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# Lake Manitoba and Lake St. Martin Outlet Channels

Indigenous Perspectives on the Environmental Impact Assessment

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Gary Wagner - May 24, 2020 **FINAL**



*"Aerial View of Assiniboine Flooding" by Mike Deal, May 12, 2011. Published in The Brandon Sun.  
Portage Diversion overflows.*

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## Executive Summary

The Lake Manitoba and Lake St. Martin Outlet Channels Project is a large flood-control infrastructure proposal from the Government of Manitoba. The Project is currently undergoing a federal environmental impact assessment that calls for comments from interested parties, including Indigenous people potentially affected by the proposed works. The Interlake Reserves Tribal Council (IRTC) is preparing to comment on the Project, and requested support from Gary Wagner to help them do so.

Gary set the Government of Manitoba's Environmental Impact Statement (EIS) in the context of all of the planning, design, and assessment work performed by the Proponent, provincial and federal agencies, the IRTC and its member communities, technical specialists, and other participants in the public comment process. He examined the documents placed on the Public Registry, media coverage, and relevant materials available to the public.

Gary reviewed the methodology used in conducting the environmental impact assessment, and looked specifically at:

- the sufficiency of baseline data and appropriateness of methodologies to predict effects (and) the (effectiveness of) mitigation measures proposed by the proponent;
- the level of certainty in the conclusions reached by the proponent on the effects;
- the manner in which significance of the environmental effects have been determined (i.e. the scientific merit of the information presented and the validity of the proponent's methodologies and conclusions);
- the follow-up program proposed by the proponent; and
- whether additional information is required from the proponent to complete the technical review.

Gary Wagner was tasked to review four (4) Valued Environmental Components (VEC) identified in the EIS:

- heritage resources;

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- traditional land and resource use;
  - indigenous health and socioeconomic conditions; and
  - Aboriginal and Treaty rights.

This paper analyses the environmental impact assessment process and makes several observations on the methods employed, the information presented, and the conclusions reached. The analysis and observations lead to a number of questions that the IRTC expects to be answered as the environmental impact assessment process continues.

In conclusion, the paper comments on five topics resulting from this analysis:

- judgement of significance,
  - follow-up,
  - monitoring,
  - reporting, and
  - compliance.
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## Introduction

Gary Wagner is an independent environmental and regulatory consultant with over thirty years experience working with industry, government, and Indigenous people across Canada. He has been involved with dozens of environmental assessments (EA) under federal, territorial, provincial, and Aboriginal<sup>1</sup> land claim settlement legislation.

On April 14, 2020, the Interlake Reserves Tribal Council Inc. (IRTC) contracted Gary Wagner to participate in their technical review of the Environmental Impact Statement (EIS) for the Lake Manitoba and Lake St. Martin Outlet Channels Project (The Project).

The Interlake Reserves Tribal Council Inc. is a partnership of six Manitoba Interlake Region communities working together to advance the collective well-being of their members. This technical review is being done with three of the six IRTC communities:

- Dauphin River First Nation
- Kinonjeoshtegon First Nation
- Lake Manitoba First Nation

“The Tribal Council and its employees will attempt to enhance the authority of the band councils within its jurisdiction and in no way will it interfere or attempt to organize in a manner that would detract from those authorities.”<sup>2</sup> The IRTC’s efforts to help coordinate its members’ participation in the public comment period for this project-level environmental assessment do not replace or override the work being done by other member First Nations, the efforts of the individual IRTC Chiefs and Councils, or the initiatives of neighbouring Aboriginal communities that are not part of the IRTC.

The issues, concerns, and Traditional Knowledge and Land Use (TKLU) of all Indigenous people potentially affected by this Project are intimately interconnected. In the 2016 national census, 18% of the residents of Manitoba self-identified as Aboriginal, the largest percentage

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<sup>1</sup> Because *The Constitution Act, 1982* defines Aboriginal people as First Nations (formerly Indians), Métis, and Inuit and the term “Indigenous” has only recently become more popular within the Government of Canada, this paper will refer to Aboriginal or Indigenous people interchangeably. It will also occasionally refer to First Nations if that term is used in a reference document or comment.

<sup>2</sup> [www.irtc.ca](http://www.irtc.ca) accessed May 5, 2020.

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of all the provinces.<sup>3</sup> Since 2006, the Aboriginal population in Canada has grown by 42.5% — more than four times the growth rate of the non-Aboriginal population over the same period.<sup>4</sup> These are weighty issues and concerns that are of interest to all Manitobans and, indeed, all Canadians.

The Aboriginal reserve boundaries or community locations in the Interlake Region of Manitoba do not necessarily define how each Aboriginal individual exercises his or her Aboriginal and Treaty rights. Current environmental impact assessment methodology requires the proponent to define a Regional Assessment Area (RAA), a Local Assessment Area (LAA), and a Project Development Area (PDA) as part of the effort to establish a spatial scope for the assessment. But these defined areas are only valid within the scope of the project and the scope of the assessment. They are not binding on Aboriginal people.

Many members of the potentially affected First Nations do not live on their home reserve, and may reside on other reserves or in distant communities for personal reasons. “Among the 744,855 First Nations people with registered or treaty Indian status, 44.2% lived on reserve in 2016, while the rest of the population lived off reserve.”<sup>5</sup> Those who do not reside on a reserve still retain the Constitutionally recognized and affirmed right to access their traditional lands and waters for cultural purposes, and may have to travel long distances to do so. For those reasons, the experiences of neighbouring communities, such as the Lake St. Martin First Nation, are relevant to all Aboriginal people interested in this Project.

The timeline of this Project is interesting when set in the historical context of Manitoba’s development as a province and the evolution of the environmental impact assessment process over time, mainly because of the experiences of Indigenous people over roughly 400 years of interaction with non-Indigenous people. That context is vital to understanding the attitude of Indigenous people, their organizations and communities, toward government initiatives such as the Lake Manitoba and Lake St. Martin Outlet Channels Project.

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<sup>3</sup> Statistics Canada (2018) “National Indigenous Day ... by the numbers.” [www.statscan.gc.ca](http://www.statscan.gc.ca).

<sup>4</sup> Statistics Canada (2017) “Aboriginal Peoples in Canada: Key Results from the 2016 Census.” [www150.statcan.gc.ca](http://www150.statcan.gc.ca). Archived Content.

<sup>5</sup> op.cit Statistics Canada (2017).

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## Scope of Work

The IRTC technical review team sought “to ensure that the EIS is scientifically and technically accurate, to confirm that the proponent’s conclusions are supported by a defensible rationale, and to identify any areas that require clarification or additional work in relation to the assessment of environmental effects as defined in section 5 of CEAA 2012.”<sup>6</sup>

The IRTC technical review would cover:

1. the sufficiency of baseline data and appropriateness of methodologies to predict effects (and) the (effectiveness of) mitigation measures proposed by the proponent;
2. the level of certainty in the conclusions reached by the proponent on the effects;
3. the manner in which significance of the environmental effects have been determined (i.e. the scientific merit of the information presented and the validity of the proponent’s methodologies and conclusions);
4. the follow-up program proposed by the proponent; and
5. whether additional information is required from the proponent to complete the technical review.

Gary Wagner was specifically tasked to review four (4) Valued Environmental Components (VEC) identified in the EIS:

- heritage resources;
- traditional land and resource use;
- indigenous health and socioeconomic conditions;
- Aboriginal and Treaty rights.

In addition to these specific VECs, Gary was asked to provide a general review of the methodology used in conducting the environmental impact assessment. Observations on methodology are placed in purple text boxes throughout this document.

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<sup>6</sup> This environmental impact assessment began in 2013 under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

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## My Methodology

Any appraisal of an environmental impact assessment process must establish the context of that assessment, plus controlling and influencing factors, including:

- the timeline of its evolution;
- the actions and inactions of the assessing agencies;
- the influence of political circumstances;
- changes to legislation, regulation, and procedural guidelines;
- other relevant regulatory proceedings;
- the role of the media;
- the interaction of the process with the public;
- the views of the various stakeholders;
- the concerns and expectations of Aboriginal people;
- any engagement with potentially affected communities; and
- the overall approach taken by the proponent.

Canada's project-based environmental assessment mechanisms are interactive and reactive, rarely proactive. Strategic environmental assessment is virtually unknown, even if government theoretically requires it.<sup>7</sup> The Government of Canada has, since 2010, been working under a "Cabinet Directive on the Environmental Assessment of Policy, Plan, and Program Proposals"<sup>8</sup> that expects Ministries to follow published strategic assessment guidelines. Yet, in this example, the federal government seemed unprepared for the environmental and socio-economic issues arising from massive floods in Manitoba in 2011 and 2014, calls for new flood control structures, requests for federal funding for those

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<sup>7</sup> see [www.IAIA.org](http://www.IAIA.org) "Strategic Environmental Assessment" for further discussion.

<sup>8</sup> see [www.iaac-aeic.gc.ca](http://www.iaac-aeic.gc.ca) for information on sustainability, strategic environmental assessment, and Cabinet responsibilities for implementation.



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structures, and significant displacement of, and adverse effects on, Aboriginal communities for which the Crown has fiduciary responsibilities.

In the midst of this specific environmental assessment, the Government of Canada proposed sweeping changes to environmental assessment and resource management legislation and regulation that was indirectly relevant to the project and the process, influenced the outcome, and increased complexity and uncertainty for all participants. These legislative and regulatory changes would generate considerable public debate that affected the confidence with which Aboriginal groups participated in the process and public attitudes toward the final results.

Once a project-level environmental assessment is triggered in Canada, the formal environmental assessment process creates:

- defined products (the EIS, for instance);
- numerous participants (such as the proponent, the public, the directly affected parties, Aboriginal groups, the regulatory authorities, consultants and other technical specialists, and the media);
- complex subjects (The Project, The Site, The Budget, The Schedule, The Valued Environmental Components, The Cumulative Effects Assessment, etc.) for detailed scrutiny; and
- prescribed milestones established to control the time available for comment and criticism, ostensibly to streamline the process, avoid duplication and overlap, and ensure the process is expeditious and efficient.

The timeline of this environmental assessment would change throughout the proceedings, directly affecting the ability of Aboriginal communities (and others) to participate effectively. Within that timeline, the Canadian Environmental Assessment Agency (now Impact Assessment Agency of Canada) is empowered to stop and start the clock whenever it wishes to allow the proponent time to respond to questions or provide more detail on any issues that arise, or to enable government authorities to do their work. While trying to be expedient and efficient, the Agency may require considerable additional effort to address new or complex issues that the proponent has not adequately addressed. The Agency may also decline to stop

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the clock, request additional information, or extend any deadline as it sees fit. Participants outside of government do not have those same powers, so must continually react to changing circumstances and deadlines with comparatively limited resources.

The objectives of the environmental impact assessment process are to:

- identify all of the environmental effects of a proposed project, both positive and negative;
- avoid significant adverse environmental effects wherever possible and practical to do so;
- mitigate those significant adverse effects if they cannot be avoided;
- compensate those affected through financial payment, accommodation, or other efforts by the proponent should it prove impossible to completely avoid or mitigate those significant adverse effects;<sup>9</sup> and
- provide terms and conditions for any approvals issued to ensure that commitments made during the environmental impact assessment process are subject to follow-up, monitoring, and reporting actions to ensure compliance or to enable regulatory undertakings.

The entire process is meant to be iterative; meaning responsive action that is commonly understood, repeated or habitual. Although the various provincial and federal agencies engaged in environmental impact assessment offer legislation, regulation, guidelines, and advice to proponents, the proponent controls how the work is actually conducted and how they behave during the process. Therefore, the proponent is largely responsible for the outcome of the process and the execution of the project with associated terms and conditions. In this case, the proponent also happens to be a department of the Government of Manitoba.

Although many proponents, through experience, learn how to “play the game,” some proponents never do. Despite decades of environmental assessment experience, hundreds of case studies, a substantial body of legal precedent, hundreds of skilful professional EA practitioners, and seemingly unlimited opinion, Canada’s environmental assessment “system” often lets us all down. Playing the game is always more challenging when the rules keep changing during the proceedings, which may last for a decade or more. The environmental impact assessment of the Lake Manitoba and Lake St. Martin Outlet Channels

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<sup>9</sup> The term “significant” is highly subjective, but vitally important, because adverse effects that are not deemed “significant” do not necessarily require any action or effort on the part of the proponent or regulatory agencies.

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Project began in 2013 and is not yet completed as of May 2020 (the date of this report). This project-level environmental assessment is currently in Phase Three of a Five Phase process.<sup>10</sup> There is much more work to come. All of these factors influence how this environmental impact assessment was, and is, being conducted. Assuming the Project is approved, with terms and conditions, all of the factors considered will, to a greater or lesser degree, influence how the Project is eventually constructed and operated.

From April 14, 2020 to May 25, 2020 (approximately six weeks), Gary Wagner:

- reviewed the materials provided by IRTC, as and when they arrived;
- examined the documents on the Government of Canada's Public Registry;
- looked at the materials produced by the Government of Manitoba's project planning and design process;
- participated in IRTC teleconferences;
- exchanged emails and telephone calls with other participants in this work;
- read press reports and watched relevant, publicly available videos;
- compiled applicable professional environmental assessment literature;
- completed a draft version of this report for IRTC review;
- responded to requests from IRTC to do additional research; and
- produced a final version of this report with mutually agreed upon changes and additions.

Due to the limited time and resources available for this work, some important information or opinion may have been missed or misunderstood. The author would be grateful if readers would provide that missing information or opinion, help correct any errors or misunderstandings, and make suggestions for improvement by email to [wagnerconsulting@shaw.ca](mailto:wagnerconsulting@shaw.ca).

Any errors or omissions are the sole responsibility of the author. The opinions expressed herein are the author's and do not necessarily reflect the views of the IRTC, the IRTC's member communities, neighbouring Aboriginal communities, or any of their staff.

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<sup>10</sup> Canada (2019) "Impact Assessment Process Overview." [www.canada.ca](http://www.canada.ca).

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## Historical Context

The Red River Valley, including its tributaries, flood frequently and those floods have been affecting the human inhabitants of the floodplain since the first indigenous people visited 8,000 to 10,000 years ago. The massive lakebed of the former glacial Lake Agassiz<sup>11</sup> is broad and shallow, draining northward toward Hudson Bay. The Red River and its tributaries are part of that massive drainage basin. Significant floods were recorded in 1826, 1852, 1861, 1892, 1897, 1904, 1916, 1945, 1948, 1950, 1956, 1960, 1966, 1969, 1970, 1974, 1979, 1987, 1996, 1997, 1999, 2001 and 2006. Red River Valley flooding is a fact of life.<sup>12</sup>

According to Statistics Canada:

*The Red River's watershed encompasses about 290,000 km<sup>2</sup>, including the Assiniboine River basin (163,000 km<sup>2</sup>), which joins the Red River at Winnipeg. About 16% of the Red River basin, excluding the Assiniboine basin, is located in Canada; the remainder is within North Dakota, Minnesota and South Dakota. The river falls just 70 m along its entire length of some 880 km. In Manitoba, the river has an average valley gradient of 0.0001.*

*Because of this flatness, high water has nowhere to go except to overflow the river's shallow banks and spread out across the plain until it resembles a vast, shallow lake. This flooding can have a significant impact on agricultural areas.<sup>13</sup>*

Billions of dollars have been spent over many decades to repair damage caused by Red River Valley flooding and to attempt to reduce or prevent future flooding. The "Flood of the Century" in 1997 prompted comprehensive studies and flood control measures, yet extensive flooding occurred again in 2009, 2011, and 2014. The federal and provincial governments are under significant pressure from landowners and other residents to "do something" about the flooding, extensive damages, and threats to public safety.

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<sup>11</sup> Manitoba Historical Society [www.mhs.mb.ca](http://www.mhs.mb.ca). "Manitoba History: Glacial Lake Agassiz" by Dr. Anthony P. Buckner, Manitoba Culture, Heritage and Recreation, Spring 1990. Revised October 29, 2013.

<sup>12</sup> [www.usgs.gov](http://www.usgs.gov) "Red River Basin Flooding" and [www.museedufjord.com](http://www.museedufjord.com) "The Manitoba Floods: A Tumultuous Past." April 1997.

<sup>13</sup> Statistics Canada 2011 Yearbook, Ch. 15, pp. 211. "Red River Flooding."

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## Indigenous People

After first contact in what would become Manitoba between Indigenous people and Europeans in the period 1690-1692, Indigenous people were viewed as knowledgeable guides, mentors and advisors to the early explorers and settlers, and became partners in the lucrative fur trade, as well as military allies fighting against the Crown's many enemies.<sup>14</sup>

In 1763 following the defeat of France under the Treaty of Paris, *The Royal Proclamation* laid out the relationship between the Crown and Indigenous people in what would eventually become Canada.<sup>15</sup> Somewhere along the way, that relationship changed with an increasing number of encroaching settlers, declining fish and game, deadly disease outbreaks, conversion from a subsistence to an agrarian economy, and evolving government attitudes. Although government representatives implementing their environmental assessment process in 2020 may not understand that history or its importance to Aboriginal people, be assured that First Nation and Métis leaders remember it all too well.<sup>16</sup>

The history of interaction between the Crown (federal and provincial) and Aboriginal people in Canada since 1763 has been well documented in the 1991 Royal Commission on Aboriginal Peoples<sup>17</sup>, the 2015 Truth and Reconciliation Commission<sup>18</sup>, the Department of Justice<sup>19</sup> and numerous scholarly works [start with "Making Sense of Aboriginal Law in Canada" (2015)]

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<sup>14</sup> The Canadian Encyclopedia (2019). "Henry Kelsey." [www.thecanadianencyclopedia.ca](http://www.thecanadianencyclopedia.ca)

"Kelsey was an explorer and trader who worked for the Hudson's Bay Company (HBC) for nearly 40 years. He helped establish the Company's fur trade operations at York Fort on the west coast of Hudson Bay and at Fort Albany on James Bay. Kelsey is best known for his two-year journey from Hudson Bay to the western interior between 1690 and 1692, making him the first European to see the Prairies. His goal was to encourage Indigenous peoples living inland to travel to York Fort to trade their furs."

<sup>15</sup> see <https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645> for more detail on The Royal Proclamation. It essentially set the constitutional structure for future treaties between Aboriginal people and the Crown, and set aside the entire continent west of the Appalachian Mountains for Indigenous people. That intention did not last very long.

<sup>16</sup> For example, see Daschuk, James (2013). "Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life." University of Regina Press.

<sup>17</sup> see [www.bac-lac.gc.ca](http://www.bac-lac.gc.ca) for links to Library and Archives Canada database.

<sup>18</sup> see [www.nctr.ca](http://www.nctr.ca) for links to National Centre for Truth and Reconciliation database.

<sup>19</sup> see [www.justice.gc.ca](http://www.justice.gc.ca) for "Honour of the Crown" and other links of interest.

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by Jamie Dickson<sup>20</sup>]. Then there are the multi-generational effects of the numbered treaties, the Residential School system, the “Sixties Scoop,” forced relocation to reserves, mandatory education, and suppression of Indigenous cultures to consider. The fact that government has not often done the right things in the right way to uphold the Honour of the Crown is not in dispute, but surprisingly still remains poorly known and understood amongst the general Canadian population, including politicians and civil servants. That lack of understanding and respect for Indigenous cultures is pervasive, and often undermines all efforts put toward reconciliation. Indigenous people are justifiably sceptical of government motives, methods, priorities, and promises.

It is interesting that the Manitoba Law Reform Commission in May 2015 recommended changes to the mechanisms for involving Aboriginal people in the environmental assessment process in Manitoba.<sup>21</sup>

*Despite the fact that many of these Aboriginal communities are located in the most environmentally sensitive areas of the province and possess important knowledge about the intricacies of their local ecosystems, there are currently no provisions in The Environment Act that assign Aboriginal communities with a specific role in the environmental assessment and licensing process.*

***Manitoba Law Reform Commission Recommendation:***

***The Government of Manitoba should work in partnership with Aboriginal communities to determine and implement the best means of improving the involvement of Aboriginal peoples in Manitoba’s environmental assessment and licensing process, and the integration of Aboriginal Traditional Knowledge into the decision-making process.***

Before this specific Project was subject to a federal environmental assessment, the Government of Manitoba was well aware that changes to the provincial approach to environmental assessment and licensing with regard to Aboriginal people were needed, and that the improved consideration of Aboriginal Traditional Knowledge in the provincial decision-making process was a necessary part of those changes.

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<sup>20</sup> Dickson, J. (2015) “Making Sense of Aboriginal Law in Canada.” UBC Press, Purich Publishing.

<sup>21</sup> Manitoba Law Reform Commission (2015). “Manitoba’s Environmental Assessment and Licensing Regime under *The Environment Act*.” Final Report.

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On May 30, 2016, a report entitled “Building Relationships and Advancing Reconciliation through Meaningful Consultation”<sup>22</sup> was submitted to the Government of Canada by Bryn Gray, an accomplished lawyer in this field, after the study was commissioned by the Conservative government’s Minister of Indigenous and Northern Affairs in 2015. That report was kept under wraps by the new Liberal government; quietly received without a press release and hidden away on the government’s web site. The report made 47 careful recommendations that are all pertinent to this project and the environmental impact assessment process. There is no evidence that the report was read by the federal or provincial Crown, or indeed any of the government participants in these proceedings. The Indigenous people who were consulted by Bryn Gray, and who provided their suggestions and observations in good faith, are still wondering what happened to all that work.

It is indeed surprising that, despite decades of lawsuits, court decisions, legislative changes, scholarly studies, media coverage, and direct experience, in 2020 we still find ourselves in a situation where Indigenous engagement on a major project was not accomplished effectively. How can that be? Aboriginal and Treaty rights were recognized and affirmed in the *Constitution Act, 1982* — nearly 40 years ago<sup>23</sup>. The Constitution is the highest law of the land, and any law or action that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect. Every other law and regulation, including the *Impact Assessment Act*, is subject to the paramountcy of the Constitution. Section 35 describes the basic rights of the Aboriginal Peoples of Canada. We should all be very adept at understanding the implications of these words by now:

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<sup>22</sup> Gray, Bryn. (2016) Report to the Minister of Indigenous and Northern Affairs. “Building Relationships and Advancing Reconciliation through Meaningful Consultation.”

<sup>23</sup> see [CanLii.org](http://CanLii.org) for official versions of the *Constitution Act, 1982* and Charter of Rights and Freedoms.

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## RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

### Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

### Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

### Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

### Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

## Methodology Observation:

*The province is calling on the federal government to not let consultation get in the way of protecting those threatened by flooding in the Interlake.*

*A release by the Pallister government on Tuesday asked the federal government to do its part to ensure the "timely completion" of two outlet channels in Lake Manitoba and Lake St. Martin to help protect against flooding disasters like those seen in the area in 2011 and 2014 where hundreds were displaced from their homes.*

*Pallister said he doesn't want to see the delays of the past be repeated under his watch and says the feds changing of the rules midstream to broaden the consultation requirements are slowing down the process of protecting Manitobans.*

*"If this continues, we won't get that outlet built, it will take years," Pallister said.*

*Pallister added that it's a difficult balancing act with people who feel they've been wronged in the past and want to use a threat of a delay for more support or compensation.*

*"Meanwhile, the process of protecting people against flooding is delayed and people's lives are left on hold," Pallister said.*

*Winnipeg Sun, November 27, 2018: "Pallister Wants Feds to Let Manitoba Get On With Lake Manitoba Outlet Construction." By Scott Billeck.*



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But Aboriginal people across Canada are only too aware of the ongoing challenges of dealing with government and looking, often in vain, for the Honour of the Crown. Aboriginal people still, after 153 years of marginalization in Canadian society, must fight for their fundamental human rights — including their Constitutionally-protected Aboriginal and Treaty rights. The circumstances surrounding the Lake Winnipeg and Lake St. Martin Outlet Channel Project are no different, and must be taken into account when considering the environmental and socioeconomic aspects of the Project.

Once again, a project-by-project impact assessment approach to a significant infrastructure proposal has been largely ineffective with regard to handling Indigenous perspectives because of a systemic inability to appreciate the context in which the Project will be planned, assessed, constructed and operated. Engagement, consultation (in the formal nation-to-nation context), and reconciliation with Aboriginal people demand mutual respect and understanding. When the Aboriginal communities are under stress, in the midst of massive social upheaval, and already distrustful of government intentions, then successful, meaningful engagement and consultation are virtually impossible. This has been a fundamental weakness of the Project environmental impact assessment from the beginning, and shows every sign of continuing.

Provincial and federal governments persist with aggressive timelines and disrespectful behaviour. They demand responses, only reluctantly allocate resources, and expect decades of neglect to be forgotten so government objectives can be achieved. If the Aboriginal communities object, they are blamed for putting everyone else at risk. But, if the government had done their engagement and consultation properly in the first place, the process would not have been delayed at all. The best example of this issue is Traditional Knowledge and Land Use (TKLU) studies have been increasingly important to environmental impact assessment practice since the 1980s.<sup>24</sup> TKLU studies for this Project were first discussed in 2017, but not completed until 2020 — too late for consideration during the planning and design phases.

Although the capacity among Aboriginal groups to provide information and feedback to the government-controlled process is limited, additional capacity funding is only grudgingly

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<sup>24</sup> Inglis, J.T. (Ed.)(1993). "Traditional Ecological Knowledge: Concepts and Cases." International Program on Traditional Ecological Knowledge. International Development Research Centre. Ottawa.

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doled out (often slowly and inadequately) while unreasonable accelerated timelines are adhered to. Government officials at the provincial and federal levels can organize and employ as many staff and consultants as they require and can afford, but Aboriginal communities cannot. The Aboriginal communities risk being shut out of the decision-making process and having their concerns and questions ignored if they do not comply with the process requirements. Aboriginal leaders, residents, and staff must set their previous priorities aside to deal with the new expectations. Then they must hire technical specialists to assist with complex details if they have any hope of understanding the potential adverse effects of the Project, collecting information from their constituents, formulating a coherent response, and being taken seriously by government planners and decision-makers.

The Environmental Impact Statement (EIS) for this Project is only one of many documents, technical studies, maps, diagrams, and pieces of correspondence pertinent to the environmental impact assessment process and listed on the Public Registry. The EIS includes 5 Volumes, 16 Chapters, 212 Tables, 27 Figures, 36 Appendices, a 15 page Glossary, and 60 pages of Concordance Tables. There are 7 “Referenced Reports” totalling 490 pages, and 10 “Referenced Chapters” [stand-alone reports ranging from 10 to over 1000 pages each] of highly technical material. This brings the grand total for the EIS to at least 9,551 pages of reading material (it is impossible to know for certain because so many documents on the Public Registry are duplicated or missing significant parts). That is just one EIS “document.” In reality, the EIS and the environmental impact assessment include dozens of documents all interconnected across the project timeline representing thousands of hours of work by dozens of contributors.

Imagine being the small administrative staff in a modest Aboriginal community when that massive missive lands with a thump on your desk! The Canadian Environmental Assessment Agency then gives you 60 calendar days to review the EIS and comment. You would have to read 160 pages per day just to get through the EIS itself.

It seems quite clear that this approach is fundamentally flawed, and must change, as so many have pointed out before.<sup>25</sup> The scholarly literature on the most effective ways to engage with Aboriginal people on development projects and related subjects is quite extensive, stretching

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<sup>25</sup> Kirchhoff, D. Gardner, H. and Tsuji, L. (2013) “The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples.” *The International Indigenous Policy Journal* 4:3.

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back over 30 years. Yet here we are in 2020 dealing with the same issues using the same approaches with the same unfortunate results.



*“Aerial View of Assiniboine Flooding, Interlake” by Mike Deal, May 12, 2011. Published in the Brandon Sun.*

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## Lake St. Martin Access Road

One of the more contentious issues for IRTC arising from the way this Project has evolved is how the “Lake St. Martin Access Road,” was handled by the Government of Manitoba. The Lake St. Martin Access Road is a 19.5 km expansion / extension / improvement of existing roads and winter roads to enable all-season access to the Lake St. Martin Emergency Outlet Channel. The IRTC contends that this work was once considered to be part of the Lake Manitoba and Lake St. Martin Outlet Channels Project, and would therefore be subject to the federal assessment, but that the Government of Manitoba severed this road from the Project application so they could proceed with the work without informing or consulting with Aboriginal people. The Government of Manitoba contends that the pressing need for this road to access the Lake St. Martin Emergency Outlet Channel meant that the road construction could not wait for a federal assessment.

It is odd that the May 28, 2019, Lake St. Martin Access Road Environmental Impact Assessment<sup>26</sup> documentation is included on the Public Registry for the Lake Manitoba and Lake St. Martin Outlet Channels Project if it is not considered part of that Project. The EIA Report includes the following explanation:

*The Federal Government of Canada reviewed key information on the proposed Project towards determining whether it needed to be assessed under the Federal review process. In a letter (dated June 24, 2016) to MI from the Canadian Environmental Assessment Agency, the Agency reviewed available information on the proposed road and concluded that the proposed Lake St. Martin Access Road is not an incidental activity to the Lake Manitoba and Lake St. Martin Outlet Channels Project or a designated physical activity under CEAA 2012. This was based in part on the expressed purpose of the road being that it is required for the Lake St. Martin Emergency Outlet Channel. The Agency also indicated that they recognize that the proposed all-season road is less than 50 km in length and therefore does not meet the threshold under Section 25(c) of the Regulations Designating Physical Activities under the Canadian Environmental Assessment Act (2012).<sup>27</sup>*

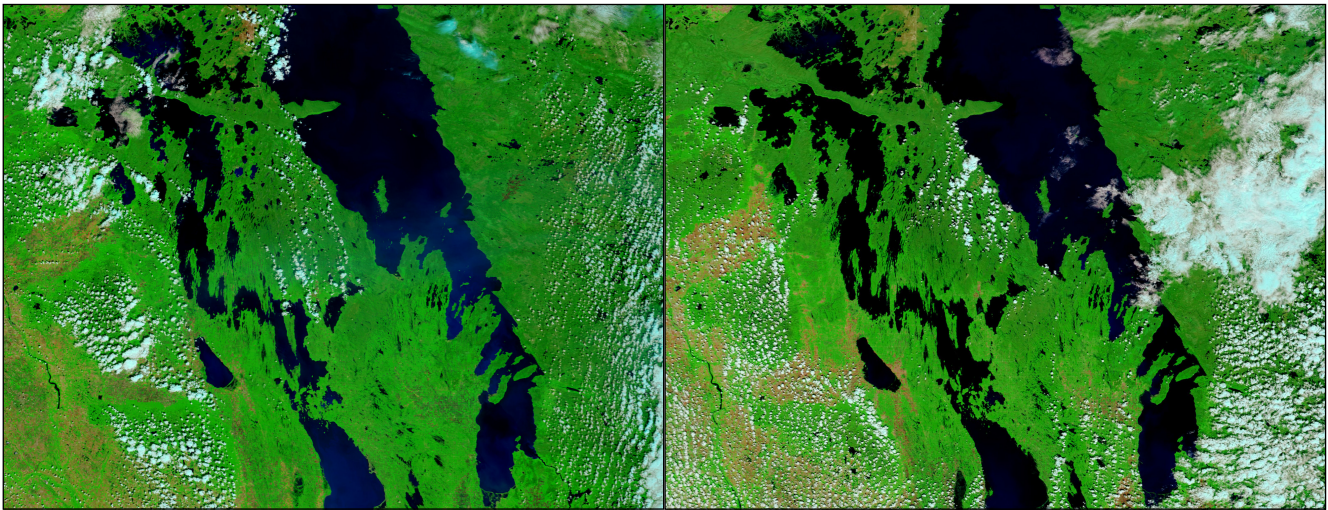
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<sup>26</sup> Lake Manitoba and Lake St. Martin Outlet Channels Project — Environmental Impact Statement (March 5, 2020). Referenced Chapter 9.

<sup>27</sup> Manitoba (2019). “Lake St. Martin Access Road Environmental Assessment Report.” pp. 2-7.

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The IRTC disagrees with this explanation because construction and upgrading work for the Lake St. Martin Access Road directly affected its members and infringed on their Aboriginal and Treaty rights. The IRTC contends that the work was done without notice or consultation. On May 6, 2020, the IRTC filed an injunction against the Province of Manitoba to prevent them from issuing any further approvals for work on the Lake St. Martin Access Road or any other activities associated with the Lake Manitoba and Lake St. Martin Outlet Channels Project until the federal environmental impact assessment is complete.<sup>28</sup>



*Interlake Region 2010 Pre-flood Condition*  
[eoimages.gsfc.nasa.gov](http://eoimages.gsfc.nasa.gov)

*Interlake Region 2011 Post-flood Condition*  
[eoimages.gsfc.nasa.gov](http://eoimages.gsfc.nasa.gov)

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<sup>28</sup> Interlake Reserves Tribal Council (2020). Press Release: “Interlake Chiefs File an Injunction Against the Province of Manitoba.”

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## The Project

*Manitoba Infrastructure is proposing the construction and operation of a new permanent flood control management system located in Manitoba. As proposed, the Lake Manitoba and Lake St. Martin Outlet Channels Project would consist of two new diversion channels each approximately 23 kilometres long: the first running northwards from Watchorn Bay on Lake Manitoba to Birch Bay on Lake St. Martin (Lake Manitoba Outlet Channel), and a second running northeast from Lake St. Martin to Lake Winnipeg, south of Willow Point (Lake St. Martin Outlet Channel). The project would also include the construction of two combined bridge and water control structures, a 24-kilovolt distribution line, and the re-alignment and/or construction of provincial highways, municipal roads and three bridge structures. [Canadian Impact Assessment Registry]*

The Proponent of this Project is the Government of Manitoba, through their responsible department known as Manitoba Infrastructure, with contributions from other provincial departments and a large number of consultants.<sup>29</sup> Manitoba's Aboriginal consultation approach is governed by the 2009 "Interim Policy for Crown Consultations with First Nations, Métis Communities, and other Aboriginal Communities" [A "Renewed Framework for Crown-Indigenous Consultations" has been promised, but is not yet in effect].

The Government of Manitoba was aware that the new Liberal government in Ottawa (elected on November 4, 2015) was committed to involving Indigenous people more fully in environmental impact assessment at the federal level, including a larger role for Indigenous Traditional Knowledge. But when they submitted the "Project Description Summary for a Designated Project under CEAA" to the federal government on January 9, 2018, there was very little detailed information on Aboriginal engagement and consultation. This seems odd given that IRTC, as one example among many, had been communicating with the Government of Manitoba on that very topic in the context of the Lake Manitoba and Lake St. Martin Outlet Channels Project since October 2017.<sup>30</sup>

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<sup>29</sup> See Government of Manitoba, Lake Manitoba and Lake St. Martin Outlet Channels Project. [www.gov.mb.ca](http://www.gov.mb.ca).

<sup>30</sup> Interlake Reserves Tribal Council letter dated May 16, 2018, summarizing the consultation undertaken from October 2017 on the Lake Manitoba and Lake St. Martin Outlet Channels Project and future consultation required. Listed on Public Registry as attachments to Reference Number 96.

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The federal government wrote directly to Aboriginal groups in Manitoba requesting comment on the “Project Description Summary for a Designated Project under CEAA,” and later shared all of the comments and questions received from all of the respondents with the Proponent by the end of February 2018. Manitoba Infrastructure was informed that several Aboriginal groups were not satisfied with the Indigenous engagement and consultation efforts so far.

On March 9, 2018, CEAA issued the “Notice of Environmental Assessment Determination” that officially decreed that the Project required a federal environmental impact assessment. Note that three more months had passed and it was increasingly obvious that Aboriginal groups were still not satisfied with the Proponent’s engagement and consultation efforts.

On March 12, 2018, CEAA published the draft EIS Guidelines tailored specifically for this Project and again invited comment. Only two days later, on March 14, 2018, CEAA formally started the federal environmental assessment process.

The final “Guidelines for the Preparation of an Environmental Impact Statement pursuant to the *Canadian Environmental Assessment Act, 2012* for the Lake Manitoba and Lake St. Martin Outlet Channels Project” were made public on May 15, 2018. The Government of Manitoba ramped up its efforts in response to these federal expectations, and carried on producing the Environmental Impact Statement required by the federal government. Canada amended the Guidelines to increase Indigenous engagement several times.

On June 5-6, 2019, the federal government convened the “Technical Advisory Group for the Lake Manitoba and Lake St. Martin Outlet Channels Project.” That Technical Advisory Group included Indigenous organizations that reported “Multiple participants articulated anticipated deficiencies in the Environmental Impact Statement (EIS) related to the reflection of their nations’ perspectives, concerns, knowledge, and expertise, especially given the proposed August 2019 submission date.”<sup>31</sup>

The first Manitoba Infrastructure EIS was submitted to the Government of Canada on August 30, 2019, more than a year after the EIS Guidelines were published. All of the participants in the environmental impact assessment process began reviewing that substantial document, including numerous Federal Authorities. The review lasted nearly two months.

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<sup>31</sup> Letter from CEAA to Manitoba Infrastructure dated June 27, 2019 Re: Technical Advisory Group for the Lake Manitoba and Lake St. Martin Outlet Channels Project June 2019. Available on the Public Registry, Reference Number 61.

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On October 22, 2019, the first Manitoba Infrastructure EIS (dated August 30, 2019), was judged deficient by the Government of Canada particularly with regard to Indigenous engagement, and their analysis documented dozens of “detailed conformity gaps” that would have to be addressed. For example:

“2.3 Engagement with Indigenous groups

*The EIS requires more detail on the ongoing and future Indigenous engagement.*

*Information and / or clarity is required to fully understand:*

- *the potential effects of changes to the environment on Indigenous peoples, and potential impacts to Aboriginal and Treaty rights for each of the Indigenous groups identified by the Agency;*
- *how information from Indigenous groups, including, but not limited to, Indigenous knowledge, was considered and incorporated into Project Design and the EIS;*
- *how areas of discrepancy between the views of Indigenous groups and the proponent were addressed; and*
- *the efforts taken to validate with affected Indigenous groups regarding the integration of Indigenous knowledge.*

*Further engagement may be required to fulfill the information requirements related to Indigenous groups’ views on the project, the assessment of environmental effects, the assessment of impacts to rights, and the use of Indigenous knowledge.”<sup>32</sup>*

Note that all of the participating Indigenous groups had been saying the same things for years. The effort required among small, poorly funded, community-based Indigenous organizations and communities to participate in this complex process was immense. Even reading and understanding the numerous technical documents, let alone responding to increasingly detailed requests for comment from the federal and provincial governments, taxed the Indigenous participants to the limit. Five months would pass while the Proponent worked on the improvements requested to the EIS, including to Indigenous engagement and consultation.

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<sup>32</sup> Annex 1 — Detailed Conformity Gaps. Letter from the Impact Assessment Agency of Canada to Manitoba Infrastructure dated October 22, 2019. Subject: Conformity review outcome for the Lake Manitoba and Lake St. Martin Outlet Channels Project Environmental Impact Assessment.

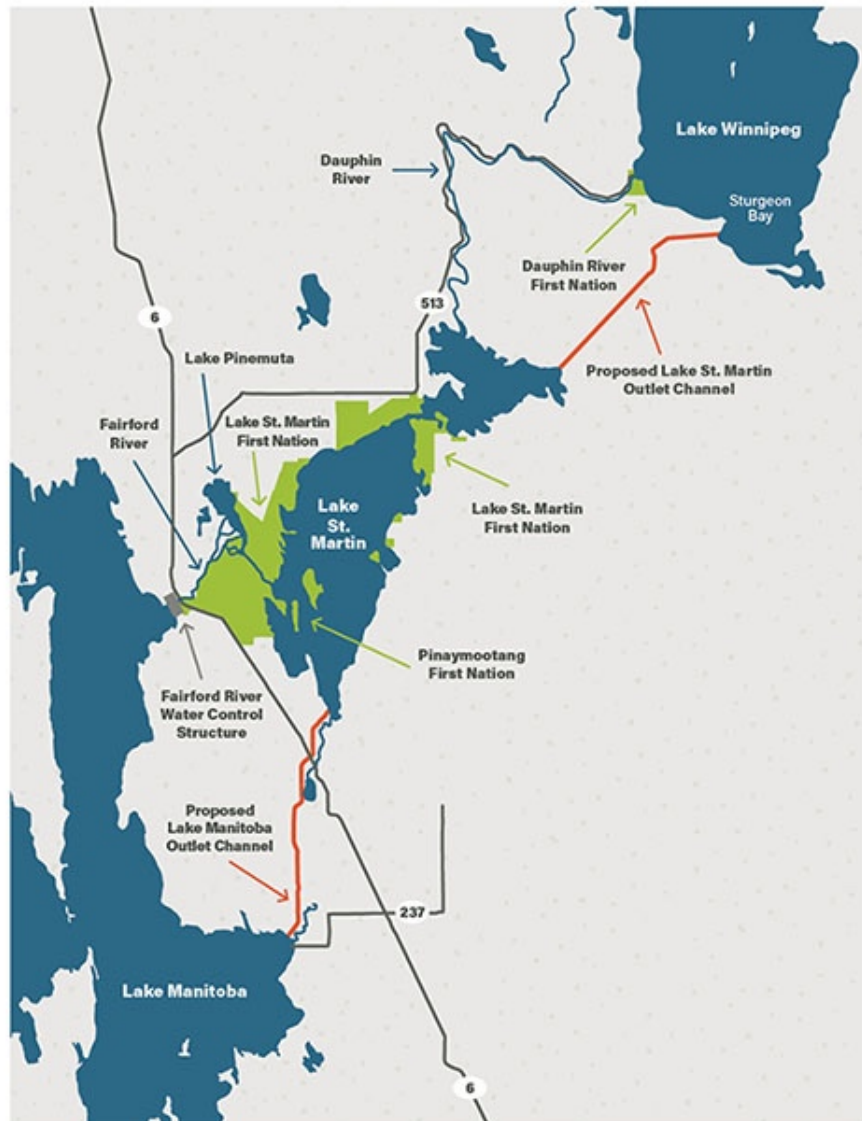


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The revised Environmental Impact Statement (EIS) for this project was filed by Manitoba Infrastructure with the Government of Canada on March 9, 2020. Participants began to examine the revised EIS, and the federal environmental impact assessment clock started again. The revised EIS was accepted as sufficient to re-start the federal environmental assessment process on March 14, 2020.

However, funding to support further research on Indigenous Knowledge and Land Use was slow in coming, and the Indigenous communities would struggle to collect and document that information until May 2020 (the date of this report). This TKLU information is essential to address Indigenous concerns, potential significant environmental effects, adverse effects on Aboriginal and Treaty rights, cultural practices, health and socioeconomic conditions, impacts on heritage resources, and complaints about the process that the Proponent should have had before it started planning and designing the Project.

How all that new information will be collected and applied, from this point onwards, to this continually evolving Project remains unclear.



*Project Location, from Government of Manitoba, Manitoba Infrastructure  
Lake Manitoba and Lake St. Martin Outlet Channels Project Overview  
[www.gov.mb.ca](http://www.gov.mb.ca).*

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The re-submitted EIS consists of approximately 10,000 pages of text, diagrams, images, and supporting technical documents. Financial support for their participation in its review and analysis was offered to the IRTC, but that support was comparatively limited.

Comments and analysis were constrained by the available time and funds, because on April 3, 2020, the Government of Canada set a deadline to submit comments by May 25, 2020. That deadline required IRTC to review, analyze, and comment on the EIS and its supporting documents within 52 calendar days.

On March 20, 2020, the Manitoba government declared a province-wide state of emergency under the *Emergency Measures Act* “to protect the health and safety of all Manitobans and reduce the spread of COVID-19.”<sup>33</sup> Other public health orders were issued from time to time, including on April 30, 2020, and May 4, 2020, restricting travel and other activities. Therefore, this review and comment period coincided with mandatory travel restriction and isolation orders, making the work (especially community engagement) extremely challenging and time consuming.

#### **Methodology Observation:**

*Reviewing and analysing a large, complex EIS during a State of Emergency is extremely difficult, if not impossible, especially for communities with limited capacity that are already struggling with significant threats to community health and well-being. Access to the IRTC’s member communities was prohibited and not medically advisable, especially for Elders who would normally be asked to provide their traditional land and resource knowledge. Given the importance of providing indigenous perspectives under Section 35 of the Constitution Act, and the mandatory requirements of the Impact Assessment Act for indigenous consultation and engagement, refusal to extend the deadline to enable face-to-face communication and site visits may be grounds for legal challenge on a procedural basis.*

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<sup>33</sup> [gov.mb.ca](http://gov.mb.ca) COVID-19 accessed May 5, 2020.

## Environmental Impact Assessment Timeline

It is relevant to any discussion of methodology to describe the timeline along which all government announcements were made, and to list the deadlines to which all public and government participants were expected to adhere. Some of the key events were described above, but when put into context the chronology of this process becomes more clear:

ACTION	SOURCE	DATE	OUTCOME
2011 Flood		Spring 2011	Public demand for flood mitigation.
Evacuation of First Nation residents from flooded reserve lands.	Manitoba	May - July 2011	Over 2,000 Indigenous people were evacuated. Some would not return to their homes for nine years, and some would never return. Approximately 5,000 non-Indigenous people were evacuated.
Lake St. Martin Emergency Outlet Channel Planned, Constructed and Used to Release Surplus Water.	Manitoba	July 22, 2011 - November 19, 2011 (four months)	Emergency measures to reduce flooding were built without consultation with affected FN communities.
Lake St. Martin Outlet Channel Authorization Regulation.	Manitoba	August 2, 2011	Permitted Government of Manitoba to build and operate emergency channel. No consultation with directly affected Aboriginal groups was required.
Class Action lawsuit filed on behalf of residents of Pinaymootang, Little Saskatchewan, Lake St. Martin, and Dauphin River FNs for damages suffered during flood.	McKenzie Lake Lawyers and Troniak Law	April 3, 2012 - January 12, 2018	While not admitting wrongdoing, the Governments of Manitoba and Canada agreed to pay \$90,283,000.00. Some payments were not made until Spring of 2019.

ACTION	SOURCE	DATE	OUTCOME
<b>2011 Flood Review Task Force</b>	Manitoba	April 2013	<p>“Manitoba 2011 Flood Review Task Force Report” (April 2013). Report to the Minister of Infrastructure and Transportation.</p> <p>“First Nations and Flooding:126. Future reviews conducted by the Province of issues that affect First Nations communities must include a mandate adequate to encompass the distinctive nature of First Nations’ issues, including geographically and gender balanced representation by members of affected First Nations communities.”</p>
<b>Technical Review</b>	Manitoba	2011- 2013	“2011 Flood: Technical Review of Lake Manitoba, Lake St. Martin and Assiniboine River Water Levels (Oct 2013). Government of Manitoba.
<b>Lake Manitoba and Lake St. Martin Regulation Review</b>	Manitoba	February 2013	“Finding the Right Balance: A Report to the Minister of Infrastructure and Transportation (February 2013).”
<b>Lake Manitoba and Lake St. Martin Outlet Channels Project First Proposed.</b>	Manitoba	2013	Options considered internally and designs that best fit internal parameters were put forward. Emphasis on “unoccupied Crown land.”
<b>Lake St. Martin Emergency Outlet Channel Used.</b>	Manitoba	Winter 2014-2015	The “emergency” channel was used again during the 2014 flood.

ACTION	SOURCE	DATE	OUTCOME
<b>2014 Flood.</b>	Assiniboine River watershed	Spring 2014	Public demand for flood mitigation and First Nation dissatisfaction with government support for relocation of 2011 evacuees.
<b>Provincial perspective on Environmental Assessment.</b>	Manitoba	2015 - 2024	The Province of Manitoba proposed a lengthy timeline for this Project with 5.5 years of engagement and consultation until a CEAA approval in September 2020, when construction would commence.
<b>Douglas Eyford delivers “A New Direction: Advancing Aboriginal and Treaty Rights” to Government of Canada.</b>	Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy	February 20, 2015	Extensive engagement in developing a new framework to address Aboriginal and treaty rights in Canada. Provides 43 recommendations.
<b>Manitoba Law Reform Commission Publishes Report.</b>	Manitoba Law Reform Commission	May 2015	“Manitoba’s Environmental Assessment and Licensing Regime under <i>The Environment Act.</i> ”
<b>Assiniboine River and Lake Manitoba Basins Flood Mitigation Study.</b>	Manitoba and KGS Group	January 2016	Engineering design basis and supporting documentation for Lake Manitoba and Lake St. Martin Outlet Channels. Also includes results of public consultation efforts.

ACTION	SOURCE	DATE	OUTCOME
<p><b>Manitoba ratifies <i>The Path to Reconciliation Act</i> that declares the government’s commitment to advancing reconciliation through respect, understanding, engagement and action.</b></p>	<p>Manitoba</p>	<p>March 15, 2016</p>	<p>Manitoba still relies on the “Interim Provincial Policy for Crown Consultations with First Nations, Métis Communities, and other Aboriginal Communities” from 2009. A new policy framework has been promised.</p>
<p><b>Pallister Government Elected in Manitoba.</b></p>	<p>Manitoba</p>	<p>May 3, 2016</p>	<p>Provincial relations with Aboriginal people will change and development projects will receive higher priority.</p>
<p><b>Bryn Gray Report: “Building Relationships and Advancing Reconciliation through Meaningful Consultation.”</b></p>	<p>Canada</p>	<p>May 30, 2016</p>	<p>Numerous relevant suggestions and observations on Aboriginal consultation were presented to the Government of Canada after an independent researcher engaged with proponents, civil servants, and indigenous peoples.</p>
<p><b>Lake St. Martin Emergency Outlet Channel Intended to be Used as Required.</b></p>	<p>Manitoba</p>	<p>December 14, 2016</p>	<p>Public comments solicited on Interim Operating Licence on January 21, 2017 and January 26, 2017.</p>
<p><b>Project Description Summary for Designated Project under CEAA.</b></p>	<p>Manitoba</p>	<p>January 9, 2018</p>	<p>First formal document required to initiate federal assessment for proposed new outlet channels.</p>

ACTION	SOURCE	DATE	OUTCOME
<b>Interlake Reserves Tribal Council: October Phase 1 Traditional Land Use and Traditional Knowledge Report.</b>	Golder Associates.	January 17, 2018	Results of preliminary meetings in October and December 2017 where representatives of the provincial government attended “to fulfill consultation requirements and provide technical information” on the Project.
<b>Public Comments Invited on Project Description Summary.</b>	Canada (CEAA)	January 23, 2018	This is an open public engagement process.
<b>By letter, CEAA invites list of Chiefs of potentially affected Aboriginal groups to comment in detail on Summary of Project, including “any potential impacts of the Project on potential and established rights.”</b>	Canada (CEAA)	January 23, 2018	Chiefs given until February 12, 2018, to comment on Project Description Summary (less than 3 weeks).
<b>CEAA requests all Federal Responsible Authorities to provide “Advice Record” by February 12, 2018.</b>	Canada (CEAA)	January 23, 2018	Responsible Authorities, including Health Canada, request more information on Aboriginal health, cumulative effects, and impacts on Aboriginal and Treaty rights.
<b>Manitoba Métis Federation (MMF) provides detailed response with legal cases, Canada-MMF Framework Agreement, and Métis Law of the Harvest references.</b>	Manitoba Métis Federation	February 12, 2018	CEAA cannot claim to be unaware of the importance of Aboriginal rights. Manitoba Infrastructure states that MMF is not a directly affected Indigenous community and is not provided funding to enable engagement, consultation or traditional knowledge and land use.



ACTION	SOURCE	DATE	OUTCOME
<p><b>Liberal government introduces Bill C-69 to change environmental impact assessment process.</b></p>	<p>Liberal Party of Canada</p>	<p>February 2018</p>	<p>Legislation would reflect UN Declaration on the Rights of Indigenous Peoples, respect Aboriginal and Treaty rights, increase use of Indigenous knowledge, and ensure meaningful consultation.</p>
<p><b>Numerous public and Aboriginal groups (including IRTC) provided comments to CEAA by deadline.</b></p> <p><b>Some Aboriginal groups did not meet the deadline due to limited capacity.</b></p>	<p>Participants</p>	<p>February 12, 2018</p>	<p>Many concerns expressed about the Summary of Project document, CEAA process, cumulative effects, lack of consultation, inadequate funding, limited resources, poor understanding of Aboriginal and Treaty rights, lack of traditional knowledge, and the need for more opportunities to comment.</p>
<p><b>Federal Authorities also responded to CEAA. Some did not make the deadline.</b></p>	<p>Canada</p>	<p>February 12, 2018</p>	<p>Numerous environmental effects listed that required more information, including direct effects on Reserve Lands.</p>
<p><b>Notice of Environmental Assessment Determination.</b></p>	<p>Canada (CEAA)</p>	<p>March 9, 2018</p>	<p>Federal acknowledgment that this Project will require an environmental assessment.</p>
<p><b>Draft EIS Guidelines.</b></p>	<p>Canada (CEAA)</p>	<p>March 12, 2018</p>	<p>Comments on Draft EIS Guidelines requested by CEAA.</p>
<p><b>Notice of Commencement of an Environmental Assessment.</b></p>	<p>Canada (CEAA)</p>	<p>March 14, 2018</p>	<p>Official start of federal Environmental Assessment process.</p>

ACTION	SOURCE	DATE	OUTCOME
<b>Comments on Draft EIS Guidelines.</b>	Numerous participants	March - May, 2018	Approximately three (3) months of feedback from public and Aboriginal groups. Several Aboriginal groups say that engagement with Manitoba Infrastructure has been inadequate and without proper funding their participation is prevented or limited.
<b>Final Environmental Impact Statement Guidelines.</b>	Canada (CEAA)	May 15, 2018	Very clear that Manitoba Infrastructure did not properly define the spatial scope of the project, and did not include all of the potentially affected Indigenous groups in planning, design, or assessment.
<b>Amendment to the EIS Guidelines.</b>	Canada (CEAA)	August 16, 2018	Add six (6) Indigenous groups.
<b>Federal Funding Notice.</b>	Canada (CEAA)	August 29, 2018	Participants allowed to apply for funding.
<b>Change in Depth of Engagement with Five Indigenous Groups.</b>	Canada (CEAA)	December 21, 2018	Increase level of engagement required with Brokenhead Ojibway Nation, Sagkeeng First Nation, Black River First Nation, Poplar River First Nation, and Misipawistic Cree Nation.
<b>IRTC discovers that work had already started on the Project while the environmental assessment was not yet completed.</b>	IRTC	March 13, 2019	"Vegetation clearing along 23 km ROW is a federal offence and violates promises to consult with communities."
<b>Manitoba clears right-of-way in preparation for construction.</b>	Manitoba	April 1, 2019	Aboriginal groups protest extensive clearance work without community consultation. IRTC objects.

ACTION	SOURCE	DATE	OUTCOME
Change in Depth of Engagement with Five Indigenous Groups.	Canada (CEAA)	June 27, 2019	Increase in level of engagement with Pimicikamak Okimawin, Tataskweyak Cree Nation, York Factory First Nation, Fox Lake Cree Nation, and First Nations in Treaty 2 Territory
Letter posted on Public Registry re: The Technical Advisory Group inaugural meeting on June 5 and 6, 2019.	Canada (CEAA)	June 27, 2019	“Multiple First Nations and Manitoba Métis Federation indicated that they had not been engaged or consulted by Manitoba Infrastructure or that engagement or consultation done to date has been insufficient. Multiple participants articulated anticipated deficiencies in the Environmental Impact Statement (EIS) related to the reflection of their nations’ perspectives, concerns, knowledge, and expertise, especially given the proposed August 2019 submission date.”
Letter from Manitoba Infrastructure to CEAA re: Indigenous Engagement Requirements.	Manitoba	July 21, 2019	“Manitoba Infrastructure remains committed to engaging with indigenous communities.”
Federal “Impact Assessment Act” proclaimed.	Canada	August 28, 2019	Canadian Environmental Assessment Agency (CEAA) becomes Impact Assessment Agency of Canada (IAAC).
Pallister Government Re-Elected.	Manitoba	September 10, 2019	Project declared as a priority.
Outcome of Conformity Review of EIS.	Canada (IAAC)	October 22, 2019	EIS does not conform and must be re-submitted.

ACTION	SOURCE	DATE	OUTCOME
Detailed annexes listing non-conformities.	Canada (IAAC)	October 22, 2019	Numerous federal departments, First Nations and MMF are dissatisfied with engagement.
Manitoba Infrastructure begins work to upgrade Lake St. Martin Access Road, originally included in the scope of the Project.	IRTC	July 2019	Manitoba Infrastructure detached the access road from the Outlet Channel Project Description in October 2018, making it a separate project under provincial jurisdiction. IRTC objects.
IRTC makes Canada and Manitoba aware of lack of consultation and lack of good faith with respect to Access Road construction and associated adverse environmental effects on FN communities.	IRTC	December 2019	No action taken. Access Road upgraded.
Manitoba engagement and consultation efforts criticized.	Winnipeg Free Press	February 26, 2020	Pallister government accused of not consulting properly with Aboriginal people.
EIS submitted to Impact Assessment Agency of Canada.	Manitoba	March 5, 2020	New EIS submitted to IAAC (5 volumes, 16 chapters, 7 referenced reports, 10 referenced chapters, plus references.)
New Summary of the Environmental Impact Statement posted on Public Registry.	Canada (IAAC)	March 9, 2020	Public comments invited. Original deadline April 23, 2020, (46 calendar days). New deadline May 25, 2020, due to COVID-19 pandemic (78 calendar days).
EIS accepted and federal assessment begins.	Canada	March 14, 2020	Federal timelines kick in.

ACTION	SOURCE	DATE	OUTCOME
Government of Manitoba Declares province-wide State of Emergency under the <i>Emergency Measures Act</i> to reduce spread of COVID-19 virus.	Manitoba	March 20, 2020	Prohibited public gatherings of more than 50 people. Prevents meetings in communities and collection of Indigenous knowledge in groups.
Indigenous communities begin restricting access by non-residents due to coronavirus threat.	IRTC	March 20, 2020	Fieldwork on Traditional Knowledge and Land Use becomes almost impossible.
Orders under <i>The Public Health Act</i> restrict gatherings to no more than 10 people.	Manitoba	April 14, 2020	Further restricts meetings and collection of Indigenous knowledge.
Orders under <i>The Public Health Act</i> require that anyone entering Manitoba must self-isolate for 14 days.	Manitoba	April 16, 2020 April 20, 2020	Isolation order prevents consultants and other technical specialists from entering Manitoba to assist with the environmental assessment.
Information Request Round 1, Package 1.	Canada (IAAC)	April 23, 2020	Detailed questions and concerns from technical reviewers.
IAAC Environmental Impact Assessment Progress Update.	Canada (IAAC)	April 27, 2020	IAAC announces that they requested more information from the proponent on April 23, 2020. Updated web page enables participants to submit a comment, view comments, and access the documents on the Registry.
“Interlake Reserves Tribal Council Traditional Knowledge and Use Study Specific to Manitoba Infrastructure’s Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project.”	Firelight Research Inc. with the Interlake Reserves Tribal Council.	May 1, 2020	Draft report reveals considerable fear and apprehension among respondents towards this Project and its impacts on Aboriginal and Treaty rights.

ACTION	SOURCE	DATE	OUTCOME
<p><b>Premier excludes Indigenous people from remarks on 150th anniversary of Manitoba becoming a province.</b></p>	<p>Brian Pallister</p>	<p>May 12, 2020</p>	<p>Long Plain Chief Dennis Meeches, whose First Nation sits near Pallister’s family farmstead, was unsurprised Pallister didn’t mention Indigenous people. "That's basically what we've come to expect from the premier," said Meeches. "He has a very hard time reconciling his own issue with Indigenous people, and unfortunately he's carried that into the premier's office."</p>
<p><b>Deadline to submit comments on the potential environmental effects of the Project and any proposed measures to prevent or mitigate those effects.</b></p>	<p>Impact Assessment Agency of Canada</p>	<p>May 25, 2020</p>	<p>This report was provided to the IRTC for inclusion in their package of comments.</p>

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## Observations and Analysis

The IRTC technical review sought “to ensure that the EIS is scientifically and technically accurate, to confirm that the proponent’s conclusions are supported by a defensible rationale, and to identify any areas that require clarification or additional work in relation to the assessment of environmental effects as defined in section 5 of CEEA 2012.”

The main weaknesses of the proponent Manitoba Infrastructure’s approach to this environmental assessment include:

1. An overall lack of appreciation at the working level for the need to engage with Indigenous communities well in advance of any irrevocable decisions on project location, design, construction, and operation. A large number of Aboriginal groups were left out of early consultation, and were subsequently added much later in the process. The Government of Manitoba does not appear to have many, if any, strong working relationships with Aboriginal communities throughout the province, despite the May 4, 2009, “Interim Provincial Policy for Crown Consultations with First Nations, Métis Communities, and Other Aboriginal Communities.” There is still a barrier of mistrust that delays or prevents effective engagement and consultation.<sup>34</sup>
2. A lot of effort was invested in the Aboriginal engagement and consultation process for the Project for at least five years. Some of that effort was effective, but much of it was not. It is difficult to discern the reasons for less effective engagement and consultation from the EIS and associated documents. The EIS expresses the Proponent’s and other government departments’ points of view, but not the opinions of the participating Indigenous communities (especially if those points of view differ). It would be interesting to investigate those interactions further, balancing both perspectives, once this process is complete.
3. The Indigenous Engagement components of the EIS say all the right things about the Honour of the Crown, the legal Duty to Consult, and the need to understand Aboriginal

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<sup>34</sup> Winnipeg Free Press (February 26, 2020). “More Talk Than Action on Consultation.” Includes Schuler comment: “To complicate matters further, Manitoba Infrastructure Minister Ron Schuler said this week that “formal” consultations with Indigenous communities have still not taken place. There have been “engagements,” but no formal talks, he said. The province is negotiating with Ottawa to determine what criteria should be used to hold formal consultations.”

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and Treaty rights. The principles appear to be understood at the higher levels of the organization, but somewhere along the chain of command there is a weakness in the Proponent's efforts in the communities that led Indigenous leaders to mistrust the ultimate results. This mistrust should be further investigated. It will remain a barrier to future projects if left unresolved.

4. A perplexing lack of respect for, and understanding of, the importance of Aboriginal and Treaty rights, including their legal standing in relation to the Crown's responsibilities and fiduciary obligations, at the working level. Manitoba continues to undertake work, such as road allowance clearance, without any consultation or engagement whatsoever. Such disrespectful actions undermine any positive efforts that may have taken place and set reconciliation back across the province.
5. A similar lack of respect for Aboriginal Knowledge and Land Use, including a reluctance to provide the resources and time necessary to methodically collect that Aboriginal Knowledge and Land Use information in all of the potentially affected Indigenous communities to inform the project planning and assessment process. Manitoba may have a "Crown-Aboriginal Consultation Participation Fund," but it requires formal Contribution Agreements to access the money. At the time this report was being prepared, some of the Aboriginal Knowledge and Land Use studies had not yet been completed because of funding delays and other restrictions. It might be better to put a core funding and capacity-building mechanism in place that does not rely on a specific project to trigger access.
6. An institutional and systemic failure across the Government of Manitoba to provide Indigenous communities with the capacity to impart timely and effective responses to the various stages of the project design, planning and assessment process, especially during the 2011 and 2014 floods, the displacement of entire communities from their homes, and the COVID-19 State of Emergency.
7. The confusing failure by Manitoba Infrastructure to provide the basic information in the first Environmental Impact Statement that they knew, or should have known, would be required for the federal environmental assessment. Important details, data, references, and basic document organization were found wanting by all participants, especially federal Responsible Authorities. Detailed conformity gaps were identified on October 22, 2019 and are still being addressed as this report was being prepared and as the federal



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government works towards creating an “Impact Assessment Report.” Delays or failures in providing that basic information from the outset resulted in significant conformity gaps and the need to supply a revised EIS before the federal process could proceed, and as the process continues more problems and omissions are being identified.

8. On page 5.27 of the EIS, “Manitoba Infrastructure and Province of Manitoba Indigenous and Northern Relations (INRM) are engaging Indigenous peoples to better understand the Project’s potential impacts on Treaty or Aboriginal rights. Engagement allows for Indigenous people to raise issues and concerns that will be further examined as part of the EIS.” But this comment is in the EIS that they are talking about. After many years of engagement and consultation, why would the government need “to better understand” these issues if their efforts had been, in fact, effective? Most of the issues and concerns were identified in the January 2018 Golder report from meetings held in 2017.<sup>35</sup> If those issues and concerns had been pursued and clarified, the work would be much further ahead.
9. A significant disconnect between the public service work invested in the Project and the political leadership’s comments, in public and private, about the urgent need to get the Project built as soon as possible.<sup>36</sup> Public comments from the Premier of Manitoba caused unnecessary confusion, undermined the already limited trust of government motives in Indigenous communities, and slowed down the proceedings as worried Aboriginal leaders sought legal advice on how best to proceed. Lobbying the Prime Minister to speed up a process that Trudeau himself was instrumental in creating was bound to raise eyebrows and suspicions.<sup>37</sup> Attempting to rally other provincial Premiers to put pressure on the federal government to revise the new impact assessment legislation suggested that Premier Pallister did not respect the federal process.<sup>38</sup> Some participants wondered if

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<sup>35</sup> Golder Associates (2018). “Interlake Reserves Tribal Council: October Phase 1 Traditional Land Use and Traditional Knowledge Report.”

<sup>36</sup> CBC News, November 27, 2018. “First Nation chiefs blast province, say consultation on Manitoba flood channels was inadequate.” Ian Froese, CBC Manitoba.

<sup>37</sup> Winnipeg Free Press, August 11, 2019. “‘I Come in Peace,’ Pallister Says After Summit with PM.”

<sup>38</sup> Winnipeg Free Press, February 13, 2020. “Pallister Seeks to Put Premier Pressure on Ottawa Resource-Project Process.” “Brian Pallister says he’s attempting to organize a conference call with his fellow premiers to demand Ottawa provide clarity on the approval process for future resource development projects.”

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Canada was merely going through the motions and the Project would be approved regardless of their concerns and suggestions.

10. Technical specialists wrote most of the documents placed on the Public Registry. These specialists are used to writing for their technical peers, not for a non-technical audience. These posted documents were not intended to describe the Project to a lay audience with limited local technical support. Most of the technical appendices were difficult to understand and, therefore, guaranteed that outside technical support for Indigenous participants would be necessary. Were any of these documents translated into Aboriginal languages, as they were into French?

As the Peguis First Nation stated:

*“After reviewing a lot of the documents that have been sent to our First Nation communities I begin to wonder how our people can understand this process and what’s required of them?”*

*I have been in this field of Environmental assessments on first nations behalf for approximately 10 years and have spent a life time on the land learning from my elders. Yet I have had to read this document over and over and portions of it repeatedly in order to fully understand what is being said and what is being asked of us?*

*It baffles me as to why Gov’t seems to think that anyone can open this document, read it, and understand what is expected of them. This I believe is a process that is nowhere near a fair and honourable process for our people. If read to many of our elderly that speak mostly Ojibway or Cree, do you think they are going to understand what is being said and asked of them through this document?”* [letter dated April 15, 2018 from Peguis First Nation to Anna Kessler, Canadian Environmental Assessment Agency].

11. Although public servants are used to relying on letters, emails, and telephone calls to disseminate information and solicit replies, they may not always work with small, overtasked Indigenous organizations with limited capacity to take on complex engineering projects and environmental impact assessments. Recognizing the bureaucratic need to keep careful track of engagement, consultation and communication efforts, perhaps other more personal and direct approaches would be more effective. Tailor the engagement effort to the local circumstances, instead of applying a “one size fits all” philosophy. Provide an appropriate level of technical support to engagement efforts,

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so that community members become more comfortable with the complexity of the proposed Project.

12. Item 10 above is illustrated by the summaries of engagement and consultation efforts in Chapter 5 and the associated Appendices, which vary widely. Some communities took advantage of meetings, presentations, open houses, site visits, and helicopter tours. Some did not. The author would be interested in discussing the reasons for such a wide variation in engagement and consultation responses.

### **Data, Methodology and Effectiveness of Mitigation**

This portion of the IRTC technical review covers the sufficiency of baseline data and appropriateness of methodologies to predict effects, and the effectiveness of mitigation measures proposed by the proponent.

Aboriginal people, especially Elders, are often suspicious of the intentions of outsiders asking for detail about culturally significant places, harvesting activities, and medicinal plants. They may be highly protective of that information for fear of misuse. Many Indigenous people are deeply worried that their way of life is under threat. For example:

*Yes, I'm scared that we'll flood and it kind of annoys me because the government is going to make these channels to save them, but we'll be the ones that it's gonna hurt.<sup>39</sup>*

### **Heritage Resources**

The “Guidelines for the Preparation of an Environmental Impact Statement, pursuant to the Canadian Environmental Assessment Act, 2012” (dated May 15, 2018), require the proponent to discuss “physical and cultural heritage, including structures, sites or things of historical, archaeological, paleontological or architectural significance level of certainty in the

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<sup>39</sup> Firelight Research Inc. (May 1, 2020). “Interlake Reserves Tribal Council Traditional Knowledge and Use Study, Specific to Manitoba Infrastructure’s Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project.”

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conclusions reached by the proponent on the effects,” and “Aspects of cultural heritage that should be considered, and that have been identified as important by Indigenous groups.”<sup>40</sup>

It appears that Manitoba Infrastructure (with some support from other departments) conducted the community engagement sessions that were used to write the two parts of the EIS that speak to Heritage Resources: Volume 1, Chapter 5 [Public and Indigenous Engagement] and Chapter 9 [Assessment of Potential Effects on Human Environment].

There is little or no evidence that during the early project planning phase the Government of Manitoba Historic Resources Branch specialists spoke with, or made presentations to, Indigenous leaders or communities with regard to their investigations of potential adverse effects on heritage resources that might be caused by the Project. If they had done that, especially with effective translation into Aboriginal languages, communities may have been able to help fine-tune the location of field investigations that followed.

That communication could also have guided the desktop and field research of other departments that should have informed Project design and planning. Elders and others whose first language is not English, and who do not have technical training, would struggle to understand the technical reports, storyboards and presentations described in the EIS. Few Aboriginal Elders would be comfortable accessing information on the project website, using email, completing questionnaires, or looking at maps, satellite images, or other technical presentations. Although the Government of Manitoba keeps telling the Federal government the public engagement process has been thorough, the fact that many Indigenous communities still do not trust the results suggests it was not effective for many Indigenous people. For example, despite the light attendance at the earliest Traditional Land Use and Traditional Knowledge meetings held by Golder Associates in 2017, several respondents mentioned grave sites, travel routes and other details but there is no indication that the information was followed up.<sup>41</sup>

*Throughout the meetings, IRTC members expressed concerns about the potential effects that the Project may have on their Aboriginal and treaty rights, including their ability to continue TLU activities and maintain TEK. Additional concerns were expressed about the potential for the Project to*

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<sup>40</sup> Acknowledged in the EIS, pp. 9.212 Chapter 9.6 “Heritage Resources.”

<sup>41</sup> Golder Associates (2018). “Interlake Reserves Tribal Council: October Phase 1 Traditional Land Use and Traditional Knowledge Report.”

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*affect the environment itself. Many of the concerns expressed were reported at multiple meetings and by multiple participants.*<sup>42</sup>

The EIS states: “It is anticipated that the Heritage Resources Impact Assessment (HRIA) that is expected to be required for the Project would be conducted by a Heritage Resources specialist in advance of construction” [pp. 9.213, para 2.]. There does not seem to be any firm commitment to conducting site-specific HRIAs, even though “concerns relevant to heritage resources were raised during open houses held with the public and engagement with Indigenous groups since 2011” [pp.9.214, para.5].

Later, the document states: “An HRIA is not completed or approved by HRB for the Project and, therefore, potential residual effects on heritage resources are possible” [pp. 9.217, para. 6]. Under “Mitigation,” the EIS says: “Because of the nature of archaeological sampling, a preconstruction HRIA may not identify all heritage resources, and there is an unlikely chance of encountering previously undiscovered features and objects during construction. Manitoba Infrastructure is developing an Environmental Protection Program (EMP) to address mitigation and monitoring requirements (see Section 3.7).”

So, according to the EIS, an HRIA is not currently planned and there is no guarantee it would find anything anyway. The Heritage Resources Branch would rely on a discovery protocol under the future “Cultural and Heritage Resources Protection Plan” as part of the Proponent’s Environmental Protection Program. It is all rather vague. Indigenous groups are not reassured that enough research and field work has been done to avoid disturbing sensitive sites (especially unmarked graves). They do not necessarily believe that a plan that they have not yet seen will adequately address their concerns.

It seems obvious that Indigenous communities are intensely interested in the possible adverse effects on heritage resources, especially on sites that would be permanently disturbed by the construction and operation of the channels, access roads, and associated works. There would be limited recourse should construction crews damage or destroy artefacts without realizing what they were doing, or while under pressure to maintain schedules during construction. Important sites might never be identified, protected or studied. The Indigenous people to whom those artefacts and sites belong might never know.

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<sup>42</sup> Golder Associates (2018). “Interlake Reserves Tribal Council: October Phase 1 Traditional Land Use and Traditional Knowledge Report.” pp. 16.

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## Traditional Land and Resource Use

The preamble of the *Impact Assessment Act* [S.C. 2019, c. 28, s.1 assented to on June 21, 2019] states:

“Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects.”

The Trudeau government has repeatedly proclaimed its interest in “a new relationship with Indigenous peoples:”

*“Working together also means sharing what we know and learning from each other. Whether that’s traditional knowledge or statistical data, if we are to collectively work on helping communities heal and succeed, this is vital. All of us need hard data in order to make decisions both small and large.*

*Those of us gathered in this room have the historic opportunity to define, together, what this relationship based on recognition will look like for generations to come.*

*Let’s not allow others to define our relationship for us, or squander this extraordinary opportunity out of fear, mistrust or doubt.”<sup>43</sup>*

This speech was delivered just before the federal environmental impact assessment process for this Project kicked off. It illustrates the perplexing gap between the publicly stated intentions of the Trudeau government, as expressed by the Prime Minister himself, and the capabilities of the government officials implementing federal policy on the ground:

*“To nurture a nation-to-nation relationship, there has to be trust. Mutual trust.*

*I refuse to engage in, or to ever use policies, that aim to ignore, and then belittle, then attack, and finally blame the recipients of that bad policy.”<sup>44</sup>*

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<sup>43</sup> Canada (December 6, 2016), Prime Minister’s Office. “Prime Minister Justin Trudeau’s Speech to the Assembly of First Nations Special Chiefs Assembly.”

<sup>44</sup> Op. cit. “Prime Minister Justin Trudeau’s Speech to the Assembly of First Nations Special Chiefs Assembly.”

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Unfortunately, four years later, this Project has not fully incorporated Indigenous Knowledge into the Project planning, design and environmental assessment phases. There is a strong disconnect between the Indigenous reconciliation policies of the current federal government, the expressed intentions of the Government of Manitoba, environmental assessment policies and practices, and the execution of this specific environmental impact assessment. There is a limited amount of time available to complete all of the required Traditional Knowledge and Land Use studies and employ the results in the decision-making process. But those constraints are largely caused by the project-by-project approach, the lack of community capacity to respond according to the Proponent's and the federal government's schedules, and the lack of respect for the value of that Traditional Knowledge and Land Use by non-Indigenous people.

The latest report on Traditional Knowledge and Land Use for the IRTC is dated May 1, 2020.<sup>45</sup> The researchers used generally accepted methodologies to collect and summarize Traditional Knowledge and Land Use data, including mapping, as it related to this specific Project. The study is subject to the usual time and budget constraints common to these research projects — there is never enough of either and the results are always “preliminary” or “incomplete.” This observation is not a criticism of the study itself, which can only be done as well as can be expected under the existing conditions. Having to accomplish such a study under a pandemic lockdown could not have been easy.

But the authors make another interesting statement:

*“The area demarcated by mapped site-specific use values should be understood to be a small portion of the actual area required for the meaningful practice of an IRTC member First Nation’s way of life, as well as Treaty and Aboriginal rights.”<sup>46</sup>*

That statement begs the question “then why do it at all?”

One answer is that relying on any given Project’s spatial boundaries, especially the defined “Project Development Area (PDA),” “Local Assessment Area (LAA),” and “Regional Assessment Area (RAA),” as this environmental impact assessment does, fails to recognize the reality of historic Traditional Knowledge and Land Use across the Indigenous group’s

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<sup>45</sup> Firelight Research Inc. (May 1, 2020). “Interlake Reserves Tribal Council Traditional Knowledge and Use Study, Specific to Manitoba Infrastructure’s Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project.”

<sup>46</sup> Op. cit. Firelight Research Inc. pp.9 of 222.

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Traditional Territory. That misconception stems from the Proponent's reliance on "proximity" to the Project footprint to determine which Indigenous communities might be affected by the development, where their reserve boundaries intersect or come close to the Project activities, and how a map of the Project is overlain with a map of Traditional Knowledge and Land Use. At best, this is an inaccurate way to describe past, current, and future traditional land use activities across a broad and changing landscape.

Evidence supporting this view includes the fact that the original list of Indigenous groups approached by the Proponent in the early stages of this process was deemed insufficient by the federal assessors. Significant time passed before the required engagement effort could be expanded, substantially more Traditional Knowledge and Land Use information could be collected, and the clearly increasing potential for adverse effects on Aboriginal and Treaty rights could be understood.

After years of engagement efforts, many Aboriginal leaders said that they had not been properly consulted or that information requested had not been provided. Clearly, some Proponent engagement and consultation efforts were more effective than others. The expanded scale and scope of Traditional Knowledge and Land Use studies still does not embrace the movement of Indigenous people who do not reside on their home reserve, and who probably travel from a distant urban centre to exercise their rights and perform their cultural activities in their Traditional Territories.

It would be better, as Gray<sup>47</sup> points out, to take these studies away from project-specific impact assessment. It might be better to conduct these studies in between projects, perhaps as part of a strategic assessment on Indigenous Knowledge.

*"In terms of the sufficiency of notice, Aboriginal groups raised a number of concerns about how early they are notified and consulted and the amount of time that they are given to respond. There were several examples where Aboriginal groups were given 2 or 3 weeks to review and respond to a complex matter that required reviewing hundreds of pages and/or outside expertise. Aboriginal groups also raised concerns about the lack of flexibility and the fact that timelines often do not take into account their cultural calendars."*

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<sup>47</sup> Gray, B. (2016). "Building Relationships and Advancing Reconciliation through Meaningful Consultation."



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Since project-specific expectations and timelines are always constrained, would it not be better to conduct regional Traditional Knowledge and Land Use programs based on Traditional Territories that might be applied to all development proposals? Federal and provincial officials would know more about the Indigenous communities and Traditional Knowledge and Land Use long before a specific proposal arrived, the Indigenous group would have an improved capacity to respond, and proponents would not have to do work they are poorly suited for.

This approach would also present a tremendous learning experience for provincial and federal officials who are rarely of Aboriginal descent, may not have spent much time in Indigenous communities, and who have previously treated Traditional Knowledge and Land Use studies as an academic exercise.

Traditional Knowledge is another way of documenting significant changes to the landscape as experienced by people who have spent their entire lives out on the land. For example:

*I think the quality of the environment and wildlife has changed a lot because of the environmental changes, you know, the tearing down of trees, building of highways, destruction of tree life, and because of that destruction it throws things off balance and affects the wildlife. It affects the fish life and affects the water. You know the different chemicals they use when they are building these infrastructure projects. You don't know how they are disposing of these elements. Whatever they use drains into our drinking water.<sup>48</sup>*

*I don't know what is causing the contamination on the shoreline on Lake Winnipeg. Algae bloom is coating the whole shoreline. What's causing it? What about zebra mussels coming from Ontario? They're 40 years too late checking all the boats. When they say they're clogging up the pipes in Ontario, it's a matter of time before we get them here in Lake Winnipeg.<sup>49</sup>*

Avoiding or mitigating adverse effects on Traditional Knowledge and Land Use is virtually impossible if they are not fully understood. Indigenous groups could offer training for impact assessment practitioners in government. Increased involvement by Indigenous groups in

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<sup>48</sup> Paraphrased from Firelight Research Inc. (2020). "Interlake Reserves Tribal Council Traditional Knowledge and Use Study, Specific to Manitoba Infrastructure's Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project" to respect confidentiality.

<sup>49</sup> Op. cit. Firelight Research Inc. (2020).

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follow-up, monitoring, reporting, and compliance management is also essential. The results of that work must be fed back into post-project appraisals, to enable continuous improvement of the environmental impact assessment process. These recommendations have been made for decades.

### **Indigenous Health and Socioeconomic Conditions**

Given the severe disruption of community life in all of the IRTC member communities for the past nine years, it is no wonder that coping with the demands of this environmental impact assessment has been problematic. Yet both provincial and federal officials apparently need to be reminded that the social fabric and economy of the Interlake Region have been significantly damaged since the 2011 flood. Thousands of Indigenous people were displaced from their homes, jobs and businesses were lost, and local people had to rely on government support to survive for years.<sup>50</sup> The health and social impacts on all affected communities have been severe, so the baseline against which this Project has been assessed in terms of socioeconomic impacts was significantly altered.

These health and socioeconomic issues are very real in Indigenous communities. The language, culture, and human connections have been torn apart. Many people have died without being able to return to their homes after the 2011 and 2014 floods. Young people have lived most of their lives in “temporary” accommodation where they became adults and started having their own families. Many young Aboriginal people will never return to the reserve or to their traditional pursuits, and that loss will be felt for generations. Already limited trust in government at the federal, provincial and municipal levels has been compromised (often for understandable reasons).<sup>51</sup>

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<sup>50</sup> Aboriginal Affairs and Northern Development Canada (2015). “Internal Audit Report: Audit of the Operation Return Home Project.

<sup>51</sup> Canada (2013). “Manitoba Floods 2011 - First Nations Recovery Needs Assessment.”

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Serious effects on physical and mental health were caused by changes to:

- community
  - separation from family and friends
  - cultural disconnection
  - loss of belief systems
  - landscape and resource damage
  - lack of access to traditional lands and activities
  - changes to education, counselling, and support services
  - difficulty of communication and access to leadership
  - exposure to discrimination and racism in city
  - loss of dignity and self-respect
- shelter (safe, secure, healthy, living environment)
  - a new or temporary house is not necessarily a home
  - hotels are unsuitable for long-term residences
  - damaged homes were unsafe due to structural issues, mould, compromised sanitation, water and heating supply, access, lack of local services, etc.
  - many cherished possessions were lost
  - some “temporary” accommodation lasted many years
  - expenses for living in the city were not adequate
  - lack of access to country food, changes in diet and lifestyle
  - the city is very different living environment from the reserve or rural communities
  - fear of crime, isolation, health and safety
  - cultural and spiritual needs not being met

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- apprehensive about risks to young people (crime, gangs, drugs, alcohol)
  - Livelihood
    - loss of jobs or businesses
    - loss of seasonal employment
    - reliance on government “handouts”
    - increased cost of living
    - fear of future costs of returning to the reserve or having to live elsewhere

In the midst of all that upheaval, the Indigenous people of the Interlake Region have been expected to provide thoughtful commentary on a massive new flood control infrastructure project that will clearly affect their lives forever.

### **Aboriginal and Treaty Rights**

As stated above, Aboriginal and Treaty rights were recognized and affirmed in the *Constitution Act, 1982* — nearly 40 years ago. The Constitution is the highest law of the land, and any law or action that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect. Every other law and regulation, including the *Impact Assessment Act*, is subject to the paramountcy of the Constitution. Section 35 describes the basic rights of the Aboriginal Peoples of Canada. The Province of Manitoba and the Government of Canada have both acknowledged these facts in the context of the environmental impact assessment of the Lake Manitoba and Lake St. Martin Outlet Channels Project.

Yet many Chiefs and Councils, and many Indigenous groups like the IRTC, do not believe that their Aboriginal and Treaty rights have been respected during the environmental impact assessment, or will be protected during construction and operation of the Project. Why?

Many Aboriginal people in Manitoba believe that their ability to access the landscape to exercise their rights has been steadily eroded for decades. They cite encroachment of competing land uses, competition from recreational users, the cumulative effects of multiple

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development projects, and declining environmental quality, including upstream pollution, for that point of view.

*That's what scares me about this channel; what if more flooding happens to my community? Where are we gonna go? What if so much water comes in and it has nowhere to go but to my land? Our community is already surrounded by swampland, these little creeks, and the river. That's what concerns me.*<sup>52</sup>

Many Indigenous people in the Interlake Region believe water quality, fish and wildlife, and plant communities have declined to the point where it is difficult, if not impossible, to enjoy their traditional pursuits. The 2011 flood devastated many habitats, preventing fishing, hunting, trapping, gathering, berry picking, and just being out on the land. Many Indigenous anglers, hunters and trappers must travel long distances to harvest fish and game, gather plants and medicines, or simply to be together on the land or water. Frequent floods over many years have damaged their reserve lands so even cultural gatherings, youth training sites, ceremonial sites, historic trails, and other special places are not as good as they once were.<sup>53</sup> Young people are increasingly disconnected from their language and culture, may reside far away in towns and cities, and may not be interested in traditional cultural practices. Elders and leaders are very concerned about these seemingly insurmountable challenges, which they believe the Project will likely increase rather than decrease. Many Aboriginal leaders are not hopeful for the future of their people, so naturally react emotionally and vigorously when these significant issues arise in conversation with non-Aboriginal people who do not seem to understand how they feel or how serious these threats are. Some community members, for instance in Lake St. Martin, were displaced from their homes for nine years after the 2011 flood. They had few opportunities to exercise their Aboriginal and Treaty rights during that time.

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<sup>52</sup> Paraphrased from Firelight Research Inc. (2020). "Interlake Reserves Tribal Council Traditional Knowledge and Use Study, Specific to Manitoba Infrastructure's Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project" to respect confidentiality.

<sup>53</sup> Olson, R. and Firelight Research Inc. (2020). "Interlake Reserves Tribal Council Traditional Knowledge and Use Study Specific to Manitoba Infrastructure's Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project."

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## Significance

The IRTC asked Gary Wagner to cover “the manner in which significance of the environmental effects have been determined (i.e. the scientific merit of the information presented and the validity of the proponent’s methodologies and conclusions). This is not a very easy thing to do because the judgement of significance in environmental impact assessment has always been problematic. That judgement of significance has usually been performed by technical specialists who are not Aboriginal and who likely have very different views about how significance should be judged. Over many years of professional environmental assessment practice during many projects, the judgement of significance has often been challenged, most frequently when local people believe an adverse effect will have a much more significant impact on their lives, but a government specialist who does not live there and does not share the same culture does not agree. Significant to whom?

Significance is usually evaluated using tools such as a matrix of arbitrary ratings or score cards expressed as “High-Medium-Low or Red-Yellow-Green,”<sup>54</sup> Although some practitioners may be comfortable with such unscientific approaches, especially in the absence of more helpful and defensible ones, such methodological distinctions would be lost on most members of the public, including Aboriginal people.

If the scientist, engineer, project manager, or other Project-level decision-maker receiving the Traditional Knowledge and Land Use reports from potentially affected Indigenous communities does not understand the value of those ‘Valued Components’ to Indigenous people, or does not agree with the “extent of significance” determination, how will that TKLU information and opinion be used on the ground as the Project is built and operated? Unfortunately, the answer too often is “not much or not at all.” This outcome is especially likely if the TKLU study was not particularly well done, does not articulate its findings very well, or uses terms and examples that are outside the reader’s personal or professional experience. Very few consulting engineers or government project managers are experts in Traditional Knowledge and Land Use, or how to apply it to a large infrastructure project.

The *Impact Assessment Act* [S.C. 2019, c. 28, s.1 assented to on June 21, 2019] no longer emphasizes the assessment of the highly subjective term “significance.” Instead, the wording

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<sup>54</sup> Canada (2019) “Summary of the Meeting of the Technical Advisory Committee on Science and Knowledge, December 3-4, 2019, Ottawa.” Accessed through [www.canada.ca/en/impact-assessment-agency](http://www.canada.ca/en/impact-assessment-agency) on May 14, 2020.

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now reads “specify the extent to which those effects are significant.” Very helpful! One must assume that the methodologies used by federal authorities to judge the significance of any adverse environmental effects has not been clarified in the newer legislation. Any attempt to use objective data and defined criteria to determine a highly subjective term like “significance” of any given impact was always highly problematic and infinitely debatable.

### Methodology Observation

*“Significance should be viewed as a descriptor of an effect on valued components in the context of a proposed project, and to what extent the effects are significant and acceptable is eventually determined by society.” [op. cit. pp. 6, para. 1]*

How does society, as a whole, do such a thing? Significance, or “extent of significance,” is relative and highly subjective. An adverse effect considered highly significant and unacceptable to an Aboriginal community may not even be viewed as significant to a distant, non-Aboriginal technical specialist without the same cultural, spiritual or traditional context.

Indeed, a meeting of the “Technical Advisory Committee on Science and Knowledge” on December 3-4, 2019 [six months after the legislation was proclaimed] described the difficulty federal authorities continue to have with the concept of “the extent of significance.”<sup>55</sup>

For example, the Committee acknowledges that “It was also noted that what is positive for one community may be viewed differently by another community. Providing decision-makers information on all perspectives would be helpful.” Precisely.

“Significance should be informed by what is acceptable to affected communities.” Even better. The Committee goes on to observe that “It was noted that thresholds for significance have often been arbitrarily set.” But, chillingly, the Committee concludes that “Ultimately, in making its decision, the Government of Canada (via the Agency or a panel) is the determiner of significance.” The Committee’s next meeting was scheduled for March 2020. The author has not been able to find any minutes or notes for that meeting.

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<sup>55</sup> Canada (2019) “Summary of the Meeting of the Technical Advisory Committee on Science and Knowledge, December 3-4, 2019, Ottawa.” Accessed through [www.canada.ca/en/impact-assessment-agency](http://www.canada.ca/en/impact-assessment-agency) on May 14, 2020.

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The Government of Canada established an “Indigenous Advisory Committee” with representation from First Nation, Inuit and Métis individuals in July 2019 as “a new structure through which First Nations, Inuit, and Métis peoples will provide advice for the development of key policies and guidance to help ensure that the unique rights, interests and perspectives of Indigenous peoples are acknowledged, affirmed and implemented in environmental and impact assessment. Let us hope that they will offer new views on “the extent of significance.”

The mandate of the Committee will be to provide the Agency with non-political advice reflecting the interests and concerns of the Indigenous peoples of Canada for the development of key policy and guidance. The Committee will also be asked to advise on approaches for collaboration and engagement with Indigenous peoples on policy and guidance products.”<sup>56</sup>

The Indigenous Advisory Committee met on July 18-19, 2019, November 6-7, 2019, and January 29-30, 2020. The Committee intends to help draft an “Indigenous Knowledge Policy Framework” by Spring of 2020. Unfortunately, this environmental impact assessment will not benefit from that work. Other components of the Committee’s work plan include:

- Indigenous Knowledge;
  - Development of the IK Framework
  - Review of interim guidance on Indigenous Knowledge in impact assessment; and additional work to address the broader topic of IK and Western Science in the IA process.
  - The First Nations Principles of OCAP (ownership, control, access, and possession) in the context of IK.
- Cooperation regulations and collaboration approaches;
  - Committee interest in working with Agency on a potential discussion paper and plans for collaborative work with Indigenous peoples in developing the relevant regulations.
- Assessment of Impacts on Rights;

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<sup>56</sup> [www.canada.ca/impact](http://www.canada.ca/impact) assessment agency of canada/advisory committees.



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- The Committee indicated interest in providing feedback on Agency’s guidance on the assessment of impacts to rights following a national workshop on this topic in December.
  - Research topics for the Committee’s internal research budget were also discussed including areas including:
    - Indigenous Knowledge (Ethical space and OCAP principles);
    - review of rights-based assessments;
    - development of an early engagement toolkit (best-practices, resources, capacity), and,
    - cultural competency training and tools.<sup>57</sup>

The Government of Canada launched a round of public and Aboriginal consultation on the “Indigenous Knowledge Policy Framework for Proposed Project Reviews and Regulatory Decisions” in June 2019 even before the *Impact Assessment Act* was passed into law on August 28, 2019. As of January 30, 2020, the Impact Assessment Agency of Canada, Natural Resources Canada, the Canadian Energy Regulator, the Department of Fisheries and Oceans, and Transport Canada were still working on it. The federal government hopes to develop an interim Indigenous Knowledge Policy Framework in collaboration with Indigenous partners that would be released for public comment in fall 2020. Again, all of this proposed work will come too late for this particular Project.

### **Follow-Up**

Under current federal environmental assessment practice, the term “follow-up”:

- is a planned program to verify the accuracy of the environmental assessment of the project and, if necessary, to adapt to changing conditions;

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<sup>57</sup> Impact Assessment Agency of Canada. “Summary of the Second Meeting of the Indigenous Advisory Committee, November 6-7, 2019, Ottawa.”

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- determines the effectiveness of measures taken to mitigate the adverse environmental effects of the project;
  - ensures compliance with the proponent's commitments and any regulatory requirements;
  - reports the results of monitoring, compliance audits, and regulatory enforcement; and
  - informs future environmental assessments to encourage continuous improvement.

The results of the follow-up, monitoring, compliance, and enforcement program may be used to support the implementation of adaptive management measures by the proponent. This means that it may not always be possible to predict with certainty all of the potential adverse environmental effects as the Project proceeds. Unanticipated conditions may develop, or workers may discover something that was not predicted during the Project planning and assessment phases. Examples might include an unexpected archaeological site found during excavation, unusual sub-surface conditions, or a species-at-risk bird nest where none was previously seen. It is important for the proponent to have contingency plans and discovery protocols in place to employ when something unexpected happens.

Under the new *Impact Assessment Act*, Indigenous peoples and other communities could have an expanded role in follow-up and monitoring programs. Where circumstances warrant, the Impact Assessment Agency could establish Environmental Monitoring Committees that would help provide additional confidence in the science and other evidence used in follow-up and monitoring programs. Information collected by monitors, and the results of monitoring and follow-up programs, would be made publicly available. Indigenous peoples and other potentially affected communities engaged in monitoring could inform the Impact Assessment Agency of possible non-compliance situations. The *Impact Assessment Act* also includes provisions for fines and penalties in case of non-compliance or other failures to do what was expected. The IRTC should request inclusion in any follow-up, monitoring, and compliance reporting activities assigned to this Project. That involvement would help Indigenous communities learn more about construction, adaptive management, monitoring, and reporting, too.

All of the details on follow-up, monitoring, compliance and enforcement would be laid out in the "Decision Statement" issued by the Minister of Environment and Climate Change upon

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completion of the environmental impact assessment. The Minister has the authority to amend Decision Statements during project implementation if needed.<sup>58</sup>

Involving Indigenous groups in monitoring and reporting is a comparatively new aspect of environmental assessment practice in Canada, so is evolving with experience. The IRTC may wish to consider the following points:

- any IRTC involvement in a follow-up, monitoring and reporting program must be supported by adequate training, funding, and lines of communication to ensure appropriate action is taken as required;
- the results of follow-up, monitoring and compliance action must be clearly communicated to the Indigenous communities affected, in the language(s) of their choice, and using appropriate mechanisms (presentations, written reports, videos, or all of them, etc.);
- a follow-up, monitoring and reporting program must incorporate Traditional Knowledge and Land Use information, site visits, and culturally appropriate schedules;
- the Impact Assessment Agency of Canada and other regulatory agencies, as appropriate, must commit to listening and responding to follow-up, monitoring and reporting efforts in a timely and respectful fashion.
- all “lessons learned” must be shared with interested parties, including communities directly and indirectly affected by the Project, to ensure continuous improvement.

The IRTC requested a list of questions arising from this work that would inform the environmental impact assessment, with the possibility of incorporating the answers into future phases of this specific assessment or other Projects.

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<sup>58</sup> Canada. “The Proposed Impact Assessment System: A Technical Guide.” Undated.

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## Questions

“The Agency develops the draft Impact Assessment Report. In preparing its analysis, the Agency considers the information and evidence provided by the Proponent, expert federal departments, Indigenous groups, the public and other jurisdictions, including provincial, territorial and Indigenous.”<sup>59</sup>

At least Indigenous groups are mentioned twice. That is encouraging.

The following questions have emerged from this review and analysis. The IRTC expects these questions to be addressed before any decisions are taken, preferably before the Impact Assessment Report is compiled, or, if that fails, in the Impact Assessment Report itself.

1. Given the unpredicted and significant upheaval of the 2011 and 2014 floods on Indigenous groups, and the travel and self-isolation restrictions imposed by the Government of Manitoba in 2020, why was the timeline for this environmental impact assessment not extended to allow Indigenous groups sufficient time to complete Traditional Knowledge and Land Use Studies, engage with their residents (especially Elders), and respond to the federal request for comment?
2. Will the Proponent describe in detail how Traditional Knowledge and Land Use Studies have been applied to the planning, design and impact assessment process for this Project? We are particularly interested in how Traditional Knowledge and Land Use Studies only recently completed will be used by the project managers, construction supervisors, engineers, provincial and federal regulators, and others tasked with building the Lake Manitoba and Lake St. Martin Outlet Channels and associated works.
3. How will the Government of Canada ensure that the affected Indigenous groups and communities are involved with the follow-up, monitoring, reporting, and compliance enforcement mechanisms established for this Project?
4. What funding, training, and employment opportunities will stem from those follow-up, monitoring, reporting, and compliance enforcement requirements?
5. Given that no provincial Heritage Resources Impact Assessment (HRIA) was required, or is anticipated, for the Lake Manitoba and Lake St. Martin Outlet Channels and associated

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<sup>59</sup> Canada (2019) “Phase 3: Impact Assessment. Impact Assessment Process Overview.” [www.canada.ca/Impact](http://www.canada.ca/Impact) Assessment Agency of Canada/Policy and guidance/Impact Assessment Process Overview

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works, how will the Proponent and regulatory agencies work with Indigenous communities to deal with any archaeological or heritage discoveries if construction is allowed to proceed?

6. Will the Government of Canada explain why the Crown (provincial and federal) did not ensure that engagement and consultation efforts with Indigenous communities on this Project were adequate from the outset and, in our opinion (as verified by several federal authorities in the 2019 “Detailed Conformity Gaps”), are still not adequate after many years of effort?
7. How were Indigenous people living off reserve included in engagement and consultation efforts?
8. “Detailed Conformity Gaps” were identified in October 2019, including numerous requests for more detail on engagement and consultation with Indigenous groups. Please require the Proponent to provide detailed responses to each of those conformity gaps and ensure that federal authorities put specific, measurable outcomes in place as Conditions of Approval so compliance can be assessed if the Project is allowed to proceed.
9. Why was road allowance clearance work clearly part of this Project allowed to proceed in 2019 without notice to, or consultation with, directly affected Indigenous groups? This work altered local Traditional Knowledge and Land Use practices while studies were underway to document them.
10. On May 30, 2016, a report entitled “Building Relationships and Advancing Reconciliation through Meaningful Consultation”<sup>60</sup> was submitted to the Government of Canada by Bryn Gray, after the study was commissioned by the Minister of Indigenous and Northern Affairs in 2015. Four years later, “meaningful consultation” has still not occurred on a major development project requiring federal approval. Would the Government of Canada please explain why not?
11. The Library of Parliament holds Publication No. 2019-17-E dated June 12, 2019, a Background Paper written by Isabelle Brideau of the Legal and Social Affairs Division outlining the requirements of “The Duty to Consult Indigenous Peoples” that refers to the

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<sup>60</sup> Gray, Bryn. (2016) Report to the Minister of Indigenous and Northern Affairs. “Building Relationships and Advancing Reconciliation through Meaningful Consultation.”

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Bryn Gray report. Has this document been provided to provincial and federal Crown representatives working on this Project?

12. In 2019, the Government of Canada through the Impact Assessment Agency of Canada, established two committees whose work is relevant to this Project and the environmental assessment process: “The Technical Advisory Committee on Science and Knowledge,” and the “Indigenous Advisory Committee.” Please explain the purpose and objectives of those committees and how their work has been incorporated into the Government of Canada’s environmental impact assessment for this Project.
13. How many people who self-declare as “Aboriginal” or “Indigenous” work for the Government of Manitoba and Government of Canada? Of those Aboriginal or Indigenous employees, how many of them worked on the Lake Manitoba and Lake St. Martin Outlet Channels Project environmental impact assessment?

More questions will undoubtedly arise as the environmental assessment process moves into subsequent phases.

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## Summary

Gary Wagner looked at the environmental impact assessment of the Lake Manitoba and Lake St. Martin Outlet Channels Project on behalf of the IRTC from the perspective of an experienced outside observer.

The IRTC technical review team sought “to ensure that the EIS is scientifically and technically accurate, to confirm that the proponent’s conclusions are supported by a defensible rationale, and to identify any areas that require clarification or additional work in relation to the assessment of environmental effects as defined in section 5 of CEEA 2012.”

To do so, Gary set the EIS in the context of all the other work performed by the Proponent, provincial and federal agencies, the IRTC and its member communities, technical specialists, and other participants in the public comment process. He examined the materials placed on the Public Registry, media coverage, and relevant materials available to the public. That is a lot of information to contribute to this brief report, so there are likely to be missing pieces and unresolved issues that deserve to be explored more fully.

Gary Wagner appreciates the opportunity to participate in this very interesting Project.

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