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September 26, 2022 26 septembre 2022			
Robert Mvondo			
WPG	1		

Court File No. _____

FEDERAL COURT

BETWEEN:

**PINAYMOOTANG FIRST NATION, SAGKEENG FIRST NATION and
SANDY BAY OJIBWAY FIRST NATION**

Applicants,

- and -

**THE ATTORNEY GENERAL OF CANADA, THE IMPACT ASSESSMENT
AGENCY OF CANADA, THE DEPARTMENT OF MANITOBA
TRANSPORTATION AND INFRASTRUCTURE OF THE GOVERNMENT OF
MANITOBA, INTERLAKE RESERVES TRIBAL COUNCIL INC.,
KINONJEOSHTEGON FIRST NATION, DAUPHIN RIVER FIRST NATION,
LITTLE SASKATCHEWAN FIRST NATION, LAKE ST. MARTIN FIRST
NATION, LAKE MANITOBA FIRST NATION, PEGUIS FIRST NATION,
MANITOBA METIS FEDERATION, O-CHI-CHAK-KO-SIPI FIRST NATION,
EBB AND FLOW FIRST NATION, SKOWNAN FIRST NATION, FISHER
RIVER FIRST NATION, BLOODVEIN FIRST NATION, NORWAY HOUSE
CREE NATION, BERENS RIVER FIRST NATION, HOLLOW WATER FIRST
NATION, BROKENHEAD OJIBWAY FIRST NATION, BLACK RIVER FIRST
NATION, POPLAR RIVER FIRST NATION and MISIPAWISTIC CREE
NATION.**

Respondents.

APPLICATION UNDER: S. 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

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EBB AND FLOW FIRST NATION, SKOWNAN FIRST NATION, FISHER
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TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicants request that this application be heard at Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or

a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the applicants' solicitor, or where an applicant is self-represented, on the applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____ Issued by: _____
Registry Officer

Address of local office:
4th Floor - 363 Broadway
Winnipeg, Manitoba R3C 3N9

TO: **FEDERAL COURT REGISTRY**
Trial Division, Federal Court of Canada
4th Floor - 363 Broadway
Winnipeg, Manitoba R3C 3N9
Telephone: (800) 663-2096

AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
301-310 Broadway
Winnipeg, Manitoba R3C 0S6

AND TO: **IMPACT ASSESSMENT AGENCY OF CANADA**
160 Elgin St, 22nd floor
Ottawa, Ontario K1A 0H3

AND TO: **THE DEPARTMENT OF MANITOBA TRANSPORTATION AND
INFRASTRUCTURE OF THE GOVERNMENT OF MANITOBA**
1630-215 Garry Street
Winnipeg, MB R3C 3P3

AND TO: **INTERLAKE RESERVES TRIBAL COUNCIL INC.**
General Delivery
Fairford, MB R0C 0X0

AND TO: **KINONJEOSHTEGON FIRST NATION**
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Dallas, MB Canada R0C 0S0

AND TO: **DAUPHIN RIVER FIRST NATION**
General Delivery
Gypsumville, MB Canada R0C 1J0

AND TO: **LITTLE SASKATCHEWAN FIRST NATION**
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St. Martin, MB Canada R0C 2T0

AND TO: **LAKE ST. MARTIN FIRST NATION**
Box 69
Gypsumville, MB Canada R0C 1J0

AND TO: **LAKE MANITOBA FIRST NATION**
General Delivery
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AND TO: **PEGUIS FIRST NATION**
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Peguis, MB Canada R0C 3J0

AND TO: **MANITOBA METIS FEDERATION**
150 Henry Ave #300
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AND TO: **O-CHI-CHAK-KO-SIPI FIRST NATION**
Box 103
Crane River, MB, R0L 0M0

AND TO: **EBB AND FLOW FIRST NATION**
Box 159
Ebb and Flow, MB R0L 0R0

AND TO: **SKOWNAN FIRST NATION**
Box 106
Skownan, Manitoba R0L 1Y0

AND TO: **FISHER RIVER FIRST NATION**
Box 367
Koostatak, MB R0C1S0

AND TO: **BLOODVEIN FIRST NATION**
General Delivery
Bloodvein, MB ROC OJO

AND TO: **NORWAY HOUSE CREE NATION**
Box 250
Norway House, Manitoba R0B 1B0

AND TO: **BERENS RIVER FIRST NATION**
Box 131
Berens River, Manitoba, R0B 0A0

AND TO: **HOLLOW WATER FIRST NATION**
Box 2561
Wanipigow, MB R0E 2E0

AND TO: **BROKENHEAD OJIBWAY FIRST NATION**
Box 180
Scanterbury, MB R0E 1W0

AND TO: **BLACK RIVER FIRST NATION**
General Delivery
O'Hanley, MB R0E 1K0

AND TO: **POPLAR RIVER FIRST NATION**
Box 90
Negginan, MB R0B 0Z0

AND TO: **MISIPAWISTIC CREE NATION**
Box 500
Grand Rapids, MB R0C 1E0

APPLICATION

1. THIS IS AN APPLICATION FOR JUDICIAL REVIEW of the written decision (the “Decision”) made by the respondent, the Impact Assessment Agency of Canada (the “Agency”), on August 26, 2022, pursuant to section 181(2.1) of the *Impact Assessment Act*, S.C. 2019, c. 28 (“IAA”), extending the time limit for the respondent, The Department of Manitoba Transportation and Infrastructure of the Government of Manitoba (the “Proponent”) to provide the required information or studies for the environmental assessment to be made pursuant to the *Canadian Environmental Assessment Act*, 2012 (“CEAA, 2012”) of the Lake Manitoba and Lake St. Martin Outlet Channels Project (the “Project”).

2. THE APPLICANTS MAKES APPLICATION FOR:

- a) A Declaration that the Decision is invalid, unlawful, incorrect and/or unreasonable;
- b) An Order quashing the Decision;
- c) An Order that the Proponent’s application for approval of the Project under CEAA, 2012 be terminated;
- d) An Order pursuant to section 181(3) of the IAA terminating the environmental assessment of the Project;
- e) The costs of this application; and
- f) Such other and further relief as counsel may advise and this Honourable Court may deem just.

3. THE GROUNDS FOR THE APPLICATION ARE:

- a) Sagkeeng First Nation (“SFN”), Pinaymootang First Nation (“PFN”) and Sandy Bay Ojibway First Nation (“SBOFN”) are Indian Bands as defined by the *Indian Act* R.S.C. 1985, c. I-5 and are comprised of people registered under the *Indian Act* as members of the aforementioned Indian Bands. SFN and SBOFN are signatories to Treaty One and PFN is a signatory to Treaty Two;
- b) PFN, SFN and SBOFN are all located in what is now the Province of Manitoba and they are all significantly impacted by and adversely affected by the proposed Project;
- c) The Respondent Manitoba Metis Federation and the First Nation Respondents are those First Nations and/or groups identified in the Canadian Environmental Assessment Agency’s Guidelines for the Preparation of an Environmental Impact Statement, dated May 15, 2018, as being expected to be affected by the Project. For those groups unknown to the Applicants who may be directly affected by the orders sought in the within judicial review, the Applicants have named the Attorney General of Canada as a Respondent in accordance with Rule 303(2) of the *Federal Courts Rules*, SOR/98-106;
- d) The Project is to be situated within the traditional territory and waters of PFN where PFN members have historically and presently exercised their Aboriginal and Treaty rights and will have significant environmental impacts and an extremely adverse effect upon those lands, waters and rights. The Project will also affect the waters of Lake Winnipeg, Lake Manitoba, Lake St. Martin and the adjacent lakes, rivers, waterways, the lands that have been set aside as reserves for PFN, SFN and SBOFN and also the traditional lands that PFN, SFN and SBOFN have used and

relied upon to fish and harvest and exercise their Aboriginal and Treaty rights for time immemorial;

- e) The Proponent of the Project submitted a project description and summary document to the Canadian Environmental Assessment Agency on January 9, 2018. From that date, until the present day, the Proponent has consistently failed to provide sufficient and/or necessary information to obtain approval of the Project, or satisfy the questions and concerns of the Applicants and/or the Canadian Environmental Assessment Agency (the "Former Agency") and/or the Agency;
- f) The Project consists of the construction and operation of two large and complex channels and related roads and infrastructure whereby waters from Lake Manitoba are drained and diverted to Lake Winnipeg through Lake St. Martin, and interconnected and adjacent lakes, rivers and waterways and over the territory and lands described in paragraph 3(d) above;
- g) Since the Proponent brought its application for approval of the Project in January of 2018, the Applicants have been forced to rely upon their own funding along with inadequate and delayed funding provided by the Province of Manitoba, the Former Agency and the Agency to assess the Project, the impacts of the Project and the adverse effects it will wreak upon their reserves, traditional lands and waterways and Aboriginal and Treaty Rights;
- h) In the course of assessing the Project with the help of professionals and technicians retained by the Applicants for that purpose, the Applicants have observed, among other things, the following delinquencies on the part of the Proponent:

- (i) the Proponent has consistently failed to provide information necessary for the proper assessment of the Project;
 - (ii) in response to requests for information made by the Applicants and others, the Proponent has failed to reply, inordinately delayed providing replies and/or provided insufficient, misleading and/or incorrect replies;
 - (iii) the documents that the Proponent has submitted, including the Environmental Impact Statement, contain significant gaps and deficiencies and do not accurately state and/or fail to state, the Project's effects on the valued environmental components;
 - (iv) the baseline data essential for the assessment of the Project has been insufficiently presented owing to flaws in the assessment methodology utilized by the Proponent; and
 - (v) any assessment of the Project has been rendered practically impossible owing to the Proponent's failure to produce a complete Project design.
- i) The delinquencies set out in paragraph 3(h) above are contrary to the duties of the Proponent to, among other things, consult and cooperate with the Applicants in good faith and in a manner that provides for the free and informed consent of the Applicants of any project affecting the Applicants' lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water and other resources;

- j) On August 28, 2019, the IAA came into force and replaced the CEAA, 2012. Section 181(2) of the IAA required the Proponent to provide the Agency with any information or studies required by the Former Agency pursuant to CEAA, 2012 before August 28, 2022. The Proponent failed to do so and instead, on June 20, 2022, made a request pursuant to Section 181(2.1) of the IAA, to the Agency for an extension of time to provide the Agency with the required information and studies;
- k) By granting an extension pursuant to 181(2.1) of the IAA, the Agency permits the continuation of the assessment of the Project under the CEAA, 2012 scheme and thereby limits the Agency's consideration and evaluation of the Project to the framework of the now repealed CEAA, 2012 instead of the framework of the current IAA;
- l) The Applicants state that the IAA is superior to the CEAA, 2012 and more consistent with the protection of their legal rights for the reasons including, but not limited to, the following:
 - (i) the IAA requires an assessment of how the Project will impact Aboriginal and Treaty Rights;
 - (ii) the IAA relies upon science and traditional knowledge in its decision-making process while the CEAA, 2012 depends upon the availability of scientific information available at the time the decision is made;
 - (iii) the definition of "effects" in the IAA is more detailed and favourable to the Applicants than the definition found in the CEAA, 2012;
 - (iv) section 22(1) of the IAA is more favourable to the Applicants than section 19 of the CEAA, 2012;

- (v) the IAA mandates studies in the areas of sustainability, gender impacts and impacts on indigenous people beyond impacts directly related to environmental effects. Under CEAA, 2012, the production of such studies is in the discretion of the Agency;
- (vi) section 6(2) of the IAA states that the Agency must exercise its power in a manner that fosters sustainability, respects the Government's commitment with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle;
- (vii) the IAA provisions include a planning phase at the beginning of the assessment process that involves robust engagement with Indigenous communities and the requirement for detailed planning; and
- (viii) section 63 of the IAA codifies consideration of section 35 of the *Constitution Act, 1982* and thereby ensures that such rights are considered as part of the assessment process.

m) The Applicants opposed the Proponent's request in a letter to the Agency dated August 3, 2022 and the respondent, Interlake Reserves Tribal Council Inc. ("IRTC") also opposed the Proponent's request on behalf of some of the respondent First Nations in a letter to the Agency dated July 28, 2022. The grounds advanced by the Applicants and the IRTC in opposing the Proponent's request for an extension included the following:

- (i) granting the extension to the Proponent would exhaust the limited resources of the Applicants by causing them further

expenses created by the need for more expert, technical and legal assistance arising from the incomplete Project design and other on-going delinquencies, identified in paragraph 3(h) above, of the Proponent;

(ii) the Proponent's failure to provide the necessary information to the Agency was due to the continuous delinquent conduct of the Proponent identified in paragraph 3(h) above and/or was part of a deliberate effort by the Proponent to disguise or minimize the appearance of the impacts and adverse effects that the Project will wreak upon the Applicants' lands, waters and Treaty and Aboriginal Rights; and

(iii) the request for an extension by the Proponent was a deliberate effort to deny the Applicants the ability to rely upon the beneficial provisions of the IAA and the *United Nations Declaration of the Rights of Indigenous People Act*, S.C. 2021 c. 14 (the "UNDRIP Act").

n) On August 26, 2022, the Agency issued the Decision herein granting the Proponent an extension of eighteen (18) months to provide the required information and studies;

o) The Agency thereby decided that the inferior protections of the CEAA, 2012 would continue to apply to the evaluation of the Project and that the framework and considerations of the Agency for its ultimate decision in relation to the Project would be limited to those set out in the CEAA, 2012 and fail to consider the mandated expanded considerations set out in the IAA;

p) The Applicants seek a review of the Decision;

- q) The Applicants state that the Agency erred in the following ways:
- (i) failing to consider the proper legal test to be used in exercising its discretion under section 181(2.1) of the IAA;
 - (ii) failing to consider the prejudice to the Applicants, including the violation of Aboriginal and Treaty Rights and the UNDRIP Act, caused by granting the extension and denying the Applicants the benefits of the IAA provisions in the assessment of the Project;
 - (iii) failing to take into account the delinquent conduct of the Proponent which caused it to require the extension;
 - (iv) failing to address the overriding requirement that the interests of justice must be served when granting an extension under section 181(2.1) of the IAA;
 - (v) failing to consider the financial prejudice caused to the Applicants by providing more opportunities to the Proponent to provide information and thereby requiring the Applicants to retain experts and technicians to review same;
 - (vi) placing undue reliance upon the Proponent's claim that the impact of the COVID-19 pandemic necessitated the extension; and
 - (vii) the Agency exceeded its jurisdiction and/or the Decision was incorrect and/or unreasonable and was not supported by law or the evidence.
- r) *Federal Courts Act*, R.S.C., 1985, c. F-7;
- s) *Federal Courts Rules*, SOR/98-106;
- t) *Indian Act*, R.S.C., 1985, c. I-5;

- u) *Canadian Environmental Assessment Act*, 2012 S.C. 2012, c. 19;
- v) *Impact Assessment Act*, S.C. 2019, c. 28;
- w) *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021 c. 14; and
- x) Such further and other grounds as counsel may advise and this Honourable Court may allow.

4. THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING:

- a) The Record to be filed the Agency;
- b) Other affidavits to be filed; and
- c) Such further and other material as counsel may provide and this Honourable Court may allow.

5. PURSUANT TO FEDERAL COURTS RULES 317 and 318, THE APPLICANTS REQUEST THAT THE Agency forthwith, or no later than twenty days from the date of service of this Notice of Application, provide the Applicants with certified copies of all the materials that were considered by the Agency in granting the Proponent an extension under section 181(2.1) of the IAA.

Date: September 26, 2022

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Per:

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