Restoring Legitimacy to Environmental Governance in Manitoba:

The Need for Meaningful Public Participation

by

Heather Fast

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Abstract

This thesis uses the concept of legitimacy, a measure of the public's support of government operations, as a lens through which to approach environmental legal reform in Canada. An analysis of the legitimacy of Manitoba's environmental regulatory regime as it pertains to the hydroelectric industry is undertaken, with an emphasis on opportunities for public participation. As a result, it is suggested that environmental governance in Manitoba has suffered a significant loss of legitimacy. This indicates that environmental reforms are needed to support meaningful public participation. Based on the components of meaningful public participation recognized by Canadian legal scholars, legal reforms are identified that could be enacted in Manitoba to restore lost legitimacy. It is suggested that the most effective means of restoring legitimacy would be to focus on reforms that clarify the environmental obligations of government and allow citizens to more meaningfully participate in the enforcement and review of environmental protection measures.

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Dedication

To Mary-Ann, Tim and Phil. I couldn't have done this without you.

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Chapter 1: Canadian Environmental Governance and the Need for Reform

Canadian environmental law, in its modern form, emerged after World War II as the negative environmental effects of natural resource development became increasingly acknowledged.[1] However, this does not mean that there was a complete lack of legal responses addressing environmental protection before this time. Instead, what existed was a piecemeal system of legal mechanisms focused on conservation and pollution control. For example, Canada's national parks system was officially created in 1911 with the enactment of the *Dominion Forest Reserves and Parks Act*.[2] Prior to this enactment, several national parks had already been established under sections of the *Dominion Lands Act* as early as 1885.[3] The *Rocky Mountains Park Act*, enacted in 1887 was the first Parks Act to provide for the preservation of the landscape and wildlife.[4] Despite the enactment of these early protective legal mechanisms, it was not until the 1960s and 1970s that the development of a more comprehensive response to environmental issues occurred in Canada.[5]

The modern environmental regulatory regime developed over the last fifty years is intended to ensure that air, land, water and biological diversity in Canada is conserved and protected.[6] Of particular importance to Canada's modern environmental regulatory regime was the development of legal mechanisms that required the assessment of the construction and

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[1] Stepan Wood, Georgia Tanner and Benjamin J. Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 *Ecology L.Q.* 981, at 994 [Wood, Tanner and Richardson].
[2] Parks Canada, "Archives: Canada Creates World's First National Parks Service" (2011), online: <https://www.pc.gc.ca/apps/cseh-twih/archives2_E.asp?id=851>; Canada's Historic Places, "Creating Canada's National Parks", online: <http://www.historicplaces.ca/en/pages/13_canadas_national_parks.aspx>.
[3] Under s. 26 of the *Dominion Lands Act*, the lands surrounding the mineral hot springs at Banff was recognized as reserved from "sale, settlement or squatting". [Parks Canada, *A History of Canada's National Parks Volume II: Chapter 4, National Parks Administration (1885 to 1973)* (Government of Canada, 1977), online: <http://parkscanadahistory.com/publications/history/lothian/eng/vol2/chap4.htm>]
[4] Parks Canada, *ibid*.
[5] Andrew Green, "Norms, Institutions, and the Environment" (2007) 57 *U. Toronto L.J.* 105, at 110.
[6] David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver, BC: UBC Press, 2003), 12. [Boyd, 2003]

operation of projects that could adversely affect the surrounding ecosystems.[7] In 1973, the federal Cabinet formally committed to reviewing the environmental effects of federal decisions, which eventually led to the adoption of the *Environmental Assessment and Review Process Guidelines Order* (EARPGO) in 1984 and later, in 1995, the *Canadian Environmental Assessment Act*.[8] At the provincial level, the development of environmental legal mechanisms followed a similar trajectory, with piecemeal legislation existing prior to the enactment of more comprehensive regulatory frameworks beginning in the 1960s and 1970s.[9]

Since the 1970s, Canada's environmental governance framework has developed into a complex body of law.[10] Although at some points in history Canada has been viewed as a leader in environmental law reform and recognized internationally for a "progressive stance on environmental matters", our environmental reputation has become tarnished.[11] Canada is now seen as a "laggard in both policy innovation and environmental performance, known for inaction and obstruction" on such issues as climate change and the recognition of Indigenous environmental rights.[12] Today, the need for reform of Canada's environmental governance

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[7] Manitoba Law Reform Commission, *Manitoba's Environmental Assessment and Licensing Regime under* The Environment Act (2015) at 30 [MLRC]; Penny Becklumb and Tim Williams, *Canada's New Federal Environmental Assessment Process*, (2012: Library of Parliament), at 1, online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-36-e.pdf>.

[8] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Note: Sections 61 to 70, 73, 75 and 78 to 80 came into force December 22, 1994, and Sections 1 to 60, 71, 72, 74, 76 and 77 came into force January 19, 1995; Canadian International Development Agency, *Implementation of the Canadian Environmental Assessment Act*, (2000: Government of Canada), at 9, online: <http://www.acdi-cida.gc.ca/inet/images.nsf/vLUImages/Performance%20Review%20Branch/$file/ImplementationofCanadianEnvironmentalAssessmentAct(CEAA).pdf>; Canadian Environmental Assessment Agency, *Frequently Asked Questions: Milestones in the History of Federal Environmental Assessment*: *Cabinet Policy*, online: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=CE87904C-1#ws9FFC22CE>.

[9] For a discussion of the development of environmental legal mechanisms in Manitoba, see: MRLC, *supra* note 7, 5-23.

[10] Meinhard Doelle and Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed. (Toronto: Thompson Reuters Canada, 2013), at v (Preface) [Doelle and Tollefson].

[11] Wood, Tanner and Richardson, *supra* note 1, at 982; Boyd, 2003, *supra* note 6, at 5-10.

[12] Wood, Tanner and Richardson, *ibid*; Brandi Morin, "Where does Canada sit 10 years after the UN Declaration on the Rights of Indigenous Peoples?", *CBC News* (September 13, 2017), online: <http://www.cbc.ca/news/indigenous/where-does-canada-sit-10-years-after-undrip-1.4288480>.

regime at both the federal and provincial level is undeniable. Canada's environmental record indicates that the current regulatory regime is not functioning effectively, especially in relation to important environmental issues such as energy and resource consumption, high greenhouse gas emissions and increasing local pressures in relation to biodiversity and water management.[13] Many of the Indigenous peoples in Canada also continue to lack access to essential services while also being more exposed to environmental risks.[14] As a result, citizens around the country have increasingly vocalized their concern with the current environmental regulatory performance of governments at all levels. This has recently included opposition to proposed pipeline projects and hydroelectric generation projects, and participation in the federal government's review of federal environmental regulatory processes.[15]

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[13] The Organisation for Economic Co-operation and Development, "OECD Environmental Performance Reviews: Canada" (2017), at 3, online: <https://read.oecd-ilibrary.org/environment/oecd-environmental-performance-reviews-canada-2017_9789264279612-en#page5> [OECD].

[14] OECD, *ibid.*

[15] Pipelines: Amy Smart, "Thousands march to protest Canada pipeline expansion project", *CTV News* (March 10, 2018), online: <https://www.ctvnews.ca/canada/thousands-march-to-protest-canada-pipeline-expansion-project-1.3837566>; Phuong Le, "Thousands march in B.C. to protest Trans Mountain pipeline expansion", *The Star* (March 10, 2018), online: <https://www.thestar.com/news/canada/2018/03/10/thousands-march-in-bc-to-protest-trans-mountain-pipeline-expansion.html>; Ian Bailey, "B.C. Premier John Horgan predicts 'crisis' from anti-pipeline protests", *The Globe and Mail* (March 28, 2018), online: <https://www.theglobeandmail.com/canada/british-columbia/article-bc-premier-john-horgan-predicts-crisis-from-anti-pipeline-protests/>; Hydroelectric projects: Caroline Barghout, "Manitoba 'Hydro justice' rally gains support on heels of board resignations", *CBC News* (March 22, 2018), online: <http://www.cbc.ca/news/canada/manitoba/manitoba-hydro-justice-rally-1.4589155>; Sean Kavanagh, "Manitoba Metis Federation plans to take province to court over cancelled Hydro agreement", *CBC News* (March 28, 2018), online: <http://www.cbc.ca/news/canada/manitoba/manitoba-metis-federation-manitoba-hydro-1.4596805>; Alexandra Paul, "Hydro turmoil empowers protesters", *Winnipeg Free Press* (March 23, 2018), online: <https://www.winnipegfreepress.com/local/hydro-turmoil-empowers-protesters-477713013.html>; Warren Bell, "Site C Dam – still on life support as opposition continues", *National Observer* (February 9, 2018), online: <https://www.nationalobserver.com/2018/02/09/opinion/site-c-dam-still-life-support-opposition-continues>; Ashley Fitzpatrick, "Land protectors still fighting Muskrat Falls", *The Chronicle Herald* (January 20, 2018), online: <http://thechronicleherald.ca/novascotia/1538321-land-protectors-still-fighting-muskrat-falls>; Participation in Regulatory Processes: Government of Canada, *Review of Environmental and Regulatory Processes*, online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views.html>; Government of Canada, *Let's Talk Environmental Assessment*, online: <https://www.letstalkea.ca/>; Fisheries and Oceans Canada, *Review of the 2012 Changes to the Fisheries Act: Summary report of Fisheries and Oceans Canada phase 1 public engagement*, (June 2017) online: <http://www.dfo-mpo.gc.ca/pnw-ppe/summaries-sommaires/summary-public-comments-eng.pdf>; Fisheries and Oceans Canada, *Review of the 2012 Changes to the Fisheries Act: What we heard from Indigenous groups and resource management boards* (June 2017), online: <http://www.dfo-mpo.gc.ca/pnw-ppe/summaries-sommaires/summary-indigenous-eng.pdf>; Standing Committee on Transport, Infrastructure and Communities, *Navigation Protection Act: Report and Government Response*, 42nd

Calls for significant environmental reform have not been limited to the realm of activists and individuals experiencing the negative consequences of natural resource development. There has also been recognition from legal scholars and practitioners of the need for new regulatory approaches in order to better address Canada's environmental issues. Over the last thirty years, scholarly discussion has increasingly reflected frustration with Canada's environmental regulatory framework.[16] As suggested by Michael M'Gonigle and Paula Ramsay, "[a]mongst environmental lawyers, a broad consensus exists that environmental law has not fulfilled its promise. For many, the field has failed."[17] The regulatory changes that occurred at the federal level at the behest of the Harper government were particularly troubling to the environmental legal community and have been characterised as "nothing short of an assault on environmental law."[18] Along with the recognized failings of Canada's environmental regulatory regime, this period has also been characterized by a recognition that "the need for strong environmental protection to safeguard our climate, our biodiversity, and our valuable resources has become even more pressing."[19]

The need for systematic environmental reforms in Canada has been best addressed in David Boyd's *Unnatural Law*. After a thorough analysis of the modern environmental regulatory regime, Boyd identifies six weaknesses which have significantly contributed to Canada's poor

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Parliament, 1st Session, online: <http://www.ourcommons.ca/Committees/en/TRAN/StudyActivity?studyActivityId=9081071>; Government of Canada, *National Energy Board Modernization: Expert Panel: Meeting Summaries*, online: <https://www.neb-modernization.ca/what-we-heard>.

[16] Wood, Tanner and Richardson, *supra* note 1, at 983.

[17] Michael M'Gonigle and Paula Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation" (2004) 14 *J Envtl L & Prac* 333, at 342. See also: Wood, Tanner and Richardson, *ibid*, at 981.

[18] By this I mean the reform of the *Canadian Environmental Assessment Act*, *Fisheries Act*, and *Navigation Protection Act* which were "rendered ineffective from an environmental protection perspective" through omnibus legislation without any "meaningful public engagement or transparency". [Jason MacLean, Meinhard Doelle and Chris Tollefson, "The Past, Present and Future of Canadian Environmental Law: A Critical Dialogue" (2015) 1:1 *Lakehead LJ* 79, at 82]

[19] MacLean, Doelle, Tollefson, *ibid.*

environmental record.[20] This includes regulatory gaps such as a lack of enforcement mechanisms, excessive discretionary powers granted to decision-maker, a failure to incorporate contemporary scientific knowledge in laws and policies, ineffective implementation and enforcement due to a lack of resources, a lack of opportunity for meaningful public participation, and an overly narrow range of legal tools available to address environmental problems.[21] Although Boyd's analysis is directed at the Canadian regulatory regime as a whole, his analysis remains relevant for the purposes of this thesis since, as discussed in chapter three, these weakness are also readily apparent in Manitoba's environmental regulatory regime. This is also true of the range of barriers identified by Boyd that prevent these weaknesses from being effectively remedied.[22] These barriers include ongoing constitutional uncertainty, a lack of separation between the legislative and executive powers of government, an accumulation of power in the offices of the government leaders, legal barriers preventing adequate citizen access to environmental justice in the courts, and the elevation of economic priorities over environmental concerns.[23]

Although all of the regulatory issues identified by Boyd should eventually be rectified, this thesis will focus on the weaknesses and barriers that have contributed to a loss of public support for the environmental governance regime in Manitoba, particularly the lack of opportunity for meaningful participation. In terms of barriers, a lack of citizen access to the courts and the perceived primacy of economic concerns over environmental concerns has also been particularly detrimental in terms of public support. This will be discussed further in chapters three and four. Although it has been fifteen years since *Unnatural Law* was published,

[20] Boyd, 2003, *supra* note 6, at 212.
[21] Boyd, 2003, *ibid*, at 212, 228-250.
[22] Boyd, 2003, *ibid*, at 212.
[23] Boyd, 2003, *ibid*, at 212, 251-272.

little progress has been made to address these systemic problems. Thus, Boyd's analysis continues to provide important insight into the issues faced by environmental governance regimes in Canada and will therefore be used to identify regulatory weaknesses within Manitoba's regime and support the argument that significant environmental reforms are required.

Boyd's insights into Canada's problematic environmental regulatory regime have been bolstered by additional analysis undertaken by Canadian legal scholars in the past decade. Such scholarly analysis has moved beyond a focused examination of existing legal mechanisms to identify more fundamental problems with the way Canadian society functions. This includes consideration of the representation of nature within Canadian governance processes and the conflicting priorities of the governing agencies functioning within capitalist, democratic societies like Canada.[24] In an environmental context, this conflict arises due to the liberal democratic basis of Canada's political system and its economic dependence on the exploitation of natural resources.

While Canada's democratic political system is based on principles of citizen participation, the Canadian economic system is not. This is where the conflict arises. The maintenance of political power in a liberal democracy is dependent on securing and maintaining the support of the public as the amount of public support a political actor or party has generally corresponds with amount of political power that is held, especially since political positions are assigned based on the number of citizen votes that can be secured. However, Canada has a capitalist economic system that requires continual growth and generation of economic profits and

[24] For example, see: Michael M'Gonigle and Louise Takeda, "The Liberal Limits of Environmental Law: A Green Legal Critique" (2013) 30 *Pace Envtl. L. Rev*. 1018; Michael M'Gonigle, "A new approach to the concept of environmental law: Green Legal Theory" (2008) 4 *Ökologisches Wirtschaften* 34; David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto, ON: ECW Press, 2017).

often relies on private industry to achieve these economic goals.[25] Canadian governments also rely upon the use and sale of Canada's natural resources to support their economic objectives.[26] As a result, Canadian governments at both the federal and provincial levels have often prioritized the natural resource industry's economic interests over the environmental interests of the general public. This prioritization of economic interests over the public's environmental interests is contradictory since as a liberal democracy, Canadian governments are supposed to represent the interests of the public.[27] Due to the economic importance of natural resources, the involvement of the natural resource industry in Canada's environmental regulatory regime is also more often prioritized than the involvement of the general public. This is also contradictory as democratic political systems like Canada's are supposed to ensure citizens are "involved in the making of decisions that affect them".[28] Thus, the main economic priority of Canadian governments (economic growth) often conflicts with their main political priorities (representing the public's interests and securing public support), especially when the development and sale of natural resources is involved.

Green Legal Theory (GLT) is a new Canadian critical approach to environmental governance that recognizes the social, economic and political influences driving the actions of Canadian governments, and suggests these conflicting priorities have contributed to Canada's "environmental problem".[29] GLT scholars examine these influences by analyzing the broader

[25] Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (Cambridge, Mass: MIT Press, 2004), at 55 [Eckersley].
[26] Elaine Hughes, Arlene J. Kwasniak and Alastair R. Lucas, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law, 2016), at 103 [Hughes, Kwasniak and Lucas]; Michael Howlett and Keith Brownsey, *Canada's Resource Economy in Transition: the Past, Present, & Future of Canadian Staples Industries* (Toronto: Edward Montgomery Publications, 2008), at 3-5 [Howlett and Brownsey].
[27] Joan Grace and Byron Sheldrick, eds., *Canadian Politics: Democracy and Dissent* (Toronto: Pearson Prentice Hall, 2006), at xix [Grace and Sheldrick].
[28] Grace and Sheldrick, *ibid*.
[29] M'Gonigle and Takeda, *supra* note 24, at 1019.

governance framework through a political economy or a political ecology lens.[30] This involves consideration of the political, economic, social and cultural elements of an issue in terms of how these elements interact with each other.[31] When nature is given a place of importance in political economic analysis, the shift is made to political ecology.[32] GLT theorists have used a political economic approach to identify the forces that shape environmental law by examining the historical development of law and policy. For states such as Canada, this involves consideration of its colonial origins and the inequalities that this colonial history has perpetuated. It also requires analysis of the capitalist, liberal democratic basis of Canadian society and how this has constrained the development of current environmental legal approaches and environmental governance more generally.[33] Such analysis by GLT theorists tends to reflect a neo-Marxist[34] or eco-Marxist[35] perspective and focuses on the conflict inherent in liberal democratic governance that stems from the often oppositional political and economic priorities discussed above.[36] By examining the "clear tension" seen to exist between these priorities, GLT theorists suggest it is possible to "uncover the constraints imposed upon the state that attempts to respond to the ecological crisis."[37]

Clearly, environmental legal critiques in Canada, like the governance framework subject to such critical analysis, have continued to evolve over time as the ramifications of natural resource development and the impacts of a capitalist driven society have become more apparent. The emergence of the GLT perspective has been particularly enlightening and has provided new

[30] M'Gonigle and Takeda, *ibid*, at 1020.
[31] Wallace Clement, *Understanding Canada: Building on the New Canadian Political Economy* (McGill-Queen's University Press: 1996), at 3.
[32] M'Gonigle and Takeda, *supra* note 24, at 1020.
[33] M'Gonigle and Takeda, *ibid*, at 1060-1062.
[34] For example, see Jürgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975) [Habermas].
[35] For example, see James O'Connor, *The Fiscal Crisis of the State* (New York: St. Martin's Press, 1973).
[36] M'Gonigle and Takeda, *supra* note 24, at 1066-67. For a discussion of neo-Marxism and eco-Marxism (i.e. ecological socialism), see: Eckersley, *supra* note 25, at 54-61.
[37] M'Gonigle and Takeda, *ibid*, at 1061.

depth to the analysis of Canada's environmental governance issues. By considering the political, economic and social forces that influence the operation of Canadian governments, it is possible to move beyond the environmental and economic arguments most often advanced by environmental reformists and develop new approaches to Canada's environmental problems. This is particularly important in light of the fact that there has been considerable resistance from Canadian governments at all levels to the environmental reform strategies utilized by advocates thus far, especially those focused on improving citizen involvement in environmental regulatory processes.

It is my intention, in this thesis, to contribute to the rich tapestry of environmental legal scholarship in Canada and support ongoing reform efforts by addressing the inherent problems of Canadian environmental governance from a perspective not often utilized within the legal community, that of the general public. While there has been an increasing focus within environmental legal scholarship on the representation of the environment within capitalist, democratic nations like Canada, there is still a drastic underrepresentation of the public within Canada's environmental governance framework that must first be addressed. As Boyd identified, one of the most significant issues contributing to Canada's poor environmental performance is a lack of opportunity for public participation.[38] Barriers preventing adequate citizen access to environmental justice in the courts has also been identified as a contributing factor to Canada's environmental problems.[39] Therefore, environmental reforms are needed that create a greater role for the public in Canadian environmental regulatory regimes. By examining the role the public plays (or ought to play) in Canadian environmental governance, it is possible to better understand what factors contribute to the behaviour of government actors and suggest reforms to

[38] Boyd, 2003, *supra* note 6, at 212; 245-248.
[39] Boyd, 2003, *ibid,* at 212; 267-272.

improve the environmental governance regime. In order to accomplish this, I have adopted the political economic approach utilized by GLT scholars to examine the participatory mechanisms contained within Canadian environmental governance approaches, with a focus on Manitoba's environmental regulatory framework, and discuss how a more inclusive environmental regulatory framework could have important legal, environmental and political consequences.

In particular, I hope to shed light on the political value of implementing environmental legal reforms that provide opportunity for meaningful public participation. This is accomplished by examining the concepts of "political legitimacy" and "meaningful public participation" as part of my analysis in chapter two and identifying why the implementation of regulatory reforms that promote meaningful public participation in environmental governance processes can contribute to the strengthening of the political foundations of Canada's capitalist, democratic approach to governance. I challenge the common misconception that reforms promoting a more inclusive governance framework act as an impediment to current legal and political processes. Instead, I suggest that it is in the best interest of all forms of Canadian governance to move towards a more inclusive environmental regulatory regime. In chapter three, this theory will be tested with an analysis of the governance of the hydroelectric power industry in Manitoba. By considering the loss of legitimacy that has occurred within Manitoban environmental governance, it becomes clear that significant environmental reform is needed to bolster the public support required for the effective and legitimate operation of Manitoba's provincial government.

Despite the fact that some environmental scholars are sceptical of the utility of legal reform as a means of influencing transformative environmental change, I also intend to demonstrate in chapter four that there are legal solutions that can contribute to both the restoration of political legitimacy and to the systemic environmental reform needed in Canada. This will involve consideration of legal mechanisms that would contribute to more meaningful

public participation opportunities in Canadian environmental governance such as the expansion of legal standing, recognition of the public trust doctrine, and the establishment of a robust environmental rights regime. While legal reforms can be more difficult and take longer to achieve than environmental policy changes due to the political and legislative processes involved, these same reforms can provide greater protection to the enacted environmental legal requirements when changes in government occur. Even when governments seek to roll-back legal environmental protection mechanisms, the legislative processes at the federal and provincial levels will, at the very least, still provide opportunity for opposing political viewpoints and the opinions of the public to be heard before such reforms are approved, as opposed to policy reforms which do not require the input of individuals outside the governing party. Overall, the goal of my research is to provide insight into the shortcomings of current environmental legal practices in Canada, with a focus on Manitoba, and identify not only the need for a new approach, but what such an approach might consist of. Through legal 'reform' we can move Canadian society towards the environmental 're-formation' needed to secure a more sustainable future and a more effective system of environmental governance.

Chapter 2: Legitimacy and the Importance of Meaningful Public Participation

Politics and law are inherently connected and play a significant role in the development of Canadian environmental governance approaches. This is largely due to the fact that political actors such as members of the federal Parliament and provincial and territorial Legislatures are responsible for the creation of new laws and the reformation of existing legislation. Many strategies have been used by environmental advocates in their attempts to convince these political actors that significant environmental reforms are necessary, such as arguments based on sustainability, environmental legal approaches used in other jurisdictions, and economic analysis.[40] However, there has been much political resistance to these approaches and proposed reforms have largely been rejected. This resistance highlights the need for a new approach, one that promotes the need for environmental reform from a perspective that is more persuasive to politicians, especially those who view environmental legislation as "regulatory red tape" that needs to be reduced in the name of efficiency.[41] This has led me to consider "political legitimacy" and its use as an indicator of the need for regulatory reforms. As will be discussed, legitimacy is a fundamental component of governance in democratic, capitalist societies and therefore, the degree to which the governance system is considered legitimate indicates how well that system is functioning. Therefore, I suggest that by examining the political legitimacy of an environmental regulatory system overseen by a democratic government, insight can be gained into whether or not there is a need for environmental reform. Such an approach can be used to

[40] For example, see: Kyrke Gaudreau and Robert B Gibson, *Framework for Sustainability-based Assessment for the Public Utilities Board's Needs For and Alternatives To (NFAT) Assessment of Manitoba Hydro's Preferred Development Plan and Alternatives*, (Consumers Association of Canada, Manitoba Branch: 2014); MLRC, *supra* note 7; Manitoba Sustainable Development, *Public Registry 5711.00: Environment Act Consultation, Public Comments*, online: <http://www.gov.mb.ca/sd/eal/registries/5711/index.html>.

[41] See *The Red Tape Reduction and Government Efficiency Act, 2017* S.M. 2017, c. 34, s. 2 (not yet in force), s. 3, s. 4, s. 5, s. 6, s. 7, s. 8, s. 11, s. 12, s. 13.

take a more political approach to environmental reform and advance an argument based on the ideals of democracy and political effectiveness.

This chapter explores the concept of "political legitimacy" and the fundamental role of government in the maintenance of such legitimacy using the crisis systems model proposed by Brent Marshall and Warren Goldstein.[42] The contribution of meaningful public participation opportunities to the maintenance and restoration of legitimacy in environmental governance regimes will also be explored. Finally, an examination of the recognized elements of meaningful public participation in environmental governance in Canada is provided. These concepts are essential to the analysis of legitimacy in Manitoba's environmental governance regime that will be undertaken in the next chapter.

2.1) Defining Legitimacy

The term "legitimacy" is utilized in a range of different ways within legal scholarship and other disciplines that examine regulatory approaches, and there is not much consistency in its use. However, most "legitimacy" commentary involving legal mechanisms is focused on providing insight into the more political elements of governance. Thus, some authors have referred specifically to "political legitimacy".[43] GLT scholars have adopted a similar concept of legitimacy, although they have labelled it "state legitimacy", meaning the acceptance of government rule by the citizens it oversees.[44] It is this concept of legitimacy that has been adopted for the purposes of this thesis. Thus, in a capitalist, democratic society like Canada,

[42] Brent K. Marshall and Warren S. Goldstein, "Managing the Environmental Legitimation Crisis" (2006) 19:2 *OAE* 214.
[43] Steven Bernstein and Benjamin Cashore, "Can non-state global governance be legitimate? An analytical framework" (2007) 1 *Regulation & Governance* 347, at 348. See also: Steven Bernstein, "Legitimacy in Global Environmental Governance", (2004) 1 *J. Int'l L & Int'l Rel*. 139, at 142.
[44] M'Gonigle and Takeda, *supra* note 24, at 1060.

legitimacy is considered to be a measure of citizen approval and trust in the operations of their elected government and its regulatory agencies. Therefore, public approval and public trust directly corresponds with the level of legitimacy that a state (and the regulatory mechanisms it enacts) is considered to have.

2.2) Marshall and Goldstein's "Environmental Legitimation Crisis"

As discussed in chapter one, the maintenance of legitimacy (citizen support) is a necessary element of liberal democratic governance and one of the main priorities of governing bodies operating within the capitalist, democratic paradigm. This maintenance of legitimacy has been referred to by Jürgen Habermas as "the legitimation system".[45] When the legitimation system does not function properly, a "legitimation crisis" may occur.[46] A legitimation crisis occurs when "the legitimizing system does not succeed in maintaining the requisite level of mass loyalty".[47] In other words, such a crisis occurs when the state fails to generate the citizen support (i.e. legitimacy) it requires to effectively govern.

Although this thesis is focused on the restoration of legitimacy as a means of supporting improvements to Canadian environmental governance, it must be acknowledged that the legitimation system does not require the government to implement positive regulatory change to maintain legitimacy. For example, Habermas discusses the legitimation system as a process used by government to elicit mass loyalty while avoiding "genuine" public participation in governance processes.[48] He suggests that, in this form, the legitimation system maintains the requisite citizen support by reducing the public to the status of "passive citizens" by distracting

[45] Habermas, *supra* note 34, at 36.
[46] This type of crisis has also been referred to as a "social welfare legitimation crisis". See Marshall and Goldstein, *supra* note 42, at 220.
[47] Habermas, *supra* note 34, at 46.
[48] Habermas, *ibid*, at 36.

the public through "career, leisure and consumption" which rewards them with money, leisure time, and security.[49] With citizen interests focused on the continuation of these rewards, their participation in political processes can largely be reduced to significant democratic events like elections, giving government autonomy to operate with little citizen interference in most aspects of the political administrative system. Alternatively, it is also possible for a government to abandon the legitimation system and simply ignore a loss of legitimacy and continue operating in the manner that has caused the public to withdraw their support. However, as recognized by Marshall and Goldstein, the legitimation system can also push the government to implement reforms in order to restore or maintain legitimacy. It is this latter conception of the legitimation system that will be discussed in this thesis since modern Canadian citizens appear to be moving out of a state of passive citizenry in relation to environmental governance and will therefore require some substantial changes in order to avoid an environmental legitimation crisis, which is discussed further below. While it is still possible that government will ignore a loss of legitimacy in relation to environmental governance, any political interest in re-election from current governments like Manitoba's will likely require some action to address a loss of public trust in the environmental regulatory regime.

In order to analyze the way in which the legitimation system and other elements of capitalist, democratic societies function, Marxist scholars have developed the "crisis systems model" (CSM) which organizes the functions of these societies into three basic and interrelated subsystems: the political administrative system, the economic system, and the sociocultural system.[50] In recognition of the importance of the environment to human society, a fourth

[49] Habermas, *ibid*, at 37.
[50] Habermas, *ibid*, at 4-5; Marshall and Goldstein, *supra* note 42, at 215-216.

subsystem has recently been added to the crisis systems model by Marshall and Goldstein: the ecological system.[51] This expanded model is illustrated in Figure 2.1 below.

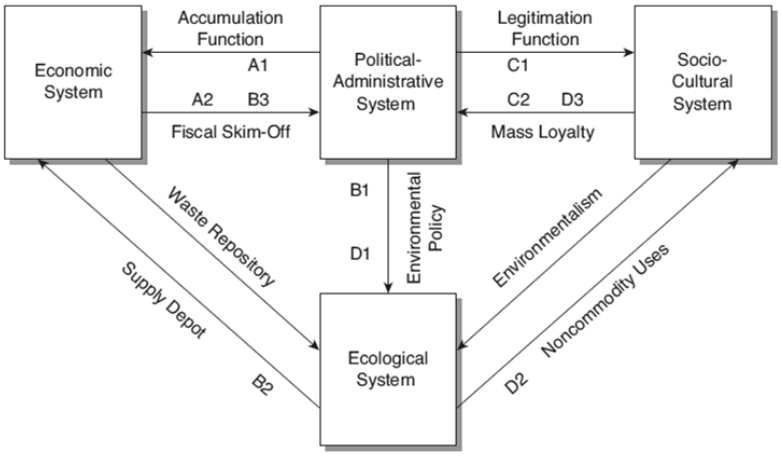

Figure 2.1: Crisis Systems Model (Marshall and Goldstein)

The ecological system is considered to provide a number of important functions in human society. First, it operates as a "supply depot" and provides the raw resources needed for industrial and agricultural production processes.[52] Second, the ecological system functions as a "waste depository" and absorbs the waste produced by human activity.[53] Third, and most important, the ecological system functions as a "living space" for human societies.[54] The four systems that encompass the CSM are considered to be interconnected, meaning no single system is fully autonomous from the others.[55] However, for the purposes of exploring the concept of legitimacy, it is the interactions of the political-administrative system (government) and the socio-cultural system (the public) that are most relevant.

Marshall and Goldstein have used their expanded CSM to analyze the interactions of government agencies and the public in the context of natural resource management in the United

[51] Marshall and Goldstein, *ibid*, at 215.
[52] Marshall and Goldstein, *ibid*, at 216.
[53] Marshall and Goldstein, *ibid*.
[54] Marshall and Goldstein, *ibid*.
[55] Marshall and Goldstein, *ibid*, at 215.

States (illustrated by Figure 2.2 below). This analysis has led them to identify a new type of crisis deriving from a loss of legitimacy in environmental governance, an "environmental legitimation crisis".[56] Similar to the legitimation crisis discussed by Habermas, an environmental legitimation crisis occurs when the political administrative system fails to perform its legitimation function and maintain public support.[57] This type of crisis could occur, for example, if government fails to shield citizens from negative environmental impacts or fails to implement effective conservation strategies.[58] Potential strategies to prevent an environmental legitimation crisis identified by Marshall and Goldstein include cleaning up toxic chemicals in contaminated communities, purchasing private land from natural resource companies and converting it for public recreational use, or conserving an old growth forest by designating it as a protected wilderness area.[59]

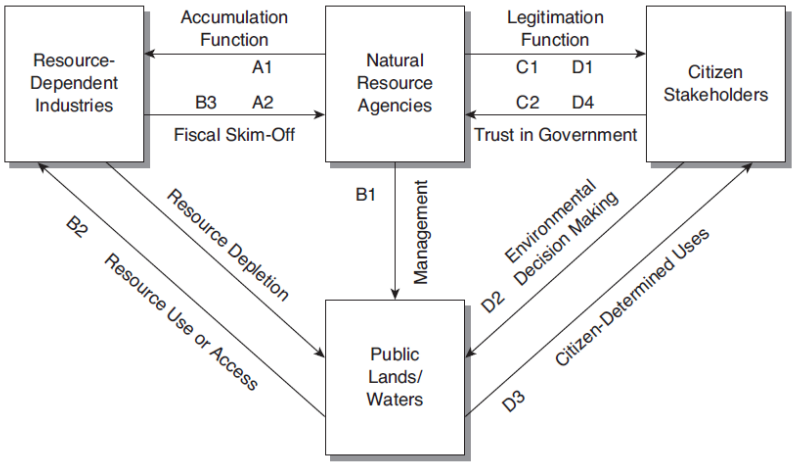

Figure 2.2: Natural Resource Management Systems Model (Marshall and Goldstein)

[56] Marshall and Goldstein, *ibid,* at 220; Dunlap, R., Michelson, M., & Stalker, G. (2002). "Environmental sociology: An introduction" in R. Dunlap & W. Michelson (Eds.), *Handbook of environmental sociology* (Westport, CT: Greenwood, 2002), 1-32.
[57] This crisis involves processes D1→D2→D3 in Figure 2.2 above [Marshall and Goldstein, *ibid*]
[58] Marshall and Goldstein, *ibid*.
[59] Marshall and Goldstein, *ibid,* at 220-221.

Marshall and Goldstein's analysis of environmental governance in the United States involves an examination of citizen participation in natural resource management and the important role played by the political-administrative system (i.e. natural resource agencies) in preventing environmental legitimation crises, as illustrated in Figure 2.2, above.[60] They suggest they that these agencies have maintained themselves as legitimate social institutions by "adjusting their organizational structure and culture, management style, and practice."[61] In particular, Marshall and Goldstein have focused on the way these natural resource agencies have improved the public's opportunities to participate in governance processes as a means of restoring legitimacy.[62]

Through a historical examination of natural resource management in the United States, they identify several points in time when natural resource agencies were forced to shift to practices that better included the public in order to maintain their legitimacy.[63] In this consideration of citizen participation, Marshall and Goldstein make an important distinction between "authentic" and "inauthentic" participation.[64] They emphasize that the restoration of legitimacy requires authentic participation opportunities, in other words, "a genuine opportunity to influence decision making at all stages of the process".[65] As will be discussed further below, this concept of authentic participation can be equated with the concept of "meaningful public

[60] Marshall and Goldstein, *ibid*, at 215.
[61] Marshall and Goldstein, *ibid*, at 221.
[62] Marshall and Goldstein, *ibid*, at 215, 227-228.
[63] Marshall and Goldstein, *ibid*, at 223-228.
[64] Marshall and Goldstein, *ibid*, at 223. It should be noted that there are other scholarly categorizations of citizen participation beyond this authentic/inauthentic dichotomy that provide insight into the impact of different participatory practices. For example, Sherry Arnstein has established a typology of citizen participation in which she recognizes eight different levels of participation, with each level corresponding to the extent of citizens' power in determining the outcome of governance processes. [Sherry Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 *AIP Journal* 216]
[65] Marshall and Goldstein, *ibid*.

participation" developed by Canadian scholars, thus, it is this Canadian terminology that will be used in this thesis instead.

Along with this substitution of terminology, Marshall and Goldstein's analysis of legitimacy will also be adapted for use in the Canadian context. Their theory of legitimacy and its connection to meaningful public participation, along with the indicators of an environmental legitimation crisis discussed below, forms the basis of the analysis of Manitoba's environmental governance framework, as it applies to the hydroelectric industry, undertaken in chapters three and four. This application of Marshall and Goldstein's analysis to the Canadian context is appropriate as there are significant similarities between environmental governance in Canada and the United States, with both states sharing a similar reliance on natural resources for economic prosperity.

Along with the identification of how government agencies have dealt with a loss of legitimacy, Marshall and Goldstein also identified a number of factors that indicate when a government agency has experienced a loss of legitimacy and is facing an environmental legitimation crisis.[66] As discussed above, these indicators will be used in later chapters to analyze the state of legitimacy in Manitoba's environmental governance regime. The first indicator emerges as citizens begin to distrust the regulatory actions of government.[67] Described as "recreancy", this includes the viewpoint that responsible government agencies have failed to carry out their responsibilities and no longer merit the trust of citizens.[68] Another indication that legitimacy has been lost is the public's perception of "agency capture" or "regulatory capture",

[66] Marshall and Goldstein, *ibid,* at 220-221.
[67] Marshall and Goldstein, *ibid,* at 220.
[68] Marshall and Goldstein, *ibid*; Thomas D. Beamish, "Environmental Hazard and Institutional Betrayal: Lay-Public Perceptions of Risk in the San Luis Obispo County Oil Spill" (2001) 14:1 *OAE* 5, at 24-26.

which also contributes to recreancy.[69] Regulatory capture occurs when "the views of a regulatory agency are more closely aligned with the industry it is supposed to regulate than with the interests of the public".[70] The final indicator identified involves the rise of grassroots environmental organizations.[71] This occurs as awareness of environmental issues grows amongst the citizen population and public interest/environmental organizations emerge to spread awareness and advocate for change.

From Marshall and Goldstein's analysis of environmental legitimation crises, I draw two important points that are fundamental to my own analysis of legitimacy in Canadian environmental governance. The first is that the promotion of public participation in environmental governance is a means of regaining citizen trust and avoiding an environmental legitimation crisis, especially if such participation opportunities are meaningful.[72] For the purposes of this thesis then, "legitimate environmental governance" and the restoration of legitimacy is considered to require meaningful citizen participation, a genuine opportunity for citizens to influence environmental governance processes, including environmental decision-making. This does not mean that meaningful participation is the lone requirement of legitimate environmental governance, only that it is a fundamental component of legitimacy. The second point I draw from Marshall and Goldstein is that public perception of recreancy and regulatory capture, along with the rise of grassroots environmental organizations are signs of an environmental legitimation crisis. Again, these are not considered to be the only indicators that legitimacy has been lost, only that the emergence of these indicators, especially when they occur

[69] Marshall and Goldstein, *ibid,* 220; Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 *J Envtl L & Prac* 111, at 119 [Maclean].
[70] Marshall and Goldstein, *ibid,* at 220; MacLean, *ibid*; Boyd, 2003, *supra* note 6, at 255-256.
[71] Marshall and Goldstein, *ibid*.
[72] Marshall and Goldstein, *ibid,* at 221; D. Stephen Cupps, "Emerging Problems of Citizen Participation" (1977) 37:5 *PAR* 478; Seth Tuler and Thomas Webler, "Voices from the Forest: What Participants Expect of a Public Participation Process" (1999) 12:5 *Soc Nat Resour* 437.

at the same time, is an important sign that government is facing or already experiencing an environmental legitimation crisis.

2.3) Meaningful Public Participation in Canadian Environmental Governance

The next chapter will use Marshall and Goldstein's crisis system model and theory of environmental legitimation crisis to analyze the legitimacy of the environmental governance regime in Manitoba. This will involve consideration of whether or not the participation opportunities contained in the provincial environmental legal regime are "meaningful". It is therefore necessary to further explore the concept of "meaningful public participation" before such analysis is undertaken to gain a better understanding of the conditions that contribute to a meaningful participation opportunity.

Legal scholars and environmental advocates in Canada have long been concerned with the participation of the public in environmental governance processes because there are a range of benefits associated with the public's involvement. Public participation provides an opportunity for "mutual learning" for all parties involved in the regulatory process; allows local concerns, values and context to be brought to the attention of decision makers; and can result in greater accountability, effectiveness and fairness in government decision-making.[73] As discussed in chapter one, the problems associated with Canadian environmental governance have been linked to a lack of participation opportunities available to the public. As identified by Boyd, "the fifth fundamental flaw of Canadian environmental law and policy is the lack of meaningful

[73] Kristen Mikadze, "Pipelines and the Changing Face of Public Participation" (2016) 29 *J Envtl L & Prac* 83, at 89 [Mikadze]; John Sinclair and Alan P. Diduck, "Public involvement in EA in Canada: a transformative learning experience" (2001) 21:2 *Environ Impact Assess Rev* 113. For a more comprehensive list of benefits, please see John Sinclair and Alan Diduck, *Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directios* in Kevin S. Hanna, e-ds. *Environmental Impact Assessment: Practice and Participation,* 2nd ed. (2009: Oxford University Press), at 59-60 [Sinclair and Diduck].

opportunities for public participation."[74] This idea of "meaningful participation" can be equated to Marshall and Goldstein's concept of "authentic participation" in that meaningful public participation requires a range of participatory mechanisms, to be discussed below, that allow citizens to influence all stages of environmental governance processes.[75] Meaningful public participation is considered to be a necessary component of effective environmental governance at both the provincial and federal levels.[76] The linkage between meaningful public participation and legitimacy has also been recognized by Canadian environmental legal scholars. Similar to Goldstein and Marshall's conclusion regarding the role of authentic participation in the restoration of legitimacy, meaningful public participation has been considered by Canadian scholars to enhance the legitimacy of environmental governance processes.[77] In order to align my analysis with Canadian scholarship, the term "meaningful participation" has therefore been substituted for "authentic participation" in any further legitimacy analysis undertaken below.

Meaningful public participation in Canadian environmental governance is considered to require a range of different components. This includes, but is not restricted to: timely and convenient citizen access to information; adequate public notice; participant assistance (which includes the provision of financial support for public participants); opportunities for public comment; public hearings; early and ongoing participation throughout the process stages; and opportunity for independent review.[78] There has been recognition that the law has an important

[74] Boyd, 2003, *supra* note 6, at 245.
[75] Sinclair and Diduck, *supra* note 73, at 58-59.
[76] Oliver M. Brandes, "At a Watershed: Ecological Governance and Sustainable Water Management in Canada" (2005) 16 *J Envtl L & Prac* 19, at 96; Robert Gibson, Meinhard Doelle & John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 *J Envtl L & Prac* 257, at 269-270 [Gibson, Doelle and Sinclair]; Mikadze, *supra* note 73, at 88-89, 94.
[77] Anna Johnston, "Imagining EA 2.0: Outcomes of the 2016 Federal Environmental Assessment Reform Summit" (2016) 30 *J Envtl L & Prac* 1, at 19-21; Gibson, Doelle and Sinclair, *ibid*; Mikadze, *ibid*, at 89; MLRC, *supra* note 7, at 48.
[78] Jerry V. DeMarco, "Building a Strong Foundation for Action: A Review of Twelve Fundamental Principles of Environmental and Resource Management Legislation" (2008) 19 *J Envtl L & Prac* 59, at 68-69; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61 (La Forest J. dissenting); Gibson, Doelle and Sinclair, *ibid*.

role to play in the incorporation of these components of meaningful public participation into Canadian environmental governance processes.[79] Thus, a variety of different legal mechanisms have been used in environmental governance regimes in order to encourage public participation and establish meaningful participation processes.[80] A further exploration of the legal mechanisms that can be utilized to support meaningful participation in environmental governance will be undertaken in chapter four.

2.4) Conclusion

This chapter has established that in capitalist, liberal democratic societies like Canada, legitimacy is a measure of citizen approval and trust in the operations of their elected government and its regulatory agencies. Using Marshall and Goldstein's analysis of legitimacy, the role of the government and the general public in the legitimation process was explored and the political danger of a loss of legitimacy in environmental governance, the emergence of an environmental legitimation crisis, was established. Marshall and Goldstein's analysis of natural resource management in the United States was also used to identify potential strategies that could be utilized by government to aid in the maintenance and/or restoration of legitimacy in environmental governance. They suggest that the improvement of public participation opportunities in American natural resource processes was used by natural resource agencies as a means of preventing an environmental legitimation crisis from occurring. From this examination of legitimacy, the conclusion can be drawn that the enactment of legal mechanisms that contribute to meaningful (or authentic) public participation is a means of restoring legitimacy to

[79] John Sinclair and Meinhard Doelle, "Using Law as a Tool to Ensure Meaningful Public Participation in Environmental Assessment" (2003) 12 *J Envtl L & Prac* 27 [Sinclair and Doelle]; Sinclair and Diduck, *supra* note 73, at 78; MLRC, *supra* note 7, at 48-57.
[80] Sinclair and Doelle, *ibid;* Sinclair and Didicuk, *ibid;* MLRC, *ibid*.

environmental governance regimes. What has also emerged from this consideration of Marshall and Goldstein's analysis is that a vital component of legitimate environmental governance is meaningful public participation.

This connection between legitimacy and meaningful public participation has been recognized by environmental legal scholars in Canada and there has been considerable work undertaken to identify the components of meaningful public participation. However, the political value of ensuring the public can meaningfully participate in Canadian environmental governance regimes (legitimacy) has largely been ignored. In the search to expand the range of arguments that can be used to encourage the adoption of environmental legal reforms by resistant politicians, an analysis of the legitimacy of environmental governance regimes seems like a promising addition to the range of analytic tools available to legal reformists and environmental advocates.

In an attempt to explore the contribution that a legitimacy analysis could have in terms of determining when and why environmental legal reforms are needed, chapter three will use Marshall and Goldstein's analysis of the legitimation process and their theory of environmental legitimation crises to analyze the legitimacy of environmental governance in Manitoba. In order to narrow the scope of this analysis, focus will be placed on the governance of the hydroelectric industry. What emerges from this analysis is that environmental governance in Manitoba has suffered a loss of legitimacy and is facing an environmental legitimation crisis. Following Marshall and Goldstein's suggestion that the enactment of legal mechanisms promoting meaningful public participation is a means of restoring legitimacy, chapter four will explore legal mechanisms that could improve public participation in environmental governance in Manitoba. This involves consideration of mechanisms that could improve citizen participation in environmental decision-making, judicial processes, and environmental enforcement procedures.

Chapter 3: Case Study – The Legitimacy of Environmental Governance in Manitoba

Using Marshall and Goldstein's crisis systems model and theory of environmental legitimation crisis discussed in chapter two, this chapter examines the legitimacy of environmental governance in Manitoba. In order to narrow the scope of this analysis, the governance of hydroelectric power is used as an example because the governance of hydroelectric energy is a hot button issue in Manitoba and is an environmental sector that draws much attention from the general public. Hydroelectric projects and utility rates have been the subject of number of recent regulatory hearings that have created much controversy.[81] The generation of hydroelectric power also impacts the lives of citizens throughout the province. For example, since the main source of electricity in Manitoba is hydroelectric power, the majority of citizens are consumers of hydroelectricity and rely on its production. Hydroelectric energy projects are subject to a high level of regulatory control, compared to some other environmental sectors in Manitoba, and will allow for consideration of many of Manitoba's main environmental legal mechanisms. Hydroelectric energy also plays an important role in the Manitoba economy, as does Manitoba Hydro, the Crown corporation that currently enjoys a monopoly in the hydroelectric energy sector. Therefore, an analysis of hydroelectric energy governance in Manitoba will provide insight into the overall legitimacy of environmental governance in Manitoba and could contribute to the analysis of legitimacy in other jurisdictions with a similar dependence on the energy sector.

To begin this legitimacy analysis, a description of the Manitoba specific components of the four subsystems contained in the crisis systems model is provided. This includes the economic system (represented by Manitoba Hydro), the political-administrative system

[81] This includes hearings for the Regional Cumulative Effects Assessment (ongoing at time of publication), Manitoba-Minnesota Transmission Project (2017), Keeyask Generation Project (2014) and the Needs for and Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan (2014).

(represented by the Government of Manitoba's environmental agencies), the sociocultural system (represented by citizen stakeholders), and the ecological system (represented by public lands and waters). This description provides insight into the main components of Manitoba's environmental governance regime and allows for further analysis later in the chapter of the political-administrative and sociocultural systems involved in the maintenance of legitimacy. This analysis includes the identification of existing public participation mechanisms in Manitoba. There is also consideration of whether or not any of Marshall and Goldstein's indicators of an environmental legitimation crisis have emerged in Manitoba. Finally, an examination of recent actions taken by the relevant government agencies is undertaken to determine if any of the strategies identified by Marshall and Goldstein as a means of restoring legitimacy have been implemented.

What emerges from this analysis is that the Manitoban environmental governance regime has suffered a loss of legitimacy and is facing an environmental legitimation crisis. There is evidence of recreancy; citizen distrust of the actions of government, administrative agencies, and the operations of Manitoba Hydro; and an increase in the activities of public interest and environmental organizations, including activism events such as public protests. The emergence of these factors indicates that the current provincial government needs to implement measures to restore legitimacy to Manitoba's environmental governance regime or face a further degradation of public support. As established in chapter two, this could be accomplished with the enactment of reforms that support meaningful public participation processes, which will be further explored in chapter four.

3.1) The Governance of the Hydroelectric Industry in Manitoba

The generation of hydroelectric energy has played an important role in Manitoba since the turn of the 20th century. The province's first hydroelectric generation station went into operation in 1900 and since this time, a number of other generating stations have been built.[82] There are currently fifteen hydroelectric generating stations in operation, generating almost all of the province's electricity.[83] Manitoba is considered to be one of the top hydroelectric power producing provinces in Canada.[84] Energy is one of the key industrial sectors in Manitoba, in which hydroelectric power plays an important role.[85] Hydroelectricity benefits Manitoba's economy by providing an inexpensive source of energy and its renewable nature contributes to Manitoba's energy security.[86] In terms of government revenue, it is has been forecasted that in the 2017/18 fiscal year, water power rentals, deriving in large part from hydroelectric developments, will amount to $118, 000, 000.[87] The utilities sector of the Manitoba economy, in which Manitoba Hydro plays a substantial role, accounted for 3.3% of the provincial GDP in 2017.[88] Thus, the operations of Manitoba Hydro make a significant contribution to Manitoba's economy.

[82] Manitoba Hydro, *A History of Electric Power in Manitoba*, online: <https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=22465&md=1>
[83] Manitoba Hydro, *Generating Stations*, online: <https://www.hydro.mb.ca/corporate/facilities/generating_stations.shtml>
[84] Canadian Hydropower Association, *Hydropower in Canada: Past, Present and Future* (2008), online: <https://canadahydro.ca/wp-content/uploads/2015/09/2008-hydropower-past-present-future-en.pdf>
[85] Government of Manitoba, *Growth Enterprise and Trade: Energy Division*, online: <https://www.gov.mb.ca/jec/energy/index.html>; Government of Manitoba, *Business & Economic Development: Sectors: Electricity*, online: <https://www.gov.mb.ca/jec/profiles/electric/index.html>.
[86] Department of Conservation and Water Stewardship, *2009 Provincial Sustainability Report for Manitoba* (Government of Manitoba, 2009), at 5. [CWS]
[87] Government of Manitoba, *Manitoba Budget 2018* (2018), at 4.
[88] Based on the projected 2017/18 GDP Forecast ($70,360,000,000) and the 2016/17 GDP ($67,455,000,000), this equates to around $2,270,000,000. [Government of Manitoba, *Budget 2018 Supplementary Financial Information* (2018), at 83, online: <http://www.gov.mb.ca/finance/budget18/papers/B_Supp_Fin_Info_r.pdf>; Statistics Canada, *Table 36-10-0400-01 Gross domestic product (GDP) at basic prices, by industry, provinces and territories, percentage share* (Manitoba, 2017)].

Using Marshall and Goldstein's crisis systems model, an illustration of hydroelectric power governance in Manitoba is set out in Figure 3.1 below, showing the four major elements of this governance regime: Manitoba Hydro; responsible government agencies including the Department of Sustainable Development, the Clean Environment Commission and the Public Utilities Board; citizen stakeholders; and public lands and waters. A description of the Manitoba specific components of each of the four systems involved is then provided to give further insight into the various legal mechanisms and processes that are utilized within Manitoba's environmental governance regime. In order to assess the legitimacy of this governance regime, further analysis of these legal approaches will take place later in this chapter.

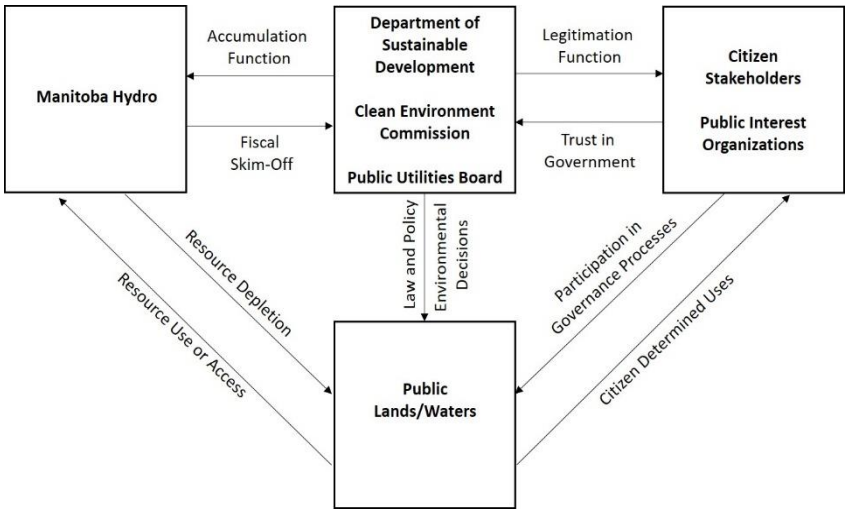

Figure 3.1: Manitoba Hydroelectric Power Governance Systems Model

Ecological System (Public Lands/Waters):

The first system included in Figure 3.1 is the ecological system, arguably the most important of the systems addressed in this model as all other systems depend on the natural resources it encompasses. In the context of hydroelectric power, the ecological system includes the lands and water required for the construction and operation of hydroelectric generation

stations, as well as the lands and waters that are impacted by such activities. The province of Manitoba encompasses an area of 650, 087 km^2 which includes 54.8 million hectares of land and 10.2 million hectares of water.[89] Manitoba has over 100,000 lakes and numerous rivers, including those that drain into Hudson Bay in the north and those that drain into Lake Winnipeg in the south. Lake Winnipeg is one of the tenth largest freshwater lakes in the world.[90] There are fifteen hydroelectric generation stations located throughout the province, with the majority of stations located in the north along the Nelson River or in the southeast along the Winnipeg River.[91] The electricity generated from these stations is transmitted throughout the province using two systems of power lines, Bipole I and II. A third system, Bipole III, is anticipated to be completed in 2018.[92] The purpose of these lines is to transmit electricity from the Nelson River area, where most hydroelectricity is generated, to southern Manitoba, where the majority of the population resides.[93] Therefore, a considerable amount of Manitoba's land and water is affected by the generation and transmission of hydroelectric energy.

In terms of environmental impacts, the generation of hydroelectric energy has been linked to a range of detrimental environmental effects. Although hydroelectricity is a renewable source of energy due to the fact that the water used to generate electricity is not removed or "used up" in the production process, there are still negative environmental consequences.[94]

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[89] CWS, *supra* note 86, at 7.
[90] CWS, *ibid.*
[91] Stations along the Nelson River include: Jenpeg (115 MW capacity, completed in 1979), Kelsey (286 MW capacity, completed in 1961), Kettle (1,220 MW capacity, completed in 1974), Limestone (1,350 MW capacity, completed in 1990), Long Spruce (980 MW capacity, completed in 1979), Keeyask (695 MW capacity, construction in progress). Stations along the Winnipeg River include: Great Falls (129 MW capacity, completed in 1928), McArthur (56 MW capacity, completed in 1955), Pine Falls (84 MW capacity, completed in 1952), Pointe du Bois (75 MW capacity, completed in 1926), Seven Sisters (165 MW capacity, completed in 1952), Slave Falls (68 MW capacity, completed in 1948). [Manitoba Hydro, *supra* note 83; Keeyask Hydropower Limited Partnership, *The Project*, online: < https://keeyask.com/the-project/>]
[92] Clean Environment Commission, *Report on Public Hearing: Keeyask Generation Project* (2014), 13 [CEC, 2014]; Manitoba Hydro, *Bipole III Transmission Line*, online: <https://www.hydro.mb.ca/projects/bipoleIII/index.shtml>.
[93] CEC, 2014, *ibid.*
[94] Canadian Hydropower Association, *supra* note 84, at 12-13.

Depending on the type of facility used to generate hydroelectricity, a significant restructuring of the water system may be required including the construction of reservoirs, the flooding of surrounding lands (including those occupied by rural and Indigenous communities), and the alteration of existing rivers and lakes both in terms of size and seasonal flows.[95] Hydroelectric generating stations also require the construction of major structures and supporting infrastructure which can contribute to significant alteration of the surrounding ecosystem.[96] This can impact the animals and vegetation in the surrounding area as well as the fish and other aquatic wildlife dependent on the affected water bodies.[97] In Manitoba, the true scope of the environmental impacts that have occurred as a result of hydroelectric power projects is difficult to determine since the majority of generating stations in Manitoba were completed prior to the enactment of environmental assessment legislation at the federal and provincial levels.[98] Therefore little to no baseline information is available from which to assess impacts over time.

However, despite not being able to determine the historical impacts the hydroelectric industry has had on the ecological system, the importance of Manitoba's public lands and waters in the overall governance regime cannot be denied. The ecological areas involved in the generation and transmission of hydroelectricity not only contribute to the creation of hydroelectric power, they also house the physical infrastructure necessary for such generation, including the living spaces of people involved in the construction, operation and maintenance of

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[95] Know History, *Hydroelectric Development in Northern Manitoba*: *A History of the Development of the Churchill, Burntwood and Nelson Rivers, 1960-2015* (Clean Environment Commission, 2016), at 45-47; West Coast Environmental Law, *Site C Dam – the environmental and regulatory process*, online: <https://www.wcel.org/sites/default/files/publications/Site%20C%20Dam%20%E2%80%93%20The%20Environmental%20and%20Regulatory%20Process%20-%20Legal%20Backgrounder.pdf>; Bradley Jeffery, et. al., *DAM IT! The Site C Dam on the Peace River* (University of British Columbia, 2015), online: <https://environment.geog.ubc.ca/dam-it-the-site-c-dam-on-the-peace-river/>.
[96] CEC, 2014, *supra* note 92, at 23-26.
[97] CEC, 2014, *ibid*, at 19, 27-28, 69-96.
[98] Government of Canada, *Minister's Response to Environmental Petition No. 302* (Environment Canada; Canadian Environmental Assessment Agency, 2011), online: < http://www.oag-bvg.gc.ca/internet/English/pet_302_e_34991.html>.

such infrastructure (the lands surrounding hydroelectric water sources). These impacted ecological areas also serve as a living space for other individuals, such as those people from rural and Indigenous communities who may be forced to relocate due to the hydroelectric operations. The surrounding ecological areas also absorb the detrimental impacts of hydroelectric generation, which impacts water quality, biodiversity, and land use. Thus, this system serves all of the important functions identified by Marshall and Goldstein (supply depot, living space, waste depository), as discussed above.

Manitoba Hydro:

The second system captured by Figure 3.1 is the economic system, represented in the context of Manitoba's hydroelectric industry by Manitoba Hydro. In Manitoba, the generation and transmission of electricity is controlled by Manitoba Hydro, the province's sole electrical utility since 1961.[99] It is responsible for the production, transmission and sale of electricity in Manitoba, 96% of which is generated by fifteen hydroelectric generating stations.[100] Manitoba Hydro is a provincial Crown corporation and is overseen by the Manitoba Hydro-Electric Board appointed by the Government of Manitoba. The Board reports to the Minister responsible for *The Manitoba Hydro Act*.[101] Crown corporations like Manitoba Hydro have played an important role in the Canadian public sector over the last century, especially in key sectors such as transportation, power generation and communications "where private enterprise were unwilling

[99] Manitoba Hydro, *supra* note 82, at 29.
[100] Manitoba Hydro, *Facilities & operations*, online: <https://www.hydro.mb.ca/corporate/facilities/index.shtml>
[101] It should be noted that during the completion of this thesis, a provincial Cabinet shuffle occurred in early August 2018, moving existing Minister of Crown Services, Cliff Cullen, to the position of Minister of Justice and Attorney General and promoting Colleen Mayer to the position of Minister of Crown Services. Minister Mayer has been "tasked with fixing troubles at Manitoba Hydro". [Government of Manitoba, *Cabinet Ministers: Colleen Mayer, Minister of Crown Services*, online: <https://www.gov.mb.ca/minister/min_crown.html>; The Canadian Press, "Changes to Health, Finance portfolios as Manitoba government shuffles cabinet" *CBC News* (August 1, 2018), online: < https://www.cbc.ca/news/canada/manitoba/manitoba-cabinet-shuffle-august-2018-1.4769768>; Government of Manitoba, *News Release: Premier Announces Changes to Manitoba Executive Council* (August 1, 2018)]

or unable to provide the necessary services".[102] Although Crown corporations operate at arm's length from government, they are still ultimately accountable to the government since they are considered to be public institutions.[103] As a result, the government of Manitoba uses a range of legislation to regulate the operations of Crown corporations like Manitoba Hydro that gives government actors substantial legal power to grant licences and other regulatory approvals needed by such corporations in order to continue their operations.[104]

Crown corporations face the difficult task of balancing their public policy and commercial objectives.[105] For example, Manitoba Hydro's public policy purpose/objective is "to provide for the continuance of a supply of power adequate for the needs of the province, and to engage in and to promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power" while its commercial purpose/objective is "to provide and market products, services and expertise related to the development, generation, transmission, distribution, supply and end-use of power, within and outside the province; and (…) to market and supply power to persons outside the province on terms and conditions acceptable to the board".[106] Due to the important role the energy sector plays in the Manitoba economy, the commercial objectives of Manitoba Hydro have in recent years been increasingly viewed as overshadowing its broader public policy purposes, especially with Manitoba Hydro's focus on the sale of electricity to the United States which has influenced the construction of new

[102] Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations* (Government of Canada, 2005), at 9.
[103] Treasury Board of Canada Secretariat, *ibid*, at 11.
[104] This includes (for Manitoba Hydro): *The Manitoba Hydro Act*, R.S.M. 1987, c. H190; *The Crown Corporations Governance and Accountability Act* SM 2017, c. 19; *The Public Utilities Board Act* RSM 1987, c. P280; *The Environment Act* SM 1987-88, c. 26.
[105] Treasury Board of Canada Secretariat, *supra* note 102, at 9.
[106] *The Manitoba Hydro Act*, *supra* note 104, s. 2.

hydroelectric generating facilities and transmission lines.[107] These projects have been controversial due to their considerable construction costs, environmental impacts and potential impact on the electricity rates Manitobans have to pay. Although the Government of Manitoba has recently made changes to the regulatory framework within which Crown corporations like Manitoba Hydro must operate, there is considerable animosity towards Manitoba Hydro and the provincial government's oversight of its operations.[108] This will be discussed further in section 3.3.

Responsible Regulatory Agencies:

The third system addressed in Figure 3.1 is the political-administrative system, represented by the provincial government agencies responsible for regulating the environmental impacts of the hydroelectric industry. While it was important to consider the first two systems to gain an overall understanding of Manitoba's regulatory regime as it pertains to the hydroelectric industry, this system and the next are especially significant for the purposes of this thesis. As discussed in chapter two, it is the interactions between the political-administrative and the sociocultural systems that contribute to the perceived legitimacy of the relevant regulatory regime.

Hydroelectric power has played an important role in Canadian society since the early 1900s.[109] As society has become increasingly dependent on fossil fuels and electricity, the importance of energy extraction and production has grown. Today, one of the most valuable

[107] CEC, 2014, *supra* note 92; The Public Utilities Board, *Report on the Needs For and Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan* (2014) [PUB, 2014]; Clean Environment Commission, *Report on Public Hearing: Manitoba-Minnesota Transmission Project* (2017) [CEC, 2017].
[108] Bill 20, *The Crown Corporations Governance and Accountability Act*, 2nd Session, 41st Legislature, online: <https://web2.gov.mb.ca/bills/41-2/b020e.php>; Manitoba, Legislative Assembly, *Hansard*, 41st Legislature, 3rd Session, volume 41b (Thursday April 26, 2018) Honorable Minister Cullen, Crown Services, online: <http://www.gov.mb.ca/legislature/hansard/41st_3rd/vol_41b/h41b.html>.
[109] Hughes, Kwasniak and Lucas, *supra* note 26, at 222.

public land uses is considered to be energy extraction and energy production.[110] Thus, Canadian governments at both the federal and provincial level have ensured they maintain a significant interest in the production of hydroelectric power by retaining hydroelectric sites as Crown lands and forming Crown hydro authorities, like Manitoba Hydro.[111] Due to this significant Crown interest and involvement in the production of hydroelectric power, the hydroelectric energy industry is highly regulated by the government. Based on the constitutional division of powers, provinces have control over the natural resources within their boundaries, which includes sites for producing electrical energy.[112] Thus the regulatory oversight of the hydroelectric industry rests primarily with the provincial government. There are, however, exceptions to this provincial control. The federal government has retained jurisdiction over hydroelectric power to the extent that these activities impact fishery resources and navigable waters and has authority in relation to transboundary hydroelectric projects.[113] Government authority (both provincial and federal) in relation to natural resources is also subject to Aboriginal rights which may add additional regulatory requirements to governance processes.[114] Provincial governments largely exercise their jurisdiction over hydroelectric power projects through provincial Crown utilities, such as Manitoba Hydro, and regulatory agencies.

In Manitoba, the Department of Sustainable Development (formerly the Department of Conservation and Water Stewardship) is the government agency responsible for overseeing the provincial environmental governance regime.[115] Within this provincial regime, hydroelectric energy projects are subject to the environmental assessment and licensing process under *The*

[110] Hughes, Kwasniak & Lucas, *ibid,* at 221.
[111] Hughes, Kwasniak & Lucas, *ibid,* at 222.
[112] Hughes, Kwasniak & Lucas, *ibid,* at 247.
[113] Hughes, Kwasniak & Lucas, *ibid,* at 238, 247.
[114] Hughes, Kwasniak & Lucas, *ibid,* at 110.
[115] Manitoba Sustainable Development, *Annual Report 2016-2017* (Government of Manitoba, 2017).

Environment Act, along with a series of required regulatory approvals under other provincial legislation.[116] This includes *The Water Power Act* (WPA), designed to control provincial water powers in Manitoba.[117] This Act applies to all provincial water powers, undertakings, and Crown lands involved in their operation.[118] Among other things, the WPA and the *Water Power Regulation* set out the processes for the licensing of water power projects.[119] The Minister of Sustainable Development and the Lieutenant Governor in Council have been granted legislative power to make most of the significant licensing decisions and project approvals within the environmental regulatory regime, including those under *The Environment Act* and *The Water Power Act*. Therefore, government officials have a high level of regulatory control over the development and operation of hydroelectric projects.

New hydroelectric projects generally trigger the most stringent level of regulation under *The Environment Act*, Manitoba's main environmental statute. This is significant as it indicates that legislators in Manitoba have recognized the potential environmental impacts of hydroelectric projects and therefore have ensured that they undergo the highest level of regulatory scrutiny, including opportunities for the public to provide input, before final approval. Unfortunately, as discussed above, the majority of Manitoba Hydro's generating stations and control structures were completed before provincial environmental assessment legislation was enacted and therefore have not been required to undergo an environmental assessment before provincial regulatory approvals were issued.

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[116] CEC, 2014, *supra* note 92, at 7-9.
[117] *The Water Power Act* RSM 1987, c. W60 [WPA]. "Water Power" is defined as "any force or energy of whatever form or nature contained in, or capable of being produced or generated from, any flowing or falling water in such quantity as to make it of commercial value." (s. 1).
[118] WPA, *ibid*, s. 4. "Undertakings" includes "any undertaking which relates to the development of water power or its transmission, distribution, or use, including construction of works such as dams and transmission lines, the storage and regulation of water, and the generation of energy that is auxiliary to the water power plant." (s. 1)
[119] *Water Power Regulation*, MR 25/88R [WPR]

This issue with legacy projects has recently been addressed by the Clean Environment Commission (CEC), the administrative body responsible for providing advice and recommendations to the Minister and developing and maintaining public participation in environmental matters.[120] In the CEC's *Lake Winnipeg Regulation Report*, the recommendation was made to require all existing hydroelectric projects, including legacy projects completed before environmental assessment legislation was enacted, to undergo public review and be subject to an environmental impact assessment when undergoing the relicensing process.[121] It was recommended that these projects be held to the highest regulatory standard and be required to obtain an Environment Act licence, even if no such licence was previously necessary.[122] This is significant because this would increase the possibility that these projects would be required to undergo a public CEC hearing, providing the public with more opportunity to provide input. There have been many other reform recommendations made in recent years by the CEC and other agencies, like the Manitoba Law Reform Commission, in relation to Manitoba's environmental assessment and licensing processes and how they relate to hydroelectric developments. This has included a range of recommendations focused on improving the public's ability to participate in the development and regulation of hydroelectric developments.[123] There is no evidence to suggest any of these recommendations have been implemented.

While the environmental impacts and use of natural resources associated with hydroelectric developments are regulated mainly through *The Environment Act* and *The Water Power Act*, a series of additional legislation also plays a significant role in the governance of the hydroelectric industry in Manitoba. This includes *The Manitoba Hydro Act*, which requires

[120] *The Environment Act*, *supra* note 104, s. 6.
[121] Clean Environment Commission, *Lake Winnipeg Regulation Report* (2015), at 127-133; 143-144, online: <https://www.cecmanitoba.ca/resource/reports/LWR_WEB.pdf> [CEC, LWR].
[122] CEC, LWR, *ibid*, at 143-144.
[123] For example, see MLRC, *supra* note 7.

Manitoba to acquire government approval for the development of new generation stations and the supply of power to other jurisdictions. This act also grants the government power to require Manitoba Hydro's development plans to undergo a public review.[124] The operations of Manitoba Hydro are also regulated by the government under *The Crown Corporations Governance and Accountability Act*.[125] Additionally, the sale of the electricity produced by Manitoba Hydro's hydroelectric generating stations is subject to the oversight of The Public Utilities Board, an administrative tribunal created by provincial legislation.[126] The Board acts as an independent decision-maker in the regulation of public utilities in Manitoba and regularly holds public hearings. It has been granted more legislative power than the Clean Environment Commission and has many of the same "powers, rights, and privileges as the Manitoba Court of Queen's Bench."[127] Beyond the regulation of utilities, the Public Utilities Board has also been mandated by the provincial government to review Manitoba Hydro's development plans in order to create an opportunity for public scrutiny.[128]

Based on the regulatory approaches discussed in this section, it is apparent that the government has a high level of regulatory control over the hydroelectric industry. This is important as it indicates that environmental regulatory outcomes, such as the issuance of environmental approvals, occur at the behest of government officials. Therefore, government officials have both the legislative and political power to include (or exclude) the perspectives and preferences of all parties with an interest in hydroelectric developments, such as industry and citizen stakeholders, in environmental regulatory processes. As a result, the responsibility for any

[124] PUB, 2014, *supra* note 107, at 38; *The Manitoba Hydro Act*, *supra* note 104, s. 16(1).
[125] *The Crown Corporations Governance and Accountability Act*, *supra* note 104.
[126] *The Public Utilities Board Act*, *supra* note 104.
[127] The Public Utilities Board, *Order No. 59/18*, 4, online: < http://www.pubmanitoba.ca/v1/proceedings-decisions/orders/pubs/2018%20orders/59-18.pdf>.
[128] PUB 2014, *supra* note 107.

deficiencies in environmental regulatory processes or decisions rests solely with the provincial government. This also means that any efforts to address these deficiencies will require the involvement of government officials.

Citizen Stakeholders and their Representatives:

The final system captured by Figure 3.1 is the sociocultural system, represented by citizen stakeholders and their representatives. Along with the political-administrative system discussed above, this system is of fundamental importance to the legitimacy analysis undertaken below as the opportunities made available for citizen stakeholders to participate in the regulatory processes overseen by Manitoba's regulatory agencies can have a direct impact on the legitimacy of the legal regime, as discussed in chapter two. There are a wide range of individuals that make up Manitoba's population of around 1,350,000 people.[129] This includes a wide range of cultural backgrounds from all over the world.[130] Roughly 17% of the total Manitoba population identifies as Aboriginal.[131] This means that within this diverse population of Manitoban citizens, there are a wide range of different relationships to and opinions about the natural environment.

Environmental perspectives are further diversified due to the significant number of citizens employed in industries reliant on the use of natural resources, including the agricultural sector. Citizen perspectives in relation to the operations of corporations functioning with the natural resource sector, like Manitoba Hydro, are similarly diverse. Since Manitoba Hydro is the province's sole electrical utility, the majority of the population in Manitoba purchases their

[129] Statistics Canada, *Census Profile: 2016 Census: Manitoba, Population* (Government of Canada, 2017); Government of Manitoba, *Manitoba Economic Highlights* (2018), online: <https://www.gov.mb.ca/finance/pubs/highlights.pdf>.
[130] Statistics Canada, *Census Profile, 2016 Census: Manitoba, Ethnic origin* (Government of Canada, 2017).
[131] Statistics Canada, *Census Profile, 2016 Census: Manitoba, Aboriginal population* (Government of Canada, 2017) [223, 310 people].

electricity from this Crown corporation. This means that a significant amount of the population is impacted by Manitoba Hydro's hydroelectric operations, at the very least, as consumers of the electricity that is produced.[132] Additionally, the operations of Manitoba Hydro, including the environmental effects that occur as a result of hydroelectric generation and transmission projects, impact a range of citizen interests beyond their consumer rights. In relation to the environment, this can include access to nature for recreational purposes and employment in agricultural and natural resource industries. The Indigenous peoples in Manitoba (and their traditional lands) have been most severely impacted by Manitoba Hydro's hydroelectric operations, particularly in the Nelson River basin in the north.[133]

Due to this wide range of affected interests, there has been a considerable amount of citizen involvement in the governance of Manitoba Hydro's hydroelectric developments. Although the government is generally considered to be the default representative of the public's interests, in the context of environmental regulatory proceedings in which the government has been granted final decision-making power, responsibility generally falls on the citizens themselves to ensure their interests are not overshadowed by those of industry.

There are also numerous organizations across Canada that work to protect and represent the public's interests in environmental governance processes.[134] In Manitoba, a range of non-governmental organizations have played an important role in the promotion of citizen interests in

[132] The Consumers Association of Canada (Manitoba Branch), *About: Consumers Rights*, online: <http://cacmanitoba.ca/index.php?id=consumers-rights>.
[133] James B. Waldram, A*s Long as the Rivers Run: Hydroelectric Development and Native Communities in Western Canada* (Winnipeg, MB: University of Manitoba Press, 1993), 115-170; Frank Tough, *'As Their Natural Resources Fail': Native Peoples and the Economic History of Northern Manitoba, 1870-1930* (Vancouver: UBC Press, 1996).
[134] Environmental Law Centre, *Standing in Environmental Matters* (Alberta, Edmonton: Environmental Law Centre, 2014), at 9 [ELC].

environmental proceedings involving consideration of hydroelectric developments. This includes a range of environmental organizations, special interest groups, and Indigenous organizations.[135]

One organization that has played a particularly important role in the representation of citizen interests in Manitoban environmental proceedings is the Public Interest Law Centre (PILC).[136] PILC handles cases that defend the interests of marginalized members of society and provide tangible benefits for most Manitobans.[137] As set out in *The Legal Aid Manitoba Act*, PILC can represent groups in any matter that involves an objective or interest that is common to the members of the group and relates to "an issue of public interest including, without restricting the generality of the foregoing, any consumer or environmental issue."[138] Since its establishment, PILC has represented a range of organizations focused on the preservation and protection of the environment in court and regulatory proceedings. For example, in the 1980s, PILC represented several community organizations who opposed new developments within the City of Winnipeg due to their potential detrimental environmental impacts.[139] Since this time, PILC has also represented organizations seeking to address environmental issues related to the release of

[135] For example: Green Action Centre, <http://greenactioncentre.ca/>; Wilderness Committee, <https://www.wildernesscommittee.org/>; Manitoba Energy Justice Coalition, <https://www.mbenergyjustice.org/do_you_know_where_your_electricity_comes_from/>; Bipole III Coalition, <http://www.bipoleiiicoalition.ca/>; Lake Winnipeg Foundation, <https://www.lakewinnipegfoundation.org/>; Assembly of Manitoba Chiefs, <https://manitobachiefs.com/>; Manitoba Keewatinowi Okimakanak Inc., <https://www.mkonation.com/>

[136] Doug Smith, *In the Public Interest: The first 25 years of The Public Interest Law Centre* (Winnipeg, MB: Legal Aid Manitoba, 2007), at 12, online: <http://www.legalaid.mb.ca/pdf/PILC_history.pdf> [Smith].

[137] Smith, *ibid*, at 13.

[138] *The Legal Aid Manitoba Act*, RSM 1987, c. L105, s. 4(2).

[139] Smith, *supra* note 136, at 32-34; Legal Aid Manitoba, "Public Interest law Centre (PILC): Environment", online: <https://www.legalaid.mb.ca/pilc/cases/environment/>; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* 1988 CarswellMan 77, 11 A.C.W.S. (3d) 278; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* 1989 CarswellMan 171, [1989] 4 W.W.R. 708; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* 1990 CarswellMan 235, [1990] 3 S.C.R. 1170.

harmful chemicals,[140] flooding and other environmental consequences in Aboriginal traditional territories,[141] and the regulation of hydroelectric power generation in Manitoba.[142]

In the past two decades, PILC has advanced the interests of citizen stakeholders before administrative tribunals, namely the Public Utilities Board and the Clean Environment Commission. As representation for the Consumers' Association of Canada (Manitoba Branch) and other non-government organizations, PILC has participated in a number of environmental hearings involving hydroelectric developments, arguing for stronger regulatory protections, more effective public participation processes and meaningful consideration of adverse effects of proposed projects on the environment, low-income consumers and Indigenous communities.[143] PILC has also represented clients in environmental proceedings at the national level.[144]

PILC's representation of the public's interests during environmental proceedings dealing with hydroelectric developments has been extremely important due to the legal expertise of its staff lawyers and the wide range of expertise added by the experts regularly employed by PILC during such proceedings. Unlike other Canadian jurisdictions, Manitoba does not have any environmental organizations that regularly employ lawyers and other legal experts with specific environmental expertise. As a result, PILC is often the only participant in regulatory proceedings able to undertake the complex legal, economic and scientific analysis required in order to address the full range of issues involved in such proceedings. While this highlights the importance of ensuring PILC continues to receive adequate funding and political support so it is able to

[140] Smith, *supra* note 136, at 61-62.
[141] Smith, *ibid*, at 44-49.
[142] Smith, *ibid*, at 21-26.
[143] This includes hearings held by the CEC for the Regional Cumulative Effects Assessment (ongoing at time of publication), Manitoba-Minnesota Transmission Project (2017), Keeyask Generation Project (2014), Bipole III Transmission Project (2013), Wuskwatim Generation and Transmission Projects (2004); and the Needs for and Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan (2013) hearing held by the PUB.
[144] For example, PILC represented the Assembly of Manitoba Chiefs in the National Energy Board's Enbridge Line 3 Replacement Program hearing (2015).

continue the important work undertaken on behalf of its clients, it also sheds light on the problem of representation faced by Manitoba's citizens and representative non-governmental organizations in environmental regulatory proceedings. Particularly in the context of hydroelectric developments, which are highly complex and involve the balancing of many interests, there needs to be more opportunity for citizens (and the environmental organizations representing their interests) to access the legal expertise and expert analysis required for meaningful participation in regulatory proceedings.

Based on Marshall and Goldstein's crisis systems model that was developed to provide insight into environmental regulatory regimes and the interactions of the various systems contained within such regimes, this section has provided an overview of the four systems involved in the governance of the hydroelectric industry in Manitoba. This includes the public lands and waters that make up the ecological system; the economic system, represented by Manitoba Hydro; the political-administrative system, represented by the government of Manitoba and its respective agencies/administrative bodies, and the sociocultural system, represented by citizen stakeholders and the organizations that represent their interests, like PILC. As a Crown corporation, the operations of Manitoba Hydro are subject to a high level of regulation by the government and receive considerable scrutiny from citizen stakeholders, which will be discussed further in the next section. Government officials have been granted substantial decision-making powers and therefore play a significant role in the granting of necessary licences and other regulatory approvals Manitoba Hydro needs to continue its operations. The Clean Environment Commission assists government decision-makers with the assessment of environmental impacts and the granting of environmental licences, when requested by the Minister, by hosting public hearings and providing regulatory recommendations. The Public Utilities Board also plays an important administrative function in the oversight of the sale of the

electricity produced by Manitoba Hydro and can also play a role in the assessment of the environmental impacts of Hydro's proposed development plans, when requested by the Minister. While this overview provides insight into the regulatory framework the hydroelectric industry is subject to in Manitoba, in order to undertake an analysis of the legitimacy of this governance system, a further discussion of the participation opportunities available to the public is required. This will allow for a consideration of how "meaningful" such participation opportunities are and provide insight into the existing weaknesses that could contribute to a loss of legitimacy in relation to Manitoba's environmental governance processes.

3.2) Are Public Participation Opportunities in Manitoba Meaningful?

As discussed above, the government uses a range of legislation to regulate the operations of Manitoba Hydro and the potential environmental impacts of its hydroelectric generating stations and related infrastructure. Of most importance to the consideration of the public's role in environmental governance are the regulatory processes set out by *The Environment Act* and *The Water Power Act*.[145] While there is a range of other legislation utilized by the government to regulate the operations of Manitoba Hydro, including its administrative operations and the sale of electricity, these two Acts play a fundamental role in the regulation of the environmental impacts and use of natural resources and public lands involved in Manitoba Hydro's generation of hydroelectric power. Thus, this section will focus on analyzing the opportunities for public participation in relation to the governance processes set out in these Acts.

As discussed in chapter two, there are numerous mechanisms that can contribute to meaningful public participation in environmental governance. This includes provisions that

[145] *Supra* note 104.

allow citizen access to information; require adequate public notice; make participant funding available; create opportunities for public comment; require public hearings; ensure participation throughout the entire project lifecycle, including monitoring and enforcement processes; encourage transparent decision-making and provide opportunity for independent review.[146] While Manitoba's environmental governance regime has some of these elements, there are still significant gaps in the available participation opportunities, meaning that reform would be required in order for citizen participation to be truly meaningful.

In the context of the environmental governance of hydroelectric developments in Manitoba, the majority of public participation opportunities arise out of *The Environment Act* and *The Water Power Act* legislative processes. However, it should be noted that Manitoba Hydro also generally provides opportunity for the public to participate in the development of hydroelectric projects. For major projects, this has involved a range of participation opportunities including public meetings, open houses, community information sessions, workshops, phone and in-person interviews, aboriginal traditional knowledge studies, and project site tours.[147] Although this is a positive addition to the process hydroelectric projects undergo before they can secure regulatory approvals, there is no consistency in the participation approaches utilized by Hydro as they are not formally required, which also means the public has no legal recourse if Manitoba Hydro failed to provide such opportunities for future projects. Therefore, the remainder of this

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[146] DeMarco, *supra* note 78, at 59, 68-69; Gibson, Doelle and Sinclair, *supra* note 76, at 269-270.
[147] Manitoba Hydro, *Bipole III Project: Environmental Impact Statement, Chapter 5: Environmental Assessment Consultation Program* (2011), at 5-3, 5-4, online: <https://www.hydro.mb.ca/projects/bipoleIII/pdfs/eis/download/chapter5_environmental_assessment_consultation_program.pdf>; Keeyask Hydropower Limited Partnership, *Public Involvement Plan*, online: <https://keeyask.com/project-timeline/public-involvement/public-involvement-process/>; Manitoba Hydro, *Manitoba-Minnesota Transmission Project: Environmental Impact Statement, Public Engagement Process* (2015), online: <https://www.hydro.mb.ca/projects/mb_mn_transmission/pdfs/eis/mmtp_eis_chapter03_public_engagement.pdf>; Manitoba Hydro, *Manitoba-Minnesota Transmission Project: Environmental Impact Statement, First Nation and Metis Engagement Process* (2015), online: <https://www.hydro.mb.ca/projects/mb_mn_transmission/pdfs/eis/mmtp_eis_chapter04_first_nation_and_metis_engagement.pdf>.

section discusses the legally required participation opportunities contained in Manitoba's environmental regulatory regime, with a focus on *The Environment Act* and *The Water Power Act*, as they are the only guaranteed opportunities for public participation.

For many reasons, hydroelectric projects proposed after the enactment of *The Environment Act* have been subject to the highest level of regulation which has meant that all possible participation opportunities available under the Acts have been made available to citizen stakeholders. This means that for each of these projects, a public hearing was held by the CEC. There have also been additional hearings, held in some cases by the PUB, that have also involved scrutinizing Manitoba Hydro's hydroelectric operations and environmental impact.[148] However, there is limited involvement of citizen stakeholders in the process once a public hearing has been held and it is often difficult to ascertain how public input has been considered and incorporated into final decisions.

The public participation opportunities available in Manitoba's environmental governance framework generally occur somewhere in the middle of most regulatory processes, as opposed to occurring throughout the process as required for meaningful participation. Proponents like Manitoba Hydro are not required to consult with the public during the project planning phase, which is often when environmental assessment reports are completed. Some communication with the government will occur, but the proponent is largely allowed to move through this phase with minimal required communication with other potentially impacted parties.

This lack of required early participation has been disputed in Manitoba in relation to the development of terms of reference for CEC hearings and the scope of environmental impact

[148] PUB, 2014, *supra* note 107; CEC, LWR, *supra* note 121; Clean Environment Commission, *Hearings: Regional Cumulative Effects Assessment*, online: <http://cecmanitoba.ca/hearings/#1>; Manitoba Hydro, *Regional Cumulative Effects Assessment*, online: <https://www.hydro.mb.ca/regulatory_affairs/regional_cumulative_effects_assessment.shtml>.

statements under *The Environment Act*. However, the Manitoba Courts have taken a narrow interpretation of the Act.[149] In *Swampy Cree Tribunal Council v. Clean Environment Commission*, the applicant argued that both the Minster and the Director failed to comply with provisions of the Act by precluding the public from having input into the determination of the terms of reference and the scope of the environmental impact statement.[150] However, the Manitoba Court of Queen's Bench dismissed the application and concluded that "there is no provision in the Act for public input into the form or content of an environmental impact statement or the terms of reference and guidelines directed by the Minister to the Commission."[151] Thus, public participation at this stage has continued to occur only at the discretion of the Minister.

The first opportunity for citizen stakeholders to participate usually occurs when they receive notification of hydroelectric projects and regulatory processes that may be of interest.[152] This may require actively checking news sources and government websites or signing up for email notifications. Government notifications provide information about the parameters of public participation opportunities and identify what and where relevant information is available, including the environmental impact statement if it has been completed at the time of notification.[153] Citizen stakeholders may also have access to relevant information through the government's environmental registry.[154] After notification is provided, there will generally be an opportunity for citizens to provide written comments to the relevant government decision-maker. There are no restrictions on who may provide input during these public participation

[149] MLRC, *supra* note 7, at 51.
[150] (1994) 94 Man. R. (2d) 188; *The Environment Act*, *supra* note 104, s. 10(4) and 10(6).
[151] *Swampy Cree Tribunal Council v Clean Environment Commission*, *ibid*, para 25.
[152] *The Environment Act*, *supra* note 104, s. 10(4)(a); 11(8)(a); 12(4)(a); MLRC, *supra* note 7, at 52; WPR, *supra* note 119, s. 3, s. 6.
[153] MLRC, *ibid*, *at* 52.
[154] *The Environment Act*, *supra* note 104, s. 17.

opportunities.[155] Public participation may also be affected by the lack of legislated timelines for the submission and consideration of public input, especially since time restrictions may be established in the government issued notice. This can result in inconsistencies in terms of how long citizen stakeholders have to provide comments and how long government officials have to consider such input.[156]

In the case of large-scale hydroelectric developments proposed after *The Environment Act* was enacted, a public hearing has generally been requested by the Minister and held by one of Manitoba's administrative agencies.[157] It should be noted, however, that such public hearings have on average been held for only 1% of all developments required to undergo the modern environmental approval process.[158] A variety of participation opportunities are available to citizen stakeholders during such hearings and funding may be available, however this does not always mean that participation is meaningful.[159]

If a public hearing is held by the CEC, interested members of the public have the ability to contribute on three different levels of involvement.[160] Individuals and organizations who wish to participate at the highest level of involvement, can apply to the CEC and request participant status.[161] In deciding whether to grant participant status, the CEC panel considers: the degree to which an applicant's interests may be directly and substantially affected by the proposed project;

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[155] MLRC, *supra* note 7, at 51.
[156] The length of time allowed for public comment periods varies depending on "the time of year, complexity, logistics, and level of interest or concern." [MLRC, *ibid*]
[157] The Director may request that the Minister direct the chairperson of the CEC to conduct a public hearing (s. 10(6)), or the Minister may require a public hearing under s. 11(9) or 12(5).[*The Environment Act*, *supra* note 104; MLRC *ibid*, 28]; WPR, *supra* note 119, s. 6(4), s. 46.
[158] MLRC, *supra* note 7, at 29, 48.
[159] MLRC, *ibid*, at 51. See also: Clean Environment Commission, *Process Guidelines Respecting Public Hearings* (2015), online: <http://www.cecmanitoba.ca/resource/file/Procedures-manual-2015-final.pdf>. [CEC, 2015]
[160] MLRC, *ibid*. CEC, 2015, *ibid.*
[161] CEC, 2015, *ibid*, at 7, 23. Participants assume the fullest range of rights and responsibilities and during the hearing may: bring motions; be a witness; be questioned by the panel, proponent and other participants; call witnesses, question witnesses presented by the other parties; make submissions to the panel, including final argument; and receive copies of all documents exchanged or filed by the other parties. [CEC, 2015, at 24]

the relevance of the applicant's proposed submission to the mandate of the hearing; the significance of the applicant's commitment to the entire hearing process; and whether or not the applicant is likely to make a useful and distinct contribution to the panel's understanding of the issues in the proceeding.[162] If participant status is not granted, the individual or organization will have other opportunities to participate.[163] This includes the opportunity to make a presentation to the panel and/or submit written comments.[164] For any development that, in the opinion of the Minister, is of significant public interest, the proponent can be required to fund a participant assistance program under section 13.2 of *The Environment Act*.[165] The expenditures for which assistance may be granted are set out in the *Participant Assistance Regulation*.[166] This includes professional fees for legal and expert advisors, salaries for persons employed to assist with coordination, research and secretarial services needed for the hearing, travel and accommodation expenses, costs related to information collection, accounting and audit services, telephone rental and charges, translation services, and other expenses that have been approved by the minister.

One recent improvement in terms of public participation has involved the use of technology by regulatory agencies and the increasing availability of important documents, including complete transcripts of public hearings, online. The PUB has also recently utilized live streaming technology, allowing the public to watch public hearings, in real time, from their home computers and personal devices. These technological advancements increase the public's access to information and can improve transparency by allowing more citizens to view the hearing process.

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[162] CEC, 2015, *ibid,* 23-24.
[163] CEC, 2015, *ibid,* 24.
[164] CEC, 2015, *ibid,* 25-27.
[165] MLRC, *supra* note 7, at 54; *The Environment Act*, *supra* note 104; *Participant Assistance Regulation* M.R. 125/91, s. 2(1). [*Participant Assistance Regulation]*
[166] *Participant Assistance Regulation, ibid,* s. 7.

While there have been some positives identified in terms of public participation in Manitoba's environmental governance framework, such as the provision of funding for the participation of citizen stakeholders and the use of technology to make regulatory proceedings more accessible, there has been much criticism of the public participation opportunities available in Manitoba.[167] Such criticism arises for a number of reasons. For example, the public participation opportunities available within the environmental regulatory regime are not consistent. Citizens have different levels of participation depending on the legislative origin of a regulatory process. If the process falls under *The Environment Act,* citizens will generally have more opportunity to participate as opposed to a regulatory process under *The Water Power Act*.

The timing of participation opportunities is also an issue. As noted in chapter two, meaningful participation requires early and ongoing participation throughout environmental regulatory processes. [168] However, in Manitoba, most opportunities for public participation occur after the planning process has been completed. This limits the of impact citizen input, particularly in relation to possible project alternatives or alterations. There is also limited citizen participation opportunities in the monitoring and follow-up phase of environmental approval processes, which reduces the ability of citizens to hold proponents and government accountable for not following or enforcing environmental regulatory requirements and impacts how meaningful public participation is earlier in environmental regulatory processes.

There are also inconsistencies in terms of access to information, as the status of a participant may impact the level of information that is accessible. For example, in CEC hearings, a party with full participant status has the power to request additional information from the

[167] Manitoba Conservation and Water Stewardship, *Report of the Consultation on Sustainable Development Implementation (COSDI)* (1999), online: < http://www.gov.mb.ca/sd/susresmb/cosdireport.html#10>; Alan Diduck, Patricia Fitzpatrick and John Sinclair, *Improving the Hearing Process: A Report to the Manitoba Clean Environment Commission* (Winnipeg, MB: Natural Resource Institute, 2001); MLRC, *supra* note 7, at 47-54.
[168] DeMarco, *supra* note 78; Gibson, Doelle and Sinclair, *supra* note 76.

proponent, where as someone with presenter status does not. Without access to information, participation cannot be meaningful.

Problems have also been identified with the decision-making powers of government officials. There is a lack of transparency for important approval and licensing decisions as legislation like *The Environment Act* and *The Water Power Act* does not contain decision-making criteria and may not require decision-makers to release publicly available reasons for their decisions. For example, there is no legislative criteria to assist government decision-makers when determining if an action is in the public interest. This impacts the ability of citizens to understand how the government determines what is in their best interest and reduces how meaningful their input into environmental regulatory processes may be due to a lack of clarity in terms of what information can be provided to best assist government decision-makers with such determinations.

In terms of enforcement, Manitoba's environmental regulatory regime lacks opportunities for independent review since appeals of government decisions within the regime are also often decided by government officials. For example, under *The Environment Act*, appeals of licensing decisions of the Director are decided by the Minister, and appeals of the Minister's decisions are decided by the Lieutenant-Governor-in-Council.[169] This means the public has no opportunity for independent review of these decisions, which reduces the public's ability to hold government decision-makers accountable, if for example, environmental licences do not adequately address the concerns of the public. This lack of independent review also creates a perception of bias that impacts how meaningful the public's participation is in the determination of licensing conditions.[170]

[169] MLRC, *supra* note 7, at 85-86.
[170] MLRC, *ibid*, at 85.

Finally, Manitoba's environmental regulatory regime lacks a number of legislative mechanisms utilized in other Canadian jurisdictions that could improve public participation opportunities. This includes statutory recognition of substantive and procedural environmental rights and the incorporation of new legal approaches, like the public trust doctrine.[171]

Therefore, there are many improvements that could be made to Manitoba's environmental regulatory regime to make public participation more meaningful. Although participatory opportunities may seem to meet much of the criteria for meaningful participation at some points of environmental decision-making processes, such as during public hearings, there is certainly a lack of meaningful participation during the planning stage, as well as during the monitoring and enforcement phases. Legislators in Manitoba have also failed to adopt legislative mechanisms utilized in other jurisdictions, like environmental rights, which could significantly improve environmental participatory approaches. The next section will explore how these participatory issues, and other weaknesses in Manitoba's environmental governance system have contributed to a loss of legitimacy. Using the indicators of a legitimation crisis identified by Marshall and Goldstein, as discussed in chapter two, it is suggested that evidence of recreancy, regulatory capture, and the increasing activity of grassroots environmental organizations indicate that Manitoba is facing an environmental legitimation crisis.

3.3) Is Manitoba Experiencing an Environmental Legitimation Crisis?

While Manitoba has, in the past, been considered a leader in terms of environmental governance and public participation, there have been many jurisdictions both in Canada and internationally, that have set a much higher standard for meaningful participation today. The

[171] These approaches have been utilized in Canadian jurisdictions like Ontario (see the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28) and the Yukon (see the *Environment Act*, RSY 2002, c.76).

need for meaningful public participation in Manitoba's environmental governance processes is often linked to the effectiveness of environmental regulatory regimes in terms of environmental protection, however, it also impacts the political legitimacy of such regulatory regimes since meaningful public participation plays a significant role in the legitimation process, as discussed in chapter two. Although the lack of meaningful public participation in Manitoba's environmental governance regime has not yet appeared to significantly impact the operations of the provincial government, it is likely that a loss of public support in relation to the government's oversight of the environmental governance regime contributed to the change in government that occurred in 2016. There is also evidence that there has been an emergence of the factors identified by Marshall and Goldstein that indicate a governance framework is facing an environmental legitimation crisis, to be discussed below.[172] This includes recreancy, the viewpoint that responsible government agencies have failed to carry out their responsibilities and no longer merit the trust of citizens; citizen perception of regulatory capture, when the public perceives the views of a regulatory agency to be more closely aligned with industry than the interests of the public; and the rise of grassroots environmental organizations to spread awareness and advocate for environmental reform.[173]

Although it is difficult to provide conclusive evidence that an environmental legitimation crisis is in danger of occurring or identify the consequences if such a crisis was to occur in Manitoba, a loss of public support for any aspect of a democratic governance regime, including environmental regulation, is problematic at the very least in relation to the political prospects of government re-election. Thus, the potential occurrence of an environmental legitimation crisis adds further support to the need for environmental reform in Manitoba, especially in terms of

[172] Marshall and Goldstein, *supra* note 42, at 220-221.
[173] Marshall and Goldstein, *ibid*, at 220; MacLean, *supra* note 69, at 119; Boyd, 2003, *supra* note 6, at 255-256.

meaningful public participation, regardless of any inability to predict when such a crisis may actually occur.

Recreancy and Regulatory Capture

At the provincial level, economic considerations are often perceived as being more important to the government than environmental concerns.[174] This is in part due to the fact that provincial governments have jurisdiction over most natural resources and often rely heavily upon the natural resource industries as a source of revenue and economic development.[175] Resource industries and provincial governments are considered to have a "symbiotic relationship" in that regulatory approaches favourable to natural resource industries are usually seen as beneficial to the province as well.[176] This is particularly true in the case of Crown corporations, where there is a clear economic connection between government and industry. Beyond the economic interest government may have in the performance of natural resource corporations, such corporations are also often much more capable of influencing environmental regulatory processes than citizen stakeholders and environmental organizations due to the far greater resources and political power they enjoy.[177] As a result, a significant amount of provincial environmental laws and regulations in Canada "are produced by negotiations between government and business" instead of through more inclusive public processes.[178] This close connection between government and industry and the government's economic interest in the development of natural resources can play a significant role in the emergence of recreancy and public perception of regulatory capture.

[174] Boyd, 2003, *ibid*, at 255.
[175] Boyd, 2003, *ibid.*
[176] Boyd, 2003, *ibid.*
[177] Boyd, 2003, *ibid.*
[178] Boyd, 2003, *ibid.*

This has been the case in Manitoba, where the influence of natural resource corporations like Manitoba Hydro in the development and application of environmental regulatory requirements has contributed to a loss of trust in environmental governance processes (recreancy) and a perception of bias in favour of industry on the part of government decision-makers (regulatory capture). As discussed in chapter two, these are the first two indicators of an environmental legitimation crisis identified by Marshall and Goldstein. In particular, the public has increasingly scrutinized the operations and oversight of Manitoba Hydro due to the provincial government's economic interest in the hydroelectric industry and Manitoba Hydro's status as a Crown corporation. Citizen stakeholders often view the issuance of environmental approvals for projects proposed by Manitoba Hydro (and other influential proponents) as inevitable and a growing number of citizens consider decision-makers to be biased in favour of Crown corporations, contributing to a public perception of regulatory capture.[179] This sense of inevitability and bias has been compounded by a lack of transparency since most environmental regulatory decisions are made by government decision-makers without any requirement for public justification.[180] The perceived weaknesses with monitoring and enforcement within Manitoba's environmental governance regime has also contributed to the unease of citizen stakeholders as there is very little transparency in terms of how licensing requirements are monitored and enforced and there are few opportunities for citizen involvement.[181]

This public unease has been exacerbated by the seeming ineffectiveness of the regime in terms of environmental protection. For example, despite a range of regulatory mechanisms and government funded programs focused on the protection of Manitoba's provincial lakes and rivers, Lake Winnipeg, which generates hydroelectric power for all of Manitoba, continues to

[179] MLRC, *supra* note 7, at 82.
[180] MLRC, *ibid.*
[181] MLRC, *ibid,* at 92.

have deteriorating water quality due to high levels of municipal and industrial waste, agricultural runoff, and air pollution and the destruction of natural vegetation that would otherwise help reduce the flow of polluted water into the lake.[182] As a result, the lake continues to have high levels of phosphorus and nitrogen that causes "large, frequent and toxic algal blooms" that threaten fisheries and harms the lake's ecosystem, leading Lake Winnipeg to be identified in 2013 as "the world's most threatened lake" by the Global Nature Fund.[183] This regulatory failure to protect important natural entities like Lake Winnipeg has contributed to the public's lack of trust in Manitoba's environmental regulatory regime and the provincial government's oversight of the hydroelectric industry.

This lack of public trust has also been exacerbated in recent years by the financial problems faced by Manitoba Hydro and the potential economic impact this debt could have on Manitobans.[184] Despite a government mandated review of Manitoba Hydro's preferred development plan in 2014 by the PUB, during which participants identified problems with the projected costs for two proposed hydroelectric projects (Keeyask Generating Station and Bipole III transmission line) and suggested these projects would have a much higher financial burden on Manitobans than predicted, the government issued all necessary environmental approvals. Four

[182] Government of Canada, *Nutrients in Lake Winnipeg*, online: <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/nutrients-in-lake-winnipeg.html>; CEC, LWR, *supra* note 121, at 11-12.
[183] Government of Canada, *ibid;* Global Nature Fund, "Lake Winnipeg Named World's Most Threatened Lake This Year" (2013), online: <https://www.globalnature.org/37072/Home/Press/Press-Archives/resindex.aspx?newsid=1573&newsrefid=37072&row=20&newsrefaddcoid=&nafrom=&nato=>; Global Nature Fund, "Threatened Lake of the Year 2013: Lake Winnipeg in Canada" (2013), online: <https://www.globalnature.org/35753/Living-Lakes/Threatened-Lake-2016/Threatened-Lake-2013/resindex.aspx>; CBC News, "Lake Winnipeg most threatened in world in 2013" *CBC News* (February 2, 2013), online: <https://www.cbc.ca/news/canada/manitoba/lake-winnipeg-most-threatened-in-world-in-2013-1.1326764>; Dan Kraus, "Five Ways To Save A Lake" *Nature Conservancy Canada* (March 22, 2018), online: <http://www.natureconservancy.ca/en/blog/five-steps-to-save-lake.html#.W1uSaNJKhPY>.
[184] Sean Kavanagh, "Manitoba Hydro is a 'ticking time bomb' that needs financial help from province: board chair", *CBC News* (February 7, 2017), online: <http://www.cbc.ca/news/canada/manitoba/manitoba-hydro-sandy-riley-rate-increases-1.3970470>.

years later, both projects have been found to be significantly over budget and behind schedule, contributing to the accumulation of almost $2 billion of new debt in one year.[185]

The conservative government elected in 2016 has made significant changes to the regulatory oversight of Crown corporations like Manitoba Hydro in the past few years, including an overhaul of Manitoba Hydro's Board of Directors and changes to the regulatory regime that are intended to reduce red tape and improve efficiency. However, instead of fixing the perceived problems with Manitoba Hydro's operations and oversight, the conservative government's approach has created further problems and caused an increase in public concern. The government's approach also caused an unprecedented mass resignation of Manitoba Hydro's board members in March 2018 as a result of the government's "neglect over one of Manitoba's most important Crown corporations".[186] As a result of this and the other regulatory issues discussed above, it has been suggested that "good governance is adrift and Manitobans have every right to worry."[187]

Recreancy and the Rise of the Grassroots Movement

As discussed in chapter two, an increase in grassroots activism is the third indicator of an environmental legitimation crisis identified by Marshall and Goldstein. Along with the increase

[185] David McLaughlin, "Crown corporations and Manitoba Hydro: Who speaks for the public?", *The Globe and Mail* (March 23, 2018); Caroline Barghout, "Keeyask dam cost could reach $10.5 billion, report warns", *CBC News* (December 18, 2017), online: <http://www.cbc.ca/news/canada/manitoba/keeyask-dam-manitoba-hydro-costs-report-1.4455342>; Jen Skerritt and Christopher Martin, "Manitoba to probe electricity projects following 'tragic waste of money' that cost taxpayers billions", *Financial Post* (May 4, 2018), online: <http://business.financialpost.com/commodities/energy/manitoba-to-probe-hydro-projects-following-tragic-cost-overrun>.

[186] Karine Levasseur, "Hydro board resignations show 'good governance is adrift" in Manitoba", *CBC News* (March 25, 2018), online: <http://www.cbc.ca/news/canada/manitoba/opinion-karine-levasseur-manitoba-hydro-board-1.4591581> [Levasseur]; Sean Kavanagh, "An 'existential crisis' at Manitoba Hydro? Problems that led to board's resignation run deep", *CBC News* (March 24, 2018), online: <http://www.cbc.ca/news/canada/manitoba/hydro-pallister-riley-board-resignation-pub-manitoba-government-1.4591630>; Manitoba Hydro, *Statement from the Manitoba Hydro-Electric Board* (March 21, 2018), online: <https://www.hydro.mb.ca/corporate/news_media/news/2018-03-21-manitoba-hydro-board-statement.shtml>.

[187] Levasseur, *ibid.*

of public distrust and perception of bias in relation to environmental governance approaches in Manitoba, this indicator has also emerged with an increase in the development and operation of grassroots organizations focused on environmental reform and improved citizen participation. Some of these grassroots organizations have been created in response to specific hydroelectric projects, such as the Bipole III Coalition which was created to "promote increased public awareness among Manitobans" about the potential impacts of the route selection of the Bipole III transmission line.[188] Other organizations, like the Manitoba Energy Justice Coalition, have focused on a broader range of issues and is "committed to defending the lands, air, and water in Manitoba by working to reclaim and protect our environment and promote social justice in the energy sector."[189] An increasing number of public rallies have been held to spread awareness of these issues and encourage citizen participation in environmental regulatory processes.[190] There has also been grassroots activity in Manitoba by national organizations like the David Suzuki Foundation's Blue Dot Movement, which influenced the provincial government's decision to introduce an Environmental Bill of Rights prior to the last provincial election.[191]

Has Manitoba's New Government Addressed the Public's Concerns?

From the above examples, it is clear Manitoba's environmental governance regime is facing an environmental legitimation crisis, or already experiencing one, as the three indicators

[188] Bipole III Coalition, *Who We Are*, online: <http://www.bipoleiiicoalition.ca/who-we-are>.
[189] Manitoba Energy Justice Coalition, *About,* online: <https://www.mbenergyjustice.org/about>.
[190] Caroline Barghout, "Manitoba 'Hydro justice' rally gains support on heels of board resignations", *CBC News* (March 22, 2018), online: <http://www.cbc.ca/news/canada/manitoba/manitoba-hydro-justice-rally-1.4589155>
[191] David Suzuki Foundation, *Blue Dot Movement,* online: <https://davidsuzuki.org/project/blue-dot-movement/?nabe=6681007670689792:0&utm_referrer=https%3A%2F%2Fwww.google.ca%2F>; Blue Dot Movement, *Time For An Environmental Bill of Rights in Manitoba,* online: <http://bluedot.ca/stories/time-for-an-environmental-bill-of-rights-in-manitoba/>; Philma Scheepers, "David Suzuki leads movement, Blue Dot Tour moves Winnipeg", *The Manitoban* (October 28, 2014), online: <http://www.themanitoban.com/2014/10/david-suzuki-leads-movement-moves-winnipeg/21263/>; Ecojustice, *Statement: Ecojustice and the David Suzuki Foundation applaud introduction of Manitoba's Environmental Rights Act,* online: <https://www.ecojustice.ca/pressrelease/statement-ecojustice-and-the-david-suzuki-foundation-applaud-introduction-of-manitobas-environmental-rights-act/>.

of such a crisis identified by Marshall and Goldstein: recreancy, a perception of regulatory capture, and an increase in grassroots activism, have emerged in the last decade. During this time, there has also been a change in provincial government, with a shift from a longstanding NDP government to the recently elected PC government. While this change could have provided the new government with an opportunity to address the public's concerns with the provincial environmental governance regime, the actions of Manitoba's conservative provincial government since its election in 2016 have actually increased the public's distrust of the environmental regulatory regime and government oversight of Manitoba Hydro.

Despite the conservative party's recognition that there is a need to "restore trust in government", the actions of this government have done little to inspire public confidence in the effectiveness of the provincial environmental governance regime.[192] The first major change made the environmental regulatory regime by the new conservative government was to change the name of the responsible government department from the Department of Conservation and Water Stewardship to the Department of Sustainable Development and re-organize its operations.[193] This was considered problematic by environmental organizations as it indicated the government's intent to focus on the development of natural resources and not their conservation. As suggested by the Manitoba campaign director of grassroots organization the Wilderness Committee:

> They may say that sustainable development is how they're going to handle it in the province, but that simply is not acceptable.... Scientists around the world aren't saying, 'We really need to work on some development so our environment is healthier. Scientists around the world are saying that we really need to conserve our natural ecosystems and the processes which give us life on this planet'.[194]

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[192] Government of Manitoba, *Mandate Letter: Minister of Sustainable Development*, online: <https://www.gov.mb.ca/asset_library/en/executivecouncil/mandate/hon_catherine_cox.pdf>.
[193] Manitoba Order in Council 190/2016 (May 3, 2016).
[194] Bryce Hoye, "Environment watchdog slams Brian Pallister for not appointing a conservation minister", *CBC News* (May 3, 2016), online: <http://www.cbc.ca/news/canada/manitoba/manitoba-conservation-sustainable-development-minister-1.3564818>.

Such criticism of the provincial government has continued since then and the government has been perceived as "lacking leadership on the environment".[195] Instead of addressing the public's lack of trust in the government's ability to protect public lands and resources, the actions of the new government have instead further contributed to the perception that provincial environmental regulatory agencies are more focused on approving new developments than protecting the public's environmental interests.

This distrust of the new government's approach to environmental governance has been exacerbated by the introduction of regulatory reforms and the shutdown of existing environmental agencies as a means of reducing red tape and improving efficiency. This has further demonstrated the government's focus on altering the regulatory regime for the benefit of industry and the economy, instead of improving the conservation of natural resources and/or public participation mechanisms.[196] The Premier's response to the resignation of Manitoba Hydro's Board of Directors was also considered problematic and a sign of the government's "lack of accountability" and the Premier's lack of "knowledge about, and control over, the very government he claims to lead".[197]

The conservative government's problematic approach to environmental governance has become especially apparent in light of the recent development and introduction of the new

[195] Eric Reder, "Tories' attitude on environmental not just dismissive, but inept", *Winnipeg Free Press* (January 1, 2017), online: <https://www.winnipegfreepress.com/opinion/analysis/tories-attitude-on-environment-not-just-dismissive-but-inept-411161785.html>.
[196] Kristen Annable, "Pallister government quietly shutters agency responsible for environmental protection programs", *CBC News* (April 19, 2017), online: <http://www.cbc.ca/news/canada/manitoba/pallister-environment-green-manitoba-1.4076223>.
[197] Brian Pallister, "Our duty is to Manitobans", *Winnipeg Free Press* (March 24, 2018), online: <https://www.winnipegfreepress.com/opinion/analysis/our-duty-is-to-manitobans-477813543.html>;
Dan Lett, "Pallister's op-ed shows a lack of accountability", *Winnipeg Free Press* (March 26, 2018), online: <https://www.winnipegfreepress.com/local/pallisters-op-ed-shows-a-lack-of-accountability-477890423.html>.

Climate and Green Plan.[198] Although public consultation was undertaken, such input was gathered via an online survey which was criticized for not limiting participation to citizens within Manitoba and providing no mechanism to limit the number of submissions made by the same individual. As suggested by liberal leader Dougald Lamont, "This is not democratic consultation with Manitobans, this is handing over Manitoba's environmental policy to the Internet and it is ripe for abuse."[199] Due to the perceived inadequacies in terms of public consultation, grassroots environmental organizations felt the need to hold supplemental participation events, including a public town hall, to ensure Manitobans had a more meaningful means of participation.[200] There was no consultation summary document released by government at the end of the consultation period, making it difficult to ascertain what public feedback was considered by government in the production the final plan. The plan itself is focused on economic incentives and investments and leaves much of the final policy framework undefined. There are few proposed changes that would improve the public's participation in environmental regulatory processes and a lack of environmental reforms that would require better consideration of climate change impacts during the planning and assessment stages of environmental approval processes.

Based on Marshall and Goldstein's indicators of an environmental legitimation crisis: recreancy, public perception of regulatory capture, and the rise of grassroots activism, it appears that Manitoba's environmental governance regime as it pertains to the oversight of the environment and the hydroelectric industry is facing a crisis of legitimacy. The actions of the

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[198] Manitoba Sustainable Development, *A Made-in-Manitoba Climate and Green Plan: Hearing from Manitobans* (Government of Manitoba, 2017).
[199] CBC News, "'The devil's in the details: Local leaders still have questions about Manitoba climate plan" (October 27, 2017) online: <http://www.cbc.ca/news/canada/manitoba/climate-plan-mantoba-questions-1.4376181>.
[200] Wilderness Committee, *What We Heard: Manitobans on the Climate and Green Discussion Paper,* online: <https://www.wildernesscommittee.org/news/what-we-heard-manitobans-climate-and-green-discussion-paper>.

provincial government and the operations of Manitoba Hydro have contributed to increasing levels of citizen recreancy and a significant rise in activity from grassroots organizations. In response to the government's lack of meaningful participation opportunities, non-governmental organizations have felt the need to step in and ensure citizen stakeholders have the information they need and opportunity to provide input into the environmental actions of government and industry. It is clear that there is a lack of public trust in Manitoba's environmental governance regime and a need for reform in order to begin restoring the legitimacy that has been lost. Without sufficient public trust, the legitimacy of the actions taken by Manitoba's government is threatened, reducing the effectiveness of the environmental governance regime and increasing the chances of an ecological crisis that could further exacerbate the regime's loss of legitimacy.

3.4) Conclusion

This chapter used Marshall and Goldstein's crisis systems model (CSM) and theory of environmental legitimation crises, introduced in chapter two, to analyze the legitimacy of environmental governance in Manitoba. The governance of the hydroelectric industry was used as an example as hydroelectric projects are generally subject to the highest level of environmental regulation in Manitoba, providing insight into the regulatory regime's most stringent requirements and the role the public has in such processes. Hydroelectricity in Manitoba also plays an important economic and political role, and therefore there is considerable government interest and involvement in related regulatory processes. Along with the role of the government and its regulatory agencies, the Clean Environment Commission and the Public Utilities Board, the specifics of the three other systems involved in the governance of the hydroelectric industry in Manitoba were discussed. This includes the public lands and waters impacted by the construction and operation of hydroelectric developments, along with the

transmission of the electricity they produce; Manitoba Hydro, the Crown corporation with a monopoly in the hydroelectric industry in Manitoba; and citizen stakeholders and their representatives.

The public participation opportunities available within the regulatory processes used to regulate the hydroelectric industry in Manitoba were then explored. Particular focus was placed on the opportunities available under the processes contained in *The Environment Act* and *The Water Power Act* as this legislation encompasses the majority of the environmental regulatory requirements the hydroelectric industry is subject to. Hydroelectric developments tend to trigger the most stringent level of environmental regulation under this legislation, thus the public is usually provided with more opportunities to participate than in processes for other, smaller, natural resource developments. However, required participation opportunities tend to be restricted to the submission of written comments, and more meaningful participation opportunities, like public hearings, are dependent on discretionary decisions made by government officials. Participation is also largely limited to the middle of the project life cycle with no requirements for citizen involvement in the planning, monitoring, and follow-up stages. This means Manitobans have little to no opportunity to participate in the enforcement of environmental requirements, even if public participation played a role in the determination of such requirements. These participatory deficiencies indicate there is a need for improvement in order for public participation in Manitoba's environmental governance regime to be truly meaningful.

There was also consideration of Marshall and Goldstein's indicators of an environmental legitimation crisis: recreancy, perception of agency capture, and increase in grassroots activity; to determine if these indicators have emerged in Manitoba. As discussed, there is evidence to support the conclusion that all such indicators are visible in relation to the governance of

Manitoba's hydroelectric industry, indicating that this governance regime has experienced a loss of legitimacy and is facing an environmental legitimation crisis. The actions of Manitoba's conservative government since its election in 2016 and the contribution these government activities have made to Manitoba's loss of environmental legitimacy was also discussed. This analysis indicates that the provincial government needs to implement measures to restore legitimacy to Manitoba's environmental governance regime or face a further degradation of public support.

This need for environmental reform in Manitoba is not surprising, as the need for change has long been accepted by academics and environmental activists, as discussed in chapter one, particularly in relation to public participation. Although citizen stakeholders have legislated opportunity to participate in major environmental regulatory processes, such participation can be limited to the submission of written comments. More in-depth participation opportunities, such as public hearings, can also be limited based on the participatory status granted and the resources available to interested citizen stakeholders. While these participation opportunities, even when limited, contribute to the maintenance of legitimacy, they do little to hold government decision-makers and responsible regulatory agencies accountable for their actions (or lack of action), counteracting any legitimacy gained through existing participatory measures.

Despite the provincial government's perceived apathy in terms of improving environmental regulation and the participation of the public in environmental governance processes, there is still value in examining possible options for environmental reform that improve the participatory abilities of the public and contribute to the restoration of legitimacy. The identification of regulatory measures that improve the ability of citizen stakeholders to participate in enforcement procedures that serve to hold the government and industry accountable would be particularly useful in the restoration of legitimacy due to the significant

gaps that currently exist in this area within Manitoba's environmental governance regime. Therefore, the next chapter will explore regulatory reforms that could be implemented to accomplish these goals of improved citizen participation in enforcement and increased accountability of decision-makers. This includes reforms that clarify the government's obligations in the protection of natural resources on the public's behalf, allow for greater transparency in relation to government decisions, and create new enforcement mechanisms for citizens.

Chapter 4: Restoring Legitimacy: Promising Legal Approaches

The preceding chapters have provided insight into the need for environmental reform in Canada, with a focus on Manitoba. Scholars and activists have long been critical of Canadian environmental governance approaches, including those utilized in Manitoba. However, there has been little success in securing necessary environmental reforms. As a result, there has been an emergence of new critical approaches to Canadian environmental law that have utilized a political economic lens to show how the economic importance of natural resources influences the environmental actions of government and can lead to the prioritization of economic development over the protection of public resources and the inclusion of citizen stakeholders in environmental decision-making processes. Following such a political economic approach, Marshall and Goldstein's theory of environmental legitimation crises was introduced in chapter two to show the connection between political legitimacy and meaningful public participation in environmental governance regimes. As discussed, the identification of a loss of legitimacy in an environmental governance regime indicates there is a need to implement regulatory reforms that entrench meaningful public participation processes. Applying Marshall and Goldstein's theory of environmental legitimation, the legitimacy of Manitoba's environmental governance regime was questioned as it relates to the hydroelectric industry. This analysis indicated that the elements of an environmental legitimation crisis identified by Marshall and Goldstein including recreancy, perception of agency capture, and increase in grassroots activity; are visible in Manitoba which means the provincial environmental governance regime has experienced a loss of legitimacy. This means the provincial government needs to implement measures to restore legitimacy to Manitoba's environmental governance regime or face the further degradation of public support and the possibility of an environmental legitimation crisis, as suggested by Marshall and Goldstein. As discussed in chapter two, the implementation of regulatory reforms that support

meaningful public participation in environmental governance processes has been identified as a means of restoring legitimacy.[201] This chapter will therefore explore participatory reforms that should be implemented in Manitoba to restore the legitimacy that has been lost.

While there are existing public participation opportunities in Manitoba's environmental governance regime, as discussed in chapter three, there continue to be participatory gaps. Regulatory measures that serve to fill in these gaps would have the most impact in terms of ensuring meaningful participation throughout Manitoba's environmental regulatory processes. Thus, recommendations for reforms set out in this chapter focus on addressing participatory gaps in the decision-making and enforcement stages of environmental governance. Although public participation could be improved through non-legal approaches, legal reforms are the focus of this chapter as such changes are more difficult to reverse than policy approaches, meaning future governments would not be able to autonomously make changes without the input of the public and opposing political perspectives due to the legislative process and its participatory requirements. This chapter, therefore, considers legal reforms that could increase the transparency of decision-making, improve citizen access to enforcement procedures, and clarify the government's obligations to protect public interests in the environment. First, the use of legislated decision-making criteria for regulatory decisions is discussed. Second, the importance of legal mechanisms that grant citizen stakeholders access to court processes is explored with a focus on public interest standing. Third, the application of the public trust doctrine is examined. Finally, the legal recognition of substantive and procedural environmental human rights is discussed. While the consideration of these potential reforms focuses on examples from other

[201] Marshall and Goldstein, *supra* note 42, at 223-228.

Canadian jurisdictions, there is some discussion of legal mechanisms that have been utilized in other countries.

4.1) Determining the "Public Interest"

In democratic societies like Canada, the government is often thought of as acting in the public's best interest when making environmental decisions. This is particularly true when decisions are made that affect public lands and natural resources which are considered to be 'owned' by the government and managed on behalf of its citizens. Therefore, the consideration of the "public interest" has been made a legislative requirement for government decision-makers in many of Canada's environmental statutes. This includes environmental legislation in Manitoba such as *The Environment Act* and *The Water Power Act*.[202] However, much of this legislation lacks a clear definition or decision-making criteria to assist with determinations of the public interest, which impacts the transparency of environmental decision-making processes.[203] As discussed in chapters two and three, transparency in decision-making processes is an important element of meaningful public participation as it allows citizen stakeholders insight into how important decisions are made and contributes to government accountability as it makes the review of decisions easier. Thus, the improvement of transparency in environmental decision-making processes can be a means of making public participation more meaningful and can contribute to the restoration of legitimacy by mitigating public perceptions of government bias in

[202] *The Environment Act*, *supra* note 104, s. 25(1); *Participant Assistance Regulation*, *supra* note 165, s. 2(1); *WPR*, *supra* note 119, s. 6(5), s. 18, s 79(3).
[203] Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Visions for Impact Assessment in Canada* (Government of Canada, 2017), at 63, online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>; Josh Ginsberg, *Strengthening the new environmental impact assessment law* (Ecojustice, 2018), online: <https://www.ecojustice.ca/strengthening-the-new-environmental-impact-assessment-law/>.

favour of industry (regulatory capture). This section discusses a legal approach that has been used to improve the transparency of government decisions: the adoption of legislated decision-making criteria. While such decision-making criteria can be utilized for any regulatory decision, this section will focus on criteria that would provide transparency in terms of how government decision-makers make public interest determinations within the environmental regulatory regime.

In Manitoba's environmental regulatory regime, the term "public interest" has been incorporated into *The Environment Act* and *The Water Power Act* and a range of other statutes of importance in the environmental governance regime. For example, *The Contaminated Sites Remediation Act* indicates that "it is in the public interest to provide for the management of contaminated sites… and for appropriate remediation to be undertaken… in order to prevent, minimize or mitigate damage to human health or the environment" and that "it is in the public interest to establish a system for identifying and registering contaminated sites".[204] However, this is the only legislative example in which the public interest is so clearly identified. In the majority of regulatory process in which the public interest plays a role, including those under *The Environment Act* and *The Water Power Act*, no definition or criteria is provided to assist with public interest determinations made by government decision-makers.[205] This is problematic because it means there is a lack of transparency in terms of how certain decisions, such as the establishment of participant assistance programs for public hearings, the approval of licensing applications and the amendment of licensing conditions, have been determined to be in the

[204] *The Contaminated Sites Remediation Act*, SM 1996, c. 40, Preamble.
[205] See for example: *The Ecological Reserves Act*, RSM 1987, c. E5, s. 8(4); *The Environment Act*, *supra* note 104, s. 25(1), s. 49(2); *Participant Assistance Regulation*, *supra* note 165, s. 2(1); *The Efficiency Manitoba Act*, SM 2017, c. 18, s. 11(5); *The Forest Act*, RSM 1987, c. F150, s. 39(1); *The Gas Pipe Line Act*, RSM 1987, c. G50, s. 17(b), s. 20(2), s. 23; *The Mines and Minerals Act*, SM 1991-92, c. 9, s. 8, s. 137, s. 144; *WPR*, *supra* note 119, s. 6(5), s. 18, s 79(3); *The Water Rights Act*, RSM 1988, c. W80, s. 19.

public interest.[206] The government can therefore make decisions that are considered to be economically beneficial for the public, even if they are not good for the environment, since there is no requirement to consider environmental impacts when making public interest determinations under these statutes.

Although Manitoba has failed to provide legislative direction in the determination of the public interest in environmental governance, there has been some progress made in other Canadian jurisdictions. Both Ontario's *Environmental Bill of Rights, 1993* and the federal *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) are good examples of environmental legislation that contains criteria that must be considered by the Minister when determining whether a decision is in the public interest.[207] Under the *Environmental Bill of Rights, 1993*, when determining whether the public interest warrants the review of a statutory instrument such as an existing policy, act or regulation, the Minister may consider the following factors: the ministry statement of environmental values; the potential for harm to the environment if the review applied for is not undertaken; the fact that matters sought to be reviewed are otherwise subject to periodic review; any social, economic, scientific or other evidence that the minister considers relevant; any submission from a person who received a notice under s. 66 (i.e. someone with a direct interest); the resources required to conduct the review; and any other matter that the minister considers relevant.[208] These factors improve transparency and show the public that environmental impacts, such as the potential for harm, must be considered when such determinations are made. They also provide members of the public insight into the arguments and evidence that would be useful to include in an application

[206] *Participant Assistance Regulation, ibid*; *WPR, ibid*, s. 18, s 79(3), s. 92.
[207] *Environmental Bill of Rights, 1993, supra* note 171, s. 67; *Canadian Environmental Assessment Act, 2012* S.C. 2012, c. 19, s. 52, s. 38(2) [CEAA, 2012]
[208] *Environmental Bill of Rights, 1993, ibid*, s. 67(2).

for a statutory review, creating the opportunity for more meaningful participation. The Minister must provide reasons for their decision under section 70 of this act, which adds further clarity in such public interest determinations, thus further improving the transparency of this decision-making process.[209]

Under s. 38(2) of the current CEAA, 2012, the Minister must include a consideration of the following factors when determining whether the referral of an environmental assessment to a federal review panel is in the public interest: whether the designated project may cause significant adverse environmental effects; public concerns related to the significant adverse environmental effects that the designated project may cause; and opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it.[210] Although there are fewer factors than for the decision under Ontario's *Environmental Bill of Rights* discussed above, these factors focus on the main feature of environmental assessment: the determination of environmental impacts. They provide assurance to the public that potential adverse environmental impacts and any public concerns related to such impacts are considered when the decision to make a referral (which often means a public hearing will be held) is made. This increases transparency and government accountability, although the focus on "significant adverse environmental effects" is criticized for being too narrow.[211] However, this is a problem associated with the entire federal environmental assessment regime and is not relevant for the purposes of this analysis. Unfortunately, there is no requirement under the Act to provide reasons for the decision, which reduces the transparency in terms of understanding how such factors were considered by government officials.

[209] *Environmental Bill of Rights, 1993, ibid*.
[210] CEAA, 2012, *supra* note 207, s. 38(2).
[211] MLRC, *supra* note 7, at 99-101.

However, positive changes have been proposed to the public interest decision-making criteria within the federal environmental assessment process (now to be called 'impact assessment') in Bill C-69, currently being considered in the House of Commons.[212] Part 1 of this Bill enacts the new *Impact Assessment Act* (IAA) which will replace CEAA, 2012 and become the new federal statute regulating the impact assessment process. The IAA includes positive changes in relation to the existing factors considered in s. 38(2) of CEAA, 2012 which, if enacted, will expand the range of effects considered and require consideration of any adverse impacts the project may have on the rights of Indigenous peoples.[213] This will serve to improve transparency and accountability. The IAA also includes new public interest factors in s. 63 to be considered by the Minister when deciding if a project's adverse effects are in the public interest and should be allowed to occur.[214] These new s. 63 public interest factors include: the extent to which the designated project contributes to sustainability; the extent to which the effects are adverse; the implementation of mitigation measures; the impact the designated project may have on Indigenous groups and their legal rights; and the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.[215] Here again, we can see the inclusion of factors that emphasize the environmental effects a decision may have, including in this case the contribution such a decision may make to sustainability, as a means of

[212] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, Part 1: Impact Assessment Act,* 1st Session, 42nd Parliament, 2018 [Bill C-69].
[213] Bill C-69, *ibid.* If enacted, the Minister will be required to consider "the extent to which the effects within federal jurisdiction or the direct or incidental effects that the carrying out of the designated project may cause are adverse; public concerns relate to those effects; opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it; and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*." [s. 36(2)]
[214] Bill C-69, *ibid*, s. 36, s. 63.
[215] Bill C-69, *ibid.*

counterbalancing the perception that public interest determinations are usually made based on economic impact. Another significant improvement is that the Minister will be required to provide reasons and must demonstrate in these reasons that the s. 63 factors were considered.[216] This is a positive change as it provides further transparency and holds government decision-makers accountable by requiring them to show evidence of how the public interest factors have been considered. It also indicates that the government recognizes that sustainability and meeting its obligations in terms of climate change is in the public interest. These proposed federal reforms are intended to improve the clarity and transparency of environmental decisions at the federal level and restore the public's trust in Canadian environmental governance processes.[217] Since the reforms in both sections will expand the scope of existing public interest determination criteria by requiring the consideration of a broader range of environmental effects and also include a new requirement for reasons in relation to s. 63, it seems likely that they will have the intended impact. Therefore, reforms that will result in similar factors being added to Manitoba's environmental statutes should be considered for Manitoba as a means of addressing current problems with transparency and public perceptions of bias in relation to public interest determinations.

It is significant to note that the enactment of the new section 63 factors will be the first time the impacts of environmental decisions on Indigenous peoples and their rights have been explicitly included as a public interest factor in Canadian environmental legislation. As discussed by Indigenous advocates, the public interest has generally not been beneficial for Indigenous

[216] Bill C-69, *ibid*, s. 65(2).
[217] See the comments of Minister Catherine McKenna, Minister of Environment and Climate Change before the Standing Committee on Environment and Sustainable Development, 42nd Parliament, 1st Session, ENVI-99 (Thursday March 22, 2018), online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/ENVI/meeting-99/evidence>.

peoples.[218] Historically, the government has taken a "top-down, colonialist approach to determining what is in the public interest."[219] This has resulted in government decisions, like the construction of hydroelectric dams in northern Manitoba in the 1960s and 1970s, that was seen at the time as being in the best interest of the public, but ended up having very detrimental impacts on local Indigenous communities.[220] This includes destruction of natural elements with cultural significance and the relocation of Indigenous peoples from the traditional territories to which they had a spiritual connection.[221]

In the past decade, there have been positive signs of change as the government has given formal recognition to the negative consequences of Canada's colonial history on Indigenous peoples and their traditional territories.[222] There have been steps to better include Indigenous peoples perspectives in environmental regulatory processes such as the federal government's review of federal environmental legislation that led to the development of Bill C-69.[223] Environmental academics, like GLT scholars, have also increasingly acknowledged the negative influence Canada's colonial history has had on the modern environmental regulatory regime.[224]

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[218] Elder Florence Paynter speaking at "Bill C-69 - A Conversation on the Proposed Changes to the Federal Environmental Decision-Making Process and their Relationship with Indigenous Laws" hosted by the Manitoba Bar Association, Aboriginal Law Section on Monday April 9, 2018.
[219] See the comments of Mr. Mark O'Connor (Resource Management Coordinator, Resource Development Department, Makivik Corporation before the Standing Committee on Environment and Sustainable Development, 42nd Parliament, 1st Session, ENVI-106 (April 24, 2018), online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/ENVI/meeting-106/evidence>
[220] Waldram, *supra* note 133, at 115-170; Tough, *supra* note 133.
[221] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 Origins to 1939*, The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1 (Montreal & Kingston; London; Chicago: McGill-Queen's University Press, 2015), at 15, online: <http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_1_History_Part_1_English_Web.pdf>; C.A. Bayly, *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons* (Malden, MA: Blackwell Publishers, 2004), at 439-440; Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 *JGR* 388, at 391, 399.
[222] Government of Canada, *Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system* (2008), online: <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>; Geoff Bartlett, "Tearful Justin Trudeau apologizes to N.L. residential school survivors", *CBC News* (November 24, 2017), online: < http://www.cbc.ca/news/canada/newfoundland-labrador/justin-trudeau-labrador-residential-schools-apology-1.4417443>.
[223] Government of Canada, *Environmental and Regulatory Reviews: Discussion Paper* (Government of Canada: 2017), at 4, 6, 7, 8, 13, 15.
[224] M'Gonigle and Takeda, *supra* note 24, at 1065; M'Gonigle, *supra* note 24, at 36.

Despite these first steps, there is still much work to be done in terms of ensuring that Indigenous peoples are meaningfully included in environmental governance processes and that their rights are sufficiently considered in the determination of the general public interest. Unfortunately, a more detailed analysis of this issue is beyond the scope of this current thesis. However, the consideration of the impacts of public interest environmental decisions on Indigenous peoples should still be considered an important element of a modernized environmental regulatory regime, both at the federal and provincial levels, in order to counteract the influence Canada's colonial history has had on modern environmental decision-making processes. Change is needed because, as recognized by the SCC, an environmental decision "that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest."[225]

Beyond these legislative examples, environmental legal and policy analysts have also proposed criteria to help clarify determinations of the public interest by government decision-makers that would help improve transparency and accountability if adopted in Manitoba. For example, Leslie Pal and Judith Maxwell developed the Public Interest Accountability Framework (PIAF), a two-stage framework suggested for use by government when considering the public interest in any regulatory decision.[226] Like the legislative examples discussed above, Pal and Maxwell's framework requires the consideration of a range of different elements but requires more in-depth consideration of public opinion, impacted public goods and the ways in which the various interests impacted by such a decision are to be balanced. Stage one of this framework requires the decision-maker to consider:

- the process through which the regulatory decision-making process was created;

[225] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069.
[226] Leslie A. Pal and Judith Maxwell, *Assessing the Public Interest in the 21st Century: A Framework* (Canadian Policy Research Networks, 2004), at iv [Pal and Maxwell].

- the state of Canadian public opinion on the issue;
- the specific interests connected to the issue being considered and the way the potential costs and benefits will be distributed among these interest groups and the Canadian public in general;
- the key common interests or public goods that could be impacted by the decision (ex. health, security, safety, environmental protection, future generations, innovation, competitiveness); and
- any shared values or normative guidelines that affect the decision-making process, including any specific legal rights that may be affected.[227]

Stage two of the framework encourages the decision-maker to "explicitly consider the balancing of interests of individuals as consumers/citizens, enterprise or business interests, and collective interests in explaining the reasons for decision."[228] This more detailed analysis could be particularly helpful in terms of improving transparency when government decision-makers are faced with complex environmental decisions that require the consideration of many different and competing interests. For example, a required consideration of how public goods will be impacted and how the various impacted interests will be balanced would serve to improve transparency and accountability by providing insight into how impacted interests, like economic prosperity, are balanced with environmental interests like sustainability. A requirement to consider the state of public opinion could also improve public participation opportunities if the decision-maker is required to undertake some form of public consultation to determine what the public's opinions actually are. Therefore, the addition of Pal and Maxwell's public interest factors would have a

[227] Pal and Maxwell, *ibid*, at iv-v.
[228] Pal and Maxwell, *ibid*, at v.

positive impact in Manitoba, if incorporated into environmental legislation, as a means of improving transparency, accountability and increasing opportunity for public participation.

In terms of legislative reform that could contribute to the restoration of legitimacy in Manitoba, a number of the above criteria would significantly improve the transparency of public interest determinations in Manitoba's environmental governance regime. Of particular interest are the proposed factors in Bill C-69 and the elements of stage one of Pal and Maxwell's PIAF, especially if the decision-maker is also required to provide reasons discussing how such criteria was considered. Based these examples, a list of criteria that should guide determinations of the public interest in Manitoba's environmental regulatory regime include:

- the current state of public opinion surrounding the issue being considered;
- the key common interests or public goods that could be impacted by the decision;
- the level of public participation involved in the relevant regulatory process;
- any social, economic, scientific or other evidence that the decision-maker considers relevant; and
- the impact the decision may have on Indigenous peoples and their legal rights.

The addition of these criteria to Manitoba's environmental legislation would improve the transparency of important environmental decisions and increase the accountability of government decision-makers by providing the public with insight into the way public interest determinations are made. The implementation of such criteria would have an even more significant impact on the improvement of decision-making transparency in Manitoba's environmental governance regime if accompanied by requirements for reasons, like in Bill C-69 and Ontario's *Environmental Bill of Rights*. Unfortunately, despite the contribution such reforms could make to the restoration of legitimacy to Manitoba's environmental governance regime, there may be political resistance to the enactment of reforms that would force government

decision-makers to expose the way in which the public's interest in environmental protection is balanced with the economic interests of government and private industry in the development of natural resources. However, as such participatory requirements are increasingly incorporated into the environmental regulatory processes of other Canadian jurisdictions, like in Bill C-69 at the federal level, it becomes increasingly more likely that such political reservations will not prevent similar environmental reforms in Manitoba.

4.2) Public Access to the Courts

While improving the transparency of important regulatory decisions, like public interest determinations, can play an important role in ensuring that public participation opportunities in environmental governance are meaningful, there are other aspects of Manitoba's environmental regulatory regime that are even more lacking in terms of meaningful public participation opportunities. This includes the opportunities available to the public in the review of important environmental decisions made by government officials and the enforcement of environmental regulatory requirements. As discussed in chapter three and in the previous section, government officials have been granted a considerable amount of discretion within Manitoba's environmental regulatory framework with little to no requirement to make important decisions in a transparent manner. This lack of transparency is especially problematic due to the very limited opportunities available to the public, such as appeal provisions, that allow government decision-makers to be held accountable for their actions. Of the few existing opportunities that provide for the review of the government's environmental decisions, such review is not undertaken by an independent body which contributes to the perception of bias inherent in Manitoba's environmental governance framework. There has also been a lack of court proceedings in Manitoba that have considered the actions of government officials within the provincial environmental regulatory

regime. What is needed is more opportunity for Manitobans to participate in legal proceedings in which an independent body, such as the court, can review important environmental decisions and allow citizen stakeholders to hold government officials accountable for their actions (or lack of action). This section will therefore discuss some potential ways to improve public participation in court processes.

In all Canadian jurisdictions, public participation in environmental court proceedings has been impeded by a range of factors such as "a historical bias toward private rather than public interests, the absence of constitutional environmental rights, a lack of access to the courts, the high costs of litigation, judicial deference to government decision makers, and low penalties for environmental offences."[229] It was not until the 1990s that the Canadian courts began to recognise their role in protecting the public interest and began allowing special interest groups to participate in environmental proceedings.[230] Since this time, public interest environmental litigants have played an important role in regulatory decisions in Canada.[231] The SCC has recognized environmental protection as a "fundamental value of Canadian society"[232] and has allowed public interest environmental litigants to contribute to a number of important court proceedings by granting them public interest standing.[233] This empowerment of citizens to use the courts to enforce environmental laws has been recognized as a crucial means of improving public participation in environmental governance.[234] However, the level of necessary legal expertise, costs and time delays often discourage potential public plaintiffs.[235]

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[229] Boyd, 2003, *supra* note 6, at 267.
[230] Boyd, 2003, *ibid*.
[231] Chris Tollefson, "Advancing an Agenda - A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation" (2002) 51 *U N B LJ* 175, at 178-183.
[232] *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031(S.C.C.), at para. 55. See also *Friends of the Oldman River - Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at para. 16-17.
[233] Tollefson, *supra* note 231, at 183-184.
[234] Boyd, 2003, *supra* note 6, at 294.
[235] Hughes, Kwasniak and Lucas, *supra* note 26, at 195.

One way the courts are engaged in environmental issues is through statutory provisions that create statutory torts or causes of action.[236] For example, an environmental statute could include a statutory provision deeming a violation of one of the statute's environmental requirements to constitute a civil cause of action, such as in Alberta's *Environmental Protection and Enhancement Act*.[237] Section 219 allows any person who suffers loss or damage as a result of the conduct of a convicted offender under the Act, to sue them in court and recover from the convicted person an amount equal to the loss or damage they have proven to have suffered.

Manitoba's environmental statutes contain no such provisions. Manitoba's environmental legislation also does not contain citizen suit provisions, another means of improving the access of citizens to the courts.[238] For example, s. 84 of Ontario's *Environmental Bill of Rights* allows any person resident in Ontario to bring an action in court against a person who has contravened an Act and caused significant harm to a public resource. Such provisions "explicitly recognize the right of citizens to take law breakers to court in situations where the government refuses to enforce the law."[239] Although other jurisdictions in Canada have incorporated citizen suit provisions into their environmental legislation, they are considered to be ineffective, often as a result of too many required conditions and restrictions, such in Ontario's *Environmental Bill of Rights* which does not allow citizens to pursue an action in court under s. 84(1) unless they have applied for an investigation and have not received a reasonable response.[240] Such citizen suit provisions have rarely been used as a result. However, a promising and much less onerous

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[236] Hughes, Kwasniak and Lucas, *ibid*, at 11.
[237] *Environmental Protection and Enhancement Act* R.S.A. c E-12, s. 219.
[238] Hughes, Kwasniak and Lucas, *supra* note 26, at 191-192.
[239] Boyd, 2003, *supra* note 6, at 247.
[240] Boyd, 2003, *ibid*, at 248; *Environmental Bill of Rights*, *supra* note 171, s. 84(2); Richard D. Lindgren, *Ensuring Access to Environmental Justice: How to Strengthen Ontario's Environmental Bill of Rights* (Canadian Environmental Legal Association, 2016), at 21, online: <http://www.cela.ca/sites/cela.ca/files/1082-CELA%20Brief%20on%20EBR%20Review%20November%202016.pdf>; Environmental Commissioner of Ontario, *Looking Forward: The Environmental Bill of Rights* (Government of Ontario, 2004), at 7, online: <http://www.ontla.on.ca/library/repository/mon/9000/248172.pdf>.

citizen suit provision has been included in federal Bill C-202, the *Canadian Environmental Bill of Rights,* currently being considered in the House of Commons.[241] It is unclear, however, if this Bill will progress further in the legislative process since it has not moved past the first reading stage since its introduction in 2015. So, despite a range of existing legislative options to grant citizens access to the courts, the ineffectiveness of these provisions has meant that the public essentially has no judicial means "of ensuring that environmental laws in Canada are enforced."[242]

Although the courts have failed to be an effective means of allowing Canadian citizens to enforce environmental regulatory requirements, there has been another role created for the courts within the environmental governance framework. This has been in the context of an appeal of a government decision or a judicial review.[243] Canadian environmental statutes may contain provisions that allow environmental decisions – such as the issuance of licences or the approval of public land uses – to be reviewed by the courts.[244] In Manitoba, environmental statutory appeal provisions do not trigger court proceedings, instead, government officials have decision-making power in regard to both regulatory decisions and appeals.

Judicial review is an available avenue for public access to the courts, however, few such cases have been brought to the courts in Manitoba. Even when available, there are obstacles that can prevent citizen access to such court processes such as standing, the legal right to bring a case to court.[245] Legal standing is a "gatekeeper tool" that determines when court proceedings should be held and who should be heard.[246] By limiting the individuals allowed to participate, standing

[241] Lindgren, *ibid*, at 22; Bill C-202, *Canadian Environmental Bill of Rights,* 1st Session, 42nd Parliament, 2015, s. 18.
[242] Boyd, 2003, *supra* note 6, at 248, 268.
[243] Hughes, Kwasniak and Lucas, *supra* note 26, at 180.
[244] Hughes, Kwasniak and Lucas, *ibid.*
[245] Boyd, 2003, *supra* note 6, at 268.
[246] ELC, *supra* note 134, at 7.

requirements can impact the interests and issues represented during regulatory proceedings undertaken by the courts or administrative tribunals.[247]

The first challenge faced by citizen stakeholders and environmental groups seeking to gain standing is that generally, you need a direct personal or property interest to secure legal standing. However, as noted above, the Canadian courts have recognized a public interest standing approach to allow citizens to overcome this standing obstacle and gain access to the courts.[248] While at first this approach to standing only applied for cases challenging the validity of legislation, in 1986, the SCC expanded public interest standing to include cases reviewing the validity of administrative actions.[249] A new test for public interest standing was established which included three factors.[250] The court could grant public interest standing if the party in question had a "serious and justiciable issue"; had been "directly affected" or has a "genuine interest" in the matter; and that there was no other reasonable and effective manner in which the issue could be brought before a court.[251] In 2012, the SCC revisited the test for public interest standing and established a more "relaxed" approach to the entire test than it has in the past.[252]

In Manitoba, the issue of public interest standing has received very little consideration by the judiciary in the context of environmental governance. In the few cases in which the standing of an environmental or Indigenous group has been considered, the party in question has been successful.[253] Manitoba's environmental legislation is also largely devoid of the "directly

[247] ELC, *ibid.*
[248] Boyd, 2003, *supra* note 6, at 268; Hughes, Kwasniak and Lucas, *supra* note 26, at 193-194.
[249] Tollefson, *supra* note 231, at 183; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.
[250] Boyd, 2003, *supra* note 6, at 268; Hughes, Kwasniak and Lucas, *supra* note 26, at 193-194.
[251] ELC, *supra* note 134, at 13; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, para 2. [Downtown Eastside]
[252] ELC, *ibid*, at 14; Downtown Eastside, *ibid*.
[253] *Stein v. Winnipeg (City)*, 1974 CarswellMan 64, para 51-56; *Mathias Colomb Band of Indians v. Saskatchewan Power Corp*., 1993 CarswellMan 113, para 26, 43-44, 52-55; *Mathias Colomb Band of Indians v. Saskatchewan Power Corp*., 1994 CarswellMan 99, para 14-24; *Hudson Bay Mining & Smelting Co. v. Dumas*, 2014 MBCA 6, 2014 CarswellMan 26, para 94-103.

affected" requirement that has made public interest standing more difficult to achieve in other jurisdictions.[254] However, despite the lack of restrictions in Manitoba, the issue of public interest standing has received different treatment in other Canadian jurisdictions. It is therefore important to consider these other approaches when considering how to improve the public's participation in environmental regulatory proceedings, even if such an examination provides an indication of what not to do in Manitoba.

In Canada, the application of the public interest standing has been least successful in the context of administrative agencies. The decisions of environmental administrative agencies like the National Energy Board, the Alberta Environmental Appeals Board and Ontario's Environmental Review Tribunal impact public interests, but their enabling legislation can require that individuals be "directly affected" in order to receive standing.[255] This is problematic because the impact of environmental decisions on public interests can be indirect, so there are often situations where no one is considered directly affected, allowing important environmental issues to go unheard.[256] As a result of the restrictive approach to standing in some jurisdictions, there have been attempts to utilize public interest standing as a means of participating in environmental proceedings before administrative agencies.[257] However, there has been limited success. This has led the Alberta Environmental Law Centre to identify the issue of standing before environmental agencies as a more critical issue for reform in Canada than standing in the courts.[258] In Manitoba, this does not appear to be true, however, in other jurisdictions like

[254] Exceptions include: *The Contaminated Sites Remediation Act*, *supra* note 187, s. 7.4(2), s. 39(1), s. 39(2); *The Groundwater and Water Well Act* SM 2012, c. 27, s. 56; *The Drinking Water Safety Act*, SM 2002, c. 36, s. 16(1).
[255] Adam Driedzic, "Can Administrative Agencies Grant Common Law Public Interest Standing?" (2015) 39:3 *LawNow*, at 26, online: <http://www.lawnow.org/administrative-agencies-public-interest-standing/> [Driedzic]
[256] Driedzic, *ibid*, at 26.
[257] See for example: *Friends of Athabasca Environmental Association v. Public Health and Advisory Appeals Board*, 1994 CanLII 8931 (AB QB); *Canadian Union of Public Employees Local 30 v. WMI Waste Management Inc.*, 1996 ABCA 6; *Alberta Wilderness Association v. Alberta (Environmental Appeals Board)*, 2013 ABQB 44; *Gagne v. Sharpe*, 2014 BCSC 2077.
[258] ELC, *supra* note 134, at 89.

Alberta, this is certainly the case. For example, in Alberta, concerned public interest groups and citizens have had significant trouble with standing in relation to water licences under Alberta's *Water Act*, as the "directly affected" provisions contained in the Act have been used to prevent public interest groups from contesting such water approvals by Alberta Environment and the Alberta Environmental Appeals Board (EAB).[259] Despite the advocacy work of legal scholars and public interest organizations, the Alberta Court of Queen's Bench has ruled that public interest standing "is not available to challenge the legality of water license amendments" based on the directly affected language contained in the *Water Act*, therefore excluding citizens and public interest groups from regulatory proceedings that could impact the availability and quality of water in Alberta.[260]

In Manitoba, the Clean Environment Commission has used an "open standing" approach to participation.[261] This has allowed for more inclusive citizen participation than in other jurisdictions. The CEC's enabling legislation contains no standing test for hearings so once triggered, participation in the hearings held by the CEC are open to the public.[262] This has meant that Manitobans have not faced the same regulatory hurdles at the provincial level than citizens in other jurisdictions, like Alberta. However, at the national level, Manitobans face the same standing requirements as other Canadians, so the promotion of a broad interpretation of public

[259] Shaun Fluker, "No Public Interest Standing at the Alberta Environmental Appeals Board" (*The University of Calgary Faculty of Law Blog on Developments in Alberta Law*, 2013) [Fluker, 2013]; See also: *Alberta Wilderness Association v. Alberta (Environmental Appeals Board*, *supra* note 255; Shaun Fluker, "The Right to Public Participation in Resources and Environmental Decision-making in Alberta" (2015) 52 *Alta. L. Rev*. 567.
[260] Fluker, 2013, *ibid.*
[261] ELC, *supra* note 134, at 45-47.
[262] Public hearings under *The Environment Act* are held at the discretion of the Minister depending on the class of development assigned to the project. See *The Environment Act*, *supra* note 104, s. 10(6)(d). s. 11(9)(e), s. 12(5)(e), s. 27(2)(a), s. 28(2)(a). It should be noted, however, that the CEC still considers the "degree to which an applicant's interests may be directly and substantially affected by the proposed project" when deciding whether or not to give "participant" status to a person or organization wanting to participate in a regulatory hearing which, if not granted, could limit the party's participation in the hearing. [CEC, 2015, *supra* note 159, at 23-24]

interest standing requirements in other jurisdictions contributes to their access to environmental justice and overall legitimacy of environmental governance in Canada.

Critics of public interest standing approaches are often concerned with "floodgates and busybodies" as public interest and environmental organizations increasingly intervene in environmental regulatory proceedings and increase the complexity of decisions.[263] However, there has been no evidence in Canada that public interest standing has actually created these problems, especially since other barriers, such as costs and timing, continue to limit the ability of the public and their representative organizations to participate in judicial proceedings. Therefore, despite all of the issues discussed in this section, public interest standing has an important role to play in the review of environmental issues in Canada.[264] If the courts continue to take a broad approach to public interest standing and reforms are made at the federal level and in jurisdictions like Alberta in relation to standing in the context of environmental regulatory agencies, it will increase the legitimacy of environmental governance at both the provincial and federal level in Canada.[265] It should be noted, however, that issues like standing that involve both the courts and the legislative approaches of government can be politically complex, especially if there is disagreement between the courts and government on a certain issues. This is particularly true in an environmental context when the political and economic interests of government and private industry may make government reluctant to introduce regulatory changes that could impede the approval of natural resource developments. However, with many jurisdictions in Canada taking a broad approach to standing in environmental proceedings, the reform of existing statutory provisions that currently limit standing in jurisdictions like Alberta should still be pursued. There

[263] ELC, *supra* note 134, at 36-37.
[264] Michael Slattery, "Pathways from Paris: Does Urgenda Lead to Canada?" (2017) 30 *J Envtl L & Prac* 241, at 281-282.
[265] Tollefson, *supra* note 231, at 178.

is also a need to explore other means of improving citizen participation in court proceedings and enforcement activities. This could include increased recognition of legal approaches that have achieved success in other jurisdictions, such as the "public trust doctrine", an approach that has received widespread adoption in the United States, as will be discussed in the next section.[266]

4.3) The Public Trust Doctrine

The "public trust doctrine" is a legal concept which "recognizes and protects public interest values in common resources."[267] The public trust doctrine is based on the idea that "some things are considered too important to society to be owned by one person" and has been used to protect certain natural resources on publicly owned property.[268] By incorporating the doctrine into law, recognition is given to the "special public properties of natural resources in which the whole public has an interest".[269] Public trust principles protect the public's environmental interests by imposing limits on governmental actions that have the potential to detrimentally impact natural resources and provide a means of recourse, such as standing to initiate a court proceeding, where public trust principles have been breached.[270] Thus, the entrenchment of the public trust doctrine in Manitoba's environmental legislation would serve to improve meaningful participation by increasing citizen access to the courts and improve the government's

[266] Doelle and Tollefson, *supra* note 10, at 138.
[267] Sarah Jackson, Oliver M. Brandes, & Randy Christensen, "Lessons from an Ancient Concept: How the Public Trust Doctrine Will Meet Obligations to Protect the Environment and the Public Interest in Canadian Water Management and Governance in the 21st Century" (2012) 23 *J Envtl L & Prac* 145, at 146. [Jackson, Brandes and Christensen]
[268] Gregg Spryidon and Sam LeBlanc, "The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action" (1993) 6 *Tul. Envtl. L.J.* 287, at 291-292; Joseph L. Sax, "The Public Trust Doctrine in National Resources Law: Effective Judicial Intervention" (1970) 68 *Mich. L. Rev.* 471, at 475.
[269] James Olson, "All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine" (2014) 15 *VJEL* 361.
[270] Olson, *ibid*, at 371-372; John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 *J Envtl. L & Prac* 1, at 16.

accountability for its environmental decisions, contributing to the restoration of legitimacy in Manitoba's environmental governance regime.

In Canada, the public trust doctrine is explicitly recognized in environmental legislation in the Yukon, Northwest Territories and Nunavut.[271] In these jurisdictions, the recognition of the public trust doctrine has clarified the government's environmental responsibility to protect public resources and granted citizens a right of action to bring a case in the Supreme Court against the government if it has failed to meet its responsibilities (Yukon) or against persons polluting the environment (Northwest Territories/Nunavut). Yukon's *Environment Act* establishes that natural resources in the Yukon are the common heritage of the current and future generations, and recognizes that the territorial government is responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment.[272] Citizens in the Yukon can bring legal action in the Supreme Court if they have reasonable grounds to believe that the Government, as trustee of the public trust, has failed to uphold its environmental responsibility to protect the natural environmental from harm.[273] In the Northwest Territories and Nunavut, environmental legislation defines the public trust as "the collective interest of the people […] in the quality of the environment and the protection of the environment for future generations".[274] This legislation recognizes the right of every resident to "protect the environment and the public trust from the release of contaminants by commencing an action in the Supreme Court against any person releasing any contaminant into the environment."[275]

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[271] *Environment Act*, *supra* note 171, Preamble, s. 2, s.7, s. 8(1)(b), 10(2)(a), 20(2), 38(1); *Environmental Rights Act*, RSNWT 1988, c 83 (Supp), s. 1, 6(1); *Environmental Rights Act*, RSNWT (Nu) 1988, c 83 (Supp) s. 1, s. 6(1); Jackson, Brandes, and Christensen, *supra* note 265, 153-154.
[272] *Environment Act*, *ibid*, Preamble, s. 38(1).
[273] *Environment Act*, *ibid*, Preamble, s. 8(1)(b).
[274] *Environmental Rights Act* (NWT), *supra* note 271, s. 1; *Environmental Rights Act* (Nunavut), *supra* note 271, s. 1.
[275] NWT, *ibid*, s. 6; Nunavut, *ibid*, s. 6.

In the Canadian common law, it has been argued that the basic attributes of the public trust doctrine have been recognized, however, there has been no explicit adoption of the doctrine.[276] However, there has been increasing judicial acknowledgement of the public trust doctrine. The leading case in this area is considered to be *British Columbia v. Canadian Forest Products Ltd (Canfor).*[277] In this case, the government of British Columbia sued one of its own forestry companies when the company's negligence caused a forest fire. The fire damaged Crown lands and resources in the surrounding area. The BC Crown claimed damages for the destroyed timber, along with other environmental losses. The SCC held that the Crown has entitlement as *parens patriae* (protector of the environment and the public's interest in it) to pursue remedies for violations of public resource rights.[278] Although the Court rejected claims for non-economic damage this was due to a lack of suitable evidence, not because the Crown had no entitlement. In the decision, the SCC also commented favourably on the public trust doctrine, referring to its successful adoption in the United States.[279] In the more recently decided *Burns Bog Conservation Society v. Canada (Attorney General) et al*., both the Federal Court and the Federal Court of appeal have noted that no Canadian court has recognized the public trust doctrine.[280] However, it has been suggested that the *Burns Bog* case "may not be fatal to an argument that the PTD [public trust doctrine] should be recognized by Canadian courts because it appears there were evidentiary problems and the federal government did not own the Burns

[276] Jackson, Brandes, and Christensen, *supra* note 267, at 155-156.
[277] Jackson, Brandes, and Christensen, *ibid*, at 154-156; Doelle and Tollefson, *supra* note 10, at 138; *British Columbia v. Canadian Forest Products Ltd.* [2004] 2 S.C.R. 74 [Canfor]. See also: Jerry DeMarco, Marcia Valiante, and Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v. Canadian Forest Products Ltd.*" (2005) 15:2 *J Envtl L & Prac* 223.
[278] Canfor, *ibid*; Hughes, Kwasniak and Lucas, *supra* note 26, at 193.
[279] Hughes, Kwasniak and Lucas, *ibid*; DeMarco, Valiante and Bowden, *supra* note 277.
[280] *Burns Bog Conservation Society v. Canada (Attorney General) et al.* 2012 FC 1024; *Burns Bog Conservatory Society v. Canada (Attorney General)* 2014 CAF 170, 2014 FCA 170.

Bog so it was too much of a stretch for the Court to find it owed a duty to protect it."[281] This may mean that under a different set of circumstances, a Canadian court may still be receptive to the recognition of the public trust doctrine.[282]

Although the public trust doctrine has received minimal recognition in Canada, scholars, legal practitioners and environmental advocates have continued to argue for its incorporation into the environmental regulatory framework as a means of supporting meaningful public participation.[283] In Manitoba, the Public Interest Law Centre has advocated for the legal recognition of the public trust doctrine in regulatory proceedings as a way to improve the protection of provincial water resources and clarify the environmental responsibilities of government.[284] PILC has argued that the recognition of the public trust doctrine has the potential to "compel government action in the face of adverse environmental developments" and "act as a powerful guide to a consensus driven effort to achieve greater balance between social, economic and ecological interests".[285] Unfortunately, despite the CEC's recognition of the need for regulatory reform, the public trust doctrine was not specifically endorsed in their final Report.

Despite these setbacks, there is still a need to pursue the legal entrenchment of the public trust doctrine in Manitoba, especially in relation to threatened water bodies such as Lake

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[281] Public Interest Law Centre, "Appendix 7: Public Trust Doctrine", at 13; in *Equity and Balance in the LWR dialogue: Submission to the Clean Environment Commission* (2015) [prepared on behalf of the Consumers' Association of Canada (Manitoba Branch) for the Clean Environment Commission's Lake Winnipeg Regulation hearing] [PILC, 2015]

[282] PILC, 2015, *ibid,* at 13.

[283] Albert Koehl, "Green Law: Our legal expert builds a case for using the Public Trust Doctrine to protect Canada's ecosystems" (2006) 32.4-5 *Alternatives Journal,* online: <http://www.alternativesjournal.ca/policy-and-politics/green-law>; Ecojustice, "Water, the public trust and Ontario" (2013), online: <https://www.ecojustice.ca/water-the-public-trust-and-ontario/>; Ralph Pentland, POLIS Discussion Paper 09-03: *Public Trust Doctrine – Potential in Canadian Water and Environmental Management* (2009); The Wildlife Society, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada* (2010), online: < http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf>.

[284] Public Interest Law Centre, *Equity and Balance in the LWR dialogue: Submission to the Clean Environment Commission* (2015), at 44. [prepared on behalf of the Consumers' Association of Canada (Manitoba Branch) for the Clean Environment Commission's Lake Winnipeg Regulation hearing] [PILC]

[285] PILC, *ibid,* at 47.

Winnipeg. If given broader recognition within Canadian environmental legislation and the common law, the public trust doctrine has the potential to ensure "the protection of values that do not traditionally have a vested interest supporting or representing them, such as the needs of ecosystems, and future generations."[286] Recognition of this doctrine in Manitoba's environmental legislation could help constrain potentially destructive government actions that could adversely impact public lands, waters and natural resources in which the public has an interest and could improve access for individuals and organizations to legal recourse when the environmental interests of the public are not sufficiently protected, thus improving the government's accountability. Therefore, the implementation of the public trust doctrine could have an important role to play in the restoration of legitimacy to Manitoba's environmental governance framework.

Although *Canfor* provides hope in terms of the eventual acceptance of the public trust doctrine by the Canadian Courts, there will likely be more reluctance from governments like Manitoba's to incorporate the public trust doctrine into environmental legislation. Entrenchment of this doctrine will mean government decision-makers will have a legally enforceable obligation to protect public resources from unreasonable harm, which will make it significantly more difficult to justify environmental approvals for projects with significant environmental impacts. Such decisions would no longer be politically or legally acceptable if based primarily on the economic benefits of such projects for government and industry. Despite these challenges, introducing the public trust doctrine in Manitoba is a critical step toward improving public participation and thus improving the legitimacy of Manitoba's environmental governance regime.

[286] Jackson, Brandes, and Christensen, *supra* note 267, at 164.

4.4) Environmental Human Rights

Another means of restoring legitimacy to Manitoba's environmental governance framework is the legal enactment of environmental rights. Like the public trust doctrine, environmental rights are a means of protecting the public's rights and interest in public lands and resources while also establishing government obligations in terms of environmental protection.[287] Thus, the legal recognition of environmental rights also supports meaningful public participation in environmental governance. The creation of new environmental rights legislation can be particularly impactful in this regard, as this statutory approach can allow for the recognition of substantive and procedural environmental rights and important environmental legal principles, including the public trust doctrine, that contribute to improved government accountability, transparency and citizen access to enforcement procedures. This section will focus on identifying the ideal elements of a Manitoban environmental bill of rights based on the most recent attempt at provincial environmental legislation in Manitoba: Bill 20, *The Environmental Rights Act,* and other Canadian legislative examples.

Environmental rights are an extension of the basic human rights that all human beings are considered to have from birth.[288] Environmental rights recognize the fundamental importance of the environment to human life.[289] They also recognize the impact that environmental degradation has on human life and the obligation governments have to protect the environment from harm as a result.[290] Like other human rights, environmental rights, such as the right to a healthy environment, are considered to exist regardless of legal recognition.[291] However, the

[287] Elaine Hughes, Alastair R. Lucas, and William A. Tilleman, *Environmental Law and Policy*, 3rd ed. (Toronto, Canada: Emond Montgomery Publications Ltd., 2003), at 431 [Hughes, Lucas and Tilleman].
[288] Pachamama Alliance, *Environmental Rights*, online: <https://www.pachamama.org/environmental-rights>.
[289] John Swaigan, *Environmental Rights in Canada* (Toronto: Butterworths, 1981), at 4.
[290] Heather Fast and Patricia Fitzpatrick, "Modernizing Environmental Protection in Manitoba: *The Environmental Rights Act* as One Component of Environmental Reform" (2017) 30(3) *J Envtl L & Prac* 295, at 297.
[291] David R. Boyd, *The Environmental Rights Revolution* (Vancouver, BC: UBC Press, 2012), at 21, 22-23.

entrenchment of environmental rights in a nation's domestic legal regime is the best approach to ensure government processes and procedures are established to support such rights.

The legal entrenchment of environmental rights has been recommended by environmental reformists in North America for almost as long as modern approaches to environmental law have been in existence. As early as 1965, the idea of an environmental bill of rights as a means of environmental protection was presented in the United States.[292] In Canada, considerations of environmental rights began in the 1970s, although there was disagreement in terms of what such rights encompassed.[293] Despite such disagreement about what environmental rights should capture, members of the Canadian legal community have continued to champion the entrenchment of such rights as a means of increasing public involvement in environmental governance. This has included attempts at constitutional recognition of such rights as well as legal entrenchment through the passage of an environmental bill of rights at both the federal and provincial levels.[294] To date however, only four provinces/territories have passed environmental rights legislation: Quebec, Ontario, the Yukon and the Northwest Territories.[295] Efforts to have environmental rights recognized constitutionally and at the federal level are ongoing.[296] In recent years, there has also been an increasing number of municipal declarations supporting

[292] Kristen Douglas, *An Environmental Bill of Rights for Canada* (Ottawa: Law and Government Division, 1991), at 3; 1; Swaigan, *supra* note 289, at 4.
[293] For example, when the *Environmental Protection Act, 1971* was introduced in Ontario, it was called "an environmental bill of rights for the people of Ontario" by then Premier William Davis. However, this claim was quickly dismissed by environmentalists as the Act did not provide the public with any additional access to environmental information, granted the government exclusive discretion in terms of enforcement and restricted the public's ability to bring a private action in court. [RSO 1971, c 86; Swaigan, *ibid*, at 4]
[294] Hughes, Lucas and Tilleman, *supra* note 287, at 440; Douglas, *supra* note 292, at 15; Jacob Damstra, "20 Years Lost - Time for Change in Ontario's Environmental Bill of Rights" (2014) 27.1 *J Envtl L & Prac* 79, at 82; David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver; Toronto: UBC Press, 2012), at 38-47 [Boyd, 2012].
[295] Fraser Thomson, *An Environmental Bill of Rights for Nova Scotia* (East Coast Environmental Law, 2014), at 5; Boyd, 2012, *ibid*, at 61; *Charter of Human Rights and Freedoms*, CQLR, c. C-12; Bill C-202, *supra* note 243; *Environment Quality Act*, CQLR,c. Q-2; *Environment Act*, *supra* note 171; *Environmental Bill of Rights*, *supra* note 171; *Environmental Rights Act* (NWT), *supra* note 271.
[296] This includes the most recent legislative attempt to entrench the right to a healthy environment in the Canadian Constitution through federal Bill C-202 [Bill C-202, *ibid*, s. 30].

environmental human rights passed across the country.[297] Much of this municipal success can be attributed to a grassroots environmental movement started by the David Suzuki Foundation called "The Blue Dot Movement", which is focused on the recognition of a right to a healthy environment at the municipal, provincial and federal levels.[298] The widespread success of this movement reflects the high level of public support for the legal entrenchment of environmental rights in Canada and the dissatisfaction of the public with Canada's current environmental regulatory regime.

Legal entrenchment of environmental rights improves public participation opportunities, creates more transparency in relation to government decisions and increases the accountability of government decision-makers.[299] Environmental rights legislation often introduces new enforcement mechanisms "with which to hold those who degrade the environment responsible".[300] This includes the right to bring action in court against government, industry and other parties that violate environmental rights and cause environmental harm.[301] The entrenchment of environmental rights is a means of making Canadian environmental law more democratic by empowering citizens to "protect the quality of the natural environmental for their own and future generations."[302] Environmental rights constrain environmentally destructive government actions and ensure public interests are better considered and protected by allowing citizens to better participate in environmental proceedings and enforce their rights in court.[303]

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[297] The Blue Dot Movement, "Declarations", online: <http://bluedot.ca/about/declarations/>.
[298] Blue Dot Movement, *supra* note 191.
[299] David R. Boyd, ''Elements of an effective environmental bill of rights" (2015) 27:3 *J Envtl L & Prac* 201 [Boyd, 2015]; Ecojustice, *Restoring the Balance: Recognizing Environmental Rights in British Columbia* (2009), at 32 [Ecojustice, 2009]; Ecojustice, *The case for an Environmental Bill of Rights* (David Suzuki Foundation: Blue Dot Movement, 2016).
[300] Fast and Fitzpatrick, *supra* note 290, at 298.
[301] Fast and Fitzpatrick, *ibid*, at 302; Boyd, 2015, *supra* note 299, at 237-244; Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment?", (2015) *Santa Clara J Int'l L* 13, at 67.
[302] Kristen Douglas, *supra* note 292, at 3; Joel Colón-Ríos, "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60(1) *McGill Law Journal* 127, at 130, 138.
[303] Douglas, *ibid*, at 3.

Therefore, the recognition of environmental rights and the enactment of environmental rights legislation could make a significant contribution to the restoration of legitimacy in environmental governance regimes like Manitoba's, with participatory deficiencies in terms of citizen enforcement and the accountability of government decision-makers.

In Canada, the most success in the entrenchment of environmental rights has been achieved at the provincial level in Quebec, Ontario, the Yukon and the Northwest Territories.[304] This has involved the incorporation of environmental rights provisions into existing legislation and the enactment of stand alone environmental rights legislation, usually referred to as an environmental bill of rights (EBR). The creation of stand-alone EBR legislation is recognized as the most comprehensive means of entrenching environmental rights as it generally involves the recognition of a broader range of legal rights and procedures than if environmental rights are incorporated into existing legislation.[305]

Based on existing environmental rights legislation in Canada and the recommendations of legal scholars and environmental advocates, an effective EBR contains a range of different elements. This includes the recognition of two categories of environmental rights: "substantive rights" and "procedural rights".[306] *Substantive* rights identify the basic environmental human rights that people in a jurisdiction require in order to prosper and help define the scope of the legal environmental protections available.[307] This includes the right to clean air, clean water, a healthy ecosystem free of toxins, and other similarly tangible things that humans need in order to

[304] *Charter of Human Rights and Freedoms*, *supra* note 295; *Environment Quality Act*, *supra* note 295; *Environmental Bill of Rights*, *supra* note 171; *Environment Act*, *supra* note 171; *Environmental Rights Act* (NWT), *supra* note 271.
[305] Fast and Fitzpatrick, *supra* note 290, at 299.
[306] Boyd, 2015, *supra* note 299; Elaine L. Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-99) 30:2 *Ottawa Law Review* 229.
[307] Fast and Fitzpatrick, *note* 290, at 298-299.

be healthy.[308] The most commonly articulated substantive right in Canada is "the right to a healthy environment" which is viewed as broadly capturing all of these elements.[309] Substantive environmental rights are the most important element of an EBR as they determine the scope of legal protections available under such legislation.

In order to strengthen the impact of recognized substantive environmental rights, an effective EBR also recognizes *procedural* rights.[310] Procedural rights support citizens' substantive environmental rights by defining the range of legal "tools" that are available to citizens to ensure their substantive rights are "respected and protected".[311] Procedural environmental rights clarify the government's procedural obligations and improve the ability of citizens to participate in environmental governance processes, for example, by establishing new legal procedures through which substantive rights can be enforced (such as the initiation of an investigation or court proceedings).[312] In Canada recognized procedural rights include: access to information; public participation in environment governance and decision-making; access to justice; and whistleblower protection.[313]

An effective EBR also contains a range of other elements, including provisions that recognize the government's legal obligations to protect publicly owned natural resources for current and future generations and create institutions to protect substantive environmental rights.[314] This can include recognition of the public trust doctrine, as discussed in the previous section. Such legislation also recognizes a range of environmental law principles including the

[308] Boyd 2015, *supra* note 299, at 228.
[309] Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Leiden; Boston: Martinus Nijhoff Publishers, 2011), at 140.
[310] Boyd, 2015, *supra* note 299, at 233-246; Fast and Fitzpatrick, *supra* note 290, at 301-303.
[311] Boyd 2015, *ibid*, at 229.
[312] Donald K. Anton & Dinah L. Shelton, *Environmental Protection and Human Rights*, (New York: Cambridge University Press, 2011), at 137.
[313] Boyd, 2015, *supra* note 299, at 233-246; Fast and Fitzpatrick, *supra* note 290, at 301-303.
[314] Fast and Fitzpatrick, *ibid*, at 300; Boyd, 2015, *ibid*, at 203.

precautionary principle, polluter-pays principle, and the principle of non-regression.[315] All of these recognized rights and principles contribute to the clarification of the government's environmental obligations and responsibilities and facilitate more meaningful public participation in environmental decision-making and enforcement procedures, including improved access to the courts.[316]

In Manitoba, the most recent attempt at the enactment of an EBR occurred in 2016 with the introduction of Bill 20, *The Environmental Rights Act*, however, this attempt was unsuccessful.[317] This was not the first time an attempt had been made to entrench environmental rights in Manitoba's provincial legal regime. Starting in 1974, a number of legislative mechanisms addressing environmental rights have been proposed in the Manitoba Legislature.[318] During the 1990s, five different bills were introduced in the legislature.[319] All were Private Member Bills focused on the creation of new stand alone environmental rights legislation entrenching the right to a healthy environment.[320] Unlike these other attempts, Bill 20 was an initiative of the former NDP government, encouraged by the advocacy efforts of the Blue Dot

[315] The precautionary principle and the polluter-pays principle are already recognized in Canadian legislation and in the common law (i.e. *Canadian Environmental Protection Act,* 1999, S.C. 1999, c. 33). Incorporation of the principle of non-regression (also articulated as the 'standstill doctrine') involves "a prohibition on state acts or omissions that result in degradation in the environment (e.g. air quality, water quality, biodiversity) or in laws designed to protect the environment". This principle is a means of preventing the rollback of environmental legislation in light of a government change or other political situation. [Fast and Fitzpatrick, *supra* note 290, at 300 (footnote 31)]; See also: Lynda M. Collins & David R. Boyd, ''Non-Regression and the Charter Right to a Healthy Environment" (2016) 29 *J Envtl L & Prac* 285, at 294; Michel Prieur, "Non-regression in environmental law" (2012) 5.2 *SAPIENS* 53.

[316] Boyd, 2015, *supra* note 299, at 252; Douglas, *supra* note 292; East Coast Environmental Law, *An Introduction to Environmental Rights for Prince Edward Island, New Brunswick and Nova Scotia* (2015), at 4.

[317] Manitoba, Bill 20, *The Environmental Rights Act*, 5th Sess, 40th Leg, 2016 (first reading March 2, 2016 (Nevakshanoff)) [Bill 20].

[318] Manitoba, The Legislative Assembly of Manitoba, 1st Sess, 30th Leg, April 18, 1974.

[319] Manitoba, Bill 2, *The Environmental Bill of Rights*, 3rd Sess, 35th Leg, 1991 (first reading December 11, 1991 (Cerilli)); Manitoba, Bill 207, *The Environmental Bill of Rights Act*, 4th Sess, 35th Leg, 1993 (first reading April 22, 1993 (Cerilli)); Manitoba, Bill 217, *The Manitoba Environmental Rights Act*, 4th Sess, 35th Leg, 1993 (first reading May 12, 1993 (Edwards)); Manitoba, Bill 209, *The Manitoba Environmental Rights Act*, 5th Sess, 35th Leg, 1994 (first reading May 26, 1994 (McCormick)); Manitoba, Bill 220, *The Environmental Rights Act*, 6th Sess, 35th Leg, 1994 (first reading December 20, 1994 (Macintosh)).

[320] Fast and Fitzpatrick, *supra* note 290, at 303.

Movement.[321] Public consultation was undertaken by the government to gather feedback about what should be contained in this proposed legislation.[322] It is unclear how such feedback was used in the development of the Bill.[323]

Although Bill 20 included many of the legislative elements identified as necessary for the establishment of an effective EBR, it was doomed from the start. Despite the involvement of the Blue Dot Movement, a movement based on public support of environmental rights, there was actually a lack of local support for Bill 20 within the environmental community which affected the legitimacy of this proposed legislation. The introduction of environmental rights legislation had not received much consideration from Manitoba's environmental community prior to the introduction of Bill 20. Instead, environmental reform efforts had been focused for the better part of a decade on modernizing Manitoba's environmental assessment regime.[324] As a result, the efforts of the Blue Dot Movement to encourage the introduction of a provincial EBR were not well received and were considered to be detrimental to local efforts focused on reform of *The Environment Act.* The fact that the introduction of Bill 20 occurred during the final months before a provincial election further contributed to the environmental community's distrust of this legislation, as the push for environmental legislation by the NDP government and the Blue Dot Movement was seen as a purely a political move. However, the lack of support within

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[321] Fast and Fitzpatrick, *ibid*. Government of Manitoba, News Release, ''Manitoba First Province to Sign Right to Healthy Environment Declaration Championed by DR. David Suzuki: Premier Selinger" (October 16, 2015), online: <http://news.gov.mb.ca/news/index.html?item=36454&posted=2015-10-16>. See also media coverage of the event: S. Lambert, "Manitoba government promises environmental bill of rights", *The Canadian Press* (October 16, 2015), online: <http://www.chrisd.ca/2015/10/16/manitoba-governmentpromises- environmental-bill-of-rights/>; C. Procaylo, ''Manitoba NDP promises environmental bill of rights" *The Canadian Press* (October 16, 2015), online: <http://www.chrisd.ca/2015/10/16/manitoba-governmentpromises-environmental-bill-of-rights/>.

[322] Fast and Fitzpatrick, *supra* note 290, at 304.

[323] Fast and Fitzpatrick, *ibid.*

[324] The publication of the Manitoba Law Reform Commission's Report 130 [MLRC, *supra* note 7] in 2015 and the provincial government's subsequent public consultations focused on reforms to *The Environment Act* was considered by many environmental scholars and legal practitioners to be the final step before reform legislation was introduced. There were even rumours that a reform bill had been drafted and would be introduced before the 2016 provincial election.

Manitoba's environmental community at the time Bill 20 was introduced should not be taken as an indicator of the public support for environmental rights in Manitoba today. With the increase in local environmental grassroots activities, as discussed in chapter three, and the public's increasing dissatisfaction with Manitoba's environmental regulatory regime, it is my opinion that environmental rights legislation would be much more successful, in terms of support from the public and the environmental community, if introduced today. The enactment of an EBR would also make an important contribution to the restoration of legitimacy to Manitoba's environmental regulatory regime. Thus, it is important to consider the content of Bill 20 to determine what, if any, elements of this legislative regime should be contained in Manitoba's next attempt at an environmental bill of rights, especially if such legislation is introduced as a means of restoring the legitimacy that has been lost.

In terms of restoring legitimacy and improving the public's ability to meaningfully participate in Manitoba's environmental governance regime, Bill 20 would not have had as significant of an impact as it may seem. The recognition of the substantive right to a healthy environment and the clarification of the provincial government's environmental obligations would have been an important advancement in the clarification of the public's role in Manitoba's environmental regulatory regime.[325] The recognition of a number of environmental principles such as the precautionary principle, polluter pays principle, principle of sustainable development, principle of intergenerational equity and principle of environmental justice would have been positive as they would have supported the public's substantive environmental rights and clarified how the government should apply and interpret the provisions of environmental right regime.[326] However, procedurally, the impact of Bill 20 would have been more limited.[327] Although a range

[325] Bill 20, *supra* note 317, Preamble, s. 2, s. 5.
[326] Bill 20, *ibid*, s. 3.
[327] Fast and Fitzpatrick, *supra* note 290, at 306; Bill 20, *ibid*, Preamble, s. 2.

of procedural rights were recognized in Bill 20 including: the right to environmental information, the right of participation, the right to request a review, and the right to request an investigation, there would have been little expansion of the public's existing participatory opportunities.[328] For example, the right to environmental information did not address or seek to expand the information that must be contained in the public registry created by *The Environment Act*.

Where Bill 20 would have made a contribution to the restoration of legitimacy was through the creation of an Environmental Commissioner to provide independent oversight of the environmental rights regime.[329] Independent oversight can make an important contribution to legitimacy as it can help counteract any perceptions of government bias. The Commissioner would have been granted a range of powers, including the ability to: mediate environmental disputes, review the implementation and operation of the new environmental rights regime, review the government's compliance with the Act and provide assistance to members of the public wanting to participate in the legal processes created by Bill 20.[330] However, the independent oversight function of the Environmental Commissioner would have been weakened by the fact that the investigatory regime laid out in Bill 20 could have resulted in investigations being undertaken by existing government departments, instead of the office of the Commissioner.[331] Since there was no specification within the Bill of which departments could be assigned to undertake an investigation, it appears possible that "the same department against which a complaint was levied could have been responsible for undertaking the investigation".[332] This could have created a conflict of interest, reducing the impact Bill 20 would have had in

[328] Bill 20, *ibid*, s. 6, s. 7, s. 8, s. 10.1.
[329] Bill 20, *ibid*, s. 28-31.
[330] Bill 20, *ibid.*
[331] Fast and Fitzpatrick, *supra* note 290, at 306.
[332] Fast and Fitzpatrick, *ibid*.

terms of counteracting existing perceptions of bias in relation to environmental decision-making in Manitoba.

Bill 20 would have also contributed to the restoration of legitimacy with the recognition that citizens should have standing, outside the common law, to seek legal remedy in court.[333] The right to sue was established in the Bill, which was applicable to both private and government entities, would have allowed members of the public to take action in court against those who cause or have the potential to cause significant harm to the environment.[334] This would have significantly improved the ability of Manitobans to enforce environmental protection measures. However, it should be noted that there were no participant funding mechanisms included in Bill 20, meaning the costs of any citizen led actions would have fallen entirely on the individual or group initiating the court proceeding.[335] This may have deterred citizens from pursuing such action in court, reducing the contribution this enforcement mechanism may have had on the improvement of public participation.

Based on this analysis of Bill 20, Manitoba's next attempt at environmental legislation could borrow much from Bill 20 in order to contribute to the restoration of legitimacy in Manitoba, including the entrenchment of substantive environmental rights, the clarification of government obligations, the establishment of an independent Environmental Commissioner and the recognition of the public's right to sue. However, there should be more public involvement in the creation of a new EBR, including meaningful opportunities for public participation prior to the drafting of a Bill. There should also be consideration of the existing environmental procedural rights of Manitobans to ensure such opportunities are truly expanded, such as the access the public has to environmental information. A new EBR should also ensure the

[333] Fast and Fitzpatrick, *ibid.*
[334] Bill 20, *supra* note 317, s. 14; Fast and Fitzpatrick, *ibid.*
[335] Fast and Fitzpatrick, *ibid*, at 307.

Environmental Commissioner has more independent oversight of the review and investigation processes established. Finally, there should be funding provisions included in a new EBR to assist citizen stakeholders interested in participating in the processes established under the new Act.

Of all of the options for reform discussed in this chapter, the enactment of an EBR has the potential to make the biggest impact in the improvement of the public's ability to participate in environmental governance in Manitoba, especially if it contains the elements discussed above. If properly drafted, there is the potential to incorporate all of the approaches discussed in this chapter that contribute to the restoration of legitimacy including: improvements to citizen standing in court, increasing the accountability of government decision-makers by improving transparency, recognition of the public trust doctrine, and the clarification of the public's rights and the government's obligations in relation to the environment. Although Bill 20 would have made improvements in these areas, it could have been better designed to address existing participatory gaps in Manitoba's environmental legal framework. Thus, in order to most effectively contribute to the restoration of legitimacy, the next attempt at the entrenchment of environmental rights needs to be developed with more meaningful input from Manitobans and focus on addressing the participatory weakness of Manitoba's environmental governance regime.

Similar to the other legal reforms discussed in this chapter, there will likely be political resistance to the entrenchment of an EBR in Manitoba as such legislation, if drafted to include the elements recommended above, would create both political and legal obstacles for government decision-makers to overcome when, for example, granting environmental approvals for controversial natural resource development projects. The economic interests of government and private industry in the approval of such projects would no longer be able to supersede the public interests in environmental protection without proper justification, which would make

environmental regulatory processes significantly more complex and politically difficult. However, if the efforts of grassroots and public interest organizations like the David Suzuki Foundation and Ecojustice influence the adoption of more EBR legislation in Canada, there may be enough political momentum to overcome the reservations of legislators and result in the adoption of environmental rights in all Canadian jurisdictions.

4.5) Conclusion

This chapter has discussed reforms that could assist with the restoration of legitimacy to Manitoba's environmental governance regime. In particular, reforms that would address the participatory gaps that exist within Manitoba's environmental framework in relation to government decision-making and citizen enforcement were examined. First, the need for more transparency and accountability in relation to the decisions made by government officials within the environmental government regime was addressed by identifying legislative decision-making criteria that should be added to Manitoba's environmental statutes. This was discussed in the context of public interest determinations, a common legislative element that allows government decision-makers to justify environmental decisions (such as licensing approvals) if they are in the "public interest". By incorporating a list of criteria that must be considered by decision-makers when identifying a decision as in the public interest, citizens would have more clarity in terms of how public interest determinations are made. It was suggested that decision-making criteria would be even more effective, in terms of legitimacy, if supported by the requirement for publicly available reasons which would increase the accountability of decision-makers by requiring them to identify how public interest criteria was considered.

Next, reforms that could help fill participatory gaps in relation to citizen enforcement were discussed. This includes mechanisms to improve public participation in court processes,

like the recognition of public interest standing. Courts have adopted this approach as a means of allowing citizens and public interest environmental groups to initiate and participate in court proceedings. This has better ensured the public's interests are considered when important environmental decisions are made and has improved the enforcement of public environmental rights. Another discussed means of improving the enforcement of the public's environmental rights and interests was the recognition of the public trust doctrine, a legal concept that recognizes the public's interest in Crown lands and resources and the government's obligation to protect this interest. Entrenchment of the public trust doctrine in environmental legislation often involves the creation of a statutory cause of action giving citizens the right to take both private and government actors to court if public trust principles have been breached. Thus, the entrenchment of the public trust doctrine also serves to improve citizen access to the courts and improve the government's accountability for its environmental actions.

Finally, the legal recognition of environmental rights as a means of improving government accountability and citizen enforcement in the environmental governance regime was discussed. Of all the reforms considered in this chapter, the enactment of an EBR has the greatest potential impact on the restoration of legitimacy in Manitoba. In terms of government accountability and citizen enforcement, environmental rights legislation clarifies government obligations in relation to publicly owned natural resources and the public's environmental rights. Such legislation empowers citizens to protect the environment and their public rights by recognizing statutory causes of actions, granting access to investigatory processes, and creating new entities to provide independent oversight of important environmental decisions and approvals. Environmental rights legislation also often incorporates important environmental principles that further support meaningful public participation in environmental governance. This includes recognition of the public trust doctrine, a legal approach discussed above that

contributes to the restoration of legitimacy in its own right. Although the legal recognition of the public trust doctrine in environmental legislation other than an EBR is a means of restoring legitimacy, this doctrine fits best within an environmental rights framework as it supports the recognition of the public's interest in preserving public resources and strengthens the establishment and enforceability of the government's environmental responsibility to protect these natural resources on the public's behalf. Overall, the enactment of environmental rights legislation is the most promising means of improving public participation and restoring legitimacy of all the reforms discussed due to the breadth and depth of the legal rights and responsibilities such legislation can establish. An EBR would be particularly impactful in terms of restoring legitimacy if designed to address the participatory gaps that currently exist in Manitoba's environmental regulatory framework.

Based on the behaviour of Manitoba's conservative government since its election in 2016, as discussed in chapter three, it does not seem likely that environmental reforms that support meaningful public participation will be introduced in the near future. There would likely be significant political resistance to the adoption of participatory reforms, such as those discussed in this chapter, that would create additional political and legal barriers for the approval of natural resource developments of economic significance to government and private industry. However, regardless of the environmental position of the conservative party and its economic interests, democratically elected governments like Manitoba's are required to take action to maintain the legitimacy of the environmental governance regime, so there may still be hope. As has been established in chapter two, a successful means of restoring lost legitimacy is through environmental reforms that support meaningful public participation, such as those discussed in this chapter. With the significant loss of legitimacy that has occurred in relation to Manitoba's environmental governance regime, in large part due to the public's distrust of the government's

regulation of the hydroelectric industry, it would be in the best interest of a government seeking re-election to take measures to restore the public's trust in government operations. By advancing an argument for participatory environmental reform based on legitimacy, environmental advocates and citizen stakeholders may yet convince the Manitoba government to take a better approach to how they manage society's precious natural resources and create a more inclusive governance regime.

Chapter 5: Conclusion

The intent of this thesis is to bolster the environmental reform efforts of legal scholars and environmental advocates by addressing the inherent problems of Canadian environmental governance from an underutilized perspective: that of the general public. I have shown that by considering the legitimacy of Canadian environmental governance regimes, like Manitoba's, it is possible to gain a better understanding of why government actors should be making space for the public in environmental governance through legal reform. By analyzing the public's role in Canadian environmental governance, I have identified the political value of implementing environmental legal reforms that provide opportunity for meaningful public participation: the restoration of political legitimacy. While much of the analysis contained in this thesis could be applied to Canadian legal regimes at both the provincial and federal level, my focus has been on analyzing the public's role in Manitoba's environmental governance regime and identifying solutions that could fill existing participatory gaps at the provincial level as a means of restoring legitimacy.

Canadian environmental law has developed into a complex body of law at both the provincial and federal levels. This framework of Canadian environmental laws has at times placed Canada in a position of international environmental leadership, however, in the past few decades Canada's prominence in environmental regulation has deteriorated. Canada is now seen as a laggard in terms of environmental protection and innovation. Canada has become known for inaction and obstruction at the international level in relation important environmental issues like climate change and the recognition of Indigenous peoples' environmental rights. There are a range of accepted weaknesses associated with Canada's environmental regulatory regime, best summarized in David Boyd's *Unnatural Law,* including a lack of opportunity for meaningful public participation. These weaknesses have been perpetuated by a range of barriers, such as

legal restrictions that prevent citizens from adequately accessing environmental justice in the courts. As a result of these systemic problems, legal scholars and environmental activists have long been seeking environmental reform in Canada. However, such reform efforts have had minimal success, which has led to the emergence of new approaches to the analysis of Canadian environmental law. This includes Green Legal Theory (GLT), an approach that considers the economic, political and social influences government actors must contend with when making environmental decisions, including the decision to amend environmental legislation. GLT scholars have focused on the conflicting economic and political priorities of Canadian governments as a means of identifying solutions to Canada's environmental problems. I adopted a similar approach in my analysis of Manitoba's environmental legal framework with a focus on the political priority of Canadian governance: the maintenance of public support.

Using Brent Marshall and Warren Goldstein's eco-marxist analysis of environmental governance, I explored the relationship between the government and the general public and the ways in which this relationship can impact the Canadian environmental regulatory regime in chapter two. This involved examining the concepts of "legitimacy" and "meaningful public participation". Legitimacy is a measure of citizen support and trust in the operations of their elected government and its regulatory agencies. Therefore, public support and trust directly corresponds with the level of legitimacy that a government (and the regulatory mechanisms it enacts) is considered to have. When the government fails to maintain the legitimacy (public approval) of its environmental governance regime, an "environmental legitimation crisis" may occur. A number of indicators of an environmental legitimation crisis have been identified by Marshall and Goldstein, including: recreancy, the perception of regulatory capture, and the rise of grassroots environmental organizations.

A strategy used by environmental agencies in the United States when faced with an environmental legitimation crisis has been the adoption of legal reforms that improve public involvement in governance processes with an emphasis on "authentic" participation. I suggested that this same strategy to restore legitimacy could be used in Canadian jurisdictions, like Manitoba, with a focus on reforms that support "meaningful" public participation (the Canadian equivalent of authentic participation). Meaningful public participation requires a range of different components including timely and convenient citizen access to information; adequate public notice; participant assistance (i.e. funding); opportunities for public comment; public hearings; early and ongoing participation throughout the process stages; and opportunity for independent review. Therefore, a range of possible environmental regulatory reforms exist that could be used to restore lost legitimacy in Canadian jurisdictions.

Marshall and Goldstein's theory of environmental crisis was used to analyze the state of legitimacy in Manitoba's environmental governance regime in chapter three, with a focus on the governance of the hydroelectric industry. Due to the social, political and economic importance of hydroelectricity in Manitoba and the complex nature of the regulatory regime within which it operates, the legitimacy of the government's regulation of the hydroelectric industry provides insight into the overall legitimacy of Manitoba's environmental governance regime. The analysis undertaken in this chapter involved consideration of existing public participation mechanisms in Manitoba's environmental governance regime and whether or not any of the indicators of an environmental legitimation crisis identified in chapter two are visible in Manitoba. From this analysis, it is clear that Manitoba's environmental governance regime has suffered a loss of legitimacy and is facing an environmental legitimation crisis. There is evidence of all of Marshall and Goldstein's indicators of an environmental legitimation crisis including recreancy, perception of government bias, and an increase in the activities of public interest and

environmental organizations, which indicates that the current provincial government needs to implement measures to restore legitimacy to Manitoba's environmental governance regime or face a further degradation of public support. While the loss of legitimacy that has occurred thus far in relation to Manitoba's environmental governance regime has not yet appeared to significantly impact the operations of Manitoba's provincial government, it likely played a role in the change in government that occurred in 2016. Thus, if the current conservative government wishes to maintain its position of primacy long term, it would be wise to implement regulatory changes that restore legitimacy to Manitoba's environmental governance framework and improve existing levels of public support to help secure its re-election in the future.

Legal reforms that should be implemented in Manitoba to restore the legitimacy of the provincial environmental governance regime were identified in chapter four. Reforms that could serve to fill the participatory gaps that exist in relation to government decision-making processes and enforcement mechanisms were promoted as a means of increasing the transparency of decision-making, improving citizen access to enforcement procedures, and clarifying the government's obligations to protect the public's environmental interests. Such reforms include the introduction of decision-making criteria for important decisions within the environmental governance regime, such as public interest determinations; legal mechanisms that grant citizens better access to court processes, like the recognition of public interest standing; the application of the public trust doctrine, which improves citizen access to the courts as well as clarifies the government's legal obligations; and the adoption of an EBR, which can incorporate elements of all of these other approaches and more. Of these options for reform, the adoption of new environmental rights legislation appears most promising in terms of the restoration of legitimacy to Manitoba's environmental governance framework due to the breadth and depth of the legal rights, responsibilities and procedures such an approach can establish.

Although it does not seem likely that Manitoba's conservative government would be supportive of these environmental reforms based on the new government's approach to the environment since the election in 2016, I remain optimistic. Despite the likely political resistance that participatory reforms within the environmental regime would face due to the additional legal and political barriers that such reforms would create for government decision-makers in the context of environmental approvals, with enough political momentum and recognition of the political benefit such reforms could yield, I believe change is still possible. This thesis has identified the importance of legitimacy to democratic governance regimes like Canada's and has shown why it is in the best interest of any democratic government seeking re-election to take measures to restore lost legitimacy and generate the public support needed to remain in power. If legal scholars and environmental reformists can advance an argument for participatory environmental reform based on legitimacy, Manitoba's government may yet be convinced to take a more inclusive approach to the governance of public lands and resources.

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