreover, since this information was not collected based on distinct “aboriginal groups” it was not used to “predict, avoid and/or minimize any potential effects on resource use.”

73) The Evidence shows that where this ATK information was collected from some “aboriginal groups” such as the MMF, it was too late to influence any decisions Manitoba Hydro had already made in relation to routing. Further, the Evidence shows that Manitoba Hydro refused to engage impacted “aboriginal groups” in order to “predict, avoid and/or minimize any potential effects on resource use.”<sup>51</sup>

74) Moreover, as outlined in further detail below, the Evidence shows that Manitoba Hydro’s EIS fails to “predict, avoid and/or minimize any potential effects on resource use” because it does not understand, consider or assess how Métis use the territory that will be impacted by Bipole III.

75) Instead, Manitoba Hydro’s EIS is based on a flawed analysis that equates an “assessment” of effects on aboriginal resource use to simply attaching a ATK study to the EIS or looking at maps to see if a specific ‘kill site’ or ‘gathering location’ will be directly impacted by the route.

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<sup>51</sup> See various letters to Manitoba Hydro from the MMF, including, Exhibit #MMF-019, TABS 29, 31 and MMF-023.

76) MMF expert Patt Larcombe testified that the type of approach used by Manitoba Hydro is of relative little use to actually developing and assessing a project in relation to impacts on aboriginal use,

MR. MADDEN: Is there a difference between the study that you undertook to assist in routing, or to assist in where you would put routing, versus an impact assessment on, once you know what the project is, what effects it's going to have on resource use?

MS. LARCOMBE: Yes, there is a difference. The MMF's TLUKS system is not an impact assessment tool, it is a tool to establish baseline information that can then inform impact assessment.<sup>52</sup>

...

MS. LARCOMBE: When it comes to traditional use and traditional knowledge, it's like this box of information, and it sort of comes in late in the day. I don't know if it's because people can't come to agreements on how long it's going to take, how much it's going to cost, whether it should be done at all, but it inevitably comes in too late. And then it's almost like it gets fudged. And then particularly, since at least in the Federal legislation, and it was in the scoping document for this particular project is this directive that you're supposed to include original knowledge or traditional knowledge. It's not a box of information, it's supposed to be an iterative process where science and traditional knowledge parallel one another so that you get the best information possible. But if that information comes in late in the day, it's really not very useful.....<sup>53</sup>

77) The MMF submits that Manitoba Hydro's approach is an impoverished view of environmental assessment as it related to aboriginal traditional use. More importantly, the MMF submits such an approach is inconsistent with the actual requirements of the Scoping Document.

78) The following sections elaborate on the EIS's deficiencies with respect to aboriginal resource use as well as highlight how these issues have not been meaningfully considered in the context of the "effects assessment", "mitigation measures" or determinations with respect to "significance", as required by sections 7.5, 7.6 and 7.7 of the Scoping Document respectively.

### ***The Métis Community's "Bread Basket"***

79) The Project, as it is currently being proposed, will pass through the heart of the Manitoba Metis Community's "bread basket" on the west side of the province.<sup>54</sup> The Manitoba Metis have lived throughout and relied on this region for hunting, fishing and gathering for generations.

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<sup>52</sup> CEC Transcripts, Testimony of Patt Larcombe, Vol. 20, November 13, 2012, p. 4350 (lines 9-19).

<sup>53</sup> CEC Transcripts, Testimony of Patt Larcombe, Vol. 20, November 13, 2012, p. 4489 (lines 2-24).

<sup>54</sup> The MMF notes that the decision to proceed down the west-side of the province was a strategic level decision by the Manitoba Government. The Crown did not consult with the MMF on this decision. Nor did it consider the potential impacts on Metis rights, interests and claims. See Affidavit of David Chartrand, TAB 38 (p. 3) and TAB 43 [Exhibit #MMF-019].

80) MMF President David Chartrand explained the importance of the “bread basket” to the Métis people and the Métis harvest as well as the constraints in this region for the Métis harvesting.

But for the Commissioner's sake, you see that circle there, what's essential to us, if you look at the circle most of the south, just a little chunk of the south here, there's still some moose population, and also on the east side over here. Because it's forestry, the way it's designed. But most of the other one is cities, towns, villages and agricultural. So there is no moose in that area. When you start going up, which some define as the bread basket, that's where you have a high population of our wildlife and our medicinal, as I said, from maple syrup to blueberries to medicinal plants. They are still vibrant, strong in that area. And it also still shuffles its way to the north that way. But a lot of the other stuff that we search for come from this particular location in the map, and that's why we're so protective of this area. ... This is the main breadbasket left for us.<sup>55</sup>

81) The Métis witnesses testified about the importance of hunting, fishing and gathering in the “bread basket” to their lives. Some testified about how close to 90% of their meat came from the “bush” when they were growing up and how a majority of their meat still comes from the “bush” today.<sup>56</sup> One Métis witness described this lifestyle as follows,

MR. CHURCH: It was our way of life. It's all we ever did growing up. We grew gardens, we picked berries, and we hunted for our meat all our lives, as long as I remember.<sup>57</sup>

82) While Manitoba Hydro refers to this area as a “constraint” for its routing, the MMF urges the CEC to remember that this is the Metis community’s “pantry”, “gathering place” and “home”. The Metis perspective on the community’s relationship to the “breadbasket” is non-existent in the SSEA as well as Manitoba Hydro’s EIS on the FPR and the AFPR.

83) From the large animal harvest to traditional gatherings to berry picking this region sustains the Manitoba Metis Community culturally, spiritually and for harvesting purposes. The uncontradicted evidence from Métis community witnesses shows that it is an essential component to the identity and existence of the Manitoba Metis as a distinct aboriginal group.

84) The MMF’s Traditional Land Use and Knowledge Study (“TLUKS”) shows the importance of this region to the Manitoba Metis Community’s annual harvest. It is extensively relied upon by Metis living in Winnipeg, southwestern Manitoba and within the west side corridor itself.<sup>58</sup>

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<sup>55</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4647 (lines 3-21) and 4650 (line 13).

<sup>56</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4545 (lines 3-12).

<sup>57</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4534 (lines 24-25) – 4535 (lines 1-2).

<sup>58</sup> EIS, Aboriginal Traditional Knowledge Technical Reports, Appendix E: MMF TLUKS

85) The Métis witnesses also testified about the mobile Métis lifestyle of family living in Winnipeg, but coming home to the west side corridor to hunt, re-connect with family and live off the land.<sup>59</sup> The MMF's expert Patt Larcombe testified to this collective Métis pattern of use based on the TLUKS interviews.<sup>60</sup> As such, any impacts to this region in relation to harvesting will be felt throughout the Metis community – as a whole.

86) The Evidence also shows that the Metis “bread basket” has significant existing limitations on Métis traditional use (i.e., private lands, agricultural lands, etc.) and is increasingly under environmental stress because of development (i.e., forestry, mining, etc.).<sup>61</sup>

87) While the “breadbasket” is relied upon by the Métis community for a wide variety of harvesting, cultural and spiritual activities, the MMF's written submissions will focus on elaborating on three particular impacts that were not meaningfully considered, understood, assessed or addressed in the EIS – (1) the “berrypatch”, (2) “moose hunting”, and, (3) “trapping”.

### *The “Berry Patch”*

88) The Métis witnesses testified about the importance of the Kettle Hills within the “bread basket” for blueberry picking as well as gathering Seneca root, but also how families have historically camped throughout the area and continue to do so with makeshift tents, lean-twos, etc.

MS. G. CAMPBELL: I come from a family of 13 children, and with my mom and dad, there was 15 of us then, and we had to survive. So that was our livelihood. We had to go from -- they'd take us from school, like I was about seven, eight years old, and we had to travel many miles to go for pulp cutting, first of all, with the whole family and other families, and my dad was a pulp cutter too. So we stayed there and we worked with our family, all of us had to work. So from there we got work ethics. ... And then we had to work to get there. And I am so happy now because we still get along, like we had to do everything together, we worked together, we ate together, we played together. And then we also, there was also other families that were around us. We worked with them and we played with them after what we had to do, after we picked berries.<sup>62</sup>

89) This traditional lifestyle and use has an economic component, but also a cultural component that keeps families together, fosters kinship connections and deep familial relationships, keeps stories alive and allows the Métis people to maintain their connection to their territory.<sup>63</sup> It continues to be a very important place for the Métis today.

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<sup>59</sup> CEC Transcripts, Testimony of Clarice Genaille, Vol. 21, November 14, 2012, p. 4564.

<sup>60</sup> Larcombe Report, Exhibit #MMF-011, pp. 4-28. [Exhibit #MMF-011]

<sup>61</sup> Larcombe Report, Exhibit #MMF-011, pp. 25-30. [Exhibit #MMF-011]

<sup>62</sup> CEC Transcripts, Testimony of Gloria Campbell, Vol. 21, November 14, 2012, p. 4547 (lines 6-25).

<sup>63</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4538-4539; CEC Transcripts, Testimony of Gloria Campbell, Vol. 21, November 14, 2012, p. 4547-4551 and 4570-4571; CEC Transcripts, Testimony of Clarice Genaille, Vol. 21, November 14, 2012, p. 4564-4565.

MR. MADDEN: Is that place important to you?

MS. G. CAMPBELL: Yes, very, very important.

MR. MADDEN: Why?

MS. G. CAMPBELL: Because now we live it now, and I teach my grandchildren. I have nine grandchildren of my own now. So occasionally we go picking too still, just for our use. But some people still sell the berries, because people like blueberries and they are nutritious. Like fresh blueberries, you can't ask for anything better, or moose meat and all the other things that come from the land.

90) Witnesses also testified about relationships between First Nation and Métis families being strengthened by their common use of this area and events held in the “blueberry patch” bringing families as well as First Nations and Métis together.<sup>64</sup>

MR. MADDEN: And you said you all got along and there were other families there?

MS. G. CAMPBELL: There were other families, lots of other families.

MR. MADDEN: Was it good for the community?

MS. G. CAMPBELL: Oh, yes, it was good for the community, yes. So we got along together, we respected each other. We learned to respect one another.<sup>65</sup>

91) From the Métis perspective, the FPR will dissect the “blueberry patch”. While Manitoba Hydro’s expert testified it will only cross the western corner, this is not the Métis perspective of the extent of the “blueberry patch” and cultural space used by the Métis community.

MR. MADDEN: You talk about berry picking. Where on the map are you berry picking?

MR. CHURCH: On this map, if you can see -- the easiest, I don't know if you can see that Lenswood highway right to the east, but Swan River right to the east all the way -- how would I explain it on here? You could berry pick all the way through what we call the Kettle Hills, and always has been for hundreds of years there, I know because my grandpa always told me. That's where we stayed when we were kids. All the way up through by the end of Swan Lake there, that whole area, right down through all the way through to Camperville, Duck Bay, Pine Creek, Cowan and east, that whole area, the flatlands, Kettle Hills, that area, just off Duck Mountain, Porcupine Mountain, that's a blueberry patch through there.

MR. MADDEN: And does the Bipole III line -- that's the green line on the map?

MR. CHURCH: Yeah, it's coming right through the centre of it.<sup>66</sup>

92) The MMF notes that Manitoba Hydro’s own witness, Mr. Dyck, confirmed that the proponent did not have a precise understanding of the exact geography of the “berry patch”.<sup>67</sup>

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<sup>64</sup> CEC Transcripts, Testimony of Clarice Genaille, Vol. 21, November 14, 2012, p. 4565-4566. See also CEC Transcripts, Testimony of Gloria Campbell, Vol. 21, November 14, 2012, p. 4570.

<sup>65</sup> CEC Transcripts, Testimony of Gloria Campbell, Vol. 21, November 14, 2012, p. 4549 (lines 2-25).

<sup>66</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4538 (lines 1-21). See also CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4544-4545.

<sup>67</sup> CEC Transcripts, Testimony of Mr. Dyck, Vol. 27, March 4, 2013, p. 6145 (lines 1-14).

93) The Métis witnesses testified about how upset and distressed they were when previous structures in the “berry patch” area were removed or burned down in the area in the 1990s.<sup>68</sup>

94) The Métis witnesses also testified that there is anxiety and concern about Bipole III and its impacts on the “berry patch”.

MR. MADDEN: Do you think that there's anxiety about Bipole III?

MR. R. GENAILLE: There is, yeah. Because what it is I'm talking to, they don't know, that's the big thing, they don't know. Like they don't know where it's coming through. Like you try to explain it to them, and they don't know. It's going to affect them, because like Gloria was saying, like where they used to go, like where the line was going through, it has a lot of bearing on them because that's actual places where like they grew up, the different families from the communities from Duck Bay, Pine Creek and Camperville.

MR. MADDEN: And you don't think a giant transmission line is going to be a nice addition to those areas?

MR. R. GENAILLE: No.<sup>69</sup>

95) The Métis witnesses, including, hunters, trappers and gatherers stressed they do not want any spraying throughout this region.<sup>70</sup> Currently, based on the Evidence, there are no solid commitments from Manitoba Hydro that there will be no spraying throughout this entire region.

96) Moreover, the evidence shows that even if spraying is not done throughout the region, aboriginal people will stay away from areas where there are transmission lines. The areas in and around the transmission line will be avoided and lost to the Métis community. This was confirmed by Manitoba Hydro's own expert witness.

MR. MADDEN: Did you also hear in the ATK that, even if there is no spraying, there's still a reluctance of people to go picking there because --

MS. PETCH: Yes. Many times it was mentioned that people felt, or perceived that there would be contamination. Medicinal pickers also told us that they would not pick near transmission lines because the power of the plant would be lost.

MR. MADDEN: So even with the fact that it may not be going directly through the patch, and it may not be completely destroying, you know, there will be residual effects by virtue of people's behavioural change to adapt to the realities of, rightfully or wrongfully, perceptions that don't pick in transmission routes or near transmission routes?

MS. PETCH: Yeah, that's correct.<sup>71</sup>

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<sup>68</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4546.

<sup>69</sup> CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4567 (lines 16-25) – 4568 (lines 1-6).

<sup>70</sup> CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4555 (lines 14-24).

<sup>71</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3487 (lines 13-25) – 3488 (lines 1-6).



97) This reality has significant implications for the “berry patch” as a traditional gathering place. The area around Bipole III in the “berry patch” will essentially become a “dead zone” for aboriginal traditional use. The aboriginal communities that rely on these areas for their gathering, culture, spiritual pursuits and a ‘cash economy’ are facing a “lose-lose” proposition because the Project will cut through this important area to both the Manitoba Métis and First Nations.

98) Manitoba Hydro’s evidence in the hearing recognizes that the Swan-Pelican Traditional Berry Picking Area is “not avoidable.”<sup>72</sup> The EIS (Chapter 8) confirms that there will be residual effects on aboriginal domestic use, yet these impacts are not addressed or compensated for as other residual effects are.<sup>73</sup>

99) For example, with respect to addressing residual effects, Manitoba Hydro’s expert Mr. Osler described the following process that was followed by the proponent,

MR. OSLER: The mitigation measures that we're talking about through this SSEA process include effect avoidance, which is usually during the route selection process, effect minimization through the mitigation or other measures we can take when we're actually in a particular location, final design, final features. And finally, effect compensation will apply to remedy unavoidable residual adverse effects such as occurs in the trapper compensation policy or landowner compensation policy.<sup>74</sup>

100) However, despite and acknowledgement of effects on the “berry patch”, Manitoba Hydro proposes no compensation for the user groups who rely on this area and resource for their identity, culture, way of life and economy.

101) Further, Manitoba Hydro’s EIS determines that these residual effects on aboriginal domestic use will not be significant, but this “significance” is determined without any consideration of the aboriginal perspective outlined above. The MMF submits that this EIS conclusion fails to consider the factors for the assessment of significance that are identified in s. 7.7 of the Scoping Document (i.e., societal value, geographic extent, reversibility, etc.).

102) This indifference to the “significance” of assessing impacts on aboriginal communities can be seen in the following exchange with Manitoba Hydro’s vegetation expert in relation to the “blueberry patch”,

MR. MADDEN: Right. So in relation to vegetation, though, there are some non mitigable effects?

MR. SZWALUK: That's correct.

MR. MADDEN: And how do you compensate for those non mitigable effects, for the Aboriginal peoples who rely on that plant's life?

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<sup>72</sup> Manitoba Hydro Presentation Route/Site Selection by McGarry and Dyck (Fall 2012), Slide 40. [Exhibit #MH-046]

<sup>73</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 16, November 5, 2012, p. 3112 (lines 6-11).

<sup>74</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 12, October 29, 2012, p. 2198 (lines 2-12).

MR. SZWALUK: Well, what was non mitigable was a residual effect, that's what we identified was residual.

MR. MADDEN: So when I'm reading in the EIS that there are residual effects, that is where this assessment is? So I guess I'm going to go back to Mr. Osler's point. Removing a certain blueberry patch or area of use for the large banana area wouldn't be of concern. Removing that from Métis and First Nation communities, who may extensively rely on them in a specific quadrant of the line could be significant?

MR. SZWALUK: We didn't identify that as significant, sir.<sup>75</sup>

...

MR. MADDEN: Sure. Would you agree with me that in areas where there's vegetation, blueberries, plant life, that are extensively relied on by Aboriginal peoples, that removal and loss of that could be significant to them?

MR. SZWALUK: No, we don't feel that that's a significant effect.

MR. MADDEN: You don't feel that that's a significant effect for the purposes of the EIS?

MR. SZWALUK: That's correct and that's what we have identified —

103) However, Manitoba Hydro's own expert on these issues (Virginia Petch) acknowledged the "significance" of this area to impacted aboriginal communities in terms of the "societal value", unique "geography", "duration" of the impact and "reversibility".

MR. MADDEN: And given the fact that you talk, and quite poignantly, and describe in your report the importance of these areas to those communities, that these are, you know, I think that you've used the language of, this is where people went in the old days, this is where people went and had weddings, this is where people have been buried. In the eyes of those communities, it's pretty significant.

MS. PETCH: Yes. It came out time and time again that that was a very significant area, and probably one of the most significant along the route.<sup>76</sup>

104) In cross-examination, Mrs. Petch went further and appeared to disavow herself for the EIS's determination that the residual impacts will not be "significant" to aboriginal communities with respect to traditional use.

MR. MADDEN: And so, can you walk me through then how in your report -- not in your report, but in the EIS, then given this information, which I think is supported by also the self-directed studies you get -- or Manitoba Hydro gets to the conclusion, domestic resource use, and that that the impact is not significant?

MS. PETCH: From a regulatory perspective.

MR. MADDEN: Can you unpack that for me?

MS. PETCH: That's outside of my expertise, but there will be, from what I understand, there will be a process in place to deal with these kinds of things.

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<sup>75</sup> CEC Transcripts, Testimony of Mr. Szwaluk, Vol. 16, November 5, 2012, p. 3141-3142.

<sup>76</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3489 (lines 2-14).

MR. MADDEN: But, Ms. Petch, you are the expert in this area. You are the one that Manitoba Hydro is holding out as saying this is the traditional knowledge, and you come to that conclusion. So from that, do you agree with the conclusion that it's not significant?

MS. PETCH: From a cultural perspective, I think there will be things that are going to be very difficult to mitigate.

MR. MADDEN: Some of them may be impossible to mitigate?

MS. PETCH: Some things you can't put a value on.<sup>77</sup>

105) Mr. Petch's testimony contradicts that of Mr. Osler who states that the "significance" of effects are to be determined by the respective expert in that field.

The magnitude question comes down to, I mean, in my experience, magnitude in many ways is the core of what you're talking about. It's the intensity variable that makes the big difference. How you measure it in each case for each VEC, though, is a professional expert's job, is to tell me or you how I do it for this one versus that one. And oftentimes it's not as easily measurable as I'd like it to be in a diagram. So that gets us down to talking to each of the biophysical or socioeconomic experts as to how it gets measured, unless it's something that is a regulated threshold, like I talked about, in which case there will be clear criteria that go with the threshold as part of the regulatory environment.<sup>78</sup> (emphasis added)

106) The evidence of the Métis witnesses, the MMF's experts and even Manitoba Hydro's own expert demonstrate the "blueberry patch" is one of the "most significant along the route"<sup>79</sup> for the aboriginal communities that use this region. Yet, the Evidence shows that the EIS does not provide a "sufficient level of detail in order to in order to predict, avoid and/or minimize any potential effects on resource use."

107) It is submitted that based on the evidence it is impossible to conclude that there will not be "significant" effects from the Project on the Métis community that relies on and is deeply connected to the "berry patch". This example illustrates the deficiencies in the EIS's information collection and assessment of effects in relation to aboriginal communities, as required by the Scoping Document.

### *Moose Hunting*

108) The MMF recognizes that the Scoping Document sets out how "Mammals and Mammal Habitat" are to be addressed and assessed based on the criteria of s. 7.4.2.9, but it also requires the proponent to understand the use of these mammals by aboriginal groups for domestic use pursuant to s. 7.4.3.1 "in order to predict, avoid and/or minimize any potential effects on resource use."

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<sup>77</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3489 (lines 15-25) – 3490 (lines 1-17).

<sup>78</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 12, October 29, 2012, p. 2122 (lines 18-25) -2123 (lines 1-8).

<sup>79</sup> CEC Transcripts, Testimony of V. Petch, Vol. 17, November 6, 2012, p. 3489 (lines 2-14).

109) The EIS fails to consider how the impacted Métis community relies on and uses moose – not just from a VEC perspective – but from how this resource, along with other mammals, are used for food hunting in the “breadbasket”. Manitoba Hydro’s EIS fails to consider – in any way – how the current moose closures and proposed “enhanced” mitigation measures in the “breadbasket” will impact aboriginal domestic use. The MMF submits that this is inconsistent with the requirements of s. 7.4.3.1 of the Scoping Document.

110) The Evidence shows that the Métis community prefers moose. Hunting for moose has been an important part of their culture and diet for generations.

MR. CHURCH: I do more big game than waterfowl, but everything from partridge, rabbits, berries, moose, elk, deer, bear, beaver, everything.

MR. MADDEN: And what do you prefer to harvest?

MR. CHURCH: Moose is our number one food, meat, that we have always had.

MR. MADDEN: Why moose?

MR. CHURCH: Just the taste and the tradition, the way we grew up.<sup>80</sup>

...

MR. MADDEN: So you're going without moose?

MR. CHURCH: Yeah, it's been beef for the last two years.

MR. MADDEN: And so what are you hunting instead?

MR. CHURCH: Elk, we took three elk last year and three this year.<sup>81</sup>

111) The Evidence showed that the “breadbasket” is under strain and GHAs have been closed. This is forcing Métis harvesters to go into areas they usually don’t harvest. It is putting additional pressures on other large animal for harvesting. It is creating a “perfect storm” in this region with respect to the Métis community’s large animal food harvest.

MR. MADDEN: So because there's no hunting on moose, are you seeing changes in the elk population?

MR. CHURCH: Yeah, the elk population now are starting to drop down a bit.

MR. MADDEN: And why is that?

MR. CHURCH: Because there is no moose hunting allowed, and there is areas that are the no hunting, so the areas here that are open, we have more hunters coming into them areas.<sup>82</sup>

...

MR. MADDEN: Are people from your area going further north to hunt now?

MR. CHURCH: Yes, that's what I explained. Like my brothers did go. We never really travelled north of the Overflowing River. It will be on your other map there.

MR. MADDEN: Do you want to flip it to the --

MR. CHURCH: Okay. You can see where the Red Deer Lake is, and then you see north, you see the river that crosses right at the very top up at the highway

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<sup>80</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4527 (lines 8-18). See also CEC Transcripts, Testimony of Richard Genaille, Vol. 21, November 14, 2012, p. 4554 (lines 2-9).

<sup>81</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4528 (lines 7-10).

<sup>82</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4532 (lines 23-24) – 4533 (lines 1-4).

there, that's the overflow -- yeah, that's the overflow. And we have never traditionally ever went past those areas to hunt.

MR. MADDEN: So now you're going above Red Deer Lake?

MR. CHURCH: Yes.

MR. MADDEN: And are you running into -- are other hunters going up there as well?

MR. CHURCH: Yes.<sup>83</sup>

112) MMF President Chartrand explained how the Manitoba Métis Community has agreed to refrain from exercising its constitutionally protected right to hunt moose for food in the closed GHAs on a year-to-year basis.<sup>84</sup> This means Métis rights are currently being infringed in these areas for conservation purposes. He emphasized that collaboration on the part of all parties is needed.

MR. CHARTRAND: Because at the end of the day, most of us are hopefully planning the future of conservation as a joint effort. Because if we don't, there will be nothing to win if there's nothing left.<sup>85</sup>

113) The Métis community's willingness to not exercise their recognized constitutional rights to hunt moose for food in the Métis "bread basket" is a loss to the Métis harvester, their families and the community as a whole. The existing stresses in the region are creating additional pressures on other large animal harvesting as well as increased harvesting pressures between harvesters – Métis, First Nations and non-aboriginal alike.

MR. MADDEN: So you're going without moose?

MR. CHURCH: Yeah, it's been beef for the last two years.

MR. MADDEN: And so what are you hunting instead?

MR. CHURCH: Elk, we took three elk last year and three this year.<sup>86</sup>

114) The evidence shows that Métis harvesters believe there are many other factors that are contributing to lower moose populations in the west side, including, ticks, wolves, increased access/cutovers, etc. This is traditional knowledge from the people who are "on-the-ground" and have been living in the region for generations.

MR. MADDEN: So when you have areas of clearing, those become more susceptible to ticks? Is that what I understand?

MR. CHURCH: Yeah.

MR. MADDEN: And then the ticks equate to lowering moose populations?

MR. CHURCH: Yes. Actually, there's studies done through Natural Resources that will prove that, you can look at areas along the edge of the mountains, Riding Mountain or the cut-overs anywhere from the Duck Mountains and that.<sup>87</sup>

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<sup>83</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4534.

<sup>84</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4649 (lines 7-15).

<sup>85</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4624 (lines 14-18).

<sup>86</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4528 (lines 7-10).

<sup>87</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4530 (lines 4-14).

MR. CHURCH: To me, everything right from -- when you do a clear-cut and you get a fresh snowfall, timber wolves are also, they wreak havoc, but to me not near as much hunters or the ticks did. But a timber wolf can go in a clear-cut, and if there's moose along the edge of the clear-cut anywhere, they can see it for a half a mile or mile away. Wolves have a very -- they could see very well, right. So it's so easy for them to go get them. When there's no clear-cutting, no nothing, they've got to smell them out. They can't just see through the bush, they can't even see two, 300 yards through the bush in that area. And it makes it so much easier for hunters or harvesters or anyone else. You go across a cut-over and you can see a mile across there, then you know exactly where the moose are.<sup>88</sup>

115) Similarly, the MMF's expert, Abbie Stewart (MSES Inc.), testified that because of the lack of information available in the EIS, it was impossible to be able to determine with certainty what has led to the decline in the moose populations in the "breadbasket". She also testified that given the sensitive situation in the "breadbasket" additional stressors could be "significant".

MS. STEWART: So the expectation is that moose populations will respond positively to decreases in hunting pressure. I think this is good information. Well, I think it's useful to see this. I think at least it gives us some room for optimism. However, I do have some concerns with this information, which is that Manitoba Hydro has presented one factor that could be affecting moose populations. They have looked at a closure. There are multiple factors that could be influencing moose which we don't see on this figure here. We don't have information on, for instance, predator density or fire history or additional disturbances on the landscape. So we're really just seeing one snapshot with one factor.<sup>89</sup>

MS. STEWART: I know we've heard this message a lot, but I just wanted to reiterate it here that the moose population in the area where the Metis have historically harvested moose are in decline, and this really focuses on an area of concern, this analysis is in an area of concern for the Metis. And this includes both open and closed GHA's here, so it is that whole area. Now, while the ultimate cause of this decline is unclear, I couldn't say one way or another why we're seeing the decline that we are, what we have here is the moose populations are on a downward trend, and they are less likely to increase and recover with additional environmental stressors. And Manitoba Hydro is proposing one more linear disturbance in this area. And in this particular area, they are not following the existing linear access routes. ... It's possible that an additional effect could be significant.<sup>90</sup> (emphasis added)

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<sup>88</sup> CEC Transcripts, Testimony of Bob Church, Vol. 21, November 14, 2012, p. 4533 (lines 9-25).

<sup>89</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4376 (lines 14-25) – 4377 (lines 1-4).

<sup>90</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4367 (lines 3-23) and 4368 (line 2-3).

116) Manitoba Hydro dismisses Métis traditional knowledge as well as the expert opinion of others. Manitoba Hydro responds to suggestions that other factors and considerations may be at play in the “breadbasket” as follows,

Moose populations are managed at the GHA scale, the amount of fragmentation and increased access will not increase the overall vulnerability of moose within these management areas. Based on additional empirical analysis conducted, moose density is not a function of linear densities within the GHAs in western Manitoba. Additionally, the risk associated with increased predation by wolves has not been substantiated in this region and the literature is weak in regards to moose population declines as a result of linear development.<sup>91</sup>

117) The MMF notes that Manitoba Hydro’s categorical conclusions are inconsistent with MCWS’s own approaches to address the western region’s decreasing moose populations. For example, MCWS, as the responsible regulator, acknowledges wolf predation has an impact on moose populations. In fact, MCWS has conducted wolf surveys and implemented a wolf trapping incentive program for registered trappers.<sup>92</sup> One must ask would the regulator undertake this work on wolf predation related to the moose population on the west side corridor if it was completely “unsubstantiated” as Manitoba Hydro claims?

118) Moreover, Manitoba Hydro’s analysis fails to grasp that incorporating ATK into an EIS assessment is not just a “suggestion”. It is a requirement of the Scoping Document. Yet, the proponent ignores what the Métis harvester is seeing “on-the-ground”. It is submitted that this type of approach does not meet the requirements of s. 7.4.3.1 of the Scoping Document.

119) The MMF also raises concerns about how Hydro’s VEC analysis fails to consider the fact that Métis harvesting rights are already being infringed in the area, but believes additional short-term impacts are acceptable.

The analysis has to consider the changes that will occur due to the project. And those changes, the point from the analysis is, those changes in an area where we have closure and people are not allowed to hunt, the population is already being protected by a set of measures to stop people from hunting them. So the fundamental point that the analysis, that the experts are after is not whether the population is going to suffer any type of a short-term effect at all. It’s discussed that during construction there will be some disturbance in the area where the construction occurs, et cetera. But the question they are really fundamentally focused on is, is this population going to be affected in the longer run, its sustainability, et cetera, because of this project? If the closure stays in place, for example, and people are not allowed to hunt them, then all the access related issues that one normally worries about are not material in that area.<sup>93</sup> (emphasis added)

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<sup>91</sup> Joros Consultants & Golder Associates, Response to “Manitoba Clean Environmental Commission Hearings on Bipole III for Peguis First Nation”, February 19, 2013. [Exhibit #MH-101]

<sup>92</sup> Affidavit of David Chartrand, MCWS Presentation on Manitoba’s Western Region Moose Populations, TAB 24. [Exhibit #MMF-019]

<sup>93</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 16, November 5, 2012, p. 3095 (lines 22-25) - 3096 (lines 1-17).

120) So, according to Manitoba Hydro, the “significance” of these short-term impacts on aboriginal resource users can essentially be ignored. In fact, Manitoba Hydro’s VEC analysis benefits from the Métis community agreeing to accept the infringement of their rights in the name of conservation. And since the regulator hasn’t collected the necessary data required to do a proper assessment of these issues (as acknowledged by Manitoba Hydro’s own expert),<sup>94</sup> the Métis community is going to suffer the brunt of effects to make way for Bipole III. The MMF submits that such an analysis is deeply flawed and cannot be reconciled with the objectives and requirements of the Scoping Document.

121) Moreover, Manitoba Hydro is now working with MCWS to propose additional “Berlin Wall” like mitigation measures to further limit access and hunting opportunities in the “breadbasket”. To date, the MMF and other constitutional rights-holders are excluded from these discussions. So, essentially, we have a situation that in order for the Crown and its agent to make way for their Project, the Métis community and Métis harvesters will be further squeezed in the “breadbasket”.

122) The MMF would note that the law does not support this type of approach, which completely disregards impacts on aboriginal rights.<sup>95</sup> These further infringements that may be proposed by the Crown are not solely in the name of conservation – they are in the name of pushing the Project through without doing a proper environmental assessment or assessing impact on aboriginal resource use. This is unacceptable to the MMF.

123) The MMF also submits that based on the Scoping Document the determinations of thresholds, significance and magnitudes should have considered or incorporated the aboriginal perspective. The MMF’s expert testified to this.

MS. STEWART: Manitoba Hydro has concluded that effects are within what they perceive as acceptable, but I would ask, what about other parties? ... It doesn't appear that Manitoba Hydro worked collaboratively on an approach to significance determination with other parties or stakeholders or groups that might be affected by the project. And this would just be general good practice. Manitoba Hydro hasn't considered what the Metis might consider an acceptable level of change that I can see.<sup>96</sup>

...

MS. STEWART: I think Manitoba Hydro needs to use an alternative definition of magnitude, one which could be supported with data. And I think they should collaborate with other groups on determining significance and really come up with a relevant magnitude criteria with respect to moose, and probably with respect to the other VECs as well.<sup>97</sup>

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<sup>94</sup> CEC Transcripts, Testimony of Mr. Rettie, Vol. 14, October 31, 2012, p. 2741-2742.

<sup>95</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168.

<sup>96</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4370 (lines 2-9).

<sup>97</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4372 (lines 8-15).



124) The MMF objects to the tendering of Manitoba Hydro's Enhanced Moose Assessment only seven days prior to the resumption of the hearing. This late filing of this report did not provide parties a fair and reasonable time to review the assessment. The MMF highlights that previous evidence from Joros Consultants included errors or oversights.<sup>98</sup> The late filing of this material did not allow for this evidence to be meaningfully reviewed and tested. A proponent should not be able to benefit from its late filing of Evidence to avoid an actual review and testing of that Evidence. As such, the MMF submits it should not be relied upon by the CEC.

125) Further, this Enhanced Assessment still does not include information on key GHAs (i.e., GHA 19).<sup>99</sup> The MMF's expert also identified the following concerns with respect to the EIS and its conclusions.

A more substantial literature review and compilation of available data was provided. However, MH has only indirectly provided support for harvest control as a potentially successful mitigation measure via process of elimination. They have not definitively demonstrated that harvest management resulted in changes to moose density; rather, their analyses suggest that linear feature density, predation, and parasites do not contribute greatly to changes in moose populations. They concluded that "*the most plausible explanation for moose population declines is hunting.*" (See Enhanced Moose Assessment, Section 8.0, p. 48). A concern with the information provided is that there was not sufficient statistical power to reveal any significant relationships as it appears that the confounding variables affecting moose density have not been accounted for. **We recommend a power analysis be completed to determine the minimum sample size required to be reasonably likely to detect an effect. Once the baseline data quality and power is understood, mitigation success will require testing with follow-up and monitoring programs.**<sup>100</sup>

126) The MMF submits that the Evidence shows that the requirements of the Scoping Document have not been met by Manitoba Hydro with respect to properly collecting information and assessing effects on moose and domestic resource use (i.e., hunting) by aboriginal communities.

### *Trapping*

127) Similar to gathering and hunting, the EIS fails to consider the collective impacts with respect to the loss of trapping on the Métis community as a whole. This is inconsistent with s. 7.4.3.1 of the Scoping Document.

128) Manitoba Hydro acknowledges that traplines and trapping opportunities will be affected by Bipole III, however, collective impacts on the Métis community and other aboriginal communities are ignored. Notably, Mr. Kuzdak, Manitoba Hydro's witness on trapping, acknowledged that registered traplines have broader significance and benefits to aboriginal communities than just the individual trapper.

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<sup>98</sup> CEC Transcripts, Volume 14, October 31, 2012, pp. 2710-2712.

<sup>99</sup> CEC Transcripts, Testimony of J. Rettie, Volume 27, March 6, 2013, p. 6103.

<sup>100</sup> MSES Response to Enhance Moose Assessment, Exhibit #MMF-022, pp. 1-2. [Exhibit #MMF-022]

MR. MADDEN: Would you agree with me, in particular in Aboriginal communities, that the trapline plays maybe a more broader role in the community than just the individual trapper? So for example, whether it's bringing children, family members out on the line to teach them, or whether it's that trapper being able to contribute to the economy of an Aboriginal community, that it's not just purely an individualistic monetary role that these traplines in some communities play?

MR. KUZDAK: I agree with you 100 percent. I'm a third generation trapper and, I believe, if it weren't for my grandfather taking me out on to the land and teaching me the values and the respect for the land, that I wouldn't in fact be sitting here doing my best to represent Hydro with the trapping community.<sup>101</sup>

...

MR. MADDEN: And so you would agree with me that these traplines, while held by individuals, particularly in Aboriginal communities, contribute to community well-being?

MR. KUZDAK: Yes, I agree with you.<sup>102</sup>

129) Manitoba Hydro's EIS does not consider this collective impact even though the Scoping Document requires the proponent to "predict, avoid and/or minimize and potential effects of the Project on resource use" by "aboriginal groups" – not just individuals.

130) Presently, Manitoba Hydro's trapper compensation program for Bipole III solely focuses on compensation for an individual trapper. It does not consider or assess the collective and cultural losses to aboriginal communities along the route because of the reduction of these lines resulting in less active trappers teaching the next generation.

131) While individual trappers are at least somewhat compensated, the affected aboriginal communities – that will see further reductions in their children and the next generation trapping – are not. The MMF recommends that there must be a compensation program put in place to address collective impacts. For example, Manitoba Hydro should invest in trapper education and knowledge transfer programs between Elders, trappers and youth. These programs should be designed and operated by First Nations and the MMF in conjunction with trappers associations with financial support from Manitoba Hydro. Further, compensation arrangements should be put in place with impacted aboriginal communities.

132) As a related issue, the MMF submits that Manitoba Hydro should be required to consistently provide funding to trappers for independent legal advice or third party supports to review and understand the "Bipole III Trappers Release and Indemnity" they are asked to sign.<sup>103</sup> The evidence showed that these documents can be intimidating to some aboriginal trappers.<sup>104</sup> A proactive approach on these issues would increase fairness and balance between Manitoba Hydro and individual trappers.

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<sup>101</sup> CEC Transcripts, Testimony of Mr. Kuzdak, Vol. 17, November 6, 2012, p. 3496 (lines 16-25) – 3499 (lines 1-8).

<sup>102</sup> CEC Transcripts, Testimony of Mr. Kuzdak, Vol. 17, November 6, 2012, p. 3500 (line 4-8).

<sup>103</sup> Affidavit of David Chartrand, Bipole III Trappers Release and Indemnity, Tab 33. [Exhibit #MMF-019]

<sup>104</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4637 (lines 23-25) – 4638 (lines 1-14).

## Socio-Economic Impacts

133) Section 7.4.3.4 of the Scoping Document directed Manitoba Hydro to provide information on “communities”, including, population characteristics, household characteristics, well-being, traditional economy, health status, governance, etc.

134) Manitoba Hydro’s EIS provided no specific data with respect to the Métis – as a distinct aboriginal group – that would be affected by the Project. This was confirmed by Manitoba Hydro’s own experts.

MR. MADDEN: So for the purposes, and I want to go to, I guess I'm looking at the Bipole III socioeconomic baseline report prepared by MMM.

MS. HICKS: Okay.

MR. MADDEN: Within here you don't identify Metis as a distinct group at all?

MS. HICKS: That report, I believe it is not my report, I believe it does not.

MR. MADDEN: And your report doesn't either -- break out Metis as a distinct group at all either?

MS. HICKS: Right. What was done for the EIS was that the socioeconomic reports that were done, like transportation, the baseline report, there's a land use report, all of those reports were taken and looked at and basically used to write the baseline in chapter 6, in the EIS, as well as the effects assessment which is in chapter 8 of the EIS.<sup>105</sup>

...

MR. MADDEN: Why was the decision made in order to not address Metis as a distinct group, even though they are identified as such in the EIS scoping document?

MS. HICKS: I did not make that decision. I took the information that was given to me and I put it together into the effects assessment.<sup>106</sup>

135) Further, s. 7.4.3.4 of the Scoping Document stated that the “EIS would provide sufficient level of detail in order to predict, avoid and/or minimize any potential adverse effects on personal, family and community life.” However, the Evidence shows that key aboriginal economic pursuits such as the “blueberry patch” cash crop, community impacts from trapping losses, Métis specific socio-economic effects in and around Gillam, etc. were not considered or assessed in relation to Bipole III.

136) The MMF submits that these are significant deficiencies in the EIS based on the requirements of the Scoping Document. Manitoba Hydro has not met its obligations to collect this information and include it in the Project’s assessment. The complete failure to address this important aspect of the EIS should preclude the CEC from recommending the Project in its current form.

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<sup>105</sup> CEC Transcripts, Testimony of Ms. Hicks, Vol. 17, November 6, 2012, p. 3397 (lines 3-21).

<sup>106</sup> CEC Transcripts, Testimony of Ms. Hicks, Vol. 17, November 6, 2012, p. 3398 (lines 18-25).

## Identifying Impacted Aboriginal Communities

137) Aboriginal domestic resource use (also known as aboriginal rights) are collectively-held interests. The Supreme Court of Canada has repeatedly held that an aboriginal right such as the right to hunt is “a communal right. It inheres in the community, not the individual.”<sup>107</sup>

138) These collectively-held aboriginal interests do not inhere in, and are not controlled by individuals or creatures of the Manitoba Government (i.e., NACCs). These aboriginal interests are engaged and relevant to an EIS by virtue of aboriginal individuals being a part of a rights-bearing aboriginal community – not simply because individuals may identify as “aboriginal”.

139) The MMF submits that the attempt to distinguish between aboriginal domestic use and aboriginal rights as unrelated is unsound and leads to absurd results. Manitoba Hydro’s approach undermines the authority of the rights-bearing aboriginal collectives and the ability to actually assess the Project’s impacts on aboriginal resource use.

140) The Métis witnesses made it clear that Métis rights are collective rights and that the MMF is responsible to protect, defend and deal with these rights in relation to land, hunting, fishing, trapping, culture, etc.<sup>108</sup> MMF President David Chartrand emphasized this point in his testimony as follows,

So as the Metis, I, David Chartrand, have no rights as an individual. I have a collective right under my nation. So does all the First Nations, they have a collective right. ... we have the privilege of exercising those rights as individuals through our nation. And that's important to come to terms with.<sup>109</sup>

...

I'll tell you what Hydro's problem is, and we had this discussion with them. They look at matters from a village, a dot on a map, that's how they look at it, village by village by village. They do not look at it as a collective.<sup>110</sup>

141) The Supreme Court of Canada has made it clear that Métis rights are collective rights and that the MMF is the “body representing the collective Métis interest.”<sup>111</sup> Similarly, the Manitoba Government has recognized the MMF as the representative body to negotiate with in relation to “collectively-held Métis harvesting rights.”<sup>112</sup>

142) Yet, the Evidence shows that Manitoba Hydro has received no direction from the Crown on what aboriginal communities to engage.<sup>113</sup> Moreover, Manitoba Hydro’s evidence shows that

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<sup>107</sup> *R. v. Kapp*, [2008] 2 S.C.R. 483, para. 4.

<sup>108</sup> Affidavit of David Chartrand, MMF Annual General Assembly Resolution #8, TAB 22. [Exhibit #MMF-019]

<sup>109</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4601 (lines 4-22).

<sup>110</sup> CEC Transcripts, Testimony of David Chartrand, Vol. 21, November 14, 2012, p. 4614 (lines 20-23).

<sup>111</sup> *Manitoba Métis Federation v. Canada*, 2013 SCC 14, para. 44. [Exhibit #MMF-028]

<sup>112</sup> Affidavit of David Chartrand, MMF-Manitoba Harvesting Agreement, TAB 17, s. 1. [Exhibit #MMF-019]

<sup>113</sup> Manitoba Hydro Undertaking, CEC Transcripts, p. 3347.

it thinks it “knows better” and wants to continue to unilaterally determine who it will engage with and how.<sup>114</sup>

143) The MMF submits that the Evidence shows that Manitoba Hydro’s approach to aboriginal engagement demonstrates significant challenges and inequities between aboriginal communities in relation to Bipole III. Some impacted aboriginal communities are well-supported and engaged because of existing relationships with Manitoba Hydro, while others are not. Some have their governance structures respected, while others do not.<sup>115</sup>

144) More importantly for the MMF, Manitoba Hydro’s “aboriginal engagement” approaches attempt to undermine the Manitoba Métis Community --- as a distinct aboriginal collective. It attempts to engage Métis individuals and NACCs as replacements for engagement with the representative of the rights-bearing Métis collective – the MMF. This is unacceptable and leads to an EIS that does not assess impacts on the Métis as a distinct community.

145) The significance of these issues should not be left to the “whim” or “discretion” of Manitoba Hydro. This is particularly so given Manitoba Hydro’s sorry history and track record on these issues as well as its systemic exclusion of the Métis from its processes.<sup>116</sup>

146) It is submitted that Manitoba Hydro’s approach to engagement is deeply flawed and leads to a deficient EIS with respect to understanding impacts on the Métis community. This does not meet the requirements of the Scoping Document and should result in the CEC not recommending the Project in its current form.

147) The MMF further submits the current situation could be remedied by the Crown providing explicit direction on what aboriginal communities should be engaged in relation to future projects. The MMF asks that the CEC make this recommendation to the Minister for future engagement on Bipole III as well as future development projects. Proponents such as Manitoba Hydro should not be left to be making determinations on these complex and important legal and constitutional issues.

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<sup>114</sup> CEC Transcripts, Testimony of D. Zebrowski, Vol. 12, October 29, 2012, p. 2085 (lines 14-18).

<sup>115</sup> Manitoba Hydro Letter to Canadian Taxpayer Federation dated June 1, 2011 [Exhibit #MMF-033]

<sup>116</sup> MMF Letter to Minister dated February 27, 2013. [Exhibit #MMF-026]

## Uncertainty on the Project's Components and Related Impacts

148) The MMF's experts have raised concerns about the lack of information about key components of the Project, including, access roads, borrow pits, marshalling yards, etc. that Manitoba Hydro has acknowledged will impact wildlife.

A quantitative cumulative effects assessment, I think, would be extremely useful in this case. The qualitative CEA is just uninformative. Coming in as an outsider from Alberta, I found reading the Cumulative Effects Assessment, I was really no wiser after as to what the future projects might be in the project study area. I was provided some maps showing the location of some of these disturbances after I asked for it, however, the maps didn't show project footprints. We still don't have access routes for the project. It doesn't look like seismic lines were included in those maps. So there are still some questions here.<sup>117</sup>

149) Further, Manitoba Hydro has indicated that it will continue to work with MCWS to limit hunting around the Project and its related components; yet, the Métis community has not been engaged on these issues in any way.<sup>118</sup>

150) As previously discussed, the location of these various Project components within the Métis "bread basket" are of significant concern to the MMF. The rights of the Métis community are already being infringed in the closed GHAs with respect to moose harvesting. The Project will create additional losses to Métis hunting access and opportunities that are not in the name of conservation, but solely for the purpose of the Project.

151) Without this information, a meaningful assessment of the impacts and limitations the Project may bring to the Métis community's harvest in the "bread basket" cannot be known. Métis harvesters are already facing challenges from the pressures created by the existing closures for moose harvesting and other constraints.

152) The MMF will not accept further infringements of the Métis community's harvesting right solely for the benefit of the Project. The MMF submits that the locations of these various Project components must be known in advance, and assessed as a part of the environmental assessment in order to understand impacts on Métis harvesting rights.

153) This practice is common in other jurisdictions in order to undertake an environmental assessment of the total project. In Ontario, transmission projects are required to provide details of access roads and related facilities as a part of their "project description" for an environmental assessment.<sup>119</sup>

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<sup>117</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4370 (lines 10-16).

<sup>118</sup> EIS, pg 8-102, 8-272; Response to CEC-MH-III-069.

<sup>119</sup> Ontario Government, Guide to Environmental Assessment Requirements for Electricity Projects (January 2011), p. 29. [Exhibit #MMF-029]

154) Manitoba Hydro's own expert (Mr. Osler) acknowledged other jurisdictions such as the Yukon request this level of detail from a proponent in relation to transmission projects for an environmental assessment.<sup>120</sup> He also acknowledged that not all the Project's components have been assessed as a part of the EIS.

MR. MADDEN: So to follow that through then, you're asking approval for a project based upon an environmental assessment that doesn't include all of the project's components, because they aren't yet known?

MR. OSLER: It doesn't include all the project's details.

MR. MADDEN: But they are components of the project, sir?

MR. OSLER: I'm accepting your point that there are elements that are not unusual for this jurisdiction, it's the way it's been done transmission line after transmission line. There are elements that get resolved later that are not part of the environmental assessment at this stage.<sup>121</sup>

155) The exclusion of key Project components from the environmental assessment is particularly relevant in the "bread basket" given the fact that some of target thresholds for linear disturbances that Manitoba Hydro has now set for various GHA are near their limits. Whether additional access roads and linear disturbances are required could push those GHAs over the target thresholds Manitoba Hydro has arbitrarily set.

The additional information provided by MH mentions a target threshold for linear disturbance of 0.4 km/km<sup>2</sup> with respect to moose. According to Table 13 (Enhanced Moose Assessment, Section 7.2.1), GHA 19A is expected to have a future linear density of 0.367 km/km<sup>2</sup> (including Adjusted Final Preferred Routes) or 0.366 km/km<sup>2</sup> (including Final Preferred Route). **This comparison is noteworthy because we still do not have information on the location of required access roads or details on how much and what type of habitat may be impacted by these access roads. Subsequently, it appears that a linear disturbance threshold has nearly been or will be reached with the addition of the Project.**<sup>122</sup>

156) Without this information in advance, determinations on whether the Project's related components will exceed these thresholds cannot be determined. The MMF submits that given the pressures and state of affairs in the "bread basket" these details must be known in advance and be a part of the environmental assessment.

157) It is submitted that these Project components must be included in a future EIS related to Bipole III. Given the sensitivities in this region, this information is essential in order to undertake an adequate assessment of potential impacts.

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<sup>120</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 16, November 5, 2012, p. 3086 (lines 1-15).

<sup>121</sup> CEC Transcripts, Testimony of Cam Osler, Vol. 16, November 5, 2012, p. 3088 (lines 15-25) – 3089 (lines 1-5).

<sup>122</sup> Letter from MSES Inc. to MMF Legal Counsel re: Manitoba Hydro February 2013 Moose Enhanced Assessment – Technical Review. [Exhibit #MMF-022]

## Uncertainty on Mitigation Measures

158) Similar to the uncertainty with respect to the Project's components, there is uncertainty with respect to the proposed mitigation measures related to the Project. This is inconsistent with the requirement of s. 7.6 of the Scoping Document.

159) While Manitoba Hydro claims it will "engage" impacted aboriginal communities on these issues, there are no concrete commitments made by the proponent. Nor are there any confirmed processes with aboriginal communities in place. This is inconsistent with the Manitoba Government's commitments to impacted aboriginal communities based in the adopted AJIC recommendations.

160) The concerns about the lack of certainty on the Project's mitigation measures were also highlighted by the MMF's experts. Abbie Stewart (MSES Inc.) testified as follows:

And currently there's not enough information to really understand the effectiveness of mitigation prior to making a decision about the project's impacts. Mitigation and monitoring strategies are still undetermined. Manitoba Hydro is still in discussion with agencies such as Manitoba Conservation regarding mitigation. Metis and other parties need to know the outcome of these discussions. I think certainly the panel needs to know the outcome of these discussions.<sup>123</sup> We're in a situation where we don't know what the final mitigation measures will be for moose, or if they will be successful. The point of an impact assessment is to predict residual project impacts and residual project impacts are those remaining after mitigation has been implemented and is successful. It's difficult to understand how we have some residual project impacts, yet we don't know what some of the final mitigation will be, nor do we have evidence that for those mitigations that we are aware of, that they will be successful. And I haven't seen any detailed – or any details with respect to monitoring to understand if they are going to be monitoring the success of those mitigation measures.<sup>124</sup>

...

So the point here is that moose respond negatively to habitat loss and fragmentation, and there's multiple factors at play already influencing moose populations, and we're already in a situation where moose populations are low. We really need to have a better understanding of what Manitoba Hydro is planning on monitoring with respect to moose, and we really need to understand

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<sup>123</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4372 (lines 17-25) – 4373 (lines 1-2).

<sup>124</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4373 (lines 12-25) – 4374 (lines 1-2).



the mitigation and really have some confidence that the mitigation that they are proposing will work.<sup>125</sup>

161) Given the significant impacts the Project will have on the Métis community, the MMF submits this it impossible for the CEC to recommend the Project in its current form, without greater clarity on the Project's mitigation measures.

### **No Consideration of Métis Land and Rights Claims**

162) Section 7.4.3.2 of the Scoping Document reads,

*The EIS will provide available information on resource use as it relates to the Project including the following:*

- *Land ownership and tenure including Crown lands and the use of waterways by Aboriginal groups and other, including, Reserve lands, Treaty Land Entitlement lands, traditional resource use management areas, Community Interest Zones, Crown lands and waterways used for transportation; ...*

*The EIS will provide sufficient level of detail in order to in order to predict, avoid and/or minimize any potential effects on land and water use.*

163) Unlike the assessment done in relation to First Nation lands and Treaty Land Entitlement, the EIS provides no information with respect to Métis land related claims in Manitoba, including, within the “old postage stamp province of Manitoba” that is the subject of the Supreme Court of Canada's recent decision in the MMF case.

164) It is submitted that this deficiency in considering Métis land and rights related claims in the SSEA as well as the assessment on the FPR and AFPR results in a deficient EIS. It is also inconsistent with the honour of the Crown that these issues are considered with respect to First Nations, but disregarded in relation to the Métis community.

### **No Métis Engagement on the Adjust Final Preferred Route**

165) The Evidence shows that the Métis community was not engaged on the AFPR.<sup>126</sup>

166) Manitoba Hydro has raised significant cultural loss issues in relation to some of the proposed AFPR; yet, the impacted Métis community – as a collective – has not been engaged.

167) Given the significance of these issues to the impacted aboriginal communities, it would be unacceptable for the CEC to make recommendations on these issues without ensuring meaningful engagement occurred.

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<sup>125</sup> CEC Transcripts, Testimony of Abbie Stewart, Vol. 20, November 13, 2012, p. 4381 (lines 9-25) – 4382 (lines 1-17).

<sup>126</sup> MMF Letter to Manitoba Hydro dated February 29, 2013. [Exhibit #MMF-023]

168) The Evidence also shows that there is confusion and contradiction between the Manitoba Government and Manitoba Hydro on whether the AFPR is a government directive or a suggestion. In November 2012, Manitoba Hydro's legal counsel stated for the record that his client had been directed to implement the AFPR:

MR. BEDFORD: Well, I'm pleased I think to tell you that my client will file on Monday, January 28, 2013, a further written supplementary environmental assessment of the three route changes which the province has directed that we implement for this project. (emphasis added)

169) Now, Manitoba Hydro is claiming that these proposed adjustments are merely suggestions. This type of "game playing" between the Crown and its agent with respect to routing that will have fundamental impacts on the Métis community is unacceptable. The MMF, along with all Manitobans, have the right to know what Project is actually being reviewed at the direction of the Manitoba Government.

170) Based on these uncertainties with respect to the AFPR, the MMF submits that the CEC should recommend that further engagement and consultation with the impacted aboriginal communities must occur prior to making any recommendation with respect to the FPR or the AFPR.

## **Conclusion**

171) The MMF submits that there are too many deficiencies in the Project's EIS and too much uncertainty about the Project (i.e., its components, its routing, etc.) for the CEC to recommend the Project to the Minister based on the Evidence in this hearing.

- Fundamental questions about the Project remain unanswered, even what its current route is.
- Important components of the Project remain unknown and unassessed.
- Meaningful environmental assessment of the Project based on the Scoping Document has not happened, including, ensuring "significance" determinations reflect "societal values" and incorporate the aboriginal perspective.
- There is not clarity on mitigation measures and how they will be implemented and measured for success.

172) Most importantly from the MMF's perspective, the CEC knows that this Project will cause significant adverse effects to Métis rights, but these collective impacts have not been meaningfully assessed or addressed – not by the Crown, not by its agent, not by the CEC.

173) The MMF submits that the CEC cannot in good conscience recommend a project where these issues have not yet been addressed and it has no certainty that they will be addressed. This

would be in breach of its obligations as an administrative tribunal that is guided by constitutional norms.

174) For the record, the MMF adopts the recommendation from its experts with respect to work that must be done prior to any license being issues and conditions for any license. These recommendations are attached to this document as APPENDIX B.

175) However, the MMF wants to make it clear that it does not believe this Project can or should be recommended to the Minister as it currently stands.

176) Manitoba Hydro must go back and do what it said it would do. It must meaningfully assess the entire Project. It must meaningfully engage with the impacted Métis community to understand, assess, avoid or mitigate these effects.

177) From the MMF's perspective, the CEC has a choice to make: does it let a ship that is destined for an iceberg continue on its current course; or, does it make recommendations that allow for re-assessment and a course correction that will benefit all involved.

178) The MMF urges the CEC to not recommend the Project and allow for that important re-assessment to occur. The stakes are simply too high for all the parties involved to be willfully blind to the course Bipole III is on.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21<sup>st</sup> DAY OF MARCH 2013.**

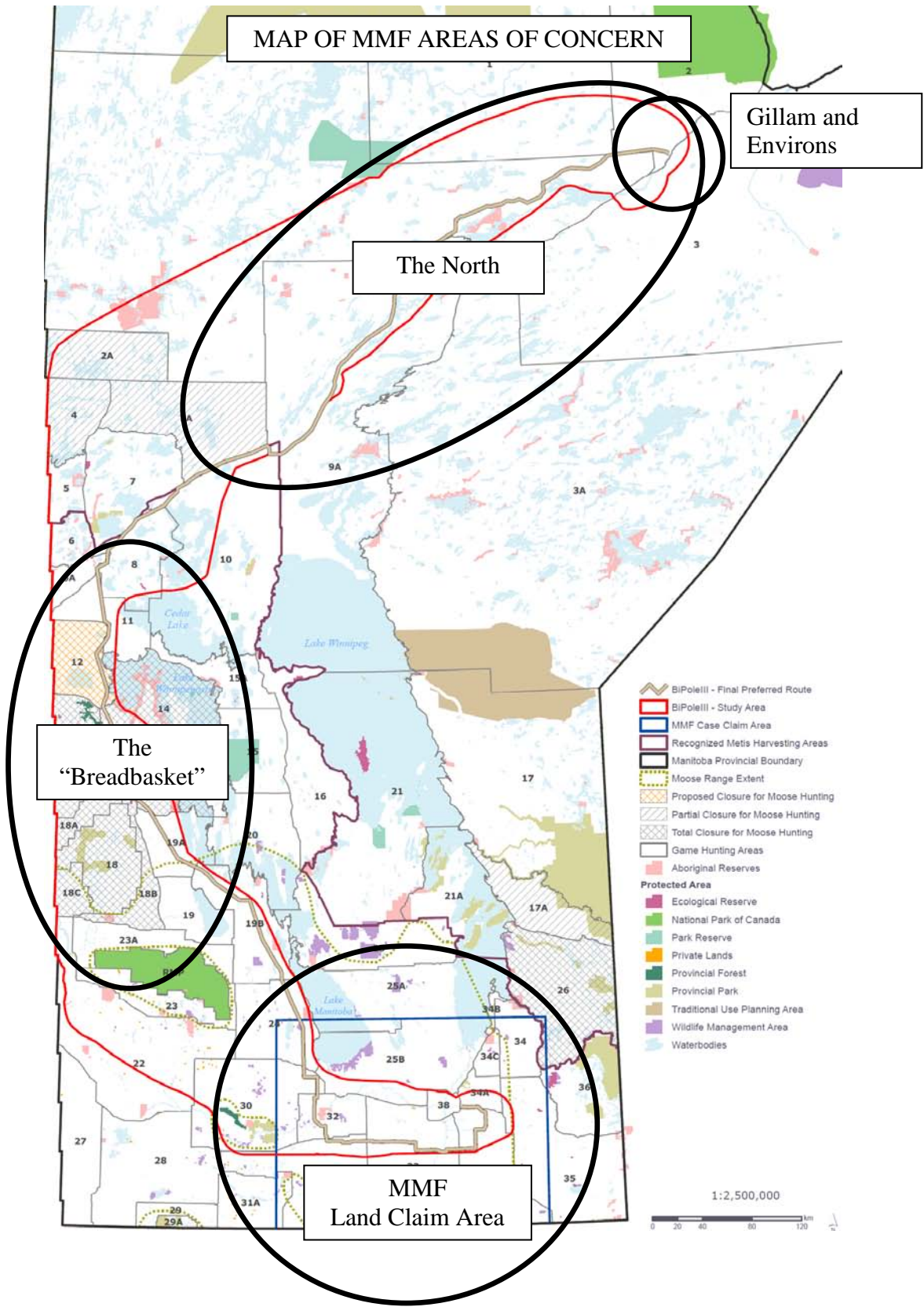


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# APPENDIX A



## APPENDIX B

### Heritage Resources Related Recommendations

- Additional research must be done to identify areas of high potential for Métis archaeological heritage throughout the BiPole III project area. This should include field research, archival research, and review of previous archaeological reports relating to Métis research in Manitoba. A modified predictive model should be applied to the study area to assist with this process. This should be updated whenever a re-routing of the line is being considered or approved.
- Before a heritage permit is issued by Manitoba Heritage for archaeological monitoring of the ROW for BiPole III, the MMF should be given the opportunity to review and comment on the permit application. While not common in Manitoba, this is standard practice in other provinces, including British Columbia. For example, all permits in British Columbia are sent to Aboriginal communities who have traditional territory and interest in the region covered by the permit. Communities have an opportunity to comment on the permit and identify any concerns. When making a decision about whether to issue a permit, the Archaeology Branch considers issues raised by the Aboriginal communities. BCAPA Code of Conduct. British Columbia Archaeology Branch Heritage Permit Policies.
- Given the unique reality that BiPole III will pass through the traditional territory of the Manitoba Métis which spans from northern to southern Manitoba, the proponent should financially support a full-time MMF Heritage/Cultural Sites Coordinator throughout the duration of the project's construction. This Coordinator will act as a point of contact for Manitoba Hydro in relation to Métis heritage, cultural sites and archaeological issues. The Coordinator will also act as a liaison between MMF Regions and Locals in relation to Métis heritage, cultural sites and archaeological issues as well as work with MMF Region and Locals in identifying and coordinating Métis Heritage Monitors throughout the Project's construction.
- During all segments of the Project's construction, local/regional Métis Heritage Monitors will be identified by the MMF in order to and work with Manitoba Hydro and liaison with the MMF through its Heritage/Cultural Sites Coordinator. Specifically, these Monitors will:
  - be included in the monitoring process when construction is taking place in locations of high potential for Métis related sites;
  - be contacted and meet with Manitoba Hydro prior to any decision about Métis heritage resources that are located during construction are made and be involved in the decision-making process with respect to those heritage resources.
- Establishment and implementation of Métis-specific protocols concerning archaeological heritage which will be included in the MMF's proposed tripartite agreement with Manitoba Hydro and MCWS in relation to the Project EPP. Specifically, this would include commitments that:
  - in the establishment of the HRPP, Métis concerns must be addressed and implemented;

- consultation with the MMF should take place before the HRPP is finalized; and
  - if necessary, a separate protocol and plan should be developed to deal with specific needs of the MMF as relating to Métis archaeological heritage.
- Explicit protocol requiring regular reporting to MMF when sites with Métis archaeological heritage are found during the construction phase of BiPole III.
  - Ongoing consultation about potential long-term impacts to heritage sites from the operation of BiPole III (i.e. access roads).
  - The HRPP should include a long-term plan for monitoring, where sites and areas of high potential are monitored on an ongoing basis. Members of the MMF should be included in monitoring activities during this phase of the BiPole III project.
  - The HRPP should explicitly state that MMF will be involved in ongoing monitoring of any sites that relate to Métis archaeological heritage that are found during construction activities.
  - Specific protocols should be included in the HRPP to determine how the Métis will be involved in monitoring heritage during maintenance activities and possible future decommissioning.

### **Ungulate Related Recommendations**

- It is recommended that a monitoring plan, through a negotiated agreement, be developed in collaboration with the MMF prior to licensing or as a condition to be met prior to construction being initiated. The plan should be based upon contractual obligations that can be relied upon by the MMF to receive timely notification of any activities relating to the development of a monitoring plan, along with sufficient funding and capacity to the MMF to participate in any of these activities. This should include MMF participation in the determination of targets and definitions of mitigation success for moose.
- It is recommended that the above-described negotiated agreement include a commitment for MMF participation in the implementation of wildlife monitoring programs, along with sufficient funding and capacity to the MMF to participate in the implementation of wildlife monitoring programs.
- It is recommended that the above-described negotiated agreement include a plan for the dissemination of monitoring data and annual monitoring reports to the MMF. The MMF should be informed when monitoring data and annual monitoring reports are available for review and the MMF should be provided with sufficient funding and capacity to review these reports and disseminate information to MMF members.
- It is recommended that the above-described negotiated agreement include a commitment that the Environmental Protection Plan (EnvPP) and Access Management Plans be available for review and suggestions by the MMF prior to their finalization and that the MMF be provided

with sufficient funding and capacity to review these reports and disseminate information to MMF members.

- Given the continued lack of detail on follow-up and monitoring programs, an independent monitoring board should be established to carry out monitoring programs that address both direct and cumulative effects from Project construction and operations on wildlife distribution and abundance within the regional cumulative effects study area. An example of this type of model is the environmental agreement creating the independent monitoring body for the Snap Lake Diamond Mine in the Northwest Territories, which has been provided as evidence in the hearings by MMF.

### **Métis Traditional Use Related Recommendations**

#### Meaningful MMF Role in Environmental Protection Plan Design and Implementation

- It is recommended that a condition of project approval be that MMF, Manitoba Hydro and MCWS negotiate and execute a tri-party agreement to design, implement, monitor and report on all EPPs. This is the only way to ensure a meaningful role for the Manitoba Metis in relation to the development, implementation and monitoring of the EPPs. While the various topics and commitments within the tri-partite agreement would be subject to negotiation,<sup>127</sup> to be effective the agreement should specifically commit to creating an EPP Committee comprised of MMF and MMF Regional and/or Local representatives (different MMF Regional and/or Local representatives would be involved with different EPP specific segments of the transmission line), MCWS and Manitoba Hydro. It is also recommended that the tri-party agreement include the following:
  - Agreement terms of reference, including;
    - the purpose, objectives and outcomes of the agreement,
    - duration of the agreement,
    - mandate of the committee,
    - frequency, timing and location of committee meetings,
    - resources for MMF participation,
    - short and long term workplans.
  - Specific commitments to address:
    - inclusion of existing and additional Manitoba Metis traditional use and knowledge to assist in on-going routing decisions, identification of ESSs;
    - construction-phase mitigation measures, including access management plans, deemed acceptable by the Committee and details on implementation responsibilities, timing, duration;
    - operational-phase mitigation measures, including access management plans, deemed acceptable by the Committee and details on implementation responsibilities, timing, duration;

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<sup>127</sup> For example, this tripartite agreement may also include provisions pertaining to processes, mitigation measures and accommodations (i.e., compensation) related to other Metis issues, concerns and adverse effects related to: trapper notification, heritage resources, socio-economic effects, wildlife, independent monitoring body, etc.

- means of assessing the efficacy of mitigation measures in real-time and means of employing adaptive management when measures are determined to require refined and/or new measures are identified in need of employment;
  - a communications program during construction; and
  - detailed arrangements for a meaningful role of the MMF in short and longer term monitoring of the efficacy of project construction and operational phase mitigation measures pertaining specifically to avoidance of or minimizing adverse effects on Manitoba Metis traditional use (as well as on heritage sites, culturally important sites, wildlife, etc.), assessment of the accuracy of the EIS effect predictions, and adaptive management.
  
- It is recommended that the communications program be designed and delivered by the MMF, since it manages the annual Metis harvest through its Metis Laws of the Hunt. As outlined above and within the MMF's TLUKS, Manitoba Metis harvesting practices are unique and in some respects are distinct from other Aboriginal harvesters in relation to distance travelled for harvesting as well as locational opportunities for harvesting. As such, general public or pan-Aboriginal communication tools will not be effective for Manitoba Metis harvesters. An effective communications program would necessarily involve on-going, time-sensitive information input and cooperation from Manitoba Hydro and MCWS, and resourcing by one or both of Manitoba Hydro and MCWS. At a minimum, the communications program should advise Manitoba Metis of:
  - locations (descriptive and maps) and timelines (start and end dates) of temporarily restricted areas;
  - the reasons for (e.g. construction camp, marshaling yard, right of way clearing) and nature of the restrictions (e.g. access route blocked, no firing of firearms within specified distance);
  - locations and timelines of the broader geographic area where construction disturbance has the potential to impact on harvesting enjoyment and/or success; and
  - negotiated arrangements or agreements (e.g. Access Management Agreements) where Manitoba Metis access will not be limited if valid MMF identification is provided.
  
- It is recommended that the tri-party committee described above, or another entity as may be proposed by the MMF, prepare bi-annual or construction season reports throughout the Project construction phase, and final end of construction report, describing at a minimum the following:
  - the efficacy of accommodation measures, including mitigation measures, employed in terms of their effectiveness in preventing adverse impacts on Manitoba Metis harvesting opportunities, success, and enjoyment. This could be informed, in part, by feedback from the communications program, MMF and/or Committee workshops with Local and/or Regional MMF offices, and/or with a regional representative sampling of harvesters;
  - the efficacy of the communications program, including measures to improve delivery, and/or the content and timeliness of information;
  - the final report should describe the extent to which adverse effects on traditional use were mitigated and lessons learned that would inform future similar projects.



- It is recommended that the tri-party committee, or another entity as may be proposed by the MMF, continue to function for at least the first ten years of Project operation. This will ensure:
  - a forum exists for MMF to bring forth Project operational phase concerns of Manitoba Metis Harvesters;
  - allow for continuous monitoring, review, and reporting on mitigation measures that continue from the construction phase and/or introduced for the operational phase;
  - on-going communications to Manitoba Metis harvesters with respect to Project maintenance activities that have potential to impact on traditional use (e.g. location and timing of mechanical or chemical vegetation management within the right of way).