

**Review of the Canadian Environmental Assessment Process**

**Submission to the Expert Review Panel**

**Manitoba Hydro December 22, 2012**

## **Recommendations**

- 1. An EA process that is timely, predictable and certain, coordinated with provincial/territorial EA processes and avoiding excessive duplication.***
- 2. No fundamental changes to CEAA 2012 should be recommended. Certain minor changes have been discussed within the brief. Most of the outstanding issues identified during the review can be ameliorated through strong policy and guidance development. Industry, regulators, Indigenous groups, other stakeholders and the public need the opportunity to utilize the CEAA 2012 process in order to gain experience and become comfortable with its features. A sufficient body of knowledge and experience must be developed before considering any significant changes to the Act.***
- 3. The current triggering mechanism, along with its flexibility, should be maintained. The Canadian Environmental Assessment Agency should remain the sole responsible authority for the assessment of projects as provided for in the Act.***
- 4. Policy and guidance should be provided to govern the use and scope of “stop the clock” provisions within the Act.***
- 5. An oversight mechanism should be developed to ensure consistency in alignment between Decision Statement conditions and the conditions contained in authorizations issued under other federal statutes pertaining to a project.***
- 6. Amend the Act to include explicit power for the Minister to amend Decision Statement conditions if warranted.***
- 7. Positive physical environmental effects resulting from a project should be formally documented and taken into account.***
- 8. Recommend governments cooperatively undertake strategic environmental assessments and regional assessments. Such assessments will facilitate more focused and higher quality project-specific assessments.***
- 9. The CCME, aided by a multi-stakeholder advisory committee, should review and provide recommendations on means to reduce duplication between federal and***

*provincial governments and enhance delegation, substitution, equivalency and cooperation activities.*

- 10. Review the process for assessment of projects located on federal land or receiving federal funding in order to make their review consistent among federal authorities, with prescribed timelines, as those carried out for projects elsewhere.*
- 11. Create either a unified or easily accessible, cross-referenced set of federal and provincial information repositories collecting all project-related information throughout its life cycle.*
- 12. Undertake with provinces and territories a review of current practices for Indigenous consultation, process engagement and decision making with a view to recommending a flexible suite of approaches which could be utilized in various parts of the country with the objective of reducing the burden on indigenous governments and communities and better coordinating federal and provincial activities.*
- 13. Develop policy and guidance on a Canadian approach to implementation of UNDRIP and FPIC.*
- 14. Create specific updated guidance documents on the acquisition, use and incorporation of Indigenous knowledge in environment assessment.*
- 15. Provide Indigenous governments with sufficient resources to allow them to develop their own capabilities to manage and fully participate in assessment and consultation activities in an informed and timely manner.*

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**SUBMISSION TO CEAA**

**EXPERT REVIEW PANEL**

Manitoba Hydro welcomes this opportunity to provide its perspectives on the environmental assessment process in Canada. In slightly more than a decade, Manitoba Hydro has received federal and provincial regulatory approvals for several major projects - two hydraulic generating stations (Wuskwatim and Keeyask) and provincial approval for one major transmission project (Bipole III). It is currently engaged in the environmental regulatory approvals process for an international power line known as the Manitoba-Minnesota Transmission Project (MMTP). The two generating station projects are located in Northern Manitoba in the traditional territories of a number of Indigenous communities and groups, and the Bipole III project originates in Northern Manitoba and travels some more than 1300 kilometers finally traversing agricultural lands and terminating just outside Winnipeg. The project currently under assessment (MMTP) occurs in Southern Manitoba. We are hopeful that the experience and insights gained by Manitoba Hydro will prove to be of some benefit to the Panel as they consider their recommendations to the Government of Canada.

**Introduction**

It appears that this review of federal environmental assessment legislation has been commissioned and driven by a belief that Canadians have lost confidence in and lack trust in the environmental assessment process and its attendant follow-up and enforcement mechanisms. While there have been several high profile projects that have been publically criticized for a number of aspects, Manitoba Hydro is of the view that the *Canadian Environmental Assessment Act 2012* is generally an effective piece of legislation which would benefit from clear supporting policy and guidance documents to improve its implementation. The manner in which a society moves forward, protects and develops resources, and provides a framework for accomplishing this encompasses the entire range of societal views, values and visions for the future. Everyone, expert and layperson alike, has views and perspectives that

need to be considered. In the assessment process, parties advance viewpoints, analysis and conclusions and methodologies which they fervently believe in. When those propositions are not accepted in whole or even only accepted in part, the natural reaction is an expression of distrust and/or a lack of confidence in the system. Decision makers in the environmental assessment process are, in some cases, expected to have perfect knowledge and completely dispassionate decision-making paradigms devoid of all of the normal human characteristics which impact decision making.

This apparent lack of trust and confidence has found a lightning rod around which to coalesce, being the sweeping amendments of 2012 to the *Canadian Environmental Assessment Act*, the *Fisheries Act* and the *Navigation Protection Act* to name but three. While the latter two Acts will be the subject of separate reviews, none of these statutes can be considered in isolation and certainly must be considered in the context of any review of CEAA 2012.

Environmental assessment is dual jurisdiction with both the provinces/territories and Canada having areas on interest and jurisdiction flowing from the *Constitution Act 1867*. While there are important heads of federal jurisdiction - most notably in fisheries, navigation, migratory bird and species at risk - the preponderance of matters to be assessed and approvals required for the planning, regulatory approvals, construction and operation of any given project are provincial given the constitutional division of powers. Both the federal and provincial crown has an obligation to consult with Indigenous peoples, but there are typically far more decisions taken by the provincial crown during the course of a project that can attract an obligation to consult. The Panel should very carefully consider the various submissions on division of powers when making recommendations.

### **Manitoba Hydro Background**

Manitoba Hydro is a Crown Corporation and the sole provider of gas and electricity services within the Province of Manitoba. In addition, Manitoba Hydro exports electricity to the north-central United States, Ontario and Saskatchewan.

As indicated in the presentation slides (Appendix A), Manitoba Hydro derives 98% of its energy from non-emitting sources. The bulk of this energy is generated from hydro-electric plants

situated on the Nelson River in northern Manitoba and the bulk of the output is transmitted to southern Manitoba via two (and soon to be three) high voltage direct current (HVDC) transmission lines.

### **Legacy Issues and Regional Cumulative Effects**

A major issue that Manitoba Hydro has been dealing with is the legacy of decisions made starting approximately 60 years ago, involving the governments of Canada and Manitoba and following the environmental laws of the day. By the 1960s a need had been identified in Manitoba to increase energy production to meet growing provincial demands. A federal-provincial Programming Board recommended a plan to develop hydroelectric facilities on the lower Nelson River and transfer the power south using new High Voltage Direct Current (HVdc) power transmission technology. The plan included the regulation of Lake Winnipeg (now known as Lake Winnipeg Regulation or LWR) and the diversion of flows from the Churchill River (via the Rat and Burntwood rivers) into the Nelson River (now known as the Churchill River Diversion or CRD). Manitoba Hydro was responsible for implementing the plan.

The major developments in the north were carried out consistent with the practices of the time. In Manitoba, these have evolved from being nearly absent in the early 1970s (mostly economic considerations), to policy-based project reviews in the late 1970s (Environmental Assessment and Review Process administered by a review agency under the Department of Mines, Resources and Environmental Management), to legislated project reviews in the late 1980s (*e.g.*, *The Environment Act*), to the current assessments with an ecosystem based approach and detailed socio-economic consideration of effects for developments.

The development of these projects in northern Manitoba had substantial effects to the environment and people living in the region; primarily a result of increased flows and water levels in the Nelson River and decreased flows and levels in the Churchill River. At the time, the approaches to community engagement and to addressing negative project effects were quite different than used today and did nothing to foster a constructive ongoing relationship. Mitigation and compensation measures were generally negotiated or arbitrated after the fact through adversarial processes under The Northern Flood Agreement (NFA). Typically,

negotiated settlements were informed by studies or analyses undertaken independently by each individual party; however, these studies and analyses rarely reached the same conclusions about the nature and scope of effects. Programming and monetary compensation were negotiated or arbitrated to resolve differences, often without a clearly definable linkage to the project effects. For the early transmission projects and generating stations on the Winnipeg River there were no processes at all. Over the years Manitoba Hydro has revisited many of its projects with the many of the affected Indigenous groups.

Notwithstanding effort to demonstrate a new approach to development, there remains lingering bitterness and distrust fueled by the past events.

In response to concerns and questions about the past effects of the northern projects and the absence of any rigorous EA process, the Manitoba government has been working with Manitoba Hydro to develop a Regional Cumulative Effects Assessment of all existing developments associated with LWR and CRD. Two phases have been completed that organize information into people, physical environment, water and present information on the environmental and social changes that have taken place following the development of hydroelectric projects. The report includes the collation and analyses of existing information and available data from ongoing monitoring programs, scientific studies, community-based studies, regulatory processes and settlement negotiations and claims processes. Next steps will be outlined in a final Regional Cumulative Effects Assessment Next Steps document, available in 2017.

### **The Canadian Environmental Assessment Act, 2012**

The Act as presently drafted contains all of the necessary tools to address many of the issues raised during this review. Many of the concerns and criticisms could be addressed by revised guidance documents, policies and procedures and in Manitoba Hydro's opinion would be the most effective and efficient approach

The changes made with the passage of CEAA 2012 have brought practical improvements to project review. These improvements include:

- Clear triggering mechanisms which allow focusing of assessment resources on projects with potential to cause large environmental impacts as opposed to being driven by the nature of the permission or authorization which might be required;
- Clear timelines for the completion of the assessment activity;
- The ability to enter into substitution or equivalency agreements which would further the objective of one project, one assessment and promote the elimination of duplication;
- Elimination of “needs for and alternatives to” requirement;
- One Responsible Authority as opposed to multiple responsible authorities which by the nature of their statutory mandates do not possess the breadth of expertise required to manage the entirety of an environmental assessment for major projects.

Reverting back to earlier constructs of environmental assessment legislation would not meet the objective of a predictable, stable and focused environmental assessment process. The old triggering mechanism was fraught with uncertainty, risk and delay and required the involvement of a significantly greater number of departments and agencies prior to project initiation. The designated activities approach allows for focus on large scale projects with potentially significant adverse impact in areas of federal jurisdiction where no other means of managing such projects exists. Going hand in hand with this, is the ability to screen out designated projects if a determination can be made based on the project description that no significant adverse effects are likely. This is complemented by the discretion in the Minister to designate a physical activity which is not listed to be subject to an EA if the Minister is of the opinion that such a project is likely to cause significant adverse environmental effects or in response to public concerns about a project.

At its most fundamental, EA is a planning tool initiated, managed and funded by a prospective proponent long before a formal regulatory process is triggered. The process is utilized to make key design decisions, project financial decisions, consultation decisions and proponent resource allocation decisions. CEAA 2012 maintains an appropriate division of responsibility between

regulators and proponents. Regulators establish the framework for the formal assessment based on guidelines issued by the Agency and the proponent conducts and prepares the assessment, including all requisite consultations, provides the assessment report and then responds to further interrogatories or questions from the regulatory subject matter experts through the RA, files any supplemental materials required and the RA then proceeds to come to a decision regarding the project.

Interposing a third party to carry out an assessment is neither an optimal use of resources nor necessarily effective. Third parties generally lack relevant contextual knowledge. A third party cannot be aware of the historical nuances of the history of peoples in a particular region, or the previous relationships between a proponent and peoples within a region, nor will they have any intimate working knowledge of other developments which may have been carried out by the same proponent or similar developments by others within a particular region.

There is an opportunity for improvement in the management of the timelines established under the Act. Presently, the timelines can be stopped as the proponent responds to information requests from the regulator or public. However, there is no system of checks and balances in existence on when the timeline suspensions are taken, or the relevance of the scope of the questions. There is potential for abuse where requests may be made of a proponent for information which is not essential or central to the assessment in question in order to bide time to develop the Agency Environmental Assessment Report. Certainly, there will be instances where timelines must be extended while important information is prepared or consultations are ongoing.

A further improvement with respect to timing would be to establish a timeline for the posting of a notice of commencement under s.17 after the completion of screening.

It would be useful if policy or guidance was put in place to ensure that there is consistency between the findings of the environmental assessment and the conditions which are set out in the Decision Statement and the authorizations issued pursuant to the various federal statutes. In addition, consideration should be given to timelines for the issuance of the various statutory authorizations flowing from the assessment. The consistency and timelines questions could be dealt with by cabinet directive, MOU or perhaps through MPMO.

For projects on federal lands (s.67) timeline requirements need to be promulgated in order that project approvals do not lag.

As projects go into service and experience is gained with their operation and the body of the knowledge accumulated through monitoring, there should be an explicit power with the agency to amend Decision Statements in order to ensure that the activities that need to be carried out with respect to the project are maintained on a current basis, in a timely manner. While the Act presently does not prohibit amendments to Decision Statements, the explicit ability to make such amendments would provide greater certainty and forestall what might be regarded as mischievous legal challenges.

### **Environmental Assessment**

In reviewing EA it must be noted that many of the projects which are not reviewed under CEEA are subject to review under Provincial jurisdiction; only larger projects that pose the risk of serious environmental harm should trigger a Federal environmental assessment. Lesser harms or lower risk projects should remain with the provinces. Moreover, the Federal assessment should concentrate on those environmental effects which are constitutionally within Federal jurisdiction.

Where an assessment requires both federal and provincial review the goal must be to have one assessment for one project. This requires cooperation and coordination between federal and provincial/territorial agencies in order to have an efficient timely and seamless process. This can be accomplished through the increased use of the equivalency and substitution provisions or even through renewing the harmonization and cooperation agreements, many of which were left to expire. Timelines and information requirements could be better coordinated among governments. The efficacy of any one approach can be determined at the time a proponent initiates a regulatory review. The goal should be a harmonized process which results in the optimum utilization of scarce government resources. Consideration could be given to making EA Guidelines clearer, outlining which information is required for which jurisdiction. In addition consideration could be given to developing base guidelines for particular classes or types of projects. This would allow the public to focus on the appropriate jurisdiction when

making their comments and responses. Detailed review of the coordination aspects could be a topic for CCME with input from a Regulatory Advisory Committee or similar body.

Environmental Assessment serves several purposes. First and foremost, it is a planning and decision making tool for both proponents and regulators in that it establishes the present state of the environment and analyzes the impacts, both positive and negative of a proposed development and drives project refinements to minimize adverse effects. For large complex projects EA typically begins long before the regulatory approvals process is triggered. It is the mechanism by which proponents can engage with stakeholders and the public to inform them of a project and its ramifications and obtain their views with respect to the efficacy of the project and works toward a social license for development activity. The assessment should establish the means on which proponents will deal with negative effects of projects that cannot be avoided or otherwise mitigated. Environmental assessment sets out expected impacts of a project and frames the monitoring activities and follow-up. The Act in its present form establishes the key matters to be reviewed in an environmental assessment and the requirements for participation and knowledge.

Assessments could be made more meaningful and balanced if they considered both positive and negative physical effects arising from a project. The implementation such an approach would require further discussion among departments, the Agency and perhaps an advisory committee

It is Manitoba Hydro's view that the Panel should resist the suggestions that the EA process be transformed into a full scale sustainability assessment. Such a dramatic overhaul would require a completely new analytical framework and suite of decision-making tools. This type of transformative change should be the subject of a separate, dedicated study and consultation among all interested stakeholders. Even today in some provinces, their process includes consideration of sustainability aspects through their own forms of "Needs for and Alternatives to" hearings or reviews. Attempting to bring such reviews within federal jurisdiction may prove problematic from a jurisdictional perspective and in any event would be a retrograde step on the issue of duplication.

Environmental Assessment must include a rigorous science-based approach in analyzing the effects of a project. It should be based on proven science which is then considered together with Indigenous knowledge. This does not mean that there should be an expectation of perfect knowledge and perfect foresight. In the final analysis the application of rigorous scientific study will always be a matter of professional judgment. Environmental assessment should not be the vehicle for the testing of theoretical new approaches or theories which have not had a proven body of work developed around them. Decisions regarding the efforts required to undertake deeper explorations to assist in predicting potential effects, as opposed to monitoring and adaptive management, should take a risk management approach – a balance of the likelihood of an effect and its magnitude.

Depending on the nature, scope and location of a project, Indigenous knowledge can and should play a significant role in the assessment process. It would be useful to develop policy or guidance setting out minimum requirements or expectations. Manitoba Hydro completed a project assessment jointly with a First Nation and endeavored to blend Indigenous knowledge and principles of Indigenous law which underpin the Cree world view with a scientific assessment in order to reach a collaborative consensus on effects and mitigation. In another case, separate, stand-alone assessments were carried out by Indigenous communities and formed part of the assessment document with the assessment discussing both perspectives. Given that these two types of assessments come with different world views and different perspectives, they are at times not fully reconcilable and to expect an assessment to accomplish that is unrealistic and devalues both the scientific and Indigenous knowledge contained in the assessment. In carrying out an assessment where Indigenous knowledge is a major component, the means by which this information is accessed, assembled, utilized and protected are matters best left to the proponent and the Indigenous groups and the manner in which the task is accomplished will, in large measure, be guided by the relationship which has developed between proponents and Indigenous communities.

An aspect of environmental assessment that would benefit from some strategic thinking on the part of proponents, government, stakeholders and other interested parties is the area of cumulative effects analysis. A proponent comes to an environment and assesses the impacts

that a particular project will have on the various components of the environment. The challenge is that in many instances there is little known about the carrying capacity and threshold or tipping point for any component which would render the project unsustainable or may in fact foreclose any future developments of higher social value. Unfortunately, there are few, if any, government-led regional assessments or strategic assessments of the ability of particular geographic areas to withstand development pressures. Instead, proponents are being requested (or ordered) to assess an entire region as if no development had taken place and then make judgments with respect to the ongoing impacts of all previous developments, adaptations that have occurred in the environment in response to previous impacts and then assess the impacts of a particular project and potential other future projects by other proponents. In many cases, no previous Environmental Assessments have been done for projects of long standing duration; therefore, available historic information often lacks reliable data sets or appropriate levels of scientific rigor which calls into question the efficacy of a cumulative effects analysis using a pre-development base line. The onus of any proponent should primarily be to demonstrate that the net effects of their project does not exceed any established threshold, and to undertake additional mitigation and monitoring for any components having an unreasonable level of uncertainty. Environmental Assessment is simply a prediction of the future with no certainty of the manner in which a particular environment will adapt over time. This leads one to conclude that one of the most important aspects of an assessment is in fact the monitoring and ongoing analytical commitments made by proponents. The ability to discern environmental trends going forward is crucial to the sustainability of a project. A commitment and willingness to adapt is crucial to success – both in increasing measures where required, or ceasing monitoring prior to any pre-project commitments if the results clearly demonstrate that the issue has been dealt with.

### **Strategic and Regional Environmental Assessment**

Many proponents are drawn into a policy or political debate on the desirability or acceptability on certain types of projects during the course of an assessment process on a particular project. We can see an example of this level of debate in connection with the climate change initiatives.

The result of such policy, plan and program assessments would be a reflection of societal imperatives and values reflecting the circumstances under which society might find certain projects acceptable or determining that in no case should a project of a certain type be acceptable. Obviously governments would have to be able to deal with projects of significant national or regional interest. Dealing with this type of overarching considerations through strategic environmental assessments would enable project specific environmental assessments to be more appropriately focused on the effects of a project.

Similarly, regional assessments could prove very helpful in creating a suite of information that proponents could access to aid in the completion of cumulative effects analysis. Where a region is subject to multiple different developments a regional assessment could provide useful baselines for carrying capacity, productivity, environmental thresholds and socio-economic indicators. If such assessments were coupled with strategic assessments decision-makers would be in a far better position to determine which projects may provide greater societal benefit if issues arose concerning the ability of the environment to withstand the stresses of multiple projects. The information derived would also aid regional planning initiatives. Studies of this nature would have to be carried out by government with transparency and involvement from various developers in order to ensure balanced perspectives broad participation. The Panel might wish to review the 2009 report from CCME on this topic.

### **Indigenous Participation**

Indigenous participation should begin (and in Manitoba Hydro's case does) long before an EIS is written or project description filed. It begins at the project planning stage. In order to fully appreciate the priorities and concerns, particularly for large complex, expensive projects, it is crucial to engage with public and Indigenous groups as early as possible – ideally before any key decisions are made beyond a project concept. An iterative process with interactions at key milestones results in efficient input to design feature issues, and the high level array of potential effects and local or regional concerns related to various project configurations. While at early stages, information does not require fine granularity, it is nonetheless important to flag issues for study. The process could, depending on the position Indigenous group, start with

Indigenous government or leadership who in turn will determine the most appropriate manner to consult with the community. The broad array of considerations reflects the fact that construction of large facilities typically requires a long term commitment and significant supporting infrastructure. Project consultations could consider training, employment, contracting and business opportunities, and mitigation activities as part of an engagement process.

The pre-engineering and design phase for large complex hydroelectric projects typically requires a considerable amount of field exploration such as geotechnical investigations.. In Manitoba these types of activities require some form of permission from the provincial government. A system has been developed whereby the province, prior to making a decision, consults with any Indigenous community potentially affected by the work permit activity. This in turn requires that the proponent undertake a form of consultation with the leadership to explain all of the facets of the project and outline any benefits which might be available to the local Indigenous community. Prior to issuing the permit, the government requires affirmation that the Indigenous community does not object to the issuance of the permit. Depending upon the nature and impact of the decision being taken, the government may also require a signoff from the local Resource Management Board. A resource management board does not have absolute decision making power over land and resources located outside a reserve. However, a recommendation that the activity proceed is generally requested. Given the number of permits required in connection with the planning and design of a hydroelectric facility, endeavours are made to batch together numbers of permits.

### **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free Prior Informed Consent (FPIC)**

Implementation of UNDRIP and FPIC will be particularly challenging. It appears that government has already acknowledged that UNDRIP, while not legally binding, will be a set of principles that will help guide and shape a renewed relationship within the context of Canadian law. It is also important that UNDRIP and FPIC be viewed in their historical construct and origins.

In attempting to craft recommendations on this issue, the Panel must be wary of a “one size fits all” approach. Each provincial government has a different view of the scope of consultation and engagement obligations, a different relationship history with Indigenous groups, differing land and treaty structures with respect to Indigenous interests and different types of projects predominate in some provinces over others. All participants would be better served by guidance documents or policies outlining the important touchstones of engagement. With respect to EIS preparation, perhaps a solution would involve increasing the degree of specificity in any EIS guidelines issued requiring more detailed information with respect to Indigenous engagement and involvement.

While guidance on the minimum requirements for Indigenous engagement should be developed, there should be an incorporation of a degree of flexibility for proponents and indigenous communities to determine their own path.. For example, in some instances Manitoba Hydro has funded the preparation of community-specific reports that document concerns, and agreed-to mitigation solutions. These can take the form of discreet stand-alone reports, which inform and form part of the EIS analysis, or through jointly scoped studies which incorporate and embed Indigenous knowledge along with the western science- based information. Manitoba Hydro in the context of its Wuskwatim project carried out a joint environmental process with NCN. The Keeyask project included reports done by each of the four partner communities and others. These reports generally tell the story of the community, touching on history, land use practices and issues that are of importance. In order to develop this process, Manitoba Hydro has actively sought direct participation with community leadership as opposed to relying solely on general open houses. Continuing communication through the project planning period is maintained through newsletters and other presentation formats.

Engagement and involvement does not end with a regulatory approvals decision or completion of construction. Opportunities can exist in the areas of monitoring and the implementation of and maintenance of mitigation works. These activities can be contracted directly, joint-ventured, or a hybrid involving some directed subcontracting. Mechanisms to report monitoring results assist in maintaining community continuity and involvement.

FPIC also requires careful thought. It must always be remembered that the word “veto” does not appear within the discussions of FPIC. This topic has been the subject of a number of discussions and pronouncements by organizations such as the World Bank, International Finance Corporation and development agencies, such as Oxfam, to name but three. The International Hydropower Association (IHA) has undertaken a considerable amount of work in examining the nature and scope of FPIC. FPIC considerations, along with the broader question of Indigenous involvement, are part of the evaluation criteria utilized by IHA in conducting their sustainability assessments. Manitoba Hydro’s Keeyask project was subject to such assessment. There are many views on how FPIC might be demonstrated. Governments collectively will have to establish the requirements for FPIC, indicia of FPIC and responsibility for FPIC. There have been suggestions that Indigenous governments should have a decision-making role in project approvals, although the nature of this role is somewhat nebulous. Again, governments will have to negotiate this issue within the context of Canadian law

### **Truth and Reconciliation Commission (TRC)**

TRC Calls to Action 44 (dealing with achievement of the goals of UNDRIP) and 92 (directed at corporate Canada dealing with consultation, relationships and FPIC, jobs, training and educational opportunities, as well as aboriginal, cultural and historic awareness training for corporate staff) are all important. Manitoba Hydro provides multiple and varied opportunities for cross cultural training, along with speakers on various current Indigenous issues for its employees and contractors.

Many companies already have policies on employment and training and many have their own training programs for specialized workers.

There are significant challenges to successful engagement. The demands upon communities are enormous coming as they do from proponents, governments and community members. At times management systems are strained and technical staff over taxed. Government, should as a longer term objective move to develop a suite of core competencies to facilitate sustainable community involvement in development activities. This could be at a local, regional or provincial level depending on the particular circumstances.

## **Conclusion**

Manitoba Hydro is of the opinion that few if any changes are required to the provisions of CEEA 2012. Issues that have been identified in the Terms of Reference and many of the issues raised by those participating in the review can be addressed for the most part through new or enhanced policies, guidance documents, processes, procedures or a combination thereof.

Given the need for predictability and certainty in the assessment and approvals process it would not be wise to make wholesale changes to a statute which is barely 4 years old and for which only a small body of information exists. Moreover, it would be burdensome to have yet another transition process to deal with those projects which are already in process.

The enhancements recommended by this review must respect the division of powers and yet harmonize the activities of government, avoid duplication and operate in a seamless manner with other changes being contemplated for other statutes under review. Given the array of projects and diversity of Canada and its peoples flexibility must be maintained and enhanced in order to allow proponents, governments of all levels, stakeholders and the public to come together, in the manner that best suits them, to determine the future while meeting standards that safeguard and enhance all Canadian resources.

## Appendix A

### Presentation Slides

# Manitoba Hydro Presentation to CEAA Expert Review Panel

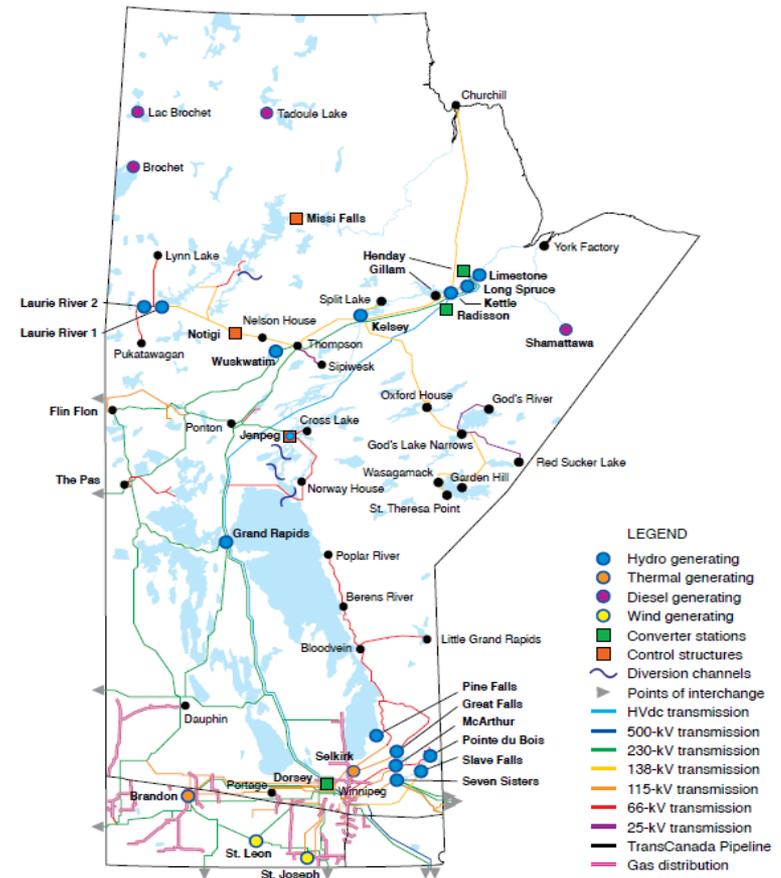
November 16, 2016

Robert D. Bettner  
Senior Counsel



# Manitoba Hydro System

- Core generation is from water power - 15 hydropower stations
  - 5,200 MW developed\*
  - 5,000 MW remaining potential\*
- 99% of electricity generated in Manitoba is renewable
- 260 MW contracted wind
- 2 thermal generating stations primarily for backup
- US import capability critical to meet seasonal peaks and provide backup in event of failure or prolonged drought



# CEAA 2012

- CEAA 2012 strikes an appropriate balance by focusing on projects likely to cause adverse effects without impairing or weakening environmental protection.
- Provides industry, stakeholders and indigenous groups with clarity of process, greater efficiency, improved timeliness and reduced duplication between federal and provincial processes through:
  - Simplified trigger mechanism – Designated Project List;
  - Reduced number of Responsible Authorities with each having requisite expertise;
  - Clear timelines for completion of assessment reviews;
  - Focusing assessment activities on larger projects in areas under federal jurisdiction and on activities that may have real environmental consequences; and

# CEAA 2012

- Removal of “Needs for and Alternatives to” analysis which is better performed by provincial bodies.
- **These improvements brought about through CEAA 2012 in comparison to previous legislation are important and should not be lost.**

# Environmental Regulation

- Similar to other hydro producers, Manitoba Hydro is rigorously regulated under both federal and provincial statutes.
- All large Manitoba Hydro projects are subject to Environmental Assessment under provincial legislation with some projects being assessed under federal legislation as well.
- Concurrent with statutory requirements Manitoba Hydro embraces the need to demonstrate environmental stewardship, maintain its social licence as a resource developer and engage with indigenous peoples in a respectful and mutually beneficial manner.
- **What is essential is a process which is:**
  - **Consistent, predictable and stable over time;**
  - **Efficient and timely;**
  - **Coordinated with provincial processes**
  - **Broadly supportable; and**
  - **Consistently applied by the three Responsible Authorities.**

# Manitoba Hydro Perspective on Issues Identified by the Panel

- Environmental Assessment
  - A mechanism to collect, synthesize and present information on the potential environmental effects of a project to inform decision makers.
  - A means by which the interested public can learn about a project and make their views known.
  - Policy issues surrounding a project and other similar developments would be more appropriately dealt with through an SEA process.
  - A mechanism to engage indigenous peoples on project issues and identify their perspectives and incorporate traditional knowledge.
  - A predictive system which serves as the basis of monitoring and follow-up which determines additional monitoring, follow-up, adaptations required and any additional mitigative measures.
  - Proponent led one project, one assessment process

# Manitoba Hydro Perspective on Issues Identified by the Panel (2)

- Indigenous Considerations
  - Can not be prescriptive. Must develop from a relationship.
  - Manitoba Hydro has, in addition to project-specific agreements, other process agreement requirements to facilitate early pre-project engagement on future developments and annual discussions.
  - Successful engagement springs from ongoing relationships developed prior to any project specific process.
  - Relationships can also be forged from early ongoing project specific engagement on topics such as, project plans, training, business opportunities, involvement in crafting the EA document and ongoing involvement in monitoring activities .
  - Government must still meet its obligations to consult and can not minimize the duty under procedural delegation.
  - Government must still analyze rights and title issues.

# Manitoba Hydro Perspective on Issues Identified by the Panel (3)

- EIS Content
  - Must contain best proven science along with traditional knowledge.
  - TK can be blended into the EIS through joint studies or a series of separate chapters depending on the nature of the relationship and the will of the parties.
- Public Involvement
  - Proponents and governments can only provide opportunities.
  - Governments can make improvements to create and enhance searchable data bases
  - Manitoba Hydro generally has multiple rounds of public consultation and endeavour's to engage the public through a variety of media.
  - Opportunities exist at the provincial level (depending on the type of project) to participate in Manitoba Clean Environment Commission pre-hearing and hearing processes on project effects, Public Utilities Board processes on justification and comment opportunities on EIS documents and initial scoping documents.

# Improvements for Consideration

- Develop a formal process to amend *Decision Statement Conditions*. This would support adaptive management and allow more responsiveness to project alterations in the latter stages of engineering.
- Establish formal mechanisms to facilitate timely adjustments to monitoring programs as results require.
- Develop and implement policies to ensure that permit conditions emanating from other federal authorities are aligned with the findings of the Environmental Assessment and the conditions set out in the Decision Statement. This will require coordination with other concurrent reviews.

# Improvements for Consideration (2)

- Establish policies and procedures to regulate the ability to “stop the clock” on legislated timelines
- Governments should be encouraged to cooperatively undertake *Strategic Environmental Assessments* and *Regional Assessments* to provide better focus for proponent led project specific assessments.
- Review and update policies and guidance documents to provide clarity for all stakeholders on implementation of the *Calls for Action* and *Declaration of the Rights of Indigenous People*.
- Federal and provincial governments must resolve duplication issues and make greater use of delegation and substitution provisions and renew harmonization/cooperation agreements.

# Manitoba Hydro Recommendations

- CEAA 2012 is barely 4 years old. This review focus its recommendations on policy and process improvements versus, repealing, replacing or seeking major amendments to the Act.
- Moving back to the previous Act or implementing a new process fosters uncertainty and delay. There is no evidence to suggest that such retrograde steps would enhance environmental protection.
- The priority must be on fine tuning a responsive process through policy refinement, guidance and necessary regulatory improvements.

# Manitoba Hydro Recommendations (2)

- Above all the process must facilitate and encourage flexibility to accommodate regional differences, cultural differences and a variety of projects with varying effects.
- There can be no “one size fits all” if we are to meet the goals of:
  - promoting greater involvement and the forging of new relationships with indigenous peoples and communities; and
  - encouraging greater involvement of non-indigenous stakeholders.

# Conclusion

- Manitoba Hydro will through its written brief (to be filed) elaborate on the brief comments herein and would be pleased to respond specifically to any issues as requested by the Panel.
- Thank you for the opportunity to present today.
- Questions?

## Appendix B

### **Manitoba Hydro Development History Highlights**

Until the late 1950s, Manitoba Hydro generation assets were hydroelectric generation assets and were exclusively along the Winnipeg River. In 1958, construction began on the Kelsey Generating Station at Sipiwesk Lake to supply electricity to the mining development and town being constructed by Inco and what is now the city of Thompson. The project site was an isolated location and remains so today, accessible only by air and rail. No environmental assessment was required and no consultation occurred.

In 1961, construction began on the Grand Rapids Generating Station at the mouth of the Saskatchewan River where it enters Lake Winnipeg. Again, no environmental assessment was formally required, although the U.S. Army Corps of Engineers was contracted to provide some advice relative to the impoundment and relocation of what is now the Chemawawin First Nation. All of the details pertaining to the relocation and any incidental costs or damages which arose as a result of the relocation and impacts on other communities surrounding Cedar Lake, were dealt with by the Government of Canada and the Government of Manitoba. Manitoba Hydro was only required to contribute to costs. Many issues remained unresolved until much later.

The year 1966 marked the beginnings of a 25-year period of development along almost the entire length of the Nelson River from Lake Winnipeg to Hudson Bay. In 1966, construction began at Kettle Rapids, presently the largest station in the system near the Town of Gillam, which was at that time a rail centre and the historic and present day home of Fox Lake Cree Nation. Few environmental studies were done and no socio-economic studies were carried out and again, there was an absence of consultation with the local Indigenous communities. Construction of the project spanned eight years and left a multi-dimensional legacy of adverse physical effects and a legacy of negative socio-cultural and economic effects from interactions between the Indigenous peoples, Manitoba Hydro and a very large transient construction staff.

Concurrent with the development of Kettle Rapids, Manitoba Hydro with significant support and involvement of Canada and Manitoba embarked on a massive complex interrelated series of projects focused on developing the power potential of the Nelson River. The suite of projects included the Churchill River Diversion to flow additional water into the Nelson River with significant flooding along the diversion route and a significant de-watering of the Churchill River and Lake Winnipeg Regulation, which entailed dredging new channels and the significant modification of other channels to move increased volumes of water from Lake Winnipeg into the west channel of the Nelson River and beyond to supply several additional generating stations. Given the massive environmental changes attendant on this suite of projects, Canada and Manitoba jointly determined to study the potential effects of these developments and an agreement was entered into which created the Lake Winnipeg, Churchill and Nelson River Study Board. The Study Board reviewed aquatic and terrestrial issues and socio-economic impacts on the various First Nations and communities potentially affected by the project. The study, although fairly advanced by Canadian standards of the day, was rudimentary at best and did not engage, to any significant degree, local residents. The other confounding feature was that the study was undertaken while construction was beginning and not before. Nonetheless, the Study Board report of several thousand pages produced a number of recommendations, many of which were directed at the Government of Canada and the Government of Manitoba.

During the course of construction, First Nations along the Nelson River became increasingly concerned about impacts on reserve land, terrestrial and aquatic resources, transportation and their culture and way of life and these concerns were exacerbated by the unresolved legacy issues from past projects and fears for the new projects. This resulted in legal proceedings being threatened and with the support of Canada; the Indian bands of Nelson House, Norway House, Cross Lake, Split Lake and York Factory formed the Northern Flood Committee Inc. (NFC) to act on their behalf. The efforts to avoid litigation included mediation and ultimately the negotiation and execution of The Northern Flood Agreement in December of 1977 (NFA). This was an agreement among the Northern Flood Committee representing the bands, the Government of Canada, the Government of Manitoba and Manitoba Hydro. The agreement provided a mechanism whereby Manitoba Hydro would be granted easements over reserve

land for water storage, commitments on the part of governments to policy measures and programs, a mechanism by which the Northern Flood Committee or its members or individual members of the bands could bring forward claims for damage and have them resolved. If claims could not be resolved informally there was recourse to an arbitration procedure contained within the agreement.

For the purposes of the specific discussion of CEAA, two features of the NFA stand out. The first was a requirement in the agreement that Manitoba Hydro should, prior to making any final decisions on any future development along the Churchill and Nelson Rivers and their environs, give notice to Canada and should not make any decisions regarding any future projects without a process of *bona fide* and meaningful consultation with the communities (Article 9.2). In addition, there was a requirement for ongoing notification of changes in operations which may affect water levels and flows. The other important aspect was a requirement for ongoing reporting and communications by Canada, Manitoba and Manitoba Hydro on the status of their implementation of recommendations made by the Study Board. All of this was designed and driven by a philosophical underpinning that potential benefits from these activities be made available in a practical manner to residents of reserves and that these developments could be seen as a potential beneficial development in their midst and that residents should be no worse off than before the projects.

Due to a lack of specificity within the NFA and wide differences of opinion on its interpretation, there ensued almost 20 years of claims and arbitrations which further exacerbated and compounded the legacy issues. In order to break the impasse and create a climate where further development could occur, the governments, Manitoba Hydro and four of the five first nations; Split Lake (now Tataskweyak Cree Nation or TCN), Norway House, Nelson House (now Nisichawaysihk Cree Nation or NCN) and York Factory began negotiations on detailed NFA Implementation Agreements to implement the provisions of the NFA and to resolve outstanding arbitration claims. Each of these agreements contains detailed provisions requiring annual consultations between Manitoba Hydro and each First Nation respecting any matters of concern and very specific and detailed provisions regarding future development planning, resource management and planning. These are independent of any environmental assessment

regulatory requirement and include not only physical effects, but employment opportunities, training opportunities, business opportunities, environmental studies, and monitoring. In addition significant funding was provided to allow the first nations to determine and address their priorities with the corpus of the money being protected within a trust.

Manitoba and a number of Indigenous communities have created resource management areas (RMAs), which are large areas of Crown Land roughly corresponding to Registered Trapline Districts, predominantly used by members of a particular first nation. Under the NFA Implementation Agreements and other mechanisms resource co-management boards (RMBs) were established comprised of representatives of the government and the first nation. These boards review all activities proposed for each RMA as they arise and provides a recommendation to government. In addition the boards can undertake land use planning activities and resource monitoring activities with the RMAs.

As well, during the 1990s and beyond, Manitoba Hydro proceeded to negotiate adverse effects agreements with a variety of future development protocols with communities and First Nations affected by the Grand Rapids Project from the 1960s and other communities and First Nations affected by Churchill and Nelson River development but not members of the NFC.

It is this history and these negotiated commitments that colour and drive Manitoba Hydro's approach to environmental assessment and interactions with Indigenous peoples.

## Appendix C

### Links

Indigenous Agreements and Other Documents  
(Select)

Joint Keeyask Development Agreement

[https://www.hydro.mb.ca/projects/keeyask/pdf/JKDA\\_090529.pdf](https://www.hydro.mb.ca/projects/keeyask/pdf/JKDA_090529.pdf)

Wuskwatim Power Limited Partnership Development Agreement

[https://www.hydro.mb.ca/corporate/facilities/pda/Wuskwatim\\_PDA\\_ToC.pdf](https://www.hydro.mb.ca/corporate/facilities/pda/Wuskwatim_PDA_ToC.pdf)

Lake Winnipeg Churchill and Nelson Rivers Study Board Summary Report 1975

[http://www.gov.mb.ca/waterstewardship/licensing/pdf/summary\\_report.pdf](http://www.gov.mb.ca/waterstewardship/licensing/pdf/summary_report.pdf)

Northern Flood Agreement

[https://www.hydro.mb.ca/community/agreements/northern\\_flood\\_agreement/index.shtml](https://www.hydro.mb.ca/community/agreements/northern_flood_agreement/index.shtml)

NFA Implementation Agreements

- Split Lake -  
[https://www.hydro.mb.ca/community/agreements/split\\_lake\\_agreement.shtml](https://www.hydro.mb.ca/community/agreements/split_lake_agreement.shtml)
- Norway House -  
[https://www.hydro.mb.ca/community/agreements/norway\\_house\\_agreement/index.shtml](https://www.hydro.mb.ca/community/agreements/norway_house_agreement/index.shtml)
- York Factory -  
[https://www.hydro.mb.ca/community/agreements/york\\_factory\\_agreement/index.shtml](https://www.hydro.mb.ca/community/agreements/york_factory_agreement/index.shtml)
- Nelson House -  
[https://www.hydro.mb.ca/community/agreements/nelha/nelson\\_house\\_agmt.shtml](https://www.hydro.mb.ca/community/agreements/nelha/nelson_house_agmt.shtml)

Fox Lake -

[https://www.hydro.mb.ca/community/agreements/fox\\_lake/fox\\_lake\\_settlement\\_agreement.pdf](https://www.hydro.mb.ca/community/agreements/fox_lake/fox_lake_settlement_agreement.pdf)

War Lake - [https://www.hydro.mb.ca/community/agreements/war\\_lake.pdf](https://www.hydro.mb.ca/community/agreements/war_lake.pdf)

NFAT Terms of Reference -

[http://www.pub.gov.mb.ca/nfat/pdf/terms\\_of\\_reference/TermsOfReference-Ap25.pdf](http://www.pub.gov.mb.ca/nfat/pdf/terms_of_reference/TermsOfReference-Ap25.pdf)

Northern Development Regional Cumulative Effects Assessment

[https://www.hydro.mb.ca/regulatory\\_affairs/rcea/](https://www.hydro.mb.ca/regulatory_affairs/rcea/)

Regional Strategic Environmental Assessment in Canada

[http://www.ccme.ca/files/Resources/enviro\\_assessment/rsea\\_principles\\_guidance\\_e.pdf](http://www.ccme.ca/files/Resources/enviro_assessment/rsea_principles_guidance_e.pdf)

## APPENDIX D

### Response to Panel on the Keeyask Generating Station Process

## **Keeyask Approval Process**

In the early 1990s, Manitoba Hydro determined that there would be a need for additional domestic resources and that economic and market conditions might be favourable to advance the construction of the Keeyask Generating Station from what would be required for domestic load only. Preliminary discussions occurred between 1993 and 1995 initially with TCN, later joined by York Factory, Fox Lake and War Lake First Nations. Early discussions were of a general nature reviewing at a high level alternatives or project development in that reach of the Nelson River and issues pertaining to, at that time, TCN. Negotiations were put on hold in 1995 while Manitoba Hydro began discussions with NCN on the development of the Wuskwatim Generating Station.

Both projects followed the same path in negotiations. That is, agreement in principle followed by a Principle's Memorandum setting out negotiating principles which was in turn followed by a process proposal providing for the principals and processes required to finalize a joint development agreement.

In the case of Keeyask, the negotiations and discussions led to a series of individual adverse effects agreements which were finalized in late 2008 and early 2009 and an agreement called the Joint Keeyask Development Agreement which is dated May 29, 2009. This agreement created a limited partnership for the development of the Keeyask Generating Station and many important commitments including:

- Agreement on fundamental features of the project which included size, location, general arrangement and water regime. (The parties had negotiated through three different configurations of a Keeyask development described in the presentation and earlier in this document).

- Specific provisions regarding training and employment and special measures negotiated under a collective labour agreement governing the construction of major Hydro projects in Manitoba.
- Commitments were also made for construction employment and operational jobs, along with attendant employment preferences and an advisory committee task specifically with employment issues.
- Specific provisions were negotiated for business opportunities including provision for direct negotiated (non-tendered) work packages scoped to the capacities of the First Nations. Some contracts were joint ventures between First Nations or First Nation Entities and Third Parties, other were strictly First Nation or First Nation Entities.
- A Partner's regulatory and licensing group was created to manage EIS preparation, public engagement and the incorporation of indigenous knowledge. Arrangements to finance the participation of the Keeyask Cree Nation Partners in the project and the manner in which income and expense would be calculated, this through a Power Purchase Agreement between Manitoba Hydro and the partnership.

In parallel with the negotiation of the JKDA, work continued on the development and finalizing of the EIS. In July of 2011, a project description was filed with Federal Authorities and under Manitoba legislation, an environment act proposal form and scoping document were submitted in December, 2011. Canada issued guidelines in February of 2012 based on the scoping document submitted by the partnership. The EIS was submitted in July of 2012.

Canada determined that their assessment would take the form of a comprehensive study report and Manitoba directed that the project be reviewed at a hearing of the Clean Environment Commission. In the guidelines phase, no hearings were held, with both levels of government relying solely upon written representations made by interested members of the public. After filing government conducted an adequacy review. Manitoba had two rounds of IRs and then moved the matter to the CEC for hearing. Canada subsequently determined that more IRs were required and this process

collided with the IR process of the CEC and hearing participants. Pre-hearings were held through the spring and summer of 2013. The Clean Environment Commission managed the granting of participants status and the award of participant funding.

Hearings commenced on September 24, 2013 and continued (with some breaks) through to January 9, 2014. The final report was issued in April of 2014 recommending the project proceed with a number of conditions. During the course of the process, over a million dollars in participant assistance funding was made available. Participants included Indigenous groups both within and outside of the project region, public interest groups and provincial government.

Concurrent with the environmental assessment work being conducted, the government in January 2011 notified Manitoba Hydro it intended to carry out a public needs needs for and alternatives review and assessment of what was referred to as Manitoba Hydro's preferred development plan. This plan covered Keeyask, the development on Conawapa with construction commencing in approximately 2017 and an international power line from Manitoba to Minnesota and certain export sale packages. In November 2012, it was announced that the government had requested the Public Utilities Board to conduct the NFAT hearing terms of reference included:

- Determination of the soundness and timing of the plan and assumptions being relied upon.
- Alignment with Manitoba Hydro's mandate:
- Alignment with Manitoba's Clean Energy Strategy and Principle's of Sustainable Development;
- Review of alternatives considered by Manitoba Hydro;
- Review of Financial and Economic Modeling including construction costs, climate change, domestic load, competing technologies and general economic conditions;
- Socio-economic impacts and benefits of the development plan and alternatives to Northern Aboriginal Communities;

- Macro Environmental Impact of the plan versus its alternatives; and determine whether the plan has been justified to provide the highest level of overall socio-economic benefit to Manitobans when compared to alternatives.

Pre-hearing conferences occurred during May and September of 2013 an Interrogatory process ran until hearings commencing on February 27, 2014 and continuing through to May 26, 2014. Interveners and presenters covered a wide array of Manitoba society including individuals, representatives of Indigenous communities and organizations, and social agencies.

The Public Utilities Board reported to the Government in June 2014 at which point Keeyask the transmission projects and sale packages were approved; however, Conawapa was deferred for more analysis.

The process used for Keeyask was different from that used for Wuskwatim although there was a separate needs for and alternatives to exercise within the Wuskwatim hearing it all flowed as one seamless hearing and the government appointed members from the Public Utilities Board to sit on the Clean Environment Commission were the purposes of the Wuskwatim Project. However, the nature and scope of the analysis was similar.

Manitoba granted its approvals in June 2014 which was after Canada had made its determination that the Keeyask project should proceed. The process suffered from a lack of coordination in terms of information requirements and timing. This was due in part to the expiry and non-renewal of the Canada- Manitoba Agreement on Environmental Cooperation. Once the EA process was fully complete work continued on negotiating the various permits required under a variety of federal and provincial statutes.