

PUBLIC UTILITIES BOARD OF MANITOBA

Efficiency Manitoba 3-Year Energy Efficiency Plan Submission (2020-2023)

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BOOK OF AUTHORITIES OF THE INTERVENOR THE ASSEMBLY OF MANITOBA CHIEFS

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# TAB I

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2016 CHRT 2

**Date:** January 26, 2016

**File No.:** T1340/7008

**Between:**

**First Nations Child and Family Caring Society of Canada**

**- and -**

**Assembly of First Nations**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Attorney General of Canada**

**(Representing the Minister of Indian Affairs and Northern Development Canada)**

**Respondent**

**- and -**

**Chiefs of Ontario**

**- and -**

**Amnesty International**

**Interested Parties**

**Decision**

**Members:** Sophie Marchildon and Edward Lustig

**f. The Crown's fiduciary relationship with Aboriginal peoples**

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a "political trust of the highest obligation":

The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

(*St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 219 [per Rand J.]

[91] However, this "political trust" was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to

## TAB 2

Date: 20191022  
Docket: CI 17-01-09352  
(Winnipeg Centre)  
Indexed as: Troller v. Manitoba Public Insurance Corporation  
Cited as: 2019 MBQB 157

## **COURT OF QUEEN'S BENCH OF MANITOBA**

### **B E T W E E N:**

NICHOLAS TROLLER,	)	<u>Counsel:</u>
	)	
applicant,	)	<u>JAMES KITCHEN</u>
	)	for the applicant
- and -	)	
	)	<u>TREVOR M. BROWN</u>
MANITOBA PUBLIC INSURANCE CORPORATION,	)	for the respondent
	)	
respondent.	)	<u>CHARLES P.R. MURRAY</u>
	)	for the Intervenor
	)	Attorney General of Manitoba
	)	
	)	JUDGMENT DELIVERED:
	)	October 22, 2019

### **LANCHBERY J.**

#### **INTRODUCTION**

[1] The applicant, Nicholas Troller ("Troller"), seeks the following relief:

- (a) A Declaration pursuant to section 24(1) of the *Charter of Rights and Freedoms* (the "*Charter*") that the Respondent's cancellation of the Applicant's personalized licence plate "ASIMIL8" (the "Plate") unjustifiably infringes section 2(b) of the *Charter*;
- (b) An Order reinstating the Plate;
- (c) Further, or in the alternative, an Order for *certiorari* pursuant to section 24(1) of the *Charter*, or Rule 68.01 of the Court of Queen's Bench

Rules, or both of the foregoing, quashing the decision to cancel the Plate by The Manitoba Insurance Corporation ("MPI");

- (d) Costs of this Application; and
- (e) Such further and other relief as this Honourable Court deems just and equitable. [Abbreviations or acronyms are used throughout.]

[2] Troller is a resident of Winnipeg, Manitoba. He is an enthusiast of *Star Trek*, a science fiction television and movie franchise. In 2015, Troller requested, and was granted, a personalized licence plate ("PLP") from Manitoba Public Insurance ("MPI") with the combination of letters and a number "ASIMIL8". Troller asserts that this combination of letters and a number is a reference to a *Star Trek* character, the Borg. Troller asserts that the Borg character speaks the word "assimilate" as a core part of their dialogue.

[3] Troller, upon receiving his PLP, surrounded the PLP with a licence plate holder that included the words "WE ARE THE BORG" and "RESISTANCE IS FUTILE". It is Troller's position that the words on the licence plate holder are references to a *Star Trek* character. The series of letters and a number chosen by him is so unique that "ASIMIL8" can only refer to the Borg character in *Star Trek*.

[4] Troller displayed the PLP for almost two years without incident. He claims that many people in the community commented positively about the PLP. People even asked to have their picture taken with it.

[5] On April 26 and April 27, 2017, Troller received two identical letters from MPI stating that the PLP "is considered offensive" and demanded he "surrender the [PLP] by Monday, May 1, 2017". (The April 27, 2017 letter demanded surrender of the PLP no later than May 2, 2017.)



[6] Troller complied with MPI's request.

[7] Troller served his application on the Attorney General of Manitoba as required by *The Constitutional Questions Act*, C.C.S.M. c. C180. The Attorney General intervened and supports the position of MPI and I refer to them collectively as "MPI".

[8] The following facts are not in dispute:

- on April 24, 2017, the Registrar requested details about the approval process for the PLP, including the customer's explanation and any other relevant details. Her staff, including David Burns, Manager, Licensing Services Department, responded. The customer's explanation for the slogan on the application form was simply "assimilate";
- the Registrar requested Troller provide the rationale for the PLP. The staff advised the Registrar that the review committee did an *Urban Dictionary* check and did not come back with any concerns. The Registrar performed her own *Urban Dictionary* search which resulted in the following results:

[T]o fit in with the Americans around you or go the fuck back where you came from;
- Carla Hocken, Registrar of Motor Vehicles (the "Registrar"), on April 25, 2017 decided to recall and replace the PLP, but Mr. Keith's evidence was that he decided during the evening hours of April 24, 2017 to recall the PLP;
- on April 26, 2017, the assistant manager of the Licensing Services Department contacted Troller;

- it was during the April 26, 2017 call that Troller explained the significance of the PLP;
- Troller also described the licence plate frame that surrounded the PLP that provides the context for his free expression;
- MPI invites registered owners of vehicles to create a unique statement about “a profession, hobby, lifestyle or interest ... or ... just for fun”;
- MPI PLP guidelines for use of a PLP do not allow “any profane, sexually suggestive, racial or alcohol/drug-related words, phrases or innuendoes that may be considered offensive or suggestive, or political messages of any description, in any language”; and
- the PLP program is not set out in an act or regulation.

[9] MPI is a Crown corporation, and MPI concurs with Troller that the *Charter* applies to its decisions.

[10] MPI’s position is that its authority permits registered owners of motor vehicles to express themselves on a PLP. The parties agree that prior to the government authorizing the issuance of PLPs, licence plates were a series of letters and/or numbers issued and restricted to the sequential order chosen by the government.

[11] Although there is some uncertainty as to when this policy changed, MPI instituted a policy that permitted registered motor vehicles to display a plate containing personal expression subject to certain conditions.

**POSITION OF TROLLER**

[12] Troller asserts that by encouraging freedom of expression on PLPs, that personal expression becomes a protected self-expression under the *Charter*. Expression is a fundamental Canadian value and is constitutionally protected by s. 2(b) of the *Charter*,

which states:

2. **FUNDAMENTAL FREEDOMS** - Everyone has the following fundamental freedoms:

...

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[13] Troller submitted that freedom of expression, might in fact, be the most fundamental value in our society. Therefore, careful scrutiny is required. Freedom of expression ensures that without fear of censure, individuals can manifest their thoughts, opinions, beliefs and expressions no matter how unpopular, distasteful or contrary to the mainstream. (See *CHP v. City of Hamilton*, 2018 ONSC 3690 (at para. 39); *Edmonton Journal (The) v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (at para. 78); *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, quoting *Boucher v. The King*, [1951] S.C.R. 265 at para. 288 (at para. 79); *Committee for the Commonwealth of Canada*, quoting *R. v. Kopyto* (1987), 24 O.A.C. 81 at pp. 90-91 (at para. 95); *R. v. Keegstra*, [1990] 3 S.C.R. 697; and *R. v. Sharpe*, 2001 SCC 2 (at para. 22)).

[14] Troller submits that by displaying "ASIMIL8" on a PLP goes to one of the three core values underlying freedom of expression, being that of self-fulfillment. Troller argues that because this is a core value "it will be harder to justify a s. 2(b) infringement of that speech (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (at para. 75)).

[15] Troller submits that the three-step test in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, to determine whether freedom of expression has been

infringed is applicable. The first step: Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? He submits that the activity is expressive content. The PLP is subject to constitutional protection by means of the method of expression. The expression is not criminal hate speech, it does not advocate violence and it is not obscene or indecent as to cause harm incompatible with society's proper functioning (see *R. v. Labaye*, 2005 SCC 80, at paras. 21 - 23).

[16] The second step: Does the location of the expression bring it within the scope of s. 2(b) protection? The location of expressive activity can only be removed from s. 2(b) protection if permitting the expressive activity in that location conflicts with or undermines the values protected by freedom of expression (see *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, at para. 37).

[17] The third step: Was the purpose or effect of the government action at issue to restrict freedom of expression? MPI's demand for the immediate return of the PLP confirms that MPI intended to limit Troller's right to freedom of expression.

[18] Troller submits that the PLP should be given the same protection as advertising displayed on a public bus as in *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31 (*Greater Vancouver*).

[19] Troller argues that the decision to revoke the PLP is not reasonable as MPI did not consider the *Charter* value at stake. A reviewing court may find an administrative decision to be reasonable, and therefore upheld, if it proportionately balances the *Charter* protections engaged by the decision with the statutory objective ostensibly

furthered by the decision. It must demonstrate that the decision “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at para. 39).

[20] Troller submits that MPI’s decision lacked sufficiency of reasons to determine whether it had considered the *Charter* protection at stake. (See *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344; *CHP v. City of Hamilton*; and *New Brunswick (Registrar of Motor Vehicles) v. Maxwell*, 2016 NBCA 37).

[21] In the absence of reasons and without the proper balance of freedom of expression, this decision cannot stand.

### **POSITION OF MPI**

[22] MPI acknowledges that there is no statutory framework in place, but that the PLP guidelines fall within its general management power. MPI is entitled to place reasonable limits on free expression in the course of administering the PLP program if it adheres, as appropriate, to the issued guidelines and non-binding instruments (see *Sex Party v. Canada Post Corporation*, 2008 FC 41, at paras. 38 - 42).

[23] MPI asserts that based on its internal policy, s. 2(b) of the *Charter* does not apply to licence plates.

[24] MPI argues that licence plates are government property and are not platforms that are subject to s. 2(b) protection. Section 2(b) does not provide an unqualified right to express oneself anywhere at any time or in any way. As stated in *Greater*

*Vancouver*, “governments will not be required to justify every restriction on expression” (at para. 28).

[25] MPI directs the Court to answer the three questions as set out in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (at para. 56):

First, did the noise have *expressive content*, thereby bringing it within s. 2(b) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law *infringe* that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [emphasis in original].

[26] MPI concedes the answers to the first and third questions are in the affirmative.

[27] MPI argues that the location at issue is a piece of government-issued ID that is the property of the Crown. As government property, “individuals do not have a constitutional right to express themselves on *all* government property” (*Greater Vancouver* (at para. 28) [emphasis in original]).

[28] In *Montréal (City)*, the Supreme Court developed a test which incorporates underlying values and contextual factors which must be considered, as well as the public versus private analysis (at para. 74):

The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

- (a) the historical or actual function of the place; and
- (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[29] MPI submits that no court has found licence plates are places of free expression. However, it acknowledged the facts of *Greater Vancouver* have similarities to the

case at bar with important differences. Particularly, the advertisements in *Greater Vancouver* did not carry a state purpose; are not created and owned by the state; and did not carry any state messages.

[30] The ultimate question for the Court: Is a licence plate “a location where constitutional protection for free expression would be expected?” (*Greater Vancouver*, at para. 45) MPI submits that it is not.

[31] MPI argues that licence plates are not historically places of free expression. Rather, they are ID tags that allow “the public and law enforcement officials to identify a particular vehicle and to confirm that the vehicle complied with Manitoba’s motor vehicle registration requirements”.

[32] MPI acknowledges that the PLP guidelines do permit some form of individual expression. It submits that a PLP is similar to a courtroom where expression is fundamental to litigation. However, expression in a courtroom remains constrained by the rules of court, tradition and discretion of a presiding judicial officer.

[33] MPI acknowledged that most provincial governments use licence plates to convey a message to the public - a motto such as “Friendly Manitoba”, “Wild Rose Country”, “Beautiful British Columbia”, “Canada’s Ocean Playground”, “Yours to Discover” and “Je me souviens”. These mottos are an important part of a government’s communication efforts to promote itself to others as the vehicle travels on the highways and byways of this country, and others.

[34] MPI acknowledged that by permitting PLPs, the licence plate is now a shared platform for expression. The shared platform is unlike any government property



considered in case law. MPI argues that as this is a shared platform, one would expect that inconsistent messages between the motto and the personal message, a government would be justified in eliminating any offensive message.

[35] In this context, the Supreme Court of the United States found that a state specialty plate may be construed as government expression or government-endorsed expression (*Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 US \_\_ (2015)).

[36] MPI also submits that PLPs are not open to members of the public to express themselves. Only registered owners of vehicles are able to express themselves on a PLP. The owning and registering of a vehicle is a privilege and not a constitutionally protected right. In this way, freedom of expression is inherently limited.

[37] A PLP must have a unique slogan. Two vehicles may not display the same slogan. MPI argues that free expression does not lend itself to permit the registrant a monopoly over the chosen phrase on a PLP. True free expression permits others to adopt the constitutionally protected speech. This personal monopoly created by restricting others from using the constitutionally protected speech on a PLP undermines the values of self-fulfillment and truth finding, if not the free expression itself.

[38] If this Honourable Court found the PLP program to be subject to s. 2(b) protection, the Crown could shutter the entire program. Therefore, any decision granting s. 2(b) protection could be made moot by administrative action.

[39] This PLP's location is distinct from other locations such as public streets, parks, airports and other government property.

[40] MPI agrees that the standard of review for the administrative decision is reasonableness. It acknowledges that the Registrar failed to account for Troller's s. 2(b) *Charter* rights because she would not have been aware of the novel proposition that licence plates are constitutionally protected platforms of expression. There needs to be a realistic and practical view of what a member of the public would expect in terms of reasons and analysis from a statutory official making administrative policy decisions (see *Doré v. Barreau du Québec*, 2012 SCC 12; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Loyola High School; Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154 (*Grande Prairie*)).

[41] MPI submits that in determining a slogan to be offensive, it takes into consideration a much broader context and has a much broader obligation to consider community and societal issues.

[42] MPI disagrees with Troller's assertion that ASIMIL8 or assimilate is not offensive. It argues that the Truth and Reconciliation Commission of Canada made clear that the official policy of assimilation of Aboriginal people was the policy of Canada at one time in history. The Right Honourable Stephen Harper, P.C. in the House of Commons acknowledged the harm that resulted from that official policy of Canada and that the assimilation of Indigenous people was offensive. MPI submits that the word assimilate is as offensive to Indigenous peoples that a swastika, Confederate battle flag or racial

slur printed on a piece of government-issued identification would have for other members of society.

[43] MPI submits that the *Star Trek* reference confirms the offensiveness of assimilate. The Borg are an alien race who is part living, part machine. The Borgs are technologically superior and assimilate any non-Borg creature into a Borg. According to the Borg, assimilation raises the quality of life for all species.

[44] MPI noted that academic literature about the *Star Trek* series being a “thinly disguised metaphor for colonialism”. Although not everyone watches *Star Trek*, everyone who lives in Canada bears its colonial legacy.

[45] MPI, citing *Daniels v. Canada (Indian Affairs and Northern Development)*, 2006 SCC 12, submitted that I must consider s.35 of the *Constitution Act, 1982*, and the grand purpose of reconciliation, being “a mutually respectful long-term relationship” (at para. 34) of Aboriginal and non-Aboriginal Canadians. Further, the Supreme Court noted that continual understanding requires “good faith policy and legislative responses” (*Daniels*, at para. 1) which serve the “overarching objective of reconciliation” (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para. 50).

[46] *The Path to Reconciliation Act*, C.C.S.M. c. R30.5, binds MPI. This Act confirms Manitoba’s process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples.

[47] In support of its position, MPI argues that I should apply the test outlined in *R. v. Oakes*, [1986] 1 S.C.R. 103. In applying the *Oakes* test, the values and principles

essential to a free and democratic society must guide this decision. The inherent dignity of the human person, and faith in political institutions and groups in society should be considered.

[48] MPI argues that there are two specific questions that I must consider: (1) do the restrictions/guidelines established by MPI that limit free expression violate s. 2(b) of the *Charter*, and (2) if the restrictions/guidelines limit free expression, are the actions of MPI a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society and protected by s. 1 of the *Charter*?

[49] A court should not just consider *Charter* values. Courts should also consider the promotion of diversity and multiculturalism when considering the reasonableness of the administrative action (see *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6).

[50] MPI submitted that the message assimilate is harmful to reconciliation.

[51] In *Canadian Broadcasting Corp. v. Canada (Attorney General)*, the Supreme Court outlined the questions I must answer to determine whether the s. 2(b) protection is present (at para. 38).

## **ANALYSIS**

[52] The Supreme Court of Canada in *Irwin Toy* instructed a court as to how it should address an alleged violation of s. 2(b) (at pp. 931 - 32):

When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls

within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[53] I find that AISIML8 does attempt to convey a meaning. The word itself does not attempt to convey a violent form of expression. Therefore, the expression is within the protected sphere of conduct.

[54] The second step is to determine if the method of expression or the location of the expression is entitled to s. 2(b) protection.

[55] The third step as outlined in *Irwin Toy* is to determine whether the purpose or effect of the government action was to restrict freedom of expression. MPI concedes its purpose was to restrict Troller's freedom of expression. In the absence of MPI's concession, I would have found that its purpose was to restrict Troller's expression.

[56] Troller asserts that his claim concerns individual self-fulfillment and human flourishing. The s. 2(b) analysis in this case turns on location of this expression. The test for location, as outlined in *Montréal (City)* is:

74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve,

namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

- (a) the historical or actual function of the place; and
- (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.

76 Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.

77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

78 The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g., R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq.* This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

[57] Vehicle licence plates are an official form of government-issued identification of vehicles. The historical function was for the state to issue plates with a series of numbers and letters on the plate to identify the registered owner. As the mass-produced automobile was an invention of the 20<sup>th</sup> century, licence plates have evolved from four numbers to now jurisdictions having a combination of seven letters and/or numbers to deal with the expanded number of vehicle registrations.

[58] Licence plate designs have evolved to include the "state" motto. Another evolution was for the placement of stickers to denote that the vehicle is insured.

[59] The PLP is a recent creation of governments. MPI states that the earliest record of PLPs in its possession is 2004. I take judicial notice that Manitoba-issued PLPs began as early as in the 1983-1986 design, which displayed the word FRIENDLY at the top of the licence plate, and MANITOBA on the bottom of the licence plate, both in red. My knowledge is as the owner of such a PLP which remains in my possession to this day.

[60] The history of PLPs in this province is at least 20 years longer than that suggested by MPI. In an historical context, we have at least a 35-year history of PLPs in Manitoba.

[61] The decision to issue PLPs, as admitted by MPI, was to permit forms of personal expression. This decision changed the historical function from solely registration and provincial mottos, to places where owners could create an individual message on a wide range of topics.

[62] By permitting personal expression, the licence plate is compatible with free expression. The purpose may have been more about revenue generation than

permitting registrants to satisfy their personal vanity. Hence, the name “vanity plates”. MPI invited individual members of the public who owned motor vehicles to express themselves in the space, and they have.

[63] The fact that the space is government-owned, the licence plate is consistent with free expression. As Justice Alito, in dissent, said in *Walker*, that a Texas licence plate that said, “Rather be Golfing” does not mean that the state is endorsing or encouraging people to play golf, rather than working. This would be true for many other types of activities that people have chosen to memorialize on PLPs.

[64] I also note that the location of the personalized free expression within the licence plate is the most dominate feature of the plate. It occupies the center location, and the series of letters and/or numbers are of the largest font on the PLP.

[65] In this location, the expression dominates the PLP. One would expect this to be true, as this message, in place of the series of numbers and letters of traditional licence plates, must permit law enforcement and witnesses to identify the motor vehicle by the content of the plate.

[66] MPI acknowledges that the case at bar is similar but distinct from the facts in *Greater Vancouver*. *Greater Vancouver* involved political advertising displayed on a city bus. I note the Supreme Court held that the content of the message is not relevant to the function of the location. City buses have a shorter history as a place for advertising than posting handbills on utility poles or in the public square, but there is a history (at para. 42). The same is true for PLPs. The history of PLPs is shorter than



advertising on buses, but there is now history in issuing PLPs in Manitoba that extends for 35 years.

[67] The presence of a PLP, like advertising on a bus, is in the public space, not a private space. By the very nature of the PLP, it cannot require privacy or limited access. By filing an application with the Registrar, the registered owner is aware that the information he/she seeks to express will be present in the public space as the vehicle travels on the highways and byways.

[68] MPI argues that the PLP is an official piece of government-issued ID. Therefore, the PLP is similar to a driver's licence or a passport. I concur that a PLP is a form of government ID, but I disagree that this form of identification equates to a driver's licence or passport. A driver's licence or passport identifies an individual. The owners of those forms of ID take great pains to keep their personal information private. Computer hackers go to great pains to attempt to obtain the information on a driver's licence or passport, such as date of birth, place of birth and/or address.

[69] The identification on a PLP is distinguishable. Whether a government-issued plate or a PLP, there is only a series of letters and numbers. The plate identifies the registered owner. However, the driver of the vehicle could be an individual authorized by the registered owner to operate the vehicle. It could also be someone who is operating the motor vehicle without authorization. An unknown number of people theoretically could operate the vehicle that displays a particular PLP. A driver's licence or a passport limits identification to a single person.

[70] MPI argues that the first person to register his/her free expression creates a personal monopoly over that expression on PLPs. That is true, but the effect of that decision is no different from the use of a copyrighted phrase. A copyrighted phrase creates a monopoly over the commercial use of the selected phrase. The copyright prevents others from profiting from the use of the phrase, but the monopoly does not extend to general use by the public.

[71] For example, the ownership group of the Winnipeg Jets hockey team, carrying on business under the name True North Sports and Entertainment, may prevent another organization or person from using the term "True North" in a business name. This protection does not extend to preventing people from yelling the words **"TRUE NORTH"** during the singing of the Canadian national anthem before Winnipeg Jet hockey games, or Winnipeg Blue Bomber games as examples. Fans of the Winnipeg Jets shout **"TRUE NORTH"** anywhere the Canadian national anthem is sung. This includes the arenas of U.S.-based NHL teams.

[72] The registrant does not own the selected series of letters and/or numbers - it is only the means to identify their vehicle. MPI does not permit the duplication of a regular plate or a PLP slogan. To do otherwise would create chaos in the vehicle registration system. The monopoly argument advanced by MPI is not helpful to its position.

[73] MPI's position is that it could limit free expression by simply rescinding the PLP program. That would be an extraordinary step if undertaken over one PLP. The

sincerity of the argument when PLPs generate revenue for the government is questionable.

[74] As stated in *Montréal (City)* (at para. 78):

As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

[75] PLPs are a location where free expression is protected is an evolution in the law, just as *Greater Vancouver* extended s. 2(b) protection to advertising panels on city buses.

[76] The expression on a PLP may serve a s. 2(b) purpose, namely (1) democratic discourse; (2) truth finding; and (3) self-fulfillment. In this case, Troller's position is that it serves his self-fulfillment, being his appreciation of the Borg character from *Star Trek*. I agree.

[77] Marshall McLuhan, a graduate of the University of Manitoba, famously said, "the medium is the message". Although McLuhan was referring to media in general, in the era of social media, *You Tube* and personal blogs, the very concept of what is media has expanded. The ability to distribute your message is unlimited in today's world. A PLP, or a vanity plate, is just one more way our thoughts enter the public discourse. MPI, by permitting a registered owner of a motor vehicle, has authorized a new location where free expression is entitled to s. 2(b) protection.

[78] I find that by applying *Irwin Toy*, *Oakes*, *Montréal (City)* and *Greater Vancouver* to these facts, the decision of the Registrar to prevent Troller from

conveying a particular message on his PLP infringed his rights under s. 2(b). However, an individual's rights under s. 2(b) are subject to reasonable limits.

## **ADMINISTRATIVE DECISION**

### **Section 1**

[79] *Charter* rights and freedoms are limited in scope. Section 1 states:

#### **Rights and freedoms in Canada**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[80] Section 1 of the *Charter* sets Canadian jurisprudence apart from American jurisprudence on free expression. The *Walker* decision concerned specialty plates in the State of Texas. Specialty plates are distinct from PLPs as they include a symbol promoting a specific sports team, such as the Winnipeg Jets, or membership in an activity such as firefighting. In *Walker*, the Supreme Court of the United States considered whether the Sons of Confederate Veterans could require the State of Texas to issue licence plates that would display the battle flag of the Confederacy, known as THE STARS AND BARS. I find the *Walker* arguments advanced by both parties are limited. The U.S. freedom of speech jurisprudence is distinct from the freedom of expression jurisprudence under s. 2(b) of the *Charter*.

[81] The parties agree that the decision to revoke Troller's PLP represents a discretionary administrative act of the Registrar. Further, both sides agree that the *Doré/Loyola* framework governs and therefore, the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[82] The Supreme Court summarized the new approach to discretionary administrative decisions that engage *Charter* protections in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 and *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32. In *Trinity Western v. Law Society of Upper Canada*, the court held:

[30] Administrative decisions that engage the *Charter* are reviewed based on the framework set out in *Doré* and *Loyola*. The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.

[31] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If *Charter* protections are engaged, the question becomes “whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (*Doré*, at para. 57; *Loyola*, at para. 39).

[83] Having found that *Charter* protections are engaged, I must now determine whether “the decision reflects a proportionate balancing of the *Charter* protections at play”.

[84] The proportionate balancing this Court must undertake requires an understanding of the PLP program.

[85] The MPI brochure (attached as Exhibit “B” to the affidavit of Ward Keith sworn September 21, 2017) sets out the restrictions for a PLP. Those principles relevant to this decision are:

Any profane, sexually suggestive, racial or alcohol/drug-related words, phrases or innuendoes that may be considered offensive or suggestive, or political

messages of any description, in any language. Note: The Registrar of Motor Vehicles reserves the right to recall personalized licence plates that are later deemed to be inappropriate.

. . .

Any combination of letters and/or numbers duplicating or resembling any existing or proposed regular number plate series, or that would create an identification problem.

[86] MPI has structured a committee to review proposed PLPs. The purpose of the committee is to “eliminate the inappropriate/possibly offensive slogans”.

[87] The PLP slogan approval is described as follows:

The review process is not black and white. Reasons for denials under the current guideline either by direct reference or innuendo are i.e. political, profane, alcohol/drug related, sexual, racial, or otherwise offensive. Google search and *Urban Dictionary* are only used as reference. A judgment call on a case by case basis is required. The committee was formed to provide different perspectives and all questionable slogans we identify are sent to the Director, Insurance & Licensing Operations and the Registrar of Motor Vehicles for the final decision.

[88] The question before me, is the limit of s. 2(b) rights on PLPs for the purpose to “eliminate the inappropriate/possibly offensive slogans”, reasonable.

[89] MPI issued to Troller the “ASIMIL8” PLP in 2015. He renewed the plate in 2016. On the morning of April 24, 2017, MPI became aware of a single complaint about ASIMIL8 by a *Facebook* post.

[90] The following actions were taken by MPI prior to making its decision:

- e-mail discussion took place between MPI employees responsible for the PLP;
- Mr. Keith had already decided to recall the PLP by 7:28 p.m. on April 24, 2017, in an e-mail with another staff member saying “[w]e can and will recall this plate”;

- final authority rests with Mr. Keith;
- steps were taken to recall the PLP on April 25, 2017;
- MPI staff telephoned Troller on April 25 and April 26, 2017;
- in letters dated April 26 and 27, 2017 directed to Troller, the PLP was “considered offensive” and “inappropriate” and MPI demanded the return of the PLP; and
- Troller complied with MPI’s demand and chose another slogan.

[91] The evidence shows that the primary concern of MPI upon receipt of the complaint was the media attention the revocation of the PLP was receiving.

[92] It is important to note that MPI is concerned with ensuring that it does not authorize inappropriate and offensive language on PLPs. MPI takes great pains to ensure that any slogan, no matter how benign on its face, shall have no other meaning such as those from the hip hop subculture.

[93] The review committee takes extensive steps to avoid unintended meanings outside of their collective knowledge. The committee considers other meanings such as those contained in secondary sources. The use of the *Urban Dictionary*, where meanings from hip hop music that may not be apparent on first examination, is one example of the extensive steps taken by the review committee to eliminate PLPs that could convey unintended meanings.

[94] I accept the submission of MPI that “ASIMIL8” was acceptable to the committee because the search term entered was “asimilate” as opposed to “assimilate”. I accept

MPI's position that **if** the committee reviewed "assimilate", it would have rejected the PLP at first instance.

[95] The error itself is of no import because MPI reserves the right to recall, for a myriad of reasons, a PLP. The length of time MPI took in making the decision is not crucial. MPI believed this required its immediate attention. It is whether, as stated in *Doré* confirming language from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, whether the decision "falls within a range of reasonable alternatives" (at para. 56).

[96] Troller submits that the decision cannot be considered reasonable for the following:

- MPI did not consider the *Charter* value of freedom of expression or acknowledge his right to express himself on a PLP;
- MPI did not identify any relevant statutory mandate that supports, or was somehow fulfilled by its decision to revoke the PLP;
- MPI did not attempt to balance the *Charter* protections engaged with a statutory mandate;
- MPI provided no meaningful reviewable reasons, only a conclusion that the PLP was "considered offensive"; and
- MPI did not provide him with an opportunity to make submissions or provide evidence regarding the potential revocation of the PLP or the concerns that MPI had regarding the PLP prior to revocation.



[97] Troller argued that by failing to consider his s. 2(b) rights and balancing of the *Charter* values, the MPI administrator's decision is not supportable. Any decision taken by MPI is therefore unreasonable and should be overturned.

[98] MPI submits that *Grande Prairie* directs the Court to consider a realistic and practical view of what one expects in terms of reasons and analysis from a statutory official making administrative policy decisions.

[99] In *Grande Prairie*, the court stated (at para. 38):

One would not expect an administrator like the respondent's transit system manager (who admittedly made the original 'decision') to provide the 'reasoning behind the decision', much less to provide a detailed *Doré* analysis. It is unrealistic to expect that all municipal administrators will be constitutional lawyers. Tribunals such as the one in *Doré*, on the other hand, might well overtly engage *Charter* issues in their reasons. That limits the submissions that the *Doré* tribunal could make on appeal or review, but those limits are not at play in this appeal.

[100] Troller argues that the administrators of MPI were required to subject its decision to the *Doré/Loyola* analysis before revoking the PLP.

[101] Applying the *Doré/Loyola* analysis, MPI submits that when its policy is contextually considered, disallowing an offensive PLP is permitted under s. 1. The decision made by MPI to recall a PLP should never be a purely subjective standard. The measure should be one of objective scrutiny.

[102] MPI submits that its objective consideration situates the slogan in context and assessing the potential impact on segments of society. The community standards of the public and the citizenship of Manitoba changes over time based on changes in context and environment and societal issues of the day, not the complaint of a single person.

[103] MPI submits that offensiveness is a matter of community standards. As in *Greater Vancouver*, the policy was that “[n]o advertisement will be accepted which is likely, in light of prevailing community standards, to cause offence to any person or group of persons” (at para. 4).

[104] The Supreme Court in *Greater Vancouver* found that policy qualifications such as “controversy” were unnecessarily broad (at para. 77).

[105] MPI’s position is the word “assimilate” when considered in the context of Canadian history is on its face objectionable. The assimilation of Aboriginal people was the official policy of the Government of Canada.

[106] The Truth and Reconciliation Commission of Canada identified the policy of assimilation as a stain on the honour of the Crown (*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015) (“TRC Report”).

[107] MPI noted that The Right Honourable Stephen Harper, P.C., on June 11, 2008, formally acknowledged the harm caused by Canada’s assimilation policy. The Prime Minister apologized on behalf of all Canadians for its implementation and ongoing effects (see Appendix 4, TRC Report).

[108] MPI submitted that there is a striking similarity to the context of assimilation in *Star Trek* to the colonization of the Indigenous peoples in Canada. Academia has devoted much time to this argument.

[109] MPI argued that its statutory mandate to administer public insurance, licensing and vehicle registration extends to ensuring a respectful and welcoming environment on Manitoba roads. Given the history of assimilate, the mere presence of AIMIL8 is contrary to a respectful and welcoming environment.

[110] Troller says that by choosing to display the PLP on his vehicle, he was not denigrating Indigenous people. I accept his position without condition. His argument is that the word assimilate cannot be considered offensive as assimilate has many definitions, not just the one argued by MPI. That argument is not helpful to my task. As the standard of review is reasonableness, I am not to substitute my opinion, or that of anyone else. I must determine if the action of the Registrar in revoking the PLP was reasonable.

[111] Applying the *Doré/Loyola* framework, I note the following:

- the Registrar is a statutory official making administrative policy decisions;
- prior to this decision, a PLP was not considered a location where s. 2(b) rights are engaged;
- the members reviewing the PLP applications are representatives of the public, and do not possess any special skill or training such as the expert tribunal of lawyers rendering the adjudicative decision in *Doré*;
- the members reviewing the PLP application consider words or phrases that are offensive, but in a specific context;
- the use of the *Urban Dictionary*, an online dictionary for slang words and phrases primarily originating from hip hop music, is used to screen out

violent and misogynist references disguised in code for those “in the know” to appreciate and understand;

- the target of the restrictions are those words or combination of letters and numbers which “either by direct reference or innuendo are i.e. political, profane, alcohol/drug related, sexual, racial, or otherwise offensive”; and
- the review committee makes its decision on a case by case basis.

[112] I find that *The Path to Reconciliation Act* played a significant part in the decision. The Act is attached hereto as Appendix “A”.

[113] The policy of the assimilation of Indigenous people appears 151 times in the TRC report. Federal and provincial governments have publically recognized that the policy of assimilation is a stain on the honour of the Crown, apologies offered, and legislation aimed at reconciliation enacted. The word assimilate has taken on a new meaning within this country.

[114] I concur with Troller’s position that the word assimilate has many uses. In the *Merriam-Webster* dictionary, online: <<https://www.merriam-webster.com/dictionary/assimilate>> is defined as follows:

Definition of *assimilate* (Entry 1 of 2)

transitive verb

**1 a** : to take into the mind and thoroughly understand

// *assimilate* information

// Students need to *assimilate* new concepts.

**b** : to take in and utilize as nourishment : to absorb into the system

// The body *assimilates* digested food.

**2 a** : to absorb into the cultural tradition of a population or group

//... the belief that tolerant hosts would be able to *assimilate* immigrants of whatever creed or colour.

— Brian Holmes

**b** : to make similar

//... the only faculty that seems to *assimilate* man to the immortal gods.

— Joseph Conrad

**c** *phonetics* : to alter by the process of assimilation (see ASSIMILATION sense 3)

**3** : COMPARE, LIKEN

intransitive verb

: to be taken in or absorbed : to become assimilated

//Food *assimilates* better if taken slowly.

— Francis Cutler Marshall

assimilate **noun**

as·sim·i·late | \ ə- 'si-mə-lət , - ,lāt\

Definition of *assimilate* (Entry 2 of 2)

: something that is assimilated

[115] An analysis of the word, whether in biology, psychology, or culturally, involves the taking of one substance (food, ideas, cultures) and elimination of the taken or weaker substance by bringing it within a stronger substance. By taking in food, the body converts the energy from the substance effectively eliminating the substance. In ideas, the person gaining knowledge has assumed an isolated thought or idea into the larger knowledge base; or the culture of what the stronger culture believes is weaker, is assimilated by the stronger and thereby eliminated.

[116] I agree that ASIMIL8 in isolation may not be offensive. Without the necessary broader context, people may be unable to understand the meaning of word assimilate. In reaching my decision, I must consider the current meaning of assimilate in the

broader context. The word assimilate has a very specific meaning outside of what the fans of the Borg and *Star Trek* believe from works of fiction.

[117] By restricting the *Charter* right of freedom of expression, MPI argued its administrative decision applied Manitoba's community standard in keeping with *The Path to Reconciliation Act*. The word assimilate and its continued use in the historical context of the Indigenous experience in Manitoba could not be more apparent.

[118] I agree that MPI's decision occurred quickly, but considering the context, it is understandable. Having accepted MPI's position that if the research into the PLP ASIMIL8 occurred correctly, the initial request would have resulted in denial for the same reasons when recalled.

[119] Troller's reason for using ASIMIL8 was for self-fulfillment. I accept that his personal enjoyment of *Star Trek* and the Borg character specifically adds to his self-fulfillment.

[120] The proportionate balancing required by *Doré/Loyola* weighs in favour of the administrative action taken by MPI. Troller is able to support his love of the Borg character from *Star Trek* by any number of words spoken by the Borg character. If you will, the expression of the Borg character that "RESISTANCE IS FUTILE" and "WE ARE THE BORG" remains for him to display. Troller is able to pose in front of his PLP with other Borg enthusiasts without limitation.

[121] In *Grande Prairie*, the court held (at para. 92):

In order to meet the *Doré* test, the rejection of the advertisement must also be proportionate, meaning that in addition to being reasonable, the *Charter* right

must be minimally impaired. This appeal concerns one particular advertisement, and the options were to accept it or reject it. The respondent never took the position that it would not accept any advertising on abortion or other social and political issues. It is unfortunate that the appellant and respondent never took the next step, by following up on the appellant's suggestion that it "adjust the creative". They never explored the type of advertising that might be acceptable to the respondent, yet allow the appellant to convey its message. This appeal does not, however, involve any general challenge to the respondent's policy on advertising, but only to one specific decision.

[122] Following the surrender of the ASIMIL8 PLP, Troller chose a different word to express his love of the Borg character in *Star Trek*. He applied for, and MPI issued a new PLP. The word chosen by him, whether spoken by the Borgs or any character from any *Star Trek* series that adds to Troller's self-fulfillment, is unchallenged by MPI's decision.

[123] If MPI took the position that every word from the *Star Trek* franchise was unacceptable due to the fear of colonialism and the policy of assimilation, I would have found that this prohibition would be so broad as to bring the concerns expressed in *Greater Vancouver* into play.

[124] Those are not the facts before me. Although the Borg character may believe in assimilation, any restriction to eliminate anything from the Borg character, or indeed the *Star Trek* franchise, would be unacceptable in a free and just democratic society.

[125] *Greater Vancouver* permits administrative restrictions based on all the circumstances in a particular case. In examining all these circumstances, the actions of MPI to limit Troller's freedom of expression are a reasonable restriction in a free and democratic society.

[126] I therefore deny Troller's application.

[127] Costs, if not agreed may be spoken to.

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J.



**APPENDIX 'A'**

C.C.S.M. c. R30.5

***The Path to Reconciliation Act***

RECOGNIZING that Manitoba is situated on the traditional lands and territories of Indigenous peoples;

FURTHER RECOGNIZING that Manitoba benefited and continues to benefit from the historical relationships and treaties with Indigenous peoples and nations;

FURTHER RECOGNIZING that Indigenous people within Canada have been subject to a wide variety of human rights abuses since European contact and that those abuses have caused great harm;

FURTHER RECOGNIZING that reconciliation is founded on respect for Indigenous nations and Indigenous peoples and their history, languages and cultures, and reconciliation is necessary to address colonization;

FURTHER RECOGNIZING that the Truth and Reconciliation Commission was established as part of a response to the abuses of colonization, and that the Commission has provided a path forward to reconciliation;

FURTHER RECOGNIZING that the Government of Canada also has a significant role in advancing reconciliation;

AND AFFIRMING that the Government of Manitoba is committed to reconciliation and will be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

**Reconciliation**

1(1) **"Reconciliation"** refers to the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing and create a more equitable and inclusive society.

**Indigenous peoples**

1(2) **"Indigenous peoples"** includes First Nations, Inuit and Metis peoples of Manitoba.

## Principles

2 To advance reconciliation, the government must have regard for the following principles:

**Respect:** Reconciliation is founded on respect for Indigenous nations and Indigenous peoples. Respect is based on awareness and acknowledgement of the history of Indigenous peoples and appreciation of their languages, cultures, practices and legal traditions.

**Engagement:** Reconciliation is founded on engagement with Indigenous nations and Indigenous peoples.

**Understanding:** Reconciliation is fostered by striving for a deeper understanding of the historical and current relationships between Indigenous and non-Indigenous peoples and the hopes and aspirations of Indigenous nations and Indigenous peoples.

**Action:** Reconciliation is furthered by concrete and constructive action that improves the present and future relationships between Indigenous and non-Indigenous peoples.

## Minister

3(1) As a member of the Executive Council, the minister responsible for reconciliation must lead the government's participation in the reconciliation process, including by

- (a) making recommendations to the Executive Council about measures to advance reconciliation;
- (b) promoting initiatives to advance reconciliation across all sectors of society, including interdepartmental, intergovernmental, corporate and community initiatives;
- (c) promoting recognition of the contributions of Indigenous peoples to the founding of Manitoba for the purpose of advancing reconciliation; and
- (d) making recommendations to the government about financial priorities and resource allocation across the government in relation to reconciliation.

## Members of Executive Council

3(2) Each member of the Executive Council is to promote measures to advance reconciliation through the work of the member's department and across government.

## Strategy

4 The minister responsible for reconciliation must guide the development of a strategy for reconciliation that

- (a) is to be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples;

- (b) builds upon meaningful engagement with Indigenous nations and Indigenous peoples about the past, present and future relationships between Indigenous and non-Indigenous peoples;
- (c) creates a framework for an ongoing and evolving process to advance reconciliation;
- (d) establishes immediate and long-term actions that are responsive to the priorities and needs of Indigenous nations and Indigenous peoples, including those set out in the calls to action of the Truth and Reconciliation Commission;
- (e) fosters the involvement of all sectors of society in the reconciliation process; and
- (f) establishes transparent mechanisms to monitor and evaluate the measures taken by the government to advance reconciliation;
- (g) ensures that survivors of residential school abuses have a role to play in its development.

### **Progress report**

5(1) For each fiscal year, the minister responsible for reconciliation must prepare a report about the measures taken by the government to advance reconciliation, including the measures taken to engage Indigenous nations and Indigenous peoples in the reconciliation process and the measures taken to implement the strategy.

### **Tabling report in Assembly and publication**

5(2) Within three months after the end of the fiscal year, the minister must table a copy of the report in the Assembly and make it available to the public. The minister must also arrange for the report, or a summary of it, to be translated into the languages of Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree, and make each translation available to the public.

### **Translation and publication in Indigenous languages**

6 Within 30 days after the coming into force of this Act, the minister responsible for reconciliation must arrange for its translation into the languages of Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree. Upon completion, each translation must be made available to the public.

### **C.C.S.M. reference**

7 This Act may be referred to as chapter R30.5 of the *Continuing Consolidation of the Statutes of Manitoba*.

### **Coming into force**

8 This Act comes into force on the day it receives royal assent.

## TAB 3

**Manitoba Hydro 2017-18 & 2018-19 General Rate Application**

**Written Submissions**

**Assembly of Manitoba Chiefs**

that make it possible for an existing structure without gas heat to be able to use gas heat may also be prohibitively expensive.<sup>42</sup> Dr Yatchew echoed these views by testifying to the “limited possibilities for energy substitution” in First Nations.<sup>43</sup>

In contrast, when considering the Province as a whole, 82.8% of residents live in an area where natural gas is available as a heating fuel.<sup>44</sup> The options for fuel switching that are available to off-reserve customers simply are not available to on-reserve customers.

### **Impact of DSM on Reserve**

In Hydro’s final submissions, its discussion of the bill affordability problem for First Nations communities focused almost exclusively on demand-side management (“DSM”) measures. It may be that Manitoba Hydro’s DSM programming has the potential to eventually bring the efficiency of on-reserve homes up to the standards of off-reserve homes. As Mr Raphals suggested in his report, Hydro’s DSM programming represents “a serious effort [...] to reach First Nations communities.”<sup>45</sup> However, it is not clear that existing DSM programs can substantially close the gap in consumption levels that exists between on-reserve and off-reserve communities, let alone do it in time to seriously mitigate the impact of the rate increases proposed by Hydro. The

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<sup>42</sup> Cross-examination of Dr Simpson, Transcript, Jan 15, p4703.

<sup>43</sup> Evidence of Dr. Yatchew, Transcript, Jan 12, p4432.

<sup>44</sup> PUB/MH I-125a-Attachments p17 of 250.

<sup>45</sup> AMC-7-1, p27.

centrepiece of Hydro's Power Smart program as it applies to on-reserve ratepayers is directed towards the installation of insulation.<sup>46</sup> However, only 3778 of 16,344 on-reserve homes are eligible for this program, meaning 77% of homes are simply not eligible.<sup>47</sup> According to Hydro's evidence, in many cases Hydro has deemed that these homes have sufficient insulation and therefore did not qualify.<sup>48</sup> Even so, improved insulation may not be sufficient to deal with the problem of lower housing quality on reserve. Although the Indigenous Power Smart program was launched in December 2014,<sup>49</sup> the consumption gap on-reserve has persisted into recent consumption data disclosed in this proceeding.

In contrast to the insulation-focused efforts of Indigenous Power Smart, Hydro also provides other energy-efficiency programming for new homes on reserve, which includes, in addition to insulation, various airtightness measures, and energy efficient windows and frames.<sup>50</sup> Hydro conceded under cross-examination that it may not be economical to offer such measures to existing homes and that no measures beyond insulation were indeed being offered to existing homes.<sup>51</sup> Moreover, as Dr Mason's presentation pointed out, "[r]etrofitting homes is a good option that Manitoba Hydro actively offers. But... this requires that houses have sufficient structural integrity"<sup>52</sup>. In our submission, Hydro's current DSM programming is unlikely to make

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<sup>46</sup> MH-88, p35.

<sup>47</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2662.

<sup>48</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2664.

<sup>49</sup> MH-88, p36.

<sup>50</sup> AMC/MH II-8(i).

<sup>51</sup> Cross examination of the Cost of Service Panel, Transcript, Dec 20, p2669.

<sup>52</sup> Presentation of Cost of Service Panel, MH-88, p61.

major progress in closing the gap in consumption levels between on-reserve and off-reserve homes.

Taken together, the evidence shows that on-reserve residential ratepayers have systemically distinct features from off-reserve residential ratepayers. Incomes are much lower and poverty much higher. The building code regime on reserve is weaker than that off-reserve, resulting in housing stock that is systematically of lower quality. This in turn results in higher energy consumption, a fact that has been quantified through Hydro's own billing data. Moreover, as a class, on-reserve residents at this time have almost non-existent recourse to alternative sources of heating. As well, DSM efforts are unlikely to significantly impact the differences between on-reserve residents and off-reserve residents in the foreseeable future. We are therefore likely to see persistently different consumption patterns on-reserve throughout the period when the rates sought in the present Application will be valid.

## **HYDRO'S PRESENCE ON INDIGENOUS LANDS**

Another of the contextual factors that this Board must bear in mind is that First Nations customers are also in a unique relationship with Manitoba Hydro. As Mr Shepherd conceded, Hydro's infrastructure is situated on the ancestral and traditional lands and waters of First Nations across Manitoba.<sup>53</sup> It is AMC's understanding that the preponderance of Hydro's infrastructure is on First Nations lands without their

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<sup>53</sup> Cross examination of Mr Shepherd, Dec 5, p 554.



generating export revenue for all ratepayers, and balance it against the impact that Hydro's infrastructure has had on the exercise of Treaty rights by Manitoba First Nations, as well as the disproportionate impact of Hydro's rate increases on First Nations communities, given their poverty and infrastructure deficit. In AMC's submission, there is ample justification for financing a discount for on-reserve customers by recovery the lost revenue from all other customers.

## **BETTER INFORMATION ON ON-RESERVE CONSUMPTION**

Throughout the proceeding, we have heard a great deal about the lack of accurate basic information in Hydro's possession about on-reserve customers. In AMC's submission, the Board should order Hydro to improve its data collection practices so that Hydro's operations and programming have the benefit of accurate information.

First, while Hydro keeps track of which customers are using electric space heating, it does not seem to have accurate information about this important characteristic of its on-reserve customers. In cross-examination, Ms Morrison of Hydro's Cost of Service panel conceded that "in our investigation, we have a large percentage of customers in First Nations communities that may not be properly coded as heating with electric heat"<sup>117</sup>. As a result, Hydro's consumption data for on-reserve customers may be inaccurate in some ways. For instance, Mr Raphals observed that in

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<sup>117</sup> Transcript, Dec 20, p2691.

Hydro's response to AMC/MH II-1, the consumption patterns of on-reserve customers classified as electric space heating and those customers classified as using some other kind of heating source are virtually identical.<sup>118</sup> Such a result defies common sense, and seems attributable to the improper coding of on-reserve customers as electric space heating customers.

It is notable that the alternative rate design proposed by Hydro,<sup>119</sup> and the rate design proposal put forward by Mr Chernick,<sup>120</sup> each propose a different rate treatment for customers using electric space heat. If the misclassification of on-reserve customers persists, they may be deprived of a benefit targeted toward electric space heating customers. The Board should order Hydro to accurately keep records of its on-reserve customers, and to properly classify them, as soon as possible.

Second, there were some questions raised in the proceeding about the accuracy of Hydro's classification of certain on-reserve consumers as general service customers. According to Hydro's billing data, the average percentage of general service accounts is higher on-reserve than it is off-reserve.<sup>121</sup> For some communities, like Fox Lake First Nation, the percent of general service customers is 30.4%, or 28.6% for Marcel Colomb First Nation.<sup>122</sup> Moreover, Hydro's billing data shows that these general service customers are predominantly classified as commercial entities. Hydro's witnesses were asked to explain how such figures could be compatible with

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<sup>118</sup> Presentation of Mr Raphals, Jan 25, p6618.

<sup>119</sup> Appendix 9.14.

<sup>120</sup> GAC-17, page 7.

<sup>121</sup> AMC/MH II-2b; Application Appendix 7.1, p3.

<sup>122</sup> AMC/MH II-2b, page 3-5 of 5.

the fact that many of these communities do not have good transportation links, and can be expected to have lower levels of commercial development. Mr Shepherd suggested that this may be because general service includes administrative offices, police buildings, and health buildings,<sup>123</sup> but this is inadequate to explain why Hydro classifies these accounts as predominantly commercial. Ms Morrison suggested that these numbers may be caused by the number of non-building accounts, such as heat tape accounts for the water infrastructure on reserves.<sup>124</sup>

In AMC's submission, the Board should order Hydro to investigate the classification of accounts on reserve, to determine whether these accounts have been properly classified, and to report back to the Board with the results of the investigation.

The classification of accounts has a number of consequences. For instance, eligibility for DSM programming is based on whether a customer is classified as residential or general service.<sup>125</sup> As well, if the unexpectedly high number of accounts is due to a number of accounts being dormant, it may also lead to the underestimation of the average consumption figures for on-reserve consumers. As Hydro has already expressed a desire to correct the issue if the classification of these customers is inadequate,<sup>126</sup> asking Hydro to report back to the Board with the results would ensure that the results of the inquiry are available to the public and to First Nations.

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<sup>123</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p578.

<sup>124</sup> Cross-examination of Ms Morrison, Transcript, Dec 20, p2675-2683.

<sup>125</sup> PUB/MH I-126a – Attachment 1.

<sup>126</sup> Cross-examination of Mr Shepherd, Transcript, Dec 5, p579; cross-examination of the Cost of Service panel, Dec 20, p2682.

Finally, Hydro has expressed concerns about the accuracy of its Residential Energy Use Survey as applied to First Nations communities, because only 35 respondents to the survey identified as First Nations.<sup>127</sup> Similarly, Dr Mason, who performed the bill affordability research for Hydro, opined that Hydro does not know enough about how social assistance payments work on reserve.<sup>128</sup> The lack of information may be an impediment to the effective implementation of bill affordability programming on reserve. AMC has expressed its willingness to assist Hydro to work more closely with First Nations communities to collect data about energy consumption.<sup>129</sup> AMC has limited financial capacity with which to do this work and capacity assistance funding will be a prerequisite for its effective participation in these processes.

## CONCLUSIONS

In Hydro's final submission, it noted that affordability and poverty are complex issues that should be left to government.<sup>130</sup> No one would deny that there is a role for government in dealing with poverty, but that does not mean there is no role left for this Board. It cannot be seriously suggested that the Board can fix all that is ill in the relationship between First Nations and other communities in Manitoba, but that does

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<sup>127</sup> Cross-examination of the Cost of Service panel, Dec 20, p2730.

<sup>128</sup> Cross-examination of the Cost of Service panel, Jan 4, p3338.

<sup>129</sup> AMC Undertaking #69.

<sup>130</sup> Hydro Final Submissions, p165 of 221.

## TAB 4

MARCH 2018

# Indigenous Conservation Programming: A New Approach

Report on Energy Conservation for First Nations and Métis in Ontario



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## Message from Terry Young, Vice-President, Policy, Engagement and Innovation



The Latin roots of the verb “to conserve” combine two elements: *con*, meaning together, and *servare*, meaning to keep. Conservation can bring people and communities together. It embodies the idea of preservation and protection – generally of a valuable resource. Without a doubt, energy is one of those valuable resources.

It is the bedrock on which a modern society is built. It powers our homes and businesses, our schools and cultural centres, our hospitals and arenas. It powers a safe, healthy and prosperous society.

When the Minister of Energy directed the IESO to prepare a report on options to improve conservation programs, and access to programs, for First Nations and Métis, as part of the *2017 Long-Term Energy Plan*, the IESO initiated a broad engagement process. It was important to gather information to better understand how well Ontario’s energy conservation programs are serving these groups. As part of that research, the IESO wanted to understand what energy means to Indigenous people, organizations and communities.

What became clear is that energy represents opportunity – the opportunity to enjoy warm and comfortable homes, develop and expand businesses, acquire and apply transferrable skills, generate new sources of revenue and protect the environment for future generations. Energy also connects people and communities.

During the engagement process, the IESO learned that many First Nations communities have embraced energy conservation and community energy planning, but others are not as far along the continuum. We also heard that Métis citizens, particularly seniors, are struggling with the cost of energy and are not aware of the conservation opportunities available to them.

The IESO is committed to working with First Nations and Métis to enable them to participate more fully in Ontario’s energy sector. In the coming months and over the longer

term, the IESO will be working to refine existing programs and develop new ones that will be better aligned with community-identified needs, priorities and objectives. The IESO will continue to engage First Nations and Métis people regularly to ensure programs are accessible and effective. Indigenous successes will be celebrated so that other communities and organizations can learn from their peers.

The IESO is grateful to everyone who took part in a meeting, completed a survey, participated in a webinar, attended the Indigenous Community Energy Symposium, or provided feedback through some other means. You shared your views and ideas with great candour, which will enable the IESO to take concrete, meaningful action to improve energy-related outcomes in Ontario’s Indigenous communities.

Through this report, the IESO will share its findings and its recommendations with the Ministry of Energy, with a view to developing ideas and options that build on a shared commitment to change.

I hope you will keep in touch. Together, we will help to power a reliable and sustainable energy future for First Nations and Métis across the province. You can reach me at [terry.young@ieso.ca](mailto:terry.young@ieso.ca) or 416-506-2832.

Chi miigwetch; Nya: weh; Marsi; Merci; Thank you.

**Terry Young**



# Executive Summary

Conservation has proven to be a low-cost and efficient way of reducing the province's longer-term energy needs as well as the need for costly investments in new generation and transmission infrastructure.

This report was developed in response to the Minister of Energy's Direction, reflected in the *2017 Long-Term Energy Plan: Delivering Fairness and Choice*, which instructs the Independent Electricity System Operator (IESO) to prepare a report on options to improve conservation programming, and access to programs, for Ontario First Nations and Métis, including those communities served by Independent Power Authorities (IPAs).

In response to the Minister's Direction, the IESO undertook the following:

- Reviewed various community energy plans funded through the Aboriginal Community Energy Plan (ACEP) program, with a goal of identifying underlying challenges and conservation opportunities;
- Reflected on feedback from First Nations and Métis gathered during engagements related to the Long-Term Energy Plan, as well as community meetings;
- Analyzed third-party evaluation report findings from the Aboriginal Conservation Program (ACP). This program provided customized conservation services to on-reserve

First Nations to reduce their electricity use and lower their monthly utility bills, and was in market from 2013 until 2015;

- Collected input through an online survey and the following in-person engagements:
  - Four regional meetings (Thunder Bay, Sudbury, London, Vaughan)
  - Indigenous Community Energy Symposium (Toronto)
  - Nishnawbe Aski Nation Climate Change Coordinators meeting
  - Métis Nation of Ontario (MNO) and MNO Councils meeting
  - IESO's Aboriginal Energy Working Group (AEWG)
  - Community visits to the Chippewas of the Thames and the Chippewas of Georgina Island
  - Province-wide webinar with 80 attendees registered
- Conducted interviews with community representatives and other industry representatives who provide energy conservation-related services to Indigenous customers;
- Examined the current suite of provincial Save on Energy programs to see if they meet existing community needs, and if not, identify opportunities for improvement;
- Considered options such as IESO organizational changes and external partnerships to help build momentum for energy conservation with First Nations and Métis.

Hearing directly from community leaders and representatives was an invaluable part of the research for this report. Based on these meetings, it became clear that for

many First Nations and Métis people, energy conservation has implications that can be much broader than simply implementing an energy plan. As a result, the solution to greater participation in energy conservation may well lie in a coordinated response that cuts across different levels of government.

In the *Feedback* section of this report ([see page 7](#)), barriers to greater uptake are divided into three categories – Programs, Capacity Building and Partnerships – illustrating there is no one barrier limiting participation in conservation programming, and also no single catch-all solution. For this same reason, the recommendations in this report are as wide-ranging as they are interconnected.

The IESO intends to capitalize on its role as an industry leader in the energy sector and will work to enable changes that help First Nations and Métis to realize more efficient and sustainable energy use, in the short- and longer-term.

With this in mind, the IESO will look within its own organization to identify structural, cultural, procedural and operational barriers that may need to change in order to allow greater – and more accessible – participation in conservation programming for First Nations and Métis.

Readers should also note that the recommendations included in this report are a first step, reflecting the IESO's commitment to moving forward, while at the same time continuing to seek input from First Nations communities and Métis Councils and their members on how to improve energy conservation programming across the province.

*“The more we know about Save on Energy programs before preparing our community energy plans, the better. If we write a community energy plan without knowing what type of funding is available, it's likely things won't line up and we won't get funding.”*

Participant at London regional meeting

The IESO's longer-term goal is to continue learning and fine-tuning its energy conservation programming to ensure there is consistent access, delivery, follow-up and measurement, as well as greater awareness for the benefits that accrue to First Nations and Métis when they adopt an energy-efficiency mindset.

Finally, in addition to responding to the Minister's Direction, this report is intended to serve as an information tool. Community members told us unequivocally, and unanimously, that one of the biggest stumbling blocks on the road to more efficient energy use was their difficulty in accessing information. In the Appendices, readers will find resources, samples and contacts that may help their communities move forward.



Over 300 attendees at 2017 Indigenous Community Energy Symposium met to share learnings, build collaboration and promote community energy planning across the province.

## Energy Conservation: Perceptions and Implications

On August 1, 2017, the delivery charge was eliminated from electricity bills for on-reserve First Nations residential customers. While the credit reduces the cost of electricity, participants in various engagements said that pursuing energy conservation initiatives still makes a difference, particularly for large non-residential buildings that are currently exempt from the First Nations Delivery Charge Credit.

For many Indigenous people, conserving energy is not just about managing energy costs, taking advantage of energy-efficient technology and mitigating the impacts of climate change. It touches on affordability and is seen by many as a way to improve living conditions. At its core, a healthy home is not just a basic need; it is the place that determines life outcomes for the people who live there.

Participants at all meetings indicated that energy conservation can lead to the following benefits and opportunities:

- Healthier and more sustainable communities;
- Reduced environmental impacts;
- Greater self-sufficiency and autonomy;
- Improved community capacity and awareness;
- Accelerated economic development including an increase in business and economic opportunity.

Of the things that stand in the way of greater energy efficiency in First Nations communities, participants at various community engagements noted:

- Lack of training, information and skilled resources;
- Lack of funding for dedicated energy staff;
- Absence of a coordinated and holistic approach at the federal and provincial levels of government;
- Lack of information about funding sources, including First Nations' eligibility to access existing funding sources;
- Lack of flexibility in terms of delivery timetables and performance criteria in existing programs.



*“In order to address and improve the social determinants of health in our communities, we need to give our youth stability and the promise of a better life. Any long-term plan about energy conservation needs to start in the home, and this home should be a place of comfort and safety, not cold, damp and mouldy.”*

Deputy Grand Chief Derek Fox, Nishnawbe Aski Nation

## Energy Affordability

While energy affordability might seem to be a natural reason to practice energy conservation, some First Nations people said that since the delivery charge was removed from electricity bills for on-reserve customers, the urgency to learn about, and practice, energy conservation at home had actually diminished.

This is not to say there is no interest in learning how to become more energy efficient in these communities, simply that it may be challenging to make energy efficiency top-of-mind.

Other participants in the engagement process said that notwithstanding the delivery charge credit, energy is still expensive. The only option for many northern remote communities is diesel – an expensive fuel source that has a negative impact on the environment. By reducing their use of diesel, these communities can reduce the associated costs as well as the associated environmental impacts.

The IESO also heard that for many Métis citizens, and First Nations people living off-reserve, the cost of electricity is of concern. The IESO sees an opportunity to increase awareness for the Ontario Electricity Support Program (OESP) as a way of helping Indigenous people across Ontario manage their electricity costs.



### About the Ontario Electricity Support Program

[The Ontario Electricity Support Program \(OESP\)](#) lowers electricity bills for lower-income households. The OESP provides a monthly credit to eligible customers based on household income and household size. And, the credits are applied directly to eligible customers' bills.

## Demographics: Opportunities for Capacity Building

Statistics Canada data provide a glimpse into the untapped potential among First Nations and Métis people in Ontario. They have a strong desire to tackle their energy efficiency challenges themselves, on their own terms, provided they have greater access to suitable education and capacity building programs.

A stronger focus on energy conservation at the primary school level would have a beneficial spill-over effect because the information children bring home from school is often shared with extended family at home. Equally, educating youth would have a similar snowball effect because as integral members of the “sharing economy”, young people have learned how to build online communities and share their knowledge on social media.

Energy conservation knowledge is empowering, and with the right information, many community representatives indicated they see the potential for greater employment and economic development opportunities.

The following data support the notion that there is untapped potential across First Nations and Métis people in Ontario for building a strong foundation for conservation awareness and practice. Unless otherwise stated, the source of the following information is Statistics Canada’s 2016 census:

- Ontario was home to 236,680 First Nations people, 120,585 Métis, with another 13,270 respondents reporting other Aboriginal identities (7,540) or more than one Aboriginal identity (5,730).
- From 2006 to 2011, Canada’s First Nations population increased by 42.5 per cent, and Ontario’s grew by 32 per cent (2011 National Household Survey).
- In 2016, the average age of Canada’s Indigenous people was 30.6 years compared to the national average age of 41 years.
- One in four (26 per cent) First Nations people and 11 per cent of Métis live in homes in need of major repairs, compared to six per cent of the non-Aboriginal population.
- Over 40 per cent of people living on-reserve lived in homes needing major repairs, compared to 14 per cent for off-reserve First Nations people.
- Approximately 28 per cent of people who identified as First Nations in Ontario (2016) had low-income status.

*“We should be teaching our school children about possible career choices in the energy sector. This includes giving them more information about energy efficiency, conservation and renewables. They’ll bring that information home and share it with their family. What they learn in school helps the next generation, and also helps us to become more energy independent. As a new energy coordinator, I’d like the IESO to help with this kind of information.”*

Becky Big Canoe, Chippewas of Georgina Island First Nation



## Feedback from Regional, Community and Council Meetings



In preparing this report, four regional and two community meetings were conducted, in addition to the Indigenous Community Energy Symposium in Toronto in October 2017, a public webinar in December 2017 and a meeting with the Métis Nation of Ontario (MNO) and fifteen MNO Councils.

Feedback from these engagements is included below. It is divided into three sections:

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**Programs**

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**Education/Capacity Building**

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**Partnerships**

## Programs

Participants at all meetings raised the following common concerns based on their experience with Save on Energy, and other conservation programs:

### On-reserve program availability

There is currently no consistency in the availability of conservation programming across First Nations communities. Different communities have access to different programs, and some have no access whatsoever.

- Eighty-eight communities are served by Hydro One, which offers the First Nations Conservation Program in communities that did not participate in the Aboriginal Conservation Program (ACP). Thirty-eight of these communities participated in the ACP.
- Nine First Nations communities are served by other local distribution companies (LDCs). Of these, the First Nations-owned utilities Attawapiskat Power Corp., Kashechewan Power Corp. and Fort Albany Power Corp. deliver a small business and a residential conservation program specifically designed for First Nations communities and delivered by Conservation on the Coast. The remaining six communities have access to the province-wide suite of Save on Energy programs which are not specifically designed for First Nation communities.
- Fifteen First Nations communities are served by Hydro One Remote Communities, which offers a mail-in rebate conservation program.
- Ten First Nations communities are served by Independent Power Authorities, and, as such, are not currently eligible for province-wide conservation programs.
- Eleven First Nations are not served by an LDC or Independent Power Authority as they are currently in the process of building their communities or do not yet have a land base.

A description of all available programs is included in the Appendices section ([see page 15](#)).

### Program promotion

Many participants said they were unaware of the Save on Energy programs, particularly programs for homeowners. They wanted to know more about these programs, as well as others that could help them lower their electricity costs. If they had heard about the Save on Energy residential programs, they weren't sure if, or how, these programs applied to them.

Some participants said they were aware of the Save on Energy residential and business programs, but felt they were ineligible because program descriptions do not refer specifically to Indigenous people.

For the Retrofit program specifically, several participants said they were not aware they were eligible because on-reserve community buildings such as arenas, pumping stations and community centres (which are typically energy-intensive) are not specifically mentioned in the program description, and they were not certain if a First Nation community would be considered a "business" under the program.

This feedback is consistent with what the IESO heard from Métis leadership with respect to Métis Council offices.

Similarly, several First Nation participants said they were not aware of the New Home Construction program, or if they qualified, because the program rules don't refer specifically to on-reserve housing.

For the above-noted programs, participants commented the IESO could be more effective in promoting Save on Energy programming to First Nations and Métis.

For existing Save on Energy programs, and when new energy conservation programs are developed specifically for First Nations and Métis, participants suggested that promotional messaging should be consistent with the cultural values of First Nations and Métis people. Rather than focusing on managing costs, for example, participants suggested that messaging should focus on "not taking more than you need."

## Program branding

Participants recommended that any new program designed specifically for First Nations and Métis be branded as a community program not as a Save on Energy program. Several participants cited the Five Nations Energy Inc. as an example of this preferred type of community-branded programming (see page 19). One energy coordinator suggested that if the IESO supplied templates for newsletters, or other educational materials, they might be more effective if they allowed for communities to brand them with their own First Nations' or Métis Council names and logos rather than exclusively as Save on Energy collateral.

## Program funding

Some participants suggested that having a dedicated funding amount for each First Nations community would be more equitable than having a global budget for all First Nations. A dedicated amount of funding would also be preferable to having communities “compete” against each other for a finite amount of program funding.

Participants also indicated the process for applying to various programs (those offered by the IESO as well as other agencies) can be burdensome. As a remedy, participants suggested the IESO streamline and integrate the process for applying to multiple programs by using a “one-stop-shop” approach. Further to this, if the IESO were to develop new energy conservation programming specifically for on-reserve First Nations communities, participants asked that they not be targeted to specific income levels because in their opinion, this approach divides the community.

## Program effectiveness

Participants suggested the IESO should set specific savings targets for First Nations communities, which LDCs would work towards together with First Nations communities. This would lead to more targeted programs, and alleviate the access issues noted earlier, particularly in remote communities where transportation costs are high and the construction season is quite short.

Participants also asked the IESO to review all Indigenous-based programs to be sure there are clear metrics and success measures.

Another common theme amongst participants was the need to consider the unique circumstances of Indigenous communities in both program design and program delivery. In reviewing and developing programs that support Indigenous communities, participants encouraged the IESO to pay close attention to program start and stop dates. They said there is often insufficient time between receiving approval for funding and implementation deadlines to actually get the work done.

Participants also reminded the IESO to consider the time of year during which programs are being implemented. Ice roads, hunting season or other seasonal issues can make participation, and the availability of materials, challenging.

Including Indigenous people in both aspects – program design and delivery – would lead to more successful programs, hopefully with better outcomes.

*“One of the most important things we learned about marketing energy conservation to Indigenous communities was that traditional means of promotion, such as direct mail, didn’t always work. What did work was engaging with the communities in person to better understand their unique situations and needs and hiring local delivery agents from within Indigenous communities.”*

Margaret Nuttall, Caroline Knight, Cara-Lynne Wade and Tina Nicholson, Union Gas



## Education/Capacity Building

Education and capacity building were discussed in depth at all meetings. Depending on the community, there are different views on what would be required in order to achieve higher energy conservation results.

Some communities are much further along in their implementation of energy conservation initiatives than others, and some have more experience and a better understanding of how the energy system works, including knowledge of how to access funding. There was general agreement that education is a key priority. The following feedback was provided:

### First Nations band staff resources are stretched

In many First Nations communities, employees who work on energy-related initiatives split their time between several portfolios, some with little day-to-day support. Priorities are regularly shuffled, and this often results in projects not being completed. Participants suggested that if there were more resources, First Nations communities could achieve more measurable success in their conservation efforts. Some participants also suggested that regional energy managers might be more effective than relying on one single resource in each community.

Some participants said their communities have energy plans in place but need support when it comes to implementation. They receive proposals from various vendors and would prefer to work with vendors they know, preferably with First Nations vendors, but this is not always possible. Many participants said they were not sure how to evaluate proposals from vendors, and that many community members didn't trust unknown vendors to come into their homes. As a result, projects get dropped. Also, several participants said it was quite difficult for them to find qualified contractors in remote northern communities.

There is also a lack of home energy data in many on-reserve communities. Without this basic information, many participants agreed it is difficult to plan and therefore to implement energy conservation initiatives.

### Knowledge transfer

A common theme throughout the engagement process was the lack of knowledge transfer by First Nations communities and Métis Councils. Participants agreed that working in isolation was inefficient, and that a collaborative approach between Indigenous communities would be more effective in delivering energy savings.

Providing a mechanism that would enable First Nations band staff and Métis Council members working on energy-related initiatives to network in person with one another – at workshops and conferences – was seen as a positive way to promote greater knowledge transfer. Other options included using social media such as Facebook to share information.

Some participants said that having better access to the IESO's technical staff would be beneficial. Knowing the right people to contact at the IESO for a critique of community energy plan findings, for example, would be useful. Such access to IESO staff would also help to build capacity within the community, rather than retaining an external consultant to do the same work.

As some communities are further along on their path to energy efficiency and/or energy independence than others, participants suggested that funding for mentorships or internships that allow them to share resources between communities would be helpful. Instead of reinventing the wheel, this type of knowledge transfer among Indigenous communities would be cost-effective and would also help bridge the training gap that some participants said was a barrier to greater uptake of energy conservation initiatives.

## Educational materials

Participants noted there is a lack of quality educational materials, and that having a broad array of such materials for school children, homeowners, community residents and businesses should be a priority.

In most First Nations communities, there is limited funding for a full-time energy coordinator and insufficient time available for them to do their job effectively. In communities with energy coordinators, some are hired on short-term contracts. Some are experienced communicators; others are not. To help community energy coordinators (and others) raise awareness of energy conservation opportunities in their communities, there was more or less unanimous agreement that conservation-related educational materials from a trusted source would be beneficial. Participants also indicated that having contractors first learn how to engage with their communities in a positive way, and getting to know the community by partnering with someone from the community, might encourage homeowners to allow contractors into their homes more readily.

*“It would be great if our leadership was more aware of where energy conservation could take our community and why it’s important. Energy conservation leads to energy independence, more control and more self-reliance from energy companies.”*

Participant from Vaughan Regional Meeting



Community members of Bkejwanong Territory participated in workshops discussing topics such as community energy planning, energy conservation and renewable energy development. The workshops were held by TREC Education, with funding from the IESO Education and Capacity Building Support Program.

## Partnerships

Housing stock – and the need to develop partnerships to improve it – was one of the most talked about issues at the IESO’s meetings. The following feedback was provided:

### Existing First Nations housing stock makes energy conservation challenging:

Participants said that in many cases, on-reserve houses were in such a state of disrepair that it made no sense to undertake energy retrofits. Mould created by inadequate insulation and ventilation is a common occurrence in First Nations communities across Ontario, as is overcrowding. In many communities, the lack of proper insulation and weather-stripping contributes to poor air quality, and this in turn, can lead to health issues.

Participants encouraged the IESO to reach out to organizations such as Canada Mortgage and Housing Corporation (CMHC), and other government agencies such as Green Ontario Fund, to work together to address these issues. Participants also strongly suggested that a process for building energy efficiency standards into the blueprints of on-reserve housing, rather than continuing in a cycle of inefficient retrofitting of poor housing stock, would be helpful.

At the London regional meeting, participants talked about current building practices and suggested they are poorly aligned with how people in many First Nations communities actually live. This feedback is further supported by data showing that in some remote First Nations communities, 96 per cent of households surveyed use wood

as the primary heating source. Based on this input, participants seemed ready for the IESO to play a greater role in discussions about building practices that balance how First Nations people actually live with current energy-efficient technology.

### Vendors and installers don’t show homeowners how equipment works:

Participants said that in some cases homeowners are not shown how installed devices (such as programmable thermostats) work once they are installed. This can lead to damaged equipment or quite simply to homeowners’ decision not to use these installed devices. In some cases, participants also said it was difficult to get new energy efficient appliances serviced, even with a warranty. Participants asked if the IESO could help them to address these issues.

### Distributed energy and net metering

Participants wanted to know more about how to access funding for renewable energy equipment and/or microgrids. They asked if the IESO could partner with financial institutions, or other agencies, to advise them about how to plan financially for these types of small-to medium-sized projects; for large projects, they were interested in knowing how to obtain loan guarantees.

#### About GreenON

Funded through proceeds from Ontario’s carbon market, the [Green Ontario Fund](#) is a not-for-profit provincial agency tasked with reducing greenhouse gas pollution in buildings and industry to help meet Ontario’s emission reduction targets. Through programs and rebates the Green Ontario Fund helps people and businesses take climate action into their own hands.

## Implementation: Moving Forward

This report marks the beginning of a long-term process. Based on the feedback received during the engagement process, there is considerable work to be done, and the recommendations for moving the process ahead are detailed below. Going forward, the guiding principle will be to keep the energy efficiency conversation with First Nations and Métis alive. These discussions were extremely informative, and helpful, providing first-hand feedback about what is working, what's not, and what can be done to change and improve programming.

In submitting this report to the Minister of Energy, the IESO is fully committed to implementing the following action plan, working in collaboration with the Ministry of Energy and other ministries as required:

1. Change the program delivery model, through the Conservation First Framework, to improve access to programming for on-reserve First Nations communities, regardless of their location or connection to the electricity system.
2. Develop targeted promotions of Save on Energy programs for First Nations and Métis peoples.
3. Offer both on-reserve and off-reserve First Nations and Métis energy management support services that provide training, program information and technical expertise, as resources for energy efficiency initiatives.
4. Develop a directory that lists qualified vendors with experience working with First Nations and Métis. The listing would include each category of work that is required for delivering relevant programs for First Nations and Métis.
5. Launch an online portal for First Nations and Métis to share energy related information such as educational and marketing materials.
6. Launch a Joint Advisory Committee consisting of First Nations, Métis and energy leadership. This Committee will develop a plan of action for energy conservation and greenhouse gas emissions reduction in Indigenous communities through potential partnerships with LDCs, natural gas utilities, the Green Ontario Fund (GreenON), Canada Housing and Mortgage Corporation, the Ministry of Municipal Affairs and Housing, and the Ministry of Education.
7. Coordinate with GreenON to establish funding and develop programs that support First Nations and Métis where there are opportunities to reduce reliance on greenhouse gas emitting fuels.

*“The key to getting more First Nations communities to participate in energy conservation is showing our administrators how energy savings benefit the community directly. The more energy a community can save, the more operational money there is available for the community to spend on other high priority needs.”*

Michael Jacobs, Cambium Aboriginal Inc.

## Conclusion

Through the research and engagement process that formed the basis for this report, the IESO had the unique opportunity to see energy conservation through a very unique lens – one that focused on understanding the energy conservation challenges facing First Nations people in some of the province’s most remote communities, as well as those issues affecting Indigenous people in less remote areas.

The feedback received was that consistent access must be a priority, that delivery protocols must be improved, that more information should be available, and that training within Indigenous communities is key.

Of all the input received, perhaps most striking was a shared desire to learn more about energy efficiency, to adopt an energy efficiency mindset and to practice energy conservation more routinely. There was pragmatism, coupled with unflinching determination, in this shared outlook.

The IESO is committed to working with First Nations communities, Métis Councils and their representatives to support the achievement of their energy efficiency goals, in the short term and the longer term. This commitment is fully aligned with the IESO’s broader mandate of ensuring reliability for the province’s energy system, as conservation has proven to be a low-cost and efficient way of reducing the province’s longer-term energy needs as well as the need for costly investments in new generation and transmission infrastructure.

The IESO is also committed to understanding how to engage with Indigenous peoples about energy conservation, and then deliver energy conservation programming that bolsters their participation in these offerings.

The IESO will continue to listen, to engage, to course correct as necessary, and to move forward, all in the spirit of enabling the province’s culture of conservation.





# Appendices

In this section:

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[Energy Conservation Programs in Ontario](#)

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[Other IESO Programs](#)

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[IESO Resources](#)

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[External Materials](#)

# Energy Conservation Programs in Ontario

The following energy conservation programs are currently available in Ontario:

## **First Nations Conservation Program**

For First Nations that are customers of Hydro One Networks Inc., and have not participated in the previous Aboriginal Conservation Program, the First Nations Conservation Program offers energy-efficient upgrades (LED lights, power bars, water heating efficiency measures, appliance replacement, insulation, and more) to on-reserve homeowners and tenants in band-owned housing. Following an energy-efficiency assessment, supply and installation are done for appropriate upgrades, at no cost to homeowners or the community.

## **Conservation on the Coast**

For First Nations community members who are customers of Attawapiskat Power, Fort Albany Power and Kashechewan Power, conservation programs similar to the Save on Energy Home Assistance Program and Small Business Lighting program are offered through Conservation on the Coast.

## **Home Energy Conservation Program: Enbridge**

Helps homeowners of all home-heating types in the Enbridge service territory improve the energy efficiency of their home, lower their energy bills, receive up to \$5,000 back, and reduce their home's greenhouse gas emissions.

## **Home Reno Rebate Program: Union Gas**

With the Home Reno Rebate, customers are eligible for up to \$5,000 cash back, plus additional electric appliance rebates, for energy-saving home improvements. This program is available to all eligible homeowners in the Union Gas program area, whether they heat their home with gas, electricity, oil, propane or wood.

## **Home Weatherization Program: Union Gas**

Income eligible customers can receive free energy-saving home improvements.

## **Save on Energy: Home Assistance Program**

Helps income-eligible homeowners and tenants to improve the energy efficiency of their homes through free home upgrades such as power bars, energy saving light bulbs and low-flow showerheads. Other items such as energy-efficient refrigerators, and appliances such as window air conditioners, programmable thermostats, weather-stripping and attic/basement insulation are also available. All devices and products provided under this program are directly installed in the home and are free of charge to participants.

## **Save on Energy: Small Business Lighting Program**

This program helps small business owners manage their energy costs through turnkey installation of energy efficient lighting.

### *Eligibility*

- Businesses with average annual demand of less than 100 kW
- Participants in the Power Saving Blitz from 2008-2010 and the Direct Install Lighting or Small Business Lighting from 2011-2015 are eligible to participate

### *Eligible businesses receive:*

- Onsite lighting assessment of the facility at no cost
- Up to \$2,000 towards energy efficient lighting upgrades
- Immediate lighting installation

## **Conservation and Renewable Energy (CaRE) Program**

Hydro One Remote Communities offers the Conservation and Renewable Energy (CaRE) Program, which includes a household appliance mail-in rebate program, a commercial lighting retrofit program in existing buildings and a street-lighting retrofit program.

## **Affordability Fund Trust**

The program is designed to help people who do not qualify for low-income conservation programs and who are unable to undertake energy efficiency improvements without support.

## Other IESO Programs

### Education and Capacity Building Program

The Education and Capacity Building Program (ECB) program – provides funding to support energy initiatives that provide education, build capacity and develop the skills of First Nations and Métis to participate in the energy sector. Eligible initiatives include staff training, education workshops and awareness campaigns. The ECB program will continue to support initiatives that help build local business skills, energy literacy and youth engagement. Up to \$100,000 per initiative is available.

### Energy Partnerships Program

Open to First Nations and Métis and includes:

- *Partnership Stream*: Funds the legal, technical and financial work required to assess and develop opportunities for participating in renewable energy and transmission projects. Up to \$50,000 per community is available.
- *Project Development Stream*: Funding for costs associated with developing renewable energy projects such as obtaining regulatory approvals. Up to \$250,000 per applicant is available.
- *Remote Stream*: Up to \$500,000 per community is available for initiatives that reduce reliance on diesel fuel for the four remote First Nations that can't be feasibly connected to the transmission grid.

### Aboriginal Community Energy Plan Program

The Aboriginal Community Energy Plan (ACEP) program supports First Nation and Métis communities in the development of comprehensive, long-term energy plans. A community energy plan helps to improve energy efficiency and reduce electricity consumption at the community level. It also helps communities consider opportunities for renewable energy solutions, and can promote a greater interest, awareness and understanding about energy planning.

Funding for community energy plans is available:

- Up to \$90,000 to create a new community energy plan
- Up to \$25,000 to update an existing plan
- For remote communities, an additional \$5,000 for both streams.

Funds pay for costs directly related to projects that are considered necessary to complete the work, activities, and deliverables outlined in an approved proposal.

To date, the IESO has approved ACEPs from over 95 First Nation and Métis communities, including those communities shown in the map. (This map is interactive. See the different layers [here](#).)

### Save on Energy Training Programs

The IESO provides funding for various types of energy management training, through the Save on Energy program. Programs range from foundational courses in basic energy management to training required for industry certification and accreditation.

### IESO Conservation Fund

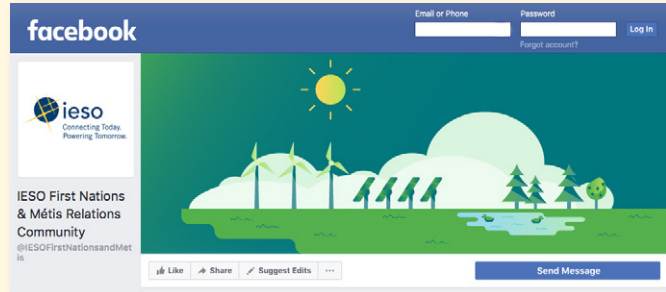
The IESO Conservation Fund provides financial support for innovative electricity conservation technologies, practices, research, and programs that will help Ontario reach its long-term energy conservation goals. The IESO Conservation Fund has supported over 200 innovative conservation and demand management projects since its inception in 2005, shaping various incentive programs, training options, tools and products.



# IESO Resources

## [IESO First Nations & Métis Relations on Facebook](#)

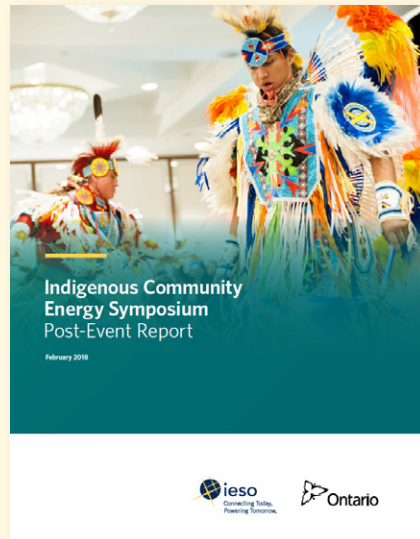
Brings First Nations and Métis communities together to discuss ideas, resources, programs, and issues around energy in Ontario.



## [IESO Indigenous Energy Symposium Post-Event Report](#)

More than 300 individuals attended this two-day conference, which brought together Ontario First Nations community and youth representatives, industry stakeholders and leading community energy experts with a common goal of sharing their learnings, building collaboration and promoting community energy planning across the province. The report identifies key themes, summarizes the discussions and presents a broader Commitment Plan for Indigenous communities that complements and supports the commitments made in the Ministry of Energy's Long-Term Energy Plan.

The Indigenous Energy Symposium was a collaboration between the IESO and the Ministry of Energy.



## [IESO Indigenous Relations webpage](#)

Provides information on long-term energy planning, Indigenous community energy planning and other programs.





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