

To the Manitoba Clean Environment Commission

IN THE MATTER OF:

The Keeyask Generation Project ("Keeyask")

APPLICANT:

Pimicikamak

NOTICE OF MOTION

THE APPLICANT, Pimicikamak, brings this motion to be heard by and before the Manitoba Clean Environment Commission (the "Commission") as soon after September 9, 2013 as this motion can be heard. The Applicant asks that the motion be heard orally.

THE MOTION IS FOR:

1. An order by the Commission to adjourn the commencement of the Commission's public hearings in connection with Keeyask until after:
 - (a) The completion of a Regional Cumulative Effects Assessment ("RCEA") for the entire Churchill River Diversion, Lake Winnipeg Regulation, Nelson River works and related facilities hydro project ("MH Project") (or in the alternative, for those aspects of the MH Project in the Nelson River sub-watershed); and
 - (b) The completion of a land use and occupancy study and an impacts study ("Studies") to determine Pimicikamak's connections to, values in and use and occupancy of its traditional territory and to help assess the impacts of Keeyask including those cumulative with impacts from the existing MH Project, on Pimicikamak.
2. In the alternative, an order by the Commission to adjourn the Commission's public hearings in connection with Keeyask following the completion of this first round of hearings scheduled to end on November 28, 2013, to allow time for the completion of:
 - (a) a RCEA for the entire MH Project (or in the alternative, for those aspects of the MH Project in the Nelson River sub-watershed); and
 - (b) the Studiesfollowing the completion of which, the Commission will reconvene the public hearings to allow Participants and the public the opportunity to make submissions to the Commission on the results of the RCEA and the Studies as they relate to the assessment the Commission is tasked to make under its Terms of Reference for Keeyask (the "Terms of Reference").
3. Such further and other relief as the Commission deems just.

THE GROUNDS OF THE MOTION ARE:

A. SUMMARY

1. The Commission has been mandated to conduct an environmental review for Keeyask. In order to do so, it must (to meet the purpose of the *Environment Act* to ensure effective environmental management) ensure that necessary and highly relevant evidence is before the Commission and the parties to the Keeyask proceedings in order for an informed report and recommendations to be completed, and in order for the Minister to make an informed decision. Such necessary and relevant information includes the information that would or should result from the RCEA and the Studies. In other words, for the Commission to proceed without the results and evidence from the RCEA and the Studies would amount to a violation of the Commission's mandate for Keeyask. This would be an error of jurisdiction or law.
2. The Commission recommended in the BiPole III proceedings and the Minister agreed, that a RCEA should be conducted for the MH Project in the Nelson River sub-watershed, before any further licences are issued for hydro development. Thus, this, at least, is now part of the Commission's mandate for Keeyask.
3. It would also amount to a breach of procedural fairness to Pimicikamak (and likely other parties) for the Commission to proceed without the results of the RCEA and Studies.
4. Pimicikamak is a party to the Commission's proceedings on Keeyask, and stands to be significantly impacted by Keeyask including cumulatively with existing impacts from the MH Project. It has been severely impacted by the cumulative effects of the MH Project to date – environmentally, socially, economically, psychologically and spiritually. Identifying and understanding all actual ongoing impacts (which Keeyask would change and in some regards add to) generally (what a RCEA would determine), and in respect of Pimicikamak in particular (what the Studies would help determine), is critical to assessing Keeyask and whether it should be allowed to proceed. A failure to allow this evidence to be gathered and submitted would amount to a denial of procedural fairness and, therefore, an error of law.
5. Further, for the Commission to undertake a review of Keeyask (or at least, for the Commission to render its report on Keeyask) before the RCEA and Studies are complete, would call into question the entire environmental assessment regime in Manitoba. Public bodies including the Commission and the Manitoba Government, are subject to the Rule of Law, and if this is not upheld then the administration of justice is in disrepute. The Commission and the Minister have recognized this and thus the Commission recommended an RCEA be conducted before any licences are issued for additional hydro development, and the Minister accepted this recommendation.

B. THE COMMISSION HAS THE AUTHORITY TO ADJOURN ITS PROCEEDINGS

6. Pimicikamak submits that the Commission has the jurisdiction to adjourn its proceedings.
7. Under s. 6(8) of the *Environment Act*, the Commission has the power to make rules governing its procedure.

8. Under s. 2.08 of the Commission's *Process Guidelines Respecting Public Hearings* ("Guidelines"):

The Commission will accept motions respecting procedural matters from the Proponent and those designated as Participants.

...

On hearing the motion, the Commission may allow, dismiss or adjourn the motion in whole or in part, and with or without terms.

9. Sections 3.21 and 3.22 of the *Guidelines* specifically contemplate the ability of the Commission to delay the commencement of hearings, adjourn, suspend hearings, or extend time in order to receive relevant information and documents.

4. The Commission heard and decided motions to adjourn in the BiPole III proceedings

Reference: Decision of the Manitoba Clean Environment Commission On the Motion of the Bipole II Coalition, Applicants, August 29, 2012.

Decision of the Manitoba Clean Environment Commission On the Motion of the Consumers' Association of Canada, Applicants, August 29, 2012.

Decision of the Manitoba Clean Environment Commission On the Motion of Peguis First Nation, Applicants, August 31, 2012.

10. The Supreme Court of Canada has found that administrative bodies, like the Commission, have the jurisdiction to adjourn their proceedings:

As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.

Reference: *Prasad v. Canada (Minister of employment and immigration)*, [1989] 1 SCR 560 at 568-569

C. THE COMMISSION MUST ADJOURN THE HEARINGS UNTIL A REGIONAL CUMULATIVE EFFECTS ASSESSMENT IS COMPLETE

- (i) **The Commission has Recommended a RCEA be Done before a Licence is Issued for Keeyask and the Minister has Agreed**

11. The Commission recommended in its June 2013 Report on the Bipole III Transmission Project (the "Bipole III Report") the following:

13.2 Manitoba Hydro, in cooperation with the Manitoba Government, conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the

Nelson River subwatershed; and that this be undertaken prior to the licensing of any additional projects in the Nelson River sub-watershed after the BiPole III Project. [Emphasis added]

12. The Minister of Conservation and Water Stewardship in a letter to Manitoba Hydro dated August 14, 2013 issuing the BiPole III licence, agreed with this recommendation and stated:

In addition to the enclosed Licence requirements [for BiPole III], please be advised that it is my intent to ensure that all of the non-licensing recommendations in the Clean Environment Commission's report be implemented. Technical staff in my department will contact you in the near future to discuss implementation of the recommendation to cooperatively conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed.

13. Keeyask is an "additional project in the Nelson River sub-watershed" for which Hydro is seeking a licence.
14. As a result, in accordance with the Commission's recommendation, and the Minister's acceptance of it, a RCEA must be completed before a licence is issued for Keeyask.

15. The Commission has recognized and the Minister has accepted that the results of a RCEA are necessary and relevant to any proceeding about further hydro development that is to be part of the MH Project (at least, in the Nelson River sub-watershed). This then forms either part of the mandate of the Commission for the Keeyask proceedings, or is otherwise required due to the rules of procedural fairness. This accords with the Rule of Law, which must be followed.

(ii) The Commission needs the Evidence from a Regional Cumulative Effects Assessment to Complete its Review of Keeyask: it is part of the Commission's Mandate

16. The results of the RCEA are material evidence that is required for the fair adjudication of the Commission's hearings on Keeyask.
17. The Commission has been tasked under its Terms of Reference to conduct a public and consultative review of all elements of the Environmental Impact Statement for Keeyask (the "EIS"), which must include cumulative effects.
18. Pimicikamak submits that the Commission cannot legally complete its review of Keeyask and issue its recommendations in accordance with its Terms of Reference until the RCEA is complete. This is because:
 - (a) The initial Terms of Reference explicitly or implicitly require consideration of the results of the RCEA; and/or
 - (b) The Minister's acceptance of the Commission's recommendation from BiPole III that called for the RCEA before any further hydro development licences were to

be issued confirmed that this requirement was now effectively part of the Terms of Reference for Keeyask.

19. This makes sense. In order for Manitoba and the Commission to ensure effective environmental management, as mandated by s. 1(1) and 12(7)(a) of the *Environment Act*, an adequate assessment of the existing and ongoing impacts of the MH Project (which Keeyask would become a part of, if licenced) must be done in order to then assess the impacts of Keeyask in the context of those existing impacts.
20. There are many serious and ongoing impacts from the MH Project. Impacts began 40 years ago when the MH Project was built, and they continue today. As a result of incremental and combined environmental degradation caused by ongoing operations, many of these adverse effects are getting worse.
21. As the Commission found in its Bipole III Report:

During the Bipole III hearings, it became apparent that past hydro-electric developments in northern Manitoba have had a profound impact on communities in the area of these projects, as well as on the environment upstream and downstream. Bipole III and projects proposed for the near future will add to these impacts.

Reference: Manitoba Clean Environment Commission, *Report on Public Hearing: Bipole III Transmission Project*, (Winnipeg: 2013) at 126

22. The need for and duty to conduct an assessment and review of the impacts of the existing MH Project arise because Keeyask would add to and alter the existing hydro system. The MH Project is one integrated whole and aspects of it cannot accurately be assessed in a vacuum. One cannot determine what the change will be, or should be, to something, unless one determines what that something (the existing hydro development and its impacts) is. There has never been a comprehensive assessment and review of the existing hydro development to enable the Commission to know what that something is.
23. An up to date and comprehensive assessment and review of the existing hydroelectric system will enable the Commission to determine whether the significance of adverse effects is appropriately assessed and whether mitigation measures are adequate.
24. As the Commission noted in its Bipole III Report:

However, in order to fully understand the impact of proposed future projects, it will be necessary to understand the impact of past and current projects in addition to new impacts. A regional cumulative effects assessment is needed for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed. The result of such an assessment would be a greater understanding of the impacts of the individual projects, as well as the cumulative impacts of all projects together. Understanding these impacts may lead to the use of current mitigation measures being applied to past impacts, resulting in some remediation.

Greater understanding may also lead to alterations in the structure or operation of existing projects, and may offset impacts from new projects.

Reference: Manitoba Clean Environment Commission, *Report on Public Hearing: Bipole III Transmission Project*, (Winnipeg: 2013) at 126

(iii) The Need for RCEA to Occur is Grounded in the Legal Rule for Procedural Fairness

25. Pimicikamak submits that it would be a denial of procedural fairness to Pimicikamak, the other Participants, and the public for the Commission to hold hearings on Keeyask (or at the very least, to render a report on Keeyask) before the RCEA is complete.

26. While adjournment is a discretionary procedural remedy, it must be granted if it is necessary to ensure procedural fairness.

Reference: Sara Blake, *Administrative Law in Canada*, 4th ed, (LexisNexis: Markham, 2006) at p. 44

27. The conduct of proceedings that fail to allow parties to procure or access relevant evidence can be found to be a breach of procedural fairness.

Reference: *Saskatchewan Teachers' federation v. De Moissac* (1973), 38 D.L.R. (3d) 296 (Sask. C.A.)

28. The Participants and the public need the opportunity to obtain and assess evidence on regional cumulative effects in order to know the case to meet at the Commission's hearings and to fairly participate in those hearings. Without that full information, the Participants and public, including Pimicikamak, will be denied the opportunity to comment in the hearings on the true cumulative impacts of Keeyask. This is particularly unfair to Pimicikamak, who has been profoundly affected by the existing hydro development in Manitoba and is seriously concerned about how Keeyask will add to those existing impacts.

29. The Commission has been mandated to incorporate the principles and guidelines of Sustainable Development into its review of Keeyask. The *Principles and Guidelines of Sustainable Development* require that all Manitobans have access to adequate environmental information:

4. **Access to Adequate Information:** we shall encourage and support the improvement and refinement of our environmental and economic information base and promotion of the opportunity for equal and timely access to information by all Manitobans.

30. There are many recent examples of RCEAs being conducted in Canada. These include:

(a) **The Great Sand Hills, Saskatchewan:** The Government of Saskatchewan conducted a regional environmental study ("RES") of the Great Sand Hills to provide a strategic assessment of human activities that cumulatively affect the long term ecological integrity and sustainability of the region and to provide

recommendations to guide future land use activities in the area. The RES considered the cumulative effects of human activities and natural change from the 1950's and projected forward to 2020.

Reference: Bram Noble, "Strategic approaches to regional cumulative effects assessment: a case study of the Great Sand Hills, Canada", *Impact Assessment and Project Appraisal*, 26(2), June 2008

- (b) **Mackenzie Valley, NWT:** the Mackenzie Valley Land and Water Board hired an independent third party to conduct a cumulative effects study for an area with four proposed diamond exploration projects, rather than have each proponent conduct its own narrow cumulative effects assessment. The setting for the projects was an unprotected area of great cultural significance to local Aboriginal groups, containing spiritual sites and teaching areas.

Reference: Alan J. Ehrlich and Sherry Sian, *Cultural Cumulative Impact Assessment in Canada's Far North*, in: *Proceedings of the 24th Annual Conference, International Association for Impact Assessment*; Vancouver, British Columbia, available at http://www.reviewboard.ca/upload/ref_library/IAIA%20Paper%20Cultural%20CFX_1183734398.pdf

- (c) **Elk Valley, BC:** A Cumulative Effects Management Framework ("CEMF") has been developed as a result of the recent application for expansion of Teck's Line Creek coal mining operation in Elk Valley, BC. The overall goal of the CEMF is to inform regulatory and management decisions by providing information about cumulative effects in the entire Elk River watershed.

Reference: *Backgrounder on the Elk Valley Cumulative Effects Management Framework*

- (d) **Fundy Tidal Energy Strategic Environmental Assessment:** the Nova Scotia Department of Energy has commissioned a Strategic Environmental Assessment ("SEA") to provide advice on whether, when and under what conditions tidal energy demonstration and commercial projects should be allowed in the Bay of Fundy.

Reference: *Fundy Tidal Energy Strategic Environmental Assessment Final Report: Executive Summary*, Submitted April, 2008, available online at <http://www.oera.ca/wp-content/uploads/2013/06/FINAL-SEA-REPORT.pdf>

31. The requirement and preference for regional reviews was recommended in the Report on Consultation on Sustainable Development Implementation ("COSDI Report"), which Manitoba adopted in 2000. Specifically, the COSDI Report recommends:

Integrated Large Area Planning

A. In order to implement the provincial sustainable development policies (including the provincial land use policies) and strategies, Manitoba requires integrated, sustainable development planning on a large area basis. Such planning areas would likely be based on

watersheds, geographic regions or urban-centered regions (e.g. Capital Region). The strong preference for the Core Group is to maximize the use of natural boundaries such as watersheds for defining the large planning areas. It is important that these large area plans, in total, eventually cover the entire province with minimal overlaps.

32. Pimicikamak submits that in the interests of fairness and in order to comply with the *Principles and Guidelines of Sustainable Development*, the Commission must adjourn the hearings until the RCEA is completed so that the Commission, Participants, and the public have essential information on existing effects with which they can properly assess Keeyask.

D. THE COMMISSION MUST ADJOURN THE HEARINGS UNTIL THE "STUDIES" ARE COMPLETE

33. Pimicikamak submits that the Commission cannot assess Keeyask in accordance with its Terms of Reference until Pimicikamak completes the Studies to ascertain Pimicikamak's connections to, values in, uses and occupancy of the land and how Keeyask, including cumulatively with existing impacts from the MH Project, may affect Pimicikamak.

(i) Manitoba Hydro has Failed to Identify and Assess the Effects of the Project on Pimicikamak

34. The Commission has been tasked under its Terms of Reference to conduct a review of all elements of the EIS and to hold public hearings to consider stakeholder and public input on that EIS.
35. Pursuant to ss. 9.1.3 and 9.4 of the *Environmental Impact Statement Guidelines for the Keeyask Generation Project* (the "*EIS Guidelines*"), in its EIS, Manitoba Hydro was required to identify and assess the significance of, among other things:
- (a) The potential social and economic effects to Pimicikamak that may arise as a result of Keeyask;
 - (b) The effects Keeyask may have on current use of lands and resources for traditional purposes by Pimicikamak and its citizens, including but not limited to, hunting, fishing, navigation, trapping, gathering, cultural and other traditional uses of the land;
 - (c) Related effects on lifestyle, culture and quality of life of Pimicikamak and its citizens;
 - (d) Measures to avoid, mitigate, compensate, or accommodate effects on those traditional uses;
 - (e) Effects on Pimicikamak and its citizens in terms of access onto the Keeyask area;
 - (f) Effects of Keeyask on heritage and archeological resources in the Keeyask area that are important or of concern to Pimicikamak; and

- (g) A discussion of any factors that may inhibit or foster the flow of economic and other benefits to Pimicikamak.

36. Manitoba Hydro has wholly failed to identify or assess any of the above for Pimicikamak in the EIS.

(ii) The Studies Must be Done to Adequately Assess the Environmental Impacts of Keeyask

37. No one has yet assessed how Pimicikamak and its citizens connect to, value and use and occupy the land. This information is critical to identify and understand “what” Pimicikamak is and thus what is and will be impacted by developments affecting it, including Keeyask.

38. No one has yet assessed the impacts to Pimicikamak’s connections to, values in and uses and occupation of the land, by Keeyask cumulatively with other aspects of and impacts from the existing MH Project.

39. Without these Studies, neither Pimicikamak nor the Commission can know the potential direct and cumulative environmental impacts of Keeyask.

40. The workplan and budget for the Studies has recently been submitted to Manitoba Hydro. Pimicikamak submits that the cause for the Studies arises now as a direct result of Manitoba Hydro’s application for a licence for Keeyask. Hence, Manitoba Hydro is considering paying for the cost of such Studies.

41. Pimicikamak submits that the evidence that would be gathered by the Studies is integral to and necessary for the Commission to render its decision on Keeyask. This is because:

- (a) Such information forms a part of the evidence that the Commission is mandated to receive directly, or
- (b) The failure to require its admission would amount to a denial of procedural fairness.

42. It would be profoundly unfair if the Commission went ahead with and completed its hearings without Pimicikamak having the opportunity to present the results of the Studies.

43. Further, Pimicikamak submits that to complete its evaluation of Keeyask, the Commission must know all of the potential environmental effects of Keeyask. Without the results of the Studies, the Commission will be missing crucial information on the environmental impacts that may be experienced by Pimicikamak.

44. Therefore, Pimicikamak submits that the Commission needs the results of the Study to fulfill its mandate and determine if:

- (a) The environment will be protected and maintained to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations if a licence is issued; and


- (b) Any licence conditions required to ensure appropriate and optimal environmental management practices.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION (see following tabs):

TAB 1	<i>Statement of Facts by Darwin Paupanakis</i>
TAB 1 Exhibit A	Article 9 of the Northern Flood Agreement
TAB 1 Exhibit B	Shared Value Solutions, Draft Workplan for Land Use and Occupancy Research Project
TAB 2	<i>Statement of Facts by Dr. Annette Luttermann</i>
TAB 2 Exhibit A	A. Luttermann CV
TAB 2 Exhibit B	COSEWIC Assessment and Update Status Report on the Lake Sturgeon in Canada
TAB 2 Exhibit C	Manitoba Lake Sturgeon Management Strategy (2012)
TAB 2 Exhibit D	Proceedings of the Lake Sturgeon research and recovery workshop, Winnipeg, Manitoba, March 10-12, 2010)
TAB 2 Exhibit E	Dam Footprint Impact Summary – BC Hydro Dams in the Columbia Basin, March 2011
TAB 3	<i>The Environment Act</i> , C.C.S.M., c.E125 (Manitoba)
TAB 4	<i>The Sustainable Development Act</i> , C.C.S.M. c. S270 and Schedules (Manitoba)
TAB 5	Manitoba Clean Environment Commission, <i>Process Guidelines Respecting Public Hearings</i> , April 2013 (Rule 2.08, 3.21 and 3.22)
TAB 6	Excerpts from the Clean Environment Commission Report on Bipole III Transmission Project, June 2013
TAB 7	<i>The Environmental Impact Statement Guidelines for the Keeyask Generation Project</i> , March 2012
TAB 8	<i>Prasad v. Canada (Minister of Employment and Immigration)</i> , [1989] 1 S.C.R. 560

- TAB 9** *Saskatchewan Teachers' Federation v. De Moissac* (1973), 38 D.L.R. (3d) 296 (Sask.C.A.)
- TAB 10** Decisions of the Clean Environment Commission in the Hearings into Bipole III, August 29 – 31, 2012
- TAB 11** Letter from Minister Gord Mackintosh to Shannon Johnson, Manitoba Hydro, August 14, 2013 regarding Environment Act License No. 3055 dated August 14, 2013 issued to Manitoba Hydro for the Bipole III Transmission Project
- TAB 12** Excerpt from Sara Blake, *Administrative Law in Canada*
- TAB 13** Alan J. Ehrlich and Sherry Sian, *Cultural Cumulative Impact Assessment in Canada's Far North* in Proceedings of the 24th Annual Conference, International Association for Impact Assessment (Vancouver, British Columbia)
- TAB 14** Backgrounder on the Elk Valley Cumulative Effects Management Framework
- TAB 15** Bram Noble, "Strategic approaches to regional cumulative effects assessment: a case study of the Great Sand Hills, Canada", *Impact Assessment and Project Appraisal*, June 2008
- TAB 16** *Fundy Tidal Energy Strategic Environmental Assessment Final Report: Executive Summary*, Submitted April, 2008

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