



# MANITOBA-MINNESOTA TRANSMISSION PROJECT

Closing Argument of the Consumers' Association of  
Canada (Manitoba Branch)

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# Overview<sup>1</sup>

The Manitoba-Minnesota Transmission Project (“MMTP”) is an International Power Line which starts at the existing Dorsey Converter Station northwest of Winnipeg and connects at the Manitoba-Minnesota border near Piney (Manitoba). The US portion of the line will end at a new station called Iron Range Station which is adjacent to the existing Blackberry Station located northwest of Duluth, Minnesota.<sup>2</sup>

The MMTP was first the subject of public review during the 2013-2014 Public Utilities Board hearings to which the Consumers’ Association of Canada (Manitoba branch) (“CAC Manitoba”), was a participant.

On 31 December 2015, the Clean Environment Commission (“CEC”) was asked by the Minister of Conservation and Water Stewardship (now the Minister of Sustainable Development) pursuant to section 6 of the *Environment Act* to hold public hearings into the proposed MMTP.<sup>3</sup>

A revised Terms of Reference was issued on 15 February 2017 by the Minister of Sustainable Development. In the revised Terms of Reference, the CEC is asked to:

- Review the EIS, including the proponent’s public consultation summary;
- Hold public hearings for the Commission to consider stakeholder and public input; and
- “To prepare and file a report with the Minister of Sustainable Development outlining the results of the Commission’s review and providing recommendations for the Minister’s consideration.”<sup>4</sup>

CAC Manitoba asks that the CEC remember the important role it plays in establishing best practice environmental assessment in Manitoba. Over the past decade, the CEC has been gaining a reputation across Canada for innovative recommendations which set the standards for best practice environmental assessment.

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<sup>1</sup> CAC Manitoba and the author of this report acknowledge the assistance of Max Griffin-Rill during the hearing and in the preparation of these written submissions.

<sup>2</sup> Manitoba Hydro, *Manitoba-Minnesota Transmission Project Environmental Impact Statement – Executive Summary*, (Winnipeg, 2015) at 2-14.

<sup>3</sup> Letter from Tom Nevakshonoff, Minister of Conservation and Water Stewardship to Terry Sargeant, Chair of the Clean Environment Commission (31 December 2015) MMTP Terms of Reference, online: < [http://www.gov.mb.ca/sd/eal/registries/5750mbhydrombminnesota/dec232015cec\\_termsofreference.pdf](http://www.gov.mb.ca/sd/eal/registries/5750mbhydrombminnesota/dec232015cec_termsofreference.pdf) >.

<sup>4</sup> Letter from Cathy Cox, Minister of Sustainable Development to Serge Scrafield, Chair of the Clean Environment Commission (15, February, 2017) Revised MMTP Terms of Reference, online: < <http://www.cecmanitoba.ca/resource/hearings/43/MMTP%20Terms%20of%20Reference21.pdf> >.

Over the course of the hearing, the CEC panel, the proponent, and participants heard that the bar is being raised for environmental assessment across Canada. The MMTP offers the CEC an opportunity to further its reputation and make recommendations which will exceed past standards and practices.

The CEC's recommendations for the Bipole III and Keeyask projects reinforced the iterative nature of the monitoring design, and set the stage for appropriate regulatory and industry practice in follow-up and monitoring programs.<sup>5</sup>

However, environmental assessment is not a stagnant process. Already since the Bipole III and Keeyask hearings, environmental practices and standards have progressed, and will continue to change in the future as elements such as respect for Indigenous legal traditions have not yet been incorporated into environmental assessment.<sup>6</sup>

From CAC Manitoba's perspective, environmental assessment must always be guided by principles of transparency, inclusivity, informed deliberations and meaningful consumer participation.<sup>7</sup>

According to Mr. Matthewson, Senior Environmental Assessment Officer for Manitoba Hydro, Manitoba Hydro has a role in creating and implementing best practice environmental assessment:

*"I certainly hope that Manitoba Hydro has been in a position or is in a position of being and creating best practice".<sup>8</sup>*

CAC Manitoba agrees with Mr. Matthewson that Manitoba Hydro has a role in implementing best practice environmental assessment. However, while Manitoba Hydro has certainly demonstrated that it has learned from past projects, CAC Manitoba argues that Manitoba Hydro continues to require improvements primarily in six main areas.

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<sup>5</sup>Clean Environment Commission, "Report on public hearing; Keeyask Generation Project", (CEC, April 2014) recommendations 10.4, 10.5, 10.6, 11.2, 11.3, 11.5, 11.6, 13.2, 10.15, 11.4 at 165-167.; Clean Environment Commission, "Report on public hearing; Bipole III Transmission project", (CEC, April 2014) recommendations 8.3, 12.2, 12.4, 8.9 at 127-129.

<sup>6</sup> See Pastora Sala, J., Dilay, K., *Written submissions of the Assembly of Manitoba Chiefs submitted to the Expert Panel for the Review of the Environmental Assessment Process* (Association of Manitoba Chiefs, 2016).

<sup>7</sup> This is consistent with the principles for good practice environmental assessment proposed in the Independent Expert Panel Report on the Federal environmental assessment process. See Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Ottawa: Canadian Environmental Assessment Agency, 2017) at 2.

<sup>8</sup> Matthewson, "MMTP Hearing", May 23 2017 at 2142-2143.

These closing arguments are divided into these six main areas of concern which include:

- The recognition that best practice environmental assessment is continuously evolving and that simple regulatory compliance is an insufficient benchmark for Manitoba Hydro to be striving towards;
- Transparency and inclusiveness of Manitoba Hydro's procedures in relation to consumers during the MMTP, specifically in regard to decision making, monitoring and follow-up processes;
- The consequences of uncertainty in environmental assessments, and the need to explicitly recognize and plan for uncertainty;
- Silos within Manitoba Hydro;
- Coordination and cooperation among provincial, federal and indigenous jurisdictions; and
- Manitoba Hydro's relationship with Indigenous nations and people.

In conclusion, and to assist the CEC in its deliberations, CAC Manitoba presents both licensing and non-licensing recommendations as well as a list of express findings to be included in the CEC Report for the Minister of Sustainable Development.

CAC Manitoba asks the CEC to carefully consider its recommendations, particularly considering Manitoba Hydro's current situation of economic uncertainty.<sup>9</sup> The CEC recommendations will be key to identifying which elements of the project receive a designated budget envelope.

CAC Manitoba asks that the CEC give significant weight to the evidence of Dr. Patricia Fitzpatrick, who is a leader in the areas of monitoring and follow-up, adaptive management and non-state market-driven initiatives.

Specifically, CAC Manitoba asks that the CEC:

- accept all of Dr. Fitzpatrick's recommendations as license recommendations; and
- expressly find that Dr. Fitzpatrick is well qualified, reliable, and provided compelling, forward-looking recommendations that are consistent with the spirit and intent of the *Environment Act*, the aspirations of Manitoba Hydro and of the policy communities.

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<sup>9</sup> Bedford, "MMTP Hearing", May 8 2017 at 25.

# Part 1: Best practice environmental assessment is always evolving & regulatory compliance is not sufficient

## 1.1. The importance of Environmental Assessment Processes

According to the Manitoba Law Reform Commission,

*Environmental assessment plays an important role in decision making processes where there is the potential for irreversible or significant harm to the environment. The basic idea of this concept is that proposed human activities should be scrutinized based on the possible environmental consequences of the action before such harm occurs. In Canada, the Supreme Court has recognized environmental assessment as “an integral component of sound decision-making”, especially since “the growth of modern societies has shown the serious problems that can result from anarchic development and use of land, in particular those problems concerning public health and the environment.”<sup>10</sup>*

Environmental assessment is “a proactive planning process, designed to identify, and where possible mitigate the potential negative impacts of a proposed project before irreversible decisions are made.”<sup>11</sup>

CAC Manitoba believes that environmental assessments are key components in giving consumers the ability to make informed and conscious decisions about the products they purchase. If done correctly, environmental assessment allows consumers to exercise their rights to education and information.

Environmental assessment is also critical to consumers for:

- providing consumers with a voice in the marketplace by participating in the decision making process relating to the construction of “development projects”<sup>12</sup>;
- requiring government and companies to publicly consider every intersecting element of the environment before making decisions; and
- forming part of the proxy for our right to choice in cases where the product is supplied by monopoly holders, as is the case with Manitoba Hydro.

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<sup>10</sup> Manitoba Law Reform Commission, *Manitoba’s Environmental Assessment and Licensing Regime under the Environment Act*, (Winnipeg, 2015) at 34.

<sup>11</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers’ Association of Canada, 2017) at i.

<sup>12</sup> See the definitions of class 1, 2, and 3 developments under s 1(2) of the *Environment Act*.

Often, environmental assessment processes offer consumers their one and only opportunity to be notified of the potential impacts that products or services will have on the environment. This process empowers consumers to make responsible and environmentally conscious decisions, thereby theoretically making it inherently better for the environment.

Furthermore, the planning process and hearing components of environmental assessments offer opportunities for relationship building and sharing of information and knowledge between the proponent and policy communities (see figure 1a).

*Figure 1a: “policy communities refers to [. . .] all of those who have interest in a particular sector or a particular issue that informs that sector.”<sup>13</sup>*

As was stated by Manitoba Hydro Senior Environmental Assessment officer, Mr. Matthewson, during the MMTP CEC hearing:

*The intervenors’ questions are excellent; they drive change. And certainly all the questions that I’ve received to date have certainly sparked different things that I may be addressing in future environmental protection programs. So I think it is a very good process.<sup>14</sup>*

## 1.2. Environmental Assessment is always evolving

*“[W]hat we expect from EA has evolved and will continue to mature.”<sup>15</sup>*

As outlined in the evidence of Dr. Fitzpatrick, there are two main elements which form the foundation of environmental assessment.

*Figure 1b: Foundational elements of environmental assessment*

- Legislative Requirements which are enshrined in law, such as the *Environment Act*<sup>16</sup>; and
- Learning from past experiences, which is also known as “process components”.

Policy communities gain knowledge and have their expectations shaped through past environmental assessment processes. As such, the proponent must endeavor to learn from

<sup>13</sup> Fitzpatrick, “MMTP Hearing”, May 29 2017 at 2838-2839.

<sup>14</sup> Matthewson, “MMTP Hearing”, May 23 2017 at 2294.

<sup>15</sup> Sinclair, A.J., & Doelle, M. (2015). “Environmental assessment in Canada: Encouraging decisions for sustainability” In B. Mitchell ed, *Resource and environmental management in Canada* (Toronto: Oxford University Press) 112. cited in Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers Association of Manitoba, 2017) at 9.

<sup>16</sup> *The Environment Act*, CCSM 1987, c E125.

past experiences, and integrate learnings into every project, as legislation will rarely adapt quickly enough to keep up with the expectations of policy communities.

*In Canada, the purpose of what has been called environmental assessment (EA) has evolved over time, from the federal Environmental Assessment and Review Process for major policy initiatives in 1974, through the first iteration of the Canadian Environmental Assessment Act in 1992 (CEAA 1992), to the more recent process implemented through the Canadian Environmental Assessment Act, 2012 (CEAA 2012).<sup>17</sup>*

Based on what we currently know, environmental assessment must involve such elements as:

- broad definition of the environment;
- public involvement in the process;
- monitoring and follow-up;
- adaptive management;
- respect for Indigenous legal traditions and worldviews; and
- respect for both treaties and the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>18</sup>

*“Traditional ecological knowledge, a subset of Indigenous knowledge which pertains specifically to the environment, must be integral to IA. More broadly, Indigenous knowledge systems also include Indigenous laws and governance. These components of Indigenous knowledge systems become relevant to IA when the principles of UNDRIP are reflected in the process, particularly when Indigenous Groups are involved in decision-making. Further, Indigenous laws and governance as they relate to Indigenous knowledge should be recognized and upheld to support a new IA sustainability model which considers impacts holistically.”<sup>19</sup>*

In her submission, Dr. Fitzpatrick explained that good practice environmental assessment is always changing and evolving.<sup>20</sup> The recent release of the final report of the expert panel for the review of environmental assessment processes “Building Common Ground: A New Vision for Impact Assessment in Canada”, in the spring of 2017 is the most recent public report

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<sup>17</sup> *Building Common Ground: a New Vision for Impact Assessment in Canada*, (Ottawa: Canadian Environmental Assessment Agency, 2017) at 17.

<sup>18</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers’ Association of Manitoba, 2017) at 11.; Fitzpatrick, P., “A Foundation for the Future”, Power Point Presentation: (Winnipeg: Consumers’ Association of Canada, 2017) at slide 4.

<sup>19</sup> *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Ottawa: Canadian Environmental Assessment Agency, 2017) at 33.

<sup>20</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers’ Association of Manitoba, 2017) at 9.



which speaks to this evolution.<sup>21</sup> This Report also speaks to the fact that environmental assessment law reform is slow. Simple regulatory compliance is not sufficient as it fails to meet the expectations of policy communities and keep up with good practice and evidence based environmental assessment.

According to this report, good practice environmental assessment must be guided by principles of transparency, inclusivity, informed deliberations and meaningful consumer participation.<sup>22</sup>

### 1.3. Best Practice Monitoring and Follow-up & Adaptive Management

*“Attention should not be lost once a project gets its approval.”<sup>23</sup>*

Monitoring and follow-up activities in the post-construction phase are critical components of good practice environmental assessment. These activities or programs “ensure that public attention remains on the project throughout construction/implementation operation and decommissioning.”<sup>24</sup>

Monitoring and follow-up programs are meant to acknowledge and plan for uncertainties with respect to the environment. Over the course of the hearing, we heard on several occasions the pithy summary of uncertainty provided by the former-Secretary of Defense, Donald Rumsfeld.

*Figure 1c: A summary of uncertainty by Donald Rumsfeld*

“There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we now know we don’t know. But there are also unknown unknowns. There are things we don’t know we don’t know.”<sup>25</sup>

Recognizing that uncertainties are inevitable in environmental assessment, “it is important to develop robust systems and methods that can deal with the unknowns as they arise.”<sup>26</sup>

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<sup>21</sup> Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Ottawa: Canadian Environmental Assessment Agency, 2017).

<sup>22</sup> *Ibid*, at 2.

<sup>23</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers’ Association of Manitoba, 2017) at i.

<sup>24</sup> *Ibid*.

<sup>25</sup> Rumsfeld, “Department of Defense News Briefing”, February 12 2002.

<sup>26</sup> *Ibid*, at 15.

The very purpose of monitoring and follow-up programs is to plan for these uncertainties. According to Dr. Fitzpatrick, best practice monitoring and follow-up programs can include:

*Figure 1d: Elements of best practice monitoring and follow-up*

- **Compliance:** which entails ensuring the proponent is meeting its regulatory requirements;
- **Monitoring:** wherein activities are designed based on valued components to identify the nature and cause of change that results from a project;
- **Auditing:** which involves an objective examination or comparison of observations with those pre-determined in the EIS; and
- **Ex-post or post-hoc evaluation:** which is a detailed comparison of the information provided in the EIS as compared to what happens in reality.

Adaptive management (“AM”) is the best practice approach to implementing monitoring and follow-up activities. AM is a “systematic process for improving strategies and practices by learning from, and acting on outcomes of management experiences.”<sup>27</sup> AM is considered best practice as it proposes an approach to dealing with uncertainties before and when they arise.

Common elements of adaptive management include:

- learning from and reducing key uncertainties;
- using what is learned to change policy and practice; and
- proceeding in a formal, structured, purposeful and systematic manner.<sup>28</sup>

Core features of adaptive management were also identified as the plan, do, evaluate and learn, and adjust cycle which is described in the figure below.

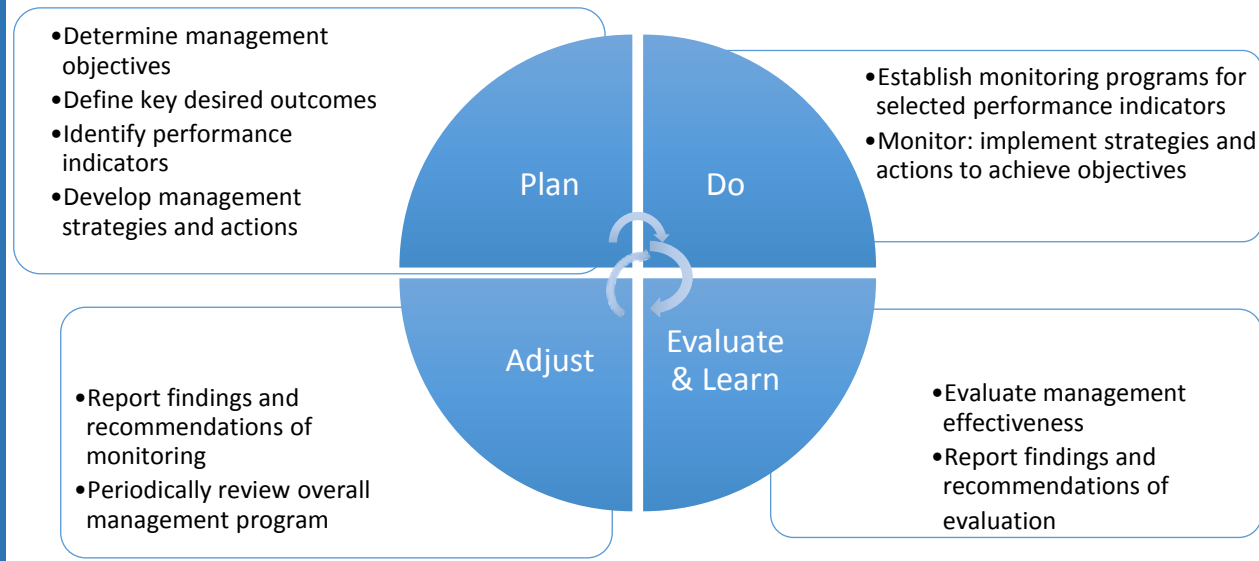
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<sup>27</sup> Nyberg, J.B., & Taylor, B., “Applying adaptive management in British Columbia’s forests” (Paper delivered at the Proceedings of the FAO/ECE/ILO International Forestry Seminar, Prince George, BC, 1995).

<sup>28</sup> Matthewson & Pastora Sala, “MMTP Hearing”, May 23 2017 at 2162-2163.

Figure 1e: Core features of adaptive management

- The plan, do, evaluate, learn and adjust cycle – leading to continuous change and adaptation
- A comprehensive definition of adaptive management and uncertainty; and
- Being deliberate in design and implementation of adaptive management plans.



Experimentation is key to adaptive management. As described by Dr. Fitzpatrick, there is both active and passive experimentation which are important and serve different purposes.<sup>29</sup> While not every element of a project requires experimentation, considerations of financial costs, potential impacts on the environment and available human resources can be helpful in order to determine what type of experimentation is required for which elements of the project in question.

Importantly, adaptive management is distinct from managing adaptively. Adaptive management requires setting strategies and a framework to deal with issues that may arise before results are known. As an illustrative example, Dr. Fitzpatrick shared the following:

*[W]hen a student comes to me asking about doing a research project, in essence, I will come up with plan A for them. If everything works out the way it's supposed to, here is when this will be due, and this and this and this. Inevitably, any student who comes to me, I'll have up to a plan J. And as life unfolds and I start going through, plan A is not going to work because of this factor and this factor, plan B is not going to work, I have been known to go to plan S. I don't share all of the plans with them at once, but they have laughed and told me, walked into my office and said, okay, it's time for plan D and please*

<sup>29</sup> Fitzpatrick, "MMTP Hearing", May 29 2017 at 2851-2852.

*tell me you have a plan L. And so that's what adaptive management is. That's living it from a systematic perspective and having many different options.*<sup>30</sup>

Overall, Manitoba Hydro's approach to adaptive management was deemed by Dr. Fitzpatrick to be a "marked improvement" over their approach in the Bipole III Project.

However, Dr. Fitzpatrick was not able to conclude that the MMTP approach to monitoring and follow-up was an improvement from the Keeyask EIS:

*MS. MAYOR: And as you set out in your current report, Manitoba Hydro's follow-up and monitoring programs and processes have improved significantly in each successive project?*

*DR. FITZPATRICK: What I said in my report is that this was a marked improvement over Bipole III.*<sup>31</sup>

#### 1.4. Manitoba Hydro's view on best practice environmental assessment

Over the course of the hearing, Manitoba Hydro has sent mixed messages about whether and how it should be involved in creating and setting best practice environmental assessment.

On the one hand, Mr. Matthewson stated that Manitoba Hydro has an active role in this regard. Further, the acknowledgement of lessons learned from past projects in each chapter seemed to be a recognition by Manitoba Hydro that there was a desire to learn from past projects and achieve best practice.

However, on the other hand, Manitoba Hydro counsel expressed some reluctance in this regard:

*MS. MAYOR: Many of the items that you have recommended, and I think you have described it as to try and push the envelope in terms of what is best practice. And you also describe to us that environmental assessment approaches have changed even since 2015. Fair to say?*

*DR. FITZPATRICK: You have three components in your question. So best practice, yes, to ensure that we are meeting best practice, particularly the best practice that we have already established in this jurisdiction, it's important to ensure that we maintain that practice. Fair to say it's changed since 2015, I would even argue that it's changed since May 15th, when the draft, or sorry, when the independent panel reviewing the potential modernization of the National Energy Board released its report, has come out. And I can't remember the third component of your question.*

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<sup>30</sup> Ibid, at pp 2849-2850.

<sup>31</sup> Ibid, at 2880.

*MS. MAYOR: Well, I guess my point is that you are trying to, and certainly a lot of the goal is to try and move environmental assessment across Canada forward in a progressive manner. You recognize, though, that Manitoba Hydro has to balance the costs of environmental assessment and extensive monitoring with the interests of its ratepayers in keeping its rates low and keeping its costs down. So you recognize that there needs to be a balance on that?<sup>32</sup> (emphasis added)*

This need to balance various interests relating to environmental assessment was perhaps one of the reasons why Manitoba Hydro's desire to improve on past projects was not applied consistently throughout the EIS. These areas of inconsistency are discussed in the following sections.

Importantly and in light of Manitoba Hydro's financial circumstances, these mixed messages are concerning and highlight the importance of CEC recommendations which challenge Manitoba Hydro towards achieving best practice environmental assessment.

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<sup>32</sup> Fitzpatrick and Mayor, "MMTP Hearing", May 29 2017 at 2917-2918.

## Part 2: Transparency and inclusiveness of consumers in decision making, monitoring and follow-up

During the CEC hearing, Dr. Fitzpatrick described transparency as “the openness of a process to the public”,<sup>33</sup> and went on to state that “clear procedures, structured decision-making, and clear decision-making criteria assist in providing transparency.”<sup>34</sup> The Report by the expert panel reviewing the federal environmental assessment processes explains the importance of transparency as follows:

*[Transparency] restore[s] trust and confidence in assessment processes, people must be able to see and understand how the process is being undertaken and how decisions are being made. Without this transparency, no process will be trusted.*<sup>35</sup>

Transparency must inform the entire environmental assessment process, including monitoring and follow-up.

Inclusive processes meaningfully consider the concerns of the entire policy community, while providing opportunities for those policy communities to influence decision making and build relationships with the proponent. In order to achieve an inclusive process, the proponent’s engagement strategies must also be transparent, proactive and adaptive.

### 2.1. Manitoba Hydro’s approach to transparency, inclusiveness and meaningful engagement

During the CEC hearing, it was revealed that Manitoba Hydro uses the terms “public engagement”, “community engagement” and “public participation” interchangeably.<sup>36</sup> It is important to note that the literature on environmental assessment seems to be moving away from this approach in favor of distinguishing these terms.

On the one hand, public participation is described in the literature as project specific techniques and goals which can be undertaken with varying levels of public impact.<sup>37</sup> The International

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<sup>33</sup> Fitzpatrick, “MMTP Hearing”, May 29 2017 at 2840-2842.

<sup>34</sup> Ibid

<sup>35</sup> Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Ottawa: Canadian Environmental Assessment Agency, 2017), at 13.

<sup>36</sup> Joyal, “MMTP Hearing”, May 9 2017 at 457.

<sup>37</sup> International Association for Public Participation, “Public Participation Spectrum” (2007) (2015), online: < <http://iap2canada.ca/page-1020549> >

Association for Public Participation (IAP2), cited in the MMTP EIS, describes the spectrum of public participation as: informing, consulting, involving, collaborating, and empowering.

On the other hand, community engagement is a concept that has emerged in the literature as a component of public participation.<sup>38</sup> While definitions have varied, ‘public engagement’ or ‘community engagement’ have been described as focusing on **building relationships** between proponents, regulators, and affected communities to achieve mutually beneficial outcomes.<sup>39</sup>

Mr. Joyal, Environmental Specialist in the Licensing and Environmental Assessment Department at Manitoba Hydro, stated that Manitoba Hydro strives to build long-term relationships as an important element of its engagement processes.<sup>40</sup>

One of the ways in which Manitoba Hydro can achieve better relationships with policy communities is by having clear process intentions and transparent information. For example, during cross examination it was revealed that the project liaison for the entire MMTP is Mr. Trevor Joyal.

*MR. JOYAL: They both go to my desk. The phone line and the e-mail address is checked by me.*

*MS. PASTORA SALA: So you are the community liaison?*

*MR. JOYAL: Generally, yes, they go to my phone.<sup>41</sup>*

However, counsel for Manitoba Hydro had to clarify in closing arguments that this information was incorrect and that Mr. Joyal was in fact “not the sole liaison officer with respect to landowner communications. Mr. Joyal coordinates a program that involves six individuals at Manitoba Hydro who divide that liaison work with the 126 landowners.”<sup>42</sup>

It is unfortunate that this type of information remained unclear at the time of closing arguments. It is also uncertain whether Manitoba Hydro has standardized processes for its public participation and engagement process which applies to all their projects.

**CAC Manitoba asks the CEC to recommend that Manitoba Hydro develop a standardized engagement process in consultation various policy communities in Manitoba.**

<sup>38</sup> Udofia, A., Noble, B. & Poelzer, G., “Community engagement in environmental assessment for resource development: Benefits, enduring concerns, opportunities for improvement” (2015) *39 The Northern Review* 98.

<sup>39</sup> Nyberg, Wallis, R., “What do we mean by “community engagement”?” (Paper delivered at the Knowledge Transfer and Engagement Forum, Sydney, 2006) online: <  
[http://www.ncsu.edu/extension/news/documents/knowledge\\_transfer\\_june\\_2006.doc](http://www.ncsu.edu/extension/news/documents/knowledge_transfer_june_2006.doc) >.

<sup>40</sup> Joyal and Pastora Sala, “MMTP Hearing”, May 9 2017 at 459.

<sup>41</sup> Ibid, at 470.

<sup>42</sup> Bedford, “MMTP Hearing”, June 6 2017 at 4006.

Recognizing the need for flexibility, Manitoba Hydro should, in conversation with various policy communities, identify common elements and principles for a standardized engagement process.

Important elements to consider could include the clarification of Manitoba Hydro's definition of public participation and/or public engagement, an outline of expectations for level of engagement at different stages, process intentions and general roles of staff involved in Manitoba Hydro's engagement processes. Another important element may include identifying the departments or titles of individuals responsible for information sharing pre-construction, during construction and post construction for all projects.

Once the standard has been developed, it should be publicly available in easily accessible formats.

## 2.2. The Pre-Construction Phase

Transparent and inclusive decision making requires meaningful engagement at every level of the environmental assessment process and this necessarily includes the preliminary planning phases of any project. Manitoba Hydro's preliminary planning process for MMTP began in February of 2012.<sup>43</sup>

Early in the process, Manitoba Hydro selected the EPRI GTC model as the route selection methodology as it was deemed to "provide a transparent model for decision making which sought to reduce effects of [the transmission line] on people and the environment".<sup>44</sup> As we heard during Manitoba Hydro testimony, the perspectives which would be considered for the process of selecting corridors were identified by Manitoba Hydro in consultation with Mr. Glasgow's team.<sup>45</sup>

The presentation and cross examination of Manitoba Hydro's Routing Panel revealed that this stage of the planning was not project specific.<sup>46</sup> Once perspectives were selected, the next step was to receive feedback through a Stakeholder Workshop, held between May 6<sup>th</sup> and May 8<sup>th</sup> of 2013. During this workshop, the weights for different criteria in the EPRI GTC model were determined.<sup>47</sup> The workshop was described in the EIS as the "basis to move forward

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<sup>43</sup> Bratland and Pastora Sala, "MMTP Hearing", May 11 2017 at 813.

<sup>44</sup> Manitoba Hydro, "Manitoba-Minnesota Transmission Project, Environmental Impact Statement: Chapter 5", September 2015 at 5-1.

<sup>45</sup> Mailey and Toyne, "MMTP Hearing", May 8 2017 at 150-151 and Bedford, "MMTP Hearing", May 11 2017 at 3998.

<sup>46</sup> Glasgow and Pastora Sala, "MMTP Hearing", May 11 2017 at 817.

<sup>47</sup> Manitoba Hydro, "Manitoba-Minnesota Transmission Project, Environmental Impact Statement: Chapter 5", September 2015 at 5-20.



with the rest of the routing approach.”<sup>48</sup> Testimony from Ms. Bratland, Senior Environmental Specialist for Manitoba Hydro, supported this claim when she stated that the stakeholder workshop formed a “foundational piece of information that inform[ed] all the subsequent steps”.<sup>49</sup>

Stated differently, the groups and individuals present at this “Stakeholders Workshop” had significant involvement in determining the basis upon which all subsequent decisions relating to routing methodology for the MMTP would be made.

It would be reasonable to expect that Manitoba Hydro would aim to invite a broad range of policy communities to an important information gathering session such as the “Stakeholders Workshop”. This is particularly the case given the heavy influence that this workshop would ultimately have on the outcome of the routing process and route selection, and the delicate process involved in the MMTP of balancing conflicting perspectives; particularly those seemingly oppositional perspectives between private landowners and Indigenous nations and groups. However, this was not the case.

When asked about the composition of the “Stakeholder Workshop”, EPRI-GTC expert, Mr. Glasgow, indicated that Manitoba Hydro sought to invite only “technical knowledge holders that could bring to the discussion their understanding of the features on the landscape and associated values to use.”<sup>50</sup> Groups that met this criteria consisted of a variety of provincial and federal government departments, along with a selected list of non-governmental organizations. These included:

- Fisheries and Oceans Canada;
- Ducks Unlimited;
- Manitoba Lodge and Outfitters Association;
- Keystone Agricultural Producers;
- Manitoba Aboriginal and Northern Affairs;
- Local Government Planners; and
- City of Winnipeg – Planning Division<sup>51</sup>

Importantly, the individuals and groups who did not meet Manitoba Hydro’s criteria of “technical knowledge holders” included consumer advocacy groups as well as Indigenous nations, peoples and representative organizations.<sup>52</sup>

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<sup>48</sup> Ibid, at 5-11.

<sup>49</sup> Bratland, “MMTP Hearing”, May 11 2017 at 826.

<sup>50</sup> Glasgow, “MMTP Hearing”, May 11 2017 at 821.

<sup>51</sup> See the full list at: Manitoba Hydro “Manitoba-Minnesota Transmission Project, Environmental Impact Statement: Appendix 5A”, September 2015 at 5A-3 – 5A-4.

<sup>52</sup> Bratland and Pastora Sala, “MMTP Hearing”, May 11 2017 at 822-823.

At this early stage in the process, Manitoba Hydro was not prepared to hear from consumers, First Nations, the Métis Nation and Aboriginal organizations. This lack of engagement at an early stage in the process concerns CAC Manitoba, especially given the fundamental role that this workshop played in determining subsequent steps in the MMTP routing process.

Transparent engagement processes require meaningful engagement at every step of the environmental assessment process and meaningful engagement was not achieved for an initial, but important step.

### 2.3. Transparency in the Post-Construction Phase

It must be noted that many of Manitoba Hydro's post-construction management plans were not made publicly available prior to, or during, the MMTP hearing. While it is understandable, and even desirable in certain cases, that some of the management plans were not yet available for publication, it is concerning that the public may never have an opportunity to review many of these plans which include the Erosion and Sediment Control Plan, the Clearing Management Plan and the Hazardous Substances Management Plan.<sup>53</sup>

A lack of transparency regarding these important plans may result in further damaging relationships between the proponent and certain policy communities of Manitoba Hydro.

Furthermore, the refusal to make these plans publicly available makes it challenging, if not impossible, to identify whether the recommendations of policy communities relating to these plans are being seriously considered and integrated. During the hearing, Manitoba Hydro indicated that it would *consider* publishing redacted versions of the management plans. While it is encouraging that Manitoba Hydro is "considering" this possibility, a consideration is not a guarantee.<sup>54</sup> Further, redacted versions of the plans run the risk of not providing sufficient information for policy communities.

In addition to the availability of post-construction management plans, Dr Fitzpatrick's report identifies many other important elements relating to transparency in the post-construction phase. These include elements which ought to form part of the licensing recommendations for the MMTP such as: making monitoring reports publicly available, maintaining a project website and conducting an ex-post evaluation. Each of these elements will be briefly discussed below and more detailed information can be found in Dr. Fitzpatrick report.

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<sup>53</sup> Matthewson and Pastora Sala, "MMTP Hearing", May 23 2017 at 2200-2204.

<sup>54</sup> Matthewson and Valdrón, "MMTP Hearing", May 23 2017 at 2215.

## 2.4. Monitoring reports should be publicly available

Manitoba Hydro's monitoring reports for the MMTP should be made publicly available.

**Specifically, the CEC should replicate the recommendations from Keeyask and Bipole III that “the proponent provide to the Manitoba Government an annual report on the ...[MMTP] containing information in such detail that past, current and future assessment can be made as to the accuracy of predictions, success of mitigation actions and commitments to future actions.”<sup>55</sup>**

While reports are typically sent to the department of sustainable development, Manitoba Hydro has committed to making the annual reports for the MMTP publicly available. Ensuring that this recommendation forms part of a licensing condition remains a key element to ensure that the results of follow-up and monitoring are made publicly available. Enshrining this element as a license recommendation (1) ensures that it will be done and (2) sends a clear message to Manitoba Hydro about the importance of transparency post-construction.

## 2.5. Maintenance of the Project Website

CAC Manitoba recommends that Manitoba Hydro maintain a project website for the life of the project.

**Specifically, the CEC should replicate the recommendations from Bipole III and Keeyask Reports that the “proponent maintain a website for the life of the project with all the information in a manner that is easily retrievable and updated frequently.”<sup>56</sup>**

Dr. Fitzpatrick also recommended that the website be maintained “for the life of the project, with all information, in a manner that is easily retrievable and updated frequently.”<sup>57</sup> She explained that in her experience, the interface of the project website on Manitoba Hydro's website was

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<sup>55</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers' Association of Manitoba, 2017) at 26.

<sup>56</sup> Clean Environment Commission, “Report on public hearing; Keeyask Generation Project”, April 2014 at 148; Clean Environment Commission, “Report on public hearing; Bipole III Transmission project”, April 2014 at 118.

<sup>57</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers' Association of Manitoba, 2017) at 24.

much more user-friendly.<sup>58</sup> Access to publicly available and accessible information is a key element of transparency in the post-construction phase of any project.

## 2.6 Ex-post (or post-hoc) evaluation

An ex-post or post hoc evaluation involves “a detailed comparison of the information provided in the impact statement, as compared to what happened in reality” with the Project. “These are typically conducted within a specific time-frame, post construction, and replicated during operation.”<sup>59</sup>

It is critically important as it “represents a real effort to undertake quality assurance – of the accuracy of predictions, the effectiveness of mitigation measures and the implementation of monitoring programs, including consideration of AM, among others.”<sup>60</sup>

**The CEC should replicate the recommendation that, upon completion of the Project, Manitoba Hydro “undertake a third-party environmental audit to assess whether commitments were met and to assess the accuracy of assumptions and predictions. The results of this audit shall be made public. This is to be repeated five years after the first environmental audit.”<sup>61</sup>**

As stated by Dr Fitzpatrick, “the importance of these recommendations cannot be understated”<sup>62</sup> as “they represent a new benchmark for best practice in follow-up and monitoring in Canada, specifically here in Manitoba.”<sup>63</sup>

## 2.7 Independent oversight

Independent oversight is an institution separate from government and the proponent which has a role in monitoring. According to Dr. Fitzpatrick,

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<sup>58</sup> Ibid, at 25.

<sup>59</sup> Ibid, at 13.

<sup>60</sup> Ibid, at 24.

<sup>61</sup> Clean Environment Commission, “Report on public hearing; Keeyask Generation Project”, April 2014 at 166; Clean Environment Commission, “Report on public hearing; Bipole III Transmission project”, April 2014 at 118.

<sup>62</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers’ Association of Manitoba, 2017) at 23.

<sup>63</sup> Ibid.

*the basic function of independent oversight is to demonstrate accountability for the appropriate, proper and intended use of resources. We want to make sure, in the context of resource management, that the system of monitoring that's laid out is appropriate, and there is a dearth or a lack of implementation gaps. And to do that, we want to ensure that there is accountability.*<sup>64</sup>

One of the recognized benefits of independent oversight is an increase in accountability. Other benefits of independent oversight are outlined in the following quote by the representative of Indian Affairs and Northern Development (as it was then) when he was testifying about the potential role for independent oversight in the Mackenzie Gas Project hearing:

*[There are concerns] about ensuring that development proceeds in a responsible fashion, that it provides the benefits, that it results in minimum hard and frankly, [...] skepticism that can be entrusted to government and industry alone to ensure it happens...The transparency of the process, the ensuring that information is readily available so that people can confirm for themselves that things are going well is a big part of it.*<sup>65</sup>

The following elements of effective independent oversight were described by Drs. Diduck, Fitzpatrick and Robson in their 2012 report prepared within the context of the Bipole III hearing:

- Strong legal foundation;
- Clear mandate;
- Effective communication;
- Independent authority;
- Independent composition;
- Adequate, long-term funding; and
- Experience.

One of the reasons independent oversight was recommended by Drs. Diduck, Fitzpatrick and Robson in the Bipole III hearings was because of the “overlapping mandate” of the government given Manitoba Hydro is a Crown Corporation.

Within the context of the MMTP, the topic of independent oversight initially emerged during the policy community workshop hosted by CAC Manitoba. As indicated by Dr Fitzpatrick,

*[p]articipants expressed a variety of concerns about the monitoring process, including questions related to accountability (e.g. if it is the government's job to ensure the monitoring is done, who ensures the government is doing its job?) and*

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<sup>64</sup> Fitzpatrick, “Bipole III Hearing”, November 12 2012 at 5722.

<sup>65</sup> Joint Panel Review, “Environmental Assessment & Regulatory Process for the Proposed Mackenzie Gas Project”, 2007, at 9135, cited in Fitzpatrick, P., “A Foundation for the Future”, Power Point Presentation: (Winnipeg: Consumers’ Association of Canada, 2017) at slide 26.

*transparency (e.g., when changes to monitoring systems, [how] does the government make a decision to approve changes? How are members of the policy community involved in those decisions? Is simple notification of approved revisions on the public registry transparent?).<sup>66</sup>*

**Given (a) the concerns identified by policy communities, (b) the damaged relationship with Indigenous people and nations, and (c) Manitoba Hydro's continued challenges with transparency - CAC Manitoba recommends that Manitoba Hydro work with policy communities to create an independent oversight body for the MMTP.**

Should the CEC accept CAC Manitoba's recommendation for independent oversight, it is recommended that consideration be given to the important elements and framework on independent oversight as set out by Drs Fitzpatrick, Diduck and Robson in their Bipole III Report, including the following four critical important elements:

- Implementation framework;
- Mandate or purpose;
- Composition; and
- Funding.

## 2.8 ISO 14001

Manitoba Hydro claims that one of the ways it will be achieving independent oversight of the MMTP is through its ISO 14001 certification.<sup>67</sup> Specifically, Manitoba Hydro has indicated that its commitment to improve its environmental performance is demonstrated through the company's Environmental Management System (EMS), which is ISO certified.<sup>68</sup> While ISO 14001 may be the most long standing non-state market driven initiative, it does not guarantee environmental stewardship.<sup>69</sup>

ISO 14001 requires compliance with government legislation and regulation and demands that companies demonstrate continual improvement. However, it is up to the Corporation to determine how they define the term "continual improvement".

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<sup>66</sup> Fitzpatrick, P., *A Foundation for the Future*, (Winnipeg, Consumers' Association of Manitoba, 2017) at 48.

<sup>67</sup> Matthewson and Pastora Sala, "MMTP Hearing", May 23 2017 at 2209.

<sup>68</sup> Stuart and Pastora Sala, "MMTP Hearing", May 15 2017 at 1128-1129.

<sup>69</sup> Fitzpatrick, "MMTP Hearing", May 23 2017 at 2874-2876.

*MS. PASTORA SALA: Perhaps I can ask you: Does Manitoba Hydro's ISO 14001 certified EMS identify what is meant by continual improvement?*

*MR. STUART: I do not believe there is a formal definition, but it certainly is an understanding that continual improvement essentially means never being satisfied of where you are at, but always looking to improve [...].<sup>70</sup>*

*MS. PASTORA SALA: Just so I'm clear, Mr Stuart, the explanation that you provided is an explanation, but not a specific definition of the term "continual improvements"; would that be accurate?*

*MR STUART: That would be accurate, yes.<sup>71</sup>*

The ISO 14001 standard does not set out any absolute requirement for environmental performance.<sup>72</sup> As a result, companies responsible for causing environmental catastrophes could still be certified under ISO 14001, so long as their performance improves incrementally, based on the company's own definition of continual improvement.<sup>73</sup> Under ISO 14001, corporations identify their own objectives, responsibilities, commitments and determine the actions that they take as a part of their ISO 14001 certification.

While Manitoba Hydro's entire EMS is ISO 14001 certified, it remains unclear how the certification will apply specifically to the MMTP. As stated by Mr. Stuart, Manager of the Corporate Environment Department for Manitoba Hydro, in his testimony on Manitoba Hydro's Construction, Operations and Property panel, this is because the ISO 14001 certification is "high level" and "does not provide a lot of prescriptive detail".<sup>74</sup>

ISO functions at the level of the EMS, which sets out the instructions for the corporation's overall goals, and actions for managing environmental risks. It is not specific to any one project.

None of the commitments made by Manitoba Hydro in their EIS would be automatically covered by ISO 14001 certification.<sup>75</sup> This includes such commitments as annual reports, the maintenance of the project website and the incorporation of traditional knowledge within components of the Environmental Protection Plan (EPP).<sup>76</sup>

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<sup>70</sup> Stuart and Pastora Sala, "MMTP Hearing", May 15 2017 at 1135

<sup>71</sup> Ibid, at 1157.

<sup>72</sup> Fitzpatrick, "MMTP Hearing", May 23 2017 at 2874-2876.

<sup>73</sup> Ibid.

<sup>74</sup> Stuart and Pastora Sala, "MMTP Hearing", May 15 2017 at 1134.

<sup>75</sup> Ibid, at 1140.

<sup>76</sup> Ibid, at 1141.

Independent audits happen every year or two years, with the auditing company setting targets that need to be met. While these audits contain important information about Manitoba Hydro's overall performance, this information has generally not been made publicly available.

For the first time and despite numerous requests, Manitoba Hydro made an excerpt of an ISO 14001 audit available during the information requests process for the MMTP. Specifically, an excerpt of the Riel Station Audit Plan was made available in CAC-IR-001 as well as select elements of the EMS dashboard. However, there is no commitment to make annual audits publicly available on an ongoing basis.<sup>77</sup>

In the interest of transparency, ISO 14001 audits should always be made publicly available. To date, it has been Manitoba Hydro's position that the audits are owned by the consulting firm conducting the audit. Over the course of the CEC hearing, Manitoba Hydro indicated that the "tender which is going for auditors has asked for a public reporting component"<sup>78</sup> of the ISO audits. This demonstrates a considerable level of control over whether future audits can be made publicly available.

Failing to make audits publicly available on an ongoing basis is especially problematic given:

- the rapidly changing picture within Manitoba Hydro whether it be due to employees retiring or leaving their positions because of financial constraints;
- the fact that the EMAC annual Dashboard is currently under review; or
- the fact that Manitoba Hydro is going through a process of updating its management system to comply with the most recent version of ISO 14001 certification.

Manitoba Hydro cannot rely on the ISO 14001 as proof of independent third party audit, particularly if the information is not made publicly available. While Manitoba Hydro may have reasons for wanting the ISO 14001, it is important to remember that it does not fulfill the same function as a post hoc evaluation.

**CAC Manitoba recommends as a licensing condition for the MMTP that all future ISO 14001 audits be made publicly available.**

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<sup>77</sup> Manitoba Hydro, Information Request, CAC-IR-001

<sup>78</sup> Mayor, "MMTP Hearing", May 23 2017 at 2910.



## Part 3: Recognition of and planning for uncertainty

### 3.1 Uncertainty with respect to monitoring and follow-up

Uncertainty is an important concept for environmental assessment. As previously mentioned, this holds especially true in the development of monitoring and follow-up plans. Given the fundamental role of uncertainty in monitoring and follow-up, good practice environmental assessment requires acknowledgement of uncertainty *throughout* the EIS.

While Manitoba Hydro acknowledges uncertainty as an element in certain parts of the EIS, Dr. Fitzpatrick determined that it was unclear how, if at all, uncertainty informed *all* the elements in the EIS.

For example, she was concerned that uncertainty was not explicitly identified as a criteria for selecting valued components (VCs). According to Dr. Fitzpatrick, uncertainty is a critical component for knowing which VC needs to be monitored. Without explicit understandings of uncertainties related to each VC, she found it difficult to evaluate if the current list of VC selected for the MMTP was adequate.<sup>79</sup>

With the important caveat that Dr. Fitzpatrick is not a natural scientist or an expert in VC specific issues, she offered her expertise with respect to the process used for VC selection.

According to Dr. Fitzpatrick, best practice VC selection process requires:

- Thinking of the areas or valued components that have higher levels of uncertainty;
- Considering the VCs that have been identified by First Nations and Métis Nation in their Land Use Studies and engagement process; and
- Including VCs that involve or have been especially effected by cumulative effects.

As indicated in the EIS, the majority of the monitoring plans, (other than the plan for sharp-tailed grouse) end approximately two years after construction.<sup>80</sup> This includes (but is not limited to):

- Stream Crossing Assessment;
- Rare Plant Surveys;
- Invasive Species Survey; and

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<sup>79</sup> Fitzpatrick, “MMTP Hearing”, May 23 2017 at 2857-2858.

<sup>80</sup> Manitoba Hydro, “Manitoba-Minnesota Transmission Project, Environmental Impact Statement: Chapter 22”, September 2015 at fig. 4-1; Matthewson and Pastora Sala, “MMTP Hearing”, May 23 2017 at 2173.

- Raptor Nest Survey<sup>81</sup>

This short time period is particularly concerning because policy communities have identified concerns about the VC and in certain cases they have identified the need to monitor additional VC and lengthen the time allocated for monitoring certain VC.

*“Today the wildlife game is scarce and hard to hunt, because of man-made desctuction and natural disasters of harsh winters, floods, drought have an impact on the traditional lands.”<sup>82</sup>*

*“Today there are still a handful of people who still hunt wild game such as moose, deer, fox and beavers for food, for the hides and for sport.”<sup>83</sup>*

*“Today fishing is a tradition is still practiced by the young and older generation, but mainly as a sport, now the rivers are contaminated with all osrts of poisons like mercury, so whatever is caught is not eaten.”<sup>84</sup>*

*[Plant gathering is still] “alive and well, it is practiced by both the young and older generations.”<sup>85</sup>*

The Peguis First Nation Land Use Occupancy Report identified the need to monitor wildlife for a period of at least five years, and also to extend the length of monitoring for traditional medicines.

**CAC Manitoba recommends that the CEC make an express finding that uncertainty must always be a factor in the selection of valued components by Manitoba Hydro.**

### 3.2 Fish and fish habitat

An example of uncertainty not being accounted for in the EIS is with ‘fish and fish habitat’, which was selected as VC because of the “fundamental role” and “functioning of ecosystems, with fish as key indicators of aquatic health, and its economic and recreational health importance to Canadians.”<sup>86</sup>

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid at p 8.

<sup>83</sup> Ibid at p 8.

<sup>84</sup> Ibid at p 9.

<sup>85</sup> Ibid at p 9.

<sup>86</sup> Manitoba-Minnesota Transmission Project, “Environmental Impact Statement: Chapter 8”, September 2015 at 8-1.

The Roseau River Anishinaabe First Nation Land Use Study identified concerns about a decrease in spawning over the last decade.<sup>87</sup>

Those same types of concerns were expressed by the Keeyask Cree Nations during the Keask Generating CEC hearing. The Keeyask CEC report stated that “fears of possible contamination might discourage community members from consuming country foods, including those not affected by mercury.”<sup>88</sup> The report emphasized that the perception of contamination was sufficient to discourage fish consumption.<sup>89</sup>

According to the EIS, there are three endangered fish species which are present in the assessment area of the MMTP. These are: **Bigmouth Buffalo, Mapleleaf Mussels and Lake Sturgeon**. In addition to being recognized as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), Mapleleaf Mussels are also protected under the *Endangered Species and Ecosystems Act*.<sup>90</sup>

According to the literature, mussels are keystone species and ecosystem engineers that have a large impact on other organisms. They also provide tangible benefits to human beings.<sup>91</sup> Mapleleaf Mussels are expected to occur within the regional assessment area or RAA of the MMTP in the Assiniboine River, Red River, Lasalle River, Seine River, Cooks Creek, Devil’s Creek, Rat River and Roseau River.<sup>92</sup>

While habitat changes may have great effects on endangered fish species “because of specialized habitat or biological requirements for species that have narrow tolerance to habitat alterations”,<sup>93</sup> Manitoba Hydro’s position relating to fish and fish habitat is that there are no serious harms or residual effects anticipated to this VC.

However, this conclusion was only based on desktop and historical data. The only field studies conducted were on water crossings, and not on fish. Despite the presence of endangered fish in the ROW, fish sampling was not conducted, not even for endangered species.<sup>94</sup>

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<sup>87</sup> Ibid, at 8-6.

<sup>88</sup> Clean Environment Commission, “Report on public hearing; Keeyask Generation Project”, April 2014 at 109.

<sup>89</sup> Ibid.

<sup>90</sup> *The Endangered Species and Ecosystems Act*, CCSM 1990, c E111.

<sup>91</sup> Manitoba Hydro, Information Request, CAC-IR-026

<sup>92</sup> Manitoba Hydro, “Manitoba-Minnesota Transmission Project, Environmental Impact Statement: Chapter 8”, September 2015 at 8-30.

<sup>93</sup> Manitoba-Minnesota Transmission Project, “Environmental Impact Statement: Chapter 8”, September 2015 at 8-48.

<sup>94</sup> Block and Pastora Sala, “MMTP Hearing”, May 18 2017 at 1975-1976.

The CEC panel observed the apparent disappointment of Mr. Block, Senior Environmental Specialist for Manitoba Hydro, when he confirmed that there would be no monitoring activities relating to any of the endangered fish species, including Bigmouth Buffalo, Mapleleaf Mussels or Lake Sturgeon.<sup>95</sup>

**CAC Manitoba recommends as part of Manitoba Hydro's licensing conditions that it create monitoring plans for:**

- a. The three endangered fish species which are found in the ROW (Bigmouth Buffalo, Mapleleaf Mussels and Lake Sturgeon); and**
- b. Medicinal and traditional plants.**

### 3.3 Uncertainty with respect to the roles and responsibilities of Manitoba Hydro staff

As indicated in Dr. Fitzpatrick's report and oral presentation, the information provided in the EIS relating to the individuals involved in the MMTP was unclear. Further, the information provided in the organizational charts in the EIS were not updated to accurately reflect the information provided in information requests, and oral submissions.

*MS. PASTORA SALA: Okay. So if we focus on this figure, would it be accurate to say that at the same level of the environmental protection management team, we see regulators, stakeholders and Aboriginal communities?*

*MR. MATTHEWSON: I don't think we intended them to be at the -- as far as a level. It was a mechanism by which those, that group communicates with the management team generally on Manitoba Hydro projects. So that's why there's a two-way communication arrow between those. That does not negate that Aboriginal communities and stakeholders also don't talk to our senior executive, but primarily on a project for the purposes of implementing the Environmental Protection Program, that is the mechanism by which most communication occurs, is at that management team level with those stakeholders.*

*MS. PASTORA SALA: So then it would be false to assume that Indigenous communities and, for example, the Indigenous community monitoring group that Manitoba Hydro hopes to create would be at the same level as the environmental protection management team. Would that be false?*

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<sup>95</sup> Ibid, at 1983.

*MR. MATTHEWSON: I guess without the terms of reference being determined for that project, we don't know how the communities would like to see that working group structured and where it would fit into the organizational chart.*<sup>96</sup>

Recognizing the evolving nature of all projects, it would be important in the interest of transparency for Manitoba Hydro to regularly update its organizational charts in order for the general public to understand the roles and responsibilities of the Manitoba Hydro staff involved at all levels of the project.

### 3.4 Planning for uncertainty through ecosystem services approach

The ecosystems services approach was suggested during the hearing by Ms. Alyson McHugh as one approach to dealing with uncertainty. While Ms. Mc Hugh used the terms interchangeably, it must be noted that the literature makes a clear distinction between an ecosystem approach and the ecosystem services approach.<sup>97</sup> Whereas an ecosystems approach recognizes that all things and beings are connected, and must be considered as such, the ecosystem services approach focuses on “valuing” different elements of the ecosystem.<sup>98</sup>

As indicated by Ms. McHugh, the ecosystem services approach requires an evaluation of the “benefits” and “costs” to society of different ecosystem services.<sup>99</sup> The witness spoke of the desire to have these costs accounted for in day-to-day market and economic decisions and the literature makes it clear that economic valuation is a key element of ecosystem services.<sup>100</sup>

Ms. McHugh acknowledged during her testimony that one of the most common criticisms in the literature on the ecosystem services approach is valuation and that monetary valuation is a common type of valuation.<sup>101</sup>

*We cannot avoid the valuation issue, because as long as we are forced to make choices we are doing valuation. But we need to be as comprehensive as possible in*

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<sup>96</sup> Matthewson and Pastora Sala, “MMTP Hearing”, May 18 2017 at 2182-2183.

<sup>97</sup> McHugh and Pastora Sala, “MMTP Hearing”, May 23 2017 at 2997.

<sup>98</sup> Costanza , R., and Folke, C., “Valuing ecosystems with efficiency, fairness and sustainability as goals” in *Nature’s Services; Societal Dependence on Natural Ecosystems* (Washington: Island Press, 1997) 49 at 50.

<sup>99</sup> McHugh and Pastora Sala, “MMTP Hearing”, May 23 2017 at 2997.

<sup>100</sup> *Ibid*, at 3003.

<sup>101</sup> *Ibid*, at 3006.

*our valuations and choices about ecosystems and sustainability, recognizing the relationship between goals and values.*<sup>102</sup>

*[E]conomic analysis is about making choices among alternative uses of scarce resources, and it is in this context that valuation becomes relevant.*<sup>103</sup>

*Many of the valuation techniques used in the studies covered in our synthesis are based, either directly or indirectly, on attempts to estimate the ‘willingness-to-pay’ of individuals for ecosystem services.*<sup>104</sup>

According to the literature cited by Ms. McHugh, this economic valuation necessarily involves making choices which inevitably leads to a discussion of trade-offs<sup>105</sup>. The Millennium Ecosystem Assessment Report, which was relied upon by the witness, categorizes four types of ecosystem services: provisioning services, regulating services, supporting services and cultural services.<sup>106</sup>

Cultural services are defined in Ms. McHugh’s report as non-material benefits obtained from ecosystems.<sup>107</sup>

Based on what CAC Manitoba has heard and understands, it is challenging if not impossible to fit Indigenous worldviews and legal orders within these four categories of ecosystem services. Given the sacred and spiritual connection of Indigenous worldviews and legal orders, it is inappropriate to assume that they should fit within the valuation of “cultural” services, or that they fit within all of the categories.<sup>108</sup>

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<sup>102</sup> Costanza , R., and Folke, C., “Valuing ecosystems with efficiency, fairness and sustainability as goals” in *Nature’s Services; Societal Dependence on Natural Ecosystems* (Washington: Island Press, 1997) 49 at 50.

<sup>103</sup> Ibid, at 51.

<sup>104</sup> Costanza, R., D’arge, R., de Groot, R. et al. “The value of the world’s ecosystem services and natural capital” (1997) 387 *Nature* 253 at 256.

<sup>105</sup> McHugh and Pastora Sala, “MMTP Hearing”, May 23 2017 at 3007 ;Costanza , R., and Folke, C., “Valuing ecosystems with efficiency, fairness and sustainability as goals” in *Nature’s Services; Societal Dependence on Natural Ecosystems* (Washington: Island Press, 1997) 49 at 50.

<sup>106</sup> Millennium Ecosystem Assessment Program. 2005. *Ecosystems and Human Wellbeing: Synthesis*. Washington, D.C.: Island Press

<sup>107</sup> At p 12.

<sup>108</sup> For a more detailed explanation of the sacred and spiritual nature of Indigenous worldviews, see the Great Binding Law CEC-011, MMTP, May 29 2017 online: <

<http://www.cecmanitoba.ca/resource/hearings/43/CAC-011%20Great%20Binding%20Law.pdf>  
>.

Futher, as was stated in the following article, the valuation exercise focuses on the calculation of economic benefits and costs on *human* welfare:

*The exercise of valuing the services of natural capital ‘at the margin’ consists of determining the differences that relatively small changes in these services make to human welfare. Changes in quality or quantity of ecosystem services have value insofar as they either change the benefits associated with human activities or change the costs of those activities. These changes in benefits and costs either have an impact on human welfare through established markets or through non-market activities.*<sup>109</sup>

While the ecosystems services approach may purport to consider a holistic understanding of the environment, the focus on human welfare and the focus on economic benefits of the “services” provided by the ecosystems contradicts this assertion.

Furthermore, the ecosystem services approach is not generally accepted as best practice for environmental assessment and should therefore not be accepted as such by the CEC.

**CAC Manitoba asks the CEC to make an express finding that**

- (1) the ecosystem services approach can be problematic, and should not be employed by Manitoba Hydro; and**
- (2) Significant caution should be given to the conclusion of Ms. McHugh on ecosystem services.**

### 3.5 Uncertainty with respect to the financial circumstances of Manitoba Hydro, and reliability of financial information

In Manitoba Hydro’s opening statement it was stated:

*This is not an easy time to be leading Manitoba Hydro. Everyone present here will know that we are losing colleagues whose jobs are being eliminated, that we are struggling to manage the costs of projects underway, and that we find we have to ask for rate increases that are higher than Manitobans have come to expect.*<sup>110</sup>

When Manitoba Hydro submitted its application for approval in September 2015, the estimated project cost was in the range of \$350 million. Through the process of information requests (SCO-IR-028), it was revealed that the updated total project cost estimate at the time of the hearing was \$453.2 million.

<sup>109</sup> Costanza, R., D’arge, R., de Groot, R. et al. “The value of the world’s ecosystem services and natural capital” (1997) 387 Nature 253 at 255.

<sup>110</sup> Bedford, “MMTP Hearing”, May 8 2017 at 25.

*MR. WILLIAMS: And you will recall that when Manitoba Hydro submitted its application for approval in September of 2015, the estimated project cost was in the range of \$350 million; agreed?*

*MS. BRATLAND: Agreed.*

*MR. WILLIAMS: So in the time period between September 2015 and April 2017, the estimated costs have risen by \$100 million, give or take a couple of mill?*

*MS. BRATLAND: The estimate provided in the response to this IR is roughly \$100 million 15 more.*

In the time period between September 2015 and April 2017, the estimated costs have risen by over \$100 million, or approximately 28%.<sup>111</sup>

*MR. WILLIAMS: And percentagewise, if you can accept this -- subject to check; my math is usually pretty good -- if we took that \$100 million and divided it by the base of 350 million, you will accept, subject to check, that is roughly a 28 per cent increase in the last -- since September 2015; agreed?*

*MS. BRATLAND: Subject to check, yes. The time period, however, I would just say that the estimate was provided in this IR response on that date.<sup>112</sup>*

Despite this significant rise in project cost estimate, Manitoba Hydro did not conduct any subsequent analysis of project expenditures for materials and services during construction.

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<sup>111</sup> Bratland and Williams, “MMTP Hearing”, May 17 2017 at 1696.

<sup>112</sup> Bratland and Williams, “MMTP Hearing”, May 17 2017 at 1696-1697.



## Part 4: Silos within Manitoba Hydro

According to Dr. Fitzpatrick, one innovative feature of Manitoba Hydro's impact statement is the inclusion in each chapter of "lessons learned". The significant changes to the EIS materials throughout the hearings, including to the monitoring plans, demonstrates that Manitoba Hydro has a desire to learn and better its processes. However, Manitoba Hydro's approach to learning has not been standardized. Rather, its approach seems ad-hoc as there is no official organizational learning policy instituted by the crown corporation.

Organizational learning refers to the process by which knowledge is transferred from the individual level to the organizational level, it involves utilizing knowledge from external and internal sources, communicating and disseminating knowledge as well as learning from past and present practices.<sup>113</sup> As stated during CAC Manitoba's questioning of Mr. Stuart: "I would say it is an important component of it. Again, it is not really the only one, but it is an important component of a successful EMS."<sup>114</sup>

When asked about whether or not Manitoba Hydro plans to create and implement an organizational learning policy, Mr. Stuart went on to state "I don't believe it's being considered, but I honestly don't know for sure"<sup>115</sup>

While members of the project team have demonstrated their interest in learning, it is difficult to understand the organizational culture related to learning within Manitoba Hydro. The lack of a formal organizational learning policy perpetuates the silos within Manitoba Hydro.

Considering both that the CEC made recommendations, in the Bipole III and Keeyask reports, relating to the lack of a standardized approach and the need to reduce silos within Manitoba Hydro as well as the current financial insecurities and job cuts at Manitoba Hydro, there is an urgent need for Manitoba Hydro to develop an organizational learning policy.

*From the Commission's perspective, the crux of the problem was the apparent lack of an overall plan or overall direction for the environmental assessment conducted by the Proponent. There did not appear to be an overall environmental assessment framework, nor did it seem that much, if any, direction was provided to the technicians on performing field and analytical operations that would fit into a standard framework. The result was a report that was long, repetitive, disorganized and included many contradictions and inconsistencies. This led to a great struggle for those examining the documentation to see the logical connections between the collection of data, Chapter Thirteen: Improving Environmental Assessment in Manitoba 124 the analysis of data and the conclusions in*

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<sup>113</sup> Stuart and Pastora Sala, "MMTP Hearing", May 15 2017 at 1130.

<sup>114</sup> Stuart, "MMTP Hearing", May 15 2017 at 1130-1131.

<sup>115</sup> Ibid, at 1131.

*the EIS. It was particularly difficult to determine how the subject area results were incorporated in the final assessments and conclusions.*<sup>116</sup>

## **CAC Manitoba recommends that Manitoba Hydro develop and implement an Organizational Learning Policy.**

Manitoba Hydro's organizational learning policy should include information about Manitoba Hydro's organizational memory.

The CEC has repeatedly recommended that Manitoba Hydro use a centralized environmental assessment process to set standards and guide, manage and coordinate all environmental assessment and monitoring processes.

Based on what was stated during the MMTP hearing from Ms. Zebrowski, Policy and Strategic Initiatives Director of the Indigenous Relations Department for Manitoba Hydro, it seems apparent that this department continues to be siloed from the rest of the organization. In fact, the cross examination of this senior employee revealed a highly siloed organization:

*MS. ZEBROWSKI: In part, that's because of how we're organized. So certainly Indigenous Relations, we have currently had a restructuring, so now we are a separate group. Prior to this, we fit under the title of Corporate Relations. And so when it comes to specifically designing environmental assessment and undertaking specific projects, those are generally undertaken by other parts of the company. And Indigenous Relations would intersect with those processes in different ways. Sometimes it would be assisting in the engagement; sometimes it would be in more specific conversations.*<sup>117</sup>

*MS. PASTORA SALA: And so sharing some of these concerns, for example, relating to this selection of VC, would that have been something that -- earlier you referred to a process which departments share information; would that be something that normally could be shared within different departments?*

*MS. ZEBROWSKI: It could be shared through that process. And part of the problem is that not all of the projects were organized the same way, so it's hard to take this as a common across all projects. I think that's the crux of where we're having some challenges in responding to your questions.*<sup>118</sup>

This explanation by Ms Zebrowski of the silos of the Indigenous Relations Department from other departments is concerning.

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<sup>116</sup> Clean Environment Commission, "Report on public hearing; Bipole III Transmission project", (CEC, April 2014), at 123-124.

<sup>117</sup> Zebrowski, "MMTP Hearing", May 9 2017 at pp 477-478

<sup>118</sup> Ibid, at 478-479.

We also heard that the Indigenous Relations Department was not involved in the selection of VC, which was surprising given the concerns which have been raised by First Nations and the Métis Nation in the past about the VC selection process, something which Ms. Zebrowski admitted Manitoba Hydro had heard, “I think we have heard some concerns from the Manitoba Metis Federation about VC selection.”<sup>119</sup>

As stated by Dr. Fitzpatrick, “the interactions between decisions seem opaque to me” and “I am particularly concerned that members of the Indigenous relations division were not involved in the selection of the VC” and that It is “important to have members of the Indigenous Relations Department involved in these critical components of the monitoring program.”<sup>120</sup>

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<sup>119</sup> Ibid, at 475.

<sup>120</sup> Fitzpatrick, “MMTP Hearing”, May 23 2017 at 2867-2868.

## Part 5: Coordination and Cooperation among Provincial, Federal and Indigenous Jurisdictions

According to Dr. Fitzpatrick, cooperation and coordination among federal, provincial and Indigenous jurisdictions can:

- provide more opportunities for meaningful engagement;
- create fail-safe mechanisms which allows one jurisdiction to address potential errors and oversights of another;
- increase the decision-maker's ability to look at the whole system of impacts which can be missed when one jurisdiction is excluded and avoids a duplication and prevents the creation of major gaps.<sup>121</sup>

Furthermore, according to Fitzpatrick and Sinclair:

*the idea we need to better co-ordinate EA efforts in cases that cross jurisdictions has been clear to most participants and government agencies for some time now. . .The obvious challenge is finding an appropriate way to take action on the need for coordination while respecting the decision-making authority of the jurisdictions involved.*<sup>122</sup>

In the case of the MMTP, the EIS is meant to meet the requirement of the provincial environmental assessment process under the *Environment Act*, as well as the federal process under the *National Energy Board Act (NEB)* and the *Canadian Environmental Assessment Act 2012 (CEAA 2012)*.<sup>123</sup>

Manitoba Hydro is required to receive authorization under section 58.1 of the *NEB Act* to construct and operate the line because it is an international power line that will connect to the Great Northern Transmission Line in the United States. Section 4(1) of the *CEAA* states that federal and provincial governments should promote the cooperation and coordination of their actions with respect to environmental assessment.

A letter dated April 2017 from Sherri Young, secretary to the National Energy Board, to counsel for the Manitoba Métis Federation, confirmed that the National Energy Board will not commence the federal environmental assessment process until after the CEC public hearing process relating to the MMTP has been completed, in order to reduce any duplications.

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<sup>121</sup> Fitzpatrick, P., & Sinclair, A., "Multi-jurisdictional environmental assessment" in Hanna, K., ed, *Environmental Impact Assessment Process and Practices in Canada* (Toronto: Oxford University Press) at 192.

<sup>122</sup> Ibid, at 195.

<sup>123</sup> *The Environment Act*, CCSM 1987, c E125; *National Energy Board Act*, RSC 1985, c N-7; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.

*The Board has determined that it will not commence the environmental assessment under CEAA 2012 until after the CEC public hearing is completed for the proposed MMTP in order to reduce any duplication of the environmental assessments required by each of the province of Manitoba and the Board. The Board expects to make a determination under CEAA 2012 and to decide to either issue a permit, or make a recommendation to the Minister under section 58.14, if the Board determines this is warranted, in 2018.*<sup>124</sup>

The challenge with cooperation between the federal and provincial processes, and the lack of communication with policy communities, including the proponent, was particularly clear during the CEC hearing when Ms. Tracey Braun, Government of Manitoba Director of the Environmental Approvals Branch, stated that the CEC hearings are being held in *lieu* of the NEB hearings.

*This project is an international power line, and as such it is federally regulated by the National Energy Board Act and the Canadian Environmental Assessment Act of 2012. The NEB Act, however, does allow for a provincial process to take precedent, if it's done through an order in council, and that is what the proponent has chosen to do. And the OIC has been completed. And the reasoning behind that is we felt that this would better facilitate public participation in the hearing portion of the process.*<sup>125</sup>

As a response to questions relating to this statement, Manitoba Hydro explained that their understanding was that the letter from the NEB indicated there had not been a formal determination made as to what the approach would be after the CEC hearing.<sup>126</sup>

This lack of coordination and cooperation is concerning given the importance of transparency and public participation in environmental assessment.

During the hearing, we also heard frustrations from Dakota Plains Wahpeton Oyate relating to the coordination between governments, including Indigenous nations, within the environmental assessment process.

*15 MR. BLACKSMITH: Thank you for that. 16 The reason why I bring these questions 17 to the table is Manitoba Hydro is not a business 18 that is -- you know, a run-of-the-mill business; 19 it is a Crown corporation. It is acting as an 20 agent of the Crown. [...]*

*7 So Manitoba Hydro, acting as an agent 8 of the Crown, has to be responsible for its 9 actions on behalf of Her Majesty. [...]*

*17 MR. BLACKSMITH: Then we would like 18 the consultation record between Manitoba Hydro and 19 Dakota Plains, the*

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<sup>124</sup> Letter from Sheri Young, Secretary of the National Energy Board to K. Jennifer Moroz and Jason Madden (19 April 2017) Manitoba Hydro Application for Approval of MMTP

<sup>125</sup> Braun, "MMTP Hearing", May 8 2017 at 14-15.

<sup>126</sup> S. Johnson, "MMTP Hearing", May 8 2017 at 215-216.

stakeholders, First Nations and 20 the Manitoba Metis Federation.  
[...]

17 MR. BLACKSMITH: Again, my 18 understanding is that this is a  
review in regards 19 to a licensing process.

20 THE CHAIRMAN: Yes, it is.

21 MR. BLACKSMITH: As Dakota people, 22 Dakota Plains, we've  
never been afforded that 23 right to have our people recognized as  
the -- 24 whether or not legal title or legal landowners, 25 and I  
make reference to Crown, Crown land. 1 And I'm not about to get  
into our 2 presentation, but the Royal Proclamation of 1763, 3 King  
George III basically gave himself title to 4 all the land in North  
America, which predicated 5 the war with the 13 Colonies in the  
United States. [1117-1118] [...]

13 If there is a licence to be -- that is 14 being -- seeking approval,  
then the Dakota people 15 have to be included in this. And the  
reference to 16 "Indian" is -- if we are Indians, or we are going 17  
to be referred to as Indians -- and again, you 18 make mention that  
you're not using that exact 19 word, you're using First Nation,  
Aboriginal, or 20 indigenous -- the Indian Act is still called the 21  
Indian Act, and all of the First Nation 22 communities are included  
under that, and that's 23 where this is coming from.

24 If there is going to be a licence 25 that's going to be approved,  
well, then, the 1 Dakota people, Dakota Plains in particular, have 2  
to be addressed in one form or another. [1118-1119]<sup>127</sup>

The frustration and themes that were discussed during Councillor Craig Blacksmith's comments were consistent with the type of frustrations that were heard by the independent expert panel reviewing the federal environmental assessment processes and captured in their Report.

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<sup>127</sup> <http://www.cecmanitoba.ca/resource/hearings/43/mmtmay1517.pdf> at pp1112-1121

# Part 6: Relationship between Manitoba Hydro and Indigenous Nations and people

## 6.1 Overall Relationship

The relationship between Indigenous people and Manitoba Hydro is one which has been damaged as a result of Manitoba Hydro's past practices in dam and land development. As was stated in the CEC's Keeyask report, "[Indigenous people] have a long history of having been affected by past development".<sup>128</sup> The report further recommends a "process to rebuild trust and respect" between Indigenous peoples and Manitoba Hydro.<sup>129</sup>

While the CEC's comments in the Keeyask report relating to the damaged relationship between Indigenous people and Manitoba Hydro focused on the North, it can be argued that the relationship between Indigenous peoples and Manitoba Hydro throughout Manitoba is damaged and needs rebuilding.

The CEC stated in the Keeyask report that "Manitoba Hydro is sincere in its efforts to address these past concerns. But the Commission believes that more must be done."<sup>130</sup> Specifically, the CEC recommended that a more formal process of reconciliation be undertaken.<sup>131</sup>

According to Manitoba Hydro's website, it is "committed to working with Indigenous communities in a spirit of cooperation"<sup>132</sup> and "over the past decade, significant contributions have been made towards a renewed relationship built on mutual respect, a committed understanding and more meaningful communication."<sup>133</sup>

Manitoba Hydro's Corporate Strategic Plan includes a commitment to addressing the adverse effects of operations on Aboriginal communities; and foster an appreciation of Aboriginal cultures in the workplace.<sup>134</sup>

In addition, Mr. Kelvin Shepherd, CEO of Manitoba Hydro, was quoted in an article published online on May 11, 2017 in the Energy magazine, that one of Manitoba Hydro's four strategic

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<sup>128</sup> Clean Environment Commission, "Report on public hearing; Keeyask Generation Project", April 2014 at 162.

<sup>129</sup> Ibid, at 163.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Manitoba Hydro, "Indigenous Relations" online: Manitoba Hydro <[https://www.hydro.mb.ca/community/indigenous\\_relations/index.shtml](https://www.hydro.mb.ca/community/indigenous_relations/index.shtml)>.

<sup>133</sup> Ibid.

<sup>134</sup> Manitoba Hydro, "Corporate Strategic Plan" (November 2013), online: Manitoba Hydro <[https://www.hydro.mb.ca/corporate/csp/corporate\\_strategic\\_plan.pdf](https://www.hydro.mb.ca/corporate/csp/corporate_strategic_plan.pdf)>.

priority areas within the next year is the “respect and support for Indigenous peoples in all aspects of our business”.<sup>135</sup>

Based on what we know, it is the Indigenous Relations Department of Manitoba Hydro who would be primarily responsible for identifying how to foster this respect and support for Indigenous peoples. However, the roles and responsibilities of the Indigenous Relations Department are unclear. The Indigenous Relations Department of Manitoba Hydro does not outline its mandate or the specific activities it undertakes in assisting Indigenous peoples and nations with their questions or concerns.

## 6.2 Treatment of Indigenous worldviews and legal orders by Manitoba Hydro

During Manitoba Hydro’s opening statement, counsel for Manitoba Hydro, referred to the work in the Truth and Reconciliation Commission of Canada, and made specific reference to Call to Action 45. In this regard, he indicated:

[A]lthough directed specifically to the Government of Canada, has some useful guidance for our work here. It recommends that Indigenous laws and legal traditions be recognized and integrated in processes that involve land claims and other constructive agreements.<sup>136</sup>

Counsel for Manitoba Hydro also explained his understanding of Indigenous legal traditions which included saying that Anishinaabe law is all about relationships.<sup>137</sup>

CAC Manitoba would note that call to action 45 also speaks to the need to implement treaties, and along this vein, call to action 50 requires recognition and support of Indigenous legal institutions, to better understand Indigenous laws in accordance with the unique cultures of Indigenous peoples.<sup>138</sup>

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<sup>135</sup> Energy, “Kelvin Shepherd, President and CEO of Manitoba Hydro Discusses Energy Delivery in Manitoba” (Issue 1, 2017) online: EnergyMag < <http://www.energymag.ca/industry-profile/kelvin-shepherd-president-and-ceo-of-manitoba-hydro-discusses-energy-delivery-in-manitoba/>>.

<sup>136</sup> Bedford, “MMTP Hearing”, May 8 2017 at 23-24.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015) at calls 45,50, and 92.



CAC Manitoba would also draw the CEC's attention to Call to Action 92, which requires the corporate sector of Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework, and to apply its principles, norms and standards to corporate policy and core operational activities.<sup>139</sup>

While CAC Manitoba appreciates the aspirational statements of Manitoba Hydro, there is little tangible evidence in this hearing to demonstrate commitment to the statements made.

When Manitoba Hydro was asked for a specific policy or practice which would require them to take Indigenous worldviews or legal traditions into account, CAC Manitoba was referred to the Cultural Heritage and Resource Protection Plan,<sup>140</sup> the explicitly outlined purpose of which is to:

*[Outline] protection measures and protocols that Manitoba Hydro, its contractors and/or consultants will undertake in the event of the discovery of previously unrecorded cultural or heritage resources during construction, maintenance or operation of an electrical or gas transmission line or facility<sup>141</sup>*

Upon review of the Plan, it became quickly apparent that it does not contain any express policy or practice relating to the respect for Indigenous worldviews or legal traditions.

*MS. PASTORA SALA: Sorry, Ms. Coughlin, I'm not asking you to identify your 6 plan with respect to the discovery of cultural or heritage resources or human remains; I'm just asking you to identify in the document a section in the report which identifies the need to respect indigenous world views within the MMTP, given this is a document that you referred to me the other day.*

*MS. COUGHLIN: Okay. So the environmental assessment itself outlines the principles, and one of those key principles is that: "The following principles guided Manitoba Hydro's approach to First Nation and Metis engagement for the project, and that includes the diversity of First Nation and Metis cultures and world views should be understood and appreciated. Manitoba Hydro should work with First Nations and Metis to better understand perspectives and determine mutual approaches to address concerns and build relationships." I could continue, if you like*

*MS. PASTORA SALA: I wonder if you could explain to me what you think that means.*

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<sup>139</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA RES 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007).

<sup>140</sup> Coughlin and Pastora Sala, "MMTP Hearing", May 16 2017 at 1317.

<sup>141</sup> Manitoba Hydro "Manitoba-Minnesota Transmission Project Cultural and Heritage Resources Protection Plan (draft)" at preface.

*MS. COUGHLIN: I think it means we have to be respectful, and we have to ask questions when we don't know the answers. I think it means that we have to be open-minded, and we have to listen.*

*MS. PASTORA SALA: And just so I'm clear, what you've just indicated is not explicitly stated anywhere; that's just your belief. Correct?*

*MS. COUGHLIN: That's correct.<sup>142</sup>*

The Province and Manitoba Hydro have been provided explicit guidance in recent hearings by the CEC about how to respect Indigenous legal orders and institutions. Specifically, in the Keyask Report, the following knowledge and insight was shared:

*In these hearings, it has been maintained that the Cree worldview is equal to Western science. However, the Cree are still not given credit for maintaining the environment for over 5,000 years. We are aware that Manitoba Hydro is not the only contributor to the condition of the water; still; it has contributed a major portion to its condition and continues to do so.*

*The indigenous people did have a governance structure that was unlike the western model and if the Europeans recognized it, it was dismissed, much the same way the indigenous worldview is dismissed today. [...]*

*Final decisions in governing our indigenous societies were made by our grandmothers – Ke nocominank.*

*The Minister should support these long-standing and successful methods of the Cree/indigenous worldview by incorporating a circle of Ke nocominank with a mission to oversee safeguarding the environment.*

However, given the responses in cross-examination and the lack of concrete actions by Manitoba Hydro demonstrating their commitment to the respect of Indigenous laws and worldviews, this recommendation remains outstanding, important and necessary.

**CAC Manitoba recommends that Manitoba Hydro develop, in collaboration with Grandmothers, Indigenous Elders and Knowledge holders, a proclamation or express policy statement on its commitment to respecting Indigenous worldviews and legal orders, which includes Manitoba Hydro's understanding of its responsibilities flowing through such a commitment.**

<sup>142</sup> Coughlin and Pastora Sala, "MMTP Hearing", May 16 2017 at 1963-1964.

## 6.3 Involvement of Indigenous people in monitoring

CAC Manitoba is concerned with the fact that there is such limited information available about the interactions between Manitoba Hydro and Indigenous people on an ongoing basis. In CAC IR 004, Manitoba Hydro was asked for an explanation on the difference between environmental monitoring and inspectors.<sup>143</sup> At that time, Manitoba Hydro indicated that it had not been determined whether environmental monitors would be employed.

At the time of the CEC hearing and questioning of the Environmental Protection Plan panel, Manitoba Hydro was still not in a position to confirm whether environmental monitors would be employed. Manitoba Hydro stated that it was not in a position to confirm whether environmental monitors would be employed, because it remained unclear whether the Indigenous Monitoring Committee would be created.<sup>144</sup>

However, Manitoba Hydro was not explicitly prepared to confirm whether environmental monitors would be created in the event that Indigenous Monitoring Committee was not created. They did state that for the Bipole III project, environmental monitors and community liaisons in each community had been used, which according to Manitoba Hydro was an approach that “worked really really well.”<sup>145</sup>

Manitoba Hydro’s response and inability to commit to an ongoing approach to engaging Indigenous peoples and nations is concerning given its timing. Despite having heard about a variety of different mechanisms for monitoring by communities, the only proposed monitoring and follow-up identified in the EIS for Indigenous nations and peoples were field trips.<sup>146</sup>

## 6.4 Indigenous monitoring committee

As of May 23<sup>rd</sup> 2017, the creation of an Indigenous Community Monitoring Group had not been confirmed. Manitoba Hydro claims that the reason for this lack of confirmation is because they would like to create terms of reference for the Indigenous Monitoring Group with the involvement of Indigenous communities.

However, a careful read of the EIS, and attention during Mr. Matthewson’s presentation reveals that Manitoba Hydro already has its own vision with respect to the role of the monitoring group. For example, during M. Matthewson’s presentation he stated

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<sup>143</sup> Manitoba Hydro, Information Request, CAC-IR-004

<sup>144</sup> Matthewson and Pastora Sala, “MMTP Hearing”, May 23 2017 at 2186-2187.

<sup>145</sup> Matthewson, “MMTP Hearing”, May 23 2017 at 2133.

<sup>146</sup> Matthewson and Pastora Sala, “MMTP Hearing”, May 23 2017 at 2191-2194.

*“we also had envisioned [the Indigenous monitoring group] as a mechanism by which we could get other groups together and go to the field during regular visits to the construction of project and be [. . .] involved in monitoring activities.”<sup>147</sup>*

According to Mr. Matthewson, the reason that the development of terms of reference had not been confirmed as because “some Indigenous communities expressed an interest in meeting with senior executive prior to moving forward any further with the monitoring group.”<sup>148</sup> However, counsel for the Southern Chiefs Organization raised the issue of timing during their questions to the Environmental Protection Plan panel:

*Mr. Beddome: I put it to you that 13 you've had ample time to start putting together this framework, and that although I think there is some good things in the framework and what you've put forward, you are kind of saying, "Just trust us; just trust Manitoba Hydro. We will work this out after we are done the hearings.”<sup>149</sup>*

It must also be noted that should the Indigenous nations and Manitoba Hydro agree that an Indigenous Monitoring Group is required, it is unclear how much decision making authority this monitoring group would actually have. For example, based on the questioning of Counsel for Peguis First Nation, we know that it will be the Environmental Management Team that will get to decide when decision thresholds of action are triggered, without any apparent involvement of the potential Indigenous Monitoring Group.<sup>150</sup>

Mr. Matthewson confirmed that it would be the environmental protection management team that would ultimately make the final decision to adjust and take some mitigative measures, or to implement an adaptive management approach.<sup>151</sup>

During the hearing, counsel for the Southern Chief’s Organization asked Manitoba Hydro what decision-making authority the Indigenous monitoring group would have. As a response, Mr. Matthewson simply indicated that “as the terms of reference are not developed, I cannot comment on what authorities the Indigenous community working group will have, or responsibilities”<sup>152</sup>

It was also confirmed that Manitoba Hydro has already determined that the Indigenous Monitoring Group would not be at the same level as the environmental protection management team, which means that they will likely not have the same privileges in terms of meetings with the Project Management Team, or access information.

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<sup>147</sup> Matthewson, “MMTP Hearing”, May 23 2017 at 2135.

<sup>148</sup> Ibid at 2224.

<sup>149</sup> Beddome, “MMTP Hearing”, May 23 2017 at 2310.

<sup>150</sup> Weins and Valdron, “MMTP Hearing”, May 23 2017 at 2233.

<sup>151</sup> Matthewson, “MMTP Hearing”, May 23 2017 at 2319.

<sup>152</sup> Ibid, at 2314

Importantly, a budget for the Indigenous Community Monitoring Working Group has not been allocated. This is particularly concerning given how much Manitoba Hydro seems to rely on this Monitoring Group for its future activities with Indigenous peoples and nations.

*MS. PASTORA SALA: And so would it be accurate to say that financial resources have not yet been allocated for the Indigenous community monitoring working group?*

*MR. MATTHEWSON: Correct. Specific financial resources have not been allocated to the working group from overall project budget. There are resources to allocate, it's just we are working, once we determine the terms of reference and the scope of the Indigenous community monitoring working group, then we can better allocate resources.<sup>153</sup>*

**CAC Manitoba recommends that Manitoba Hydro create, in collaboration with Indigenous nations and organizations, an Indigenous Community Monitoring Committee.**

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<sup>153</sup> Matthewson and Pastora Sala “MMTP Hearing”, May 23 2017 at 2195.

# Conclusion; Summary of Recommendations and Findings

## Licensing Recommendations

Based on the expertise of Dr. Fitzpatrick, and the lessons learned through its significant involvement with environmental assessments in Manitoba, CAC Manitoba has the following licensing recommendations relating to the MMTP:

1. Manitoba Hydro develop and implement an Organizational Learning Policy.
2. Manitoba Hydro modify its objectives of the monitoring program to add a reference to adaptive management, and remove the reference to baseline information.
3. Manitoba Hydro commit to developing a more standardized monitoring format across projects.
4. Manitoba Hydro maintain a project website for the life of the project, which contains all the information committed to by the Proponent in the EIS.
5. Manitoba Hydro undertake a third-party environmental audit.
6. Manitoba Hydro work with policy communities to create an independent oversight committee for the MMTP.
7. Manitoba Hydro create monitoring plans for:
  - a. The three endangered fish species which are found in the ROW (Bigmouth Buffalo, Mapleleaf Mussels and Lake Sturgeon); and
  - b. Medicinal and traditional plants
8. Manitoba Hydro create, in collaboration with Indigenous nations and organizations, an Indigenous Community Monitoring Committee.
9. Manitoba Hydro develop, in collaboration with Grandmothers, Indigenous Elders and Knowledge holders, a proclamation or express policy statement on its commitment to respecting Indigenous worldviews and legal orders, which includes Manitoba Hydro's understanding of its responsibilities flowing through such a commitment.

## Non-licensing recommendations

As non-licensing recommendations, CAC Manitoba Recommends that:

1. The Minister support the long-standing Indigenous institutions in Indigenous communities and incorporate a circle of *Ke nococominak* (Grandmothers) with a mission to oversee safeguarding the environment (as recommended in the Keeyask Report)
2. The Indigenous Relations Department of Manitoba Hydro and any other department engaging with Indigenous people undertake training by Grandmothers, Indigenous Knowledge Holders, and Elders who are the experts in Indigenous worldviews and legal traditions

## Express Findings

In addition, CAC Manitoba would ask the CEC to make the following express findings, that:

- Policy communities were not meaningfully engaged sufficiently early in the preliminary planning process, when fundamental decisions were being made
- Despite past recommendations of the CEC, Manitoba Hydro has failed to incorporate a standard for coordination and elimination of silos.
- Uncertainty must always be a factor in the selection of valued components by Manitoba Hydro
- Manitoba Hydro has responsibilities flowing from the Truth and Reconciliation Commission Report, which require concrete action by the Corporation
- In accordance with best practice, a full cumulative effects assessment for each project must always be undertaken
- The ecosystem services approach can be problematic, and should not be employed by Manitoba Hydro
- Significant caution should be given to the conclusion of Ms. McHugh on ecosystem services.