

ORAL ARGUMENT OF THE CREE (LONDON)

May 26, 2014

I appear before you this morning as Counsel to the Fox Lake Cree Nation but, by agreement amongst all four of the Cree Nations who are partners in Keeyask, I will be speaking on behalf of them all. Our clients want to make clear, however, that though we have been restricted to being a part of the Manitoba Hydro delegation in these proceedings, our submissions on behalf of the Partners are exactly that; they are not submissions for or from Manitoba Hydro. Our submission today is from the hearts of our clients' citizens whose lives, **uniquely** in these proceedings, are put in the good graces of your judgment. We suggest that judgment ought to be based in the proposition that our clients' very future and the future of their youth is at stake in the recommendations that you will make to the Government of Manitoba.

The KCN position is quintessentially a request for outcomes from this Board and from the Province which will allow them to take steps out of poverty and hopelessness into a future which we all otherwise take for granted; that is one of opportunity and choice in their lives. Ownership of profitable projects in which they have influence and which give them a sense of control over their own lives are crucial steps to achieving that opportunity and choice.

This is the sea-change of which our clients spoke at the hearings of the Clean Environment Commission and which the Commission heard, accepted and recommended accordingly. They ask the same of you in these proceedings.

The conclusions our clients wish you to reach and the recommendations they wish you to make, are as follows:

- First, as recommended by Manitoba Hydro, the Green Action Centre and MYPUG the advancement of Keeyask to 2019 and the construction of the 750 megawatt interconnection should proceed **post haste**. There is no reason to delay and every reason to believe that the short and long term best interests of Manitobans, let alone our clients, will best be served by focusing on opportunity rather than a short-sighted, short-term and small thinking focus on immediate needs and disputed risks. Manitoba has few big time resources on which to build its future. Water power is one of them and its potential benefits should not be curtailed or deferred. Indeed, these concepts were perhaps best expressed by Tataskweyak Cree Nation Elder William Beardy, who is referenced in our written submission and who said:

"The land and waters and the resources have provided for us in the past. We can't exercise our traditional pursuits as in the past because the waters have changed. Yet these waters and their powers could once again help to provide for our people."

- Secondly, the 2026 in-service date for Conawapa must be protected for two reasons:
- Manitoba Hydro should be given the opportunity to demonstrate over the next, say four year period, that desirable export contracts can be and will be concluded so as to build a proper business case for proceeding.
- And, equally, because of what Karen Anderson said:

"We see Hydro's preferred development plan, which includes Keeyask in 2019, Conawapa in 2026 and a 750 Megawatt line as essential and vital to our interest. Hydro power is one stone - a cornerstone of our plan to live mino pimatisiwin, the good life, where our people can enjoy and maintain our land-based pursuits, as well as enjoying and pursuing opportunities that the non-First Nation community takes for granted."

"Because Conawapa will be built in our resource management area, the approval and development of Conawapa is of huge importance to us and to our future generations."

- Karen Anderson (Pg. 3553 NFAT Transcript with minor edits)

Though Ms. Anderson was expressing her perspective from the point of view of Fox Lake, it is shared by all four of our clients on the basis of proper process. After ten years of negotiation, Fox Lake has a Key Terms Agreement already in existence with Manitoba Hydro for partnership in Conawapa but there is much more detail yet to be agreed upon. Consultations and negotiations also need to be effected with Tataskweyak, York Factory, War Lake and Shamattawa. Moreover, in the case of all five Conawapa Cree Nations, there have not yet been consultations by the leadership of the Nations with the membership of each of their Nations who will and must have the final say on whether to participate as a partner and on what terms and conditions.

What is key to understand is this. The negotiation of excellent export contracts takes **time** and **momentum**. Similarly, negotiations and consultations with the Conawapa Cree Nations and between the leadership of the Nations and their members take **time** and **momentum**. Training programs take **time** and momentum to plan and implement. Environmental protection takes **time** and **momentum** to study and report. Resources need to be available to do them right and there must be a clear understanding and goal that if everything falls into place, as our Nations believe it will, the effort and energy and thought will have been worthwhile and no one at the other end will feel as though they have been cheated or taken for granted by some arbitrary termination or delay.

There have been differing perspectives about under what circumstances and conditions these efforts to achieve the goal of a viable Conawapa project can and will be achieved. But we can say, without reservation, that from our clients' perspectives, any attempt to disrupt or derail activities which have been ongoing for some time: -negotiations and consultations, -employment

and training of our clients' members and others in the north, -environmental assessments by Manitoba Hydro and Aboriginal Traditional Knowledge would be received by our clients as a huge mistake and breach of trust. Our clients have been in the process now for a decade of developing capacity, infrastructure, joint ventures, band-owned enterprises, band-owned consulting organizations, healing and protective programs and a real feeling of being a part of the environmental investigation. To stop that now or to slow it down would be to destroy that momentum and all that has been built to date. It would be perceived as just another blow in a long history of blows by non-aboriginal institutions to their path to a brighter future. In our clients' views, let alone those of Manitoba Hydro for whom this is also true, you cannot take apart the infrastructure, lay-off or fire the personnel, see your joint venturers moving onto more fertile ground, training wasted, and your people despondent because the future has just closed down and expect that three years or five years or ten years later it will all simply start up again with ease and without tremendous pain having been inflicted. Let us be clear on this point. We do not suggest that all of this must and will go beyond a point where it is clear that Conawapa is not viable because the export contracts are not there. Those are reasons which our clients may then understand and tolerate. But they say that until it becomes clear, (say four years from now as Mr. Wojczynski has suggested), that the exports are not there, progress must continue and that can only happen if the in-service date is protected. The First Nations can no longer be taken for granted as policy is made in the suppression of their legitimate rights and dreams. That era has ended.

Assuming the project is a go, of course, prior to any shovel going into the ground, adverse effects agreements for all affected parties will have to be completed and of course it can proceed only after a full environmental assessment process with the Clean Environment Commission and the Canadian Environmental Assessment Agency evidencing that there are no significant adverse effects, Lastly, the Province of Manitoba will have conducted and completed

its obligations for Section 35 consultations with the appropriate First Nations. I will turn back to that word "appropriate" in a moment.

By then, of course, the Regional Cumulative Effects process now apparently underway with the Province will have been long completed about which, by the way, our clients have no concern since, in the view of our clients, their hundreds of years of living in the vicinity of these dams and accessing their environments has given them a full and thorough understanding of the cumulative effects of all of the hydro projects, **full stop**. Our clients say that there is nothing that they do not already know, and have not known for a very long time, about the effects of the projects on the Nelson River.

I want to turn back now for a few moments to canvass a few of the issues which have arisen during the course of the hearing on which our clients wish to comment and on which they hold perspectives.

The first has to do with our clients' views that the most important aspect of the sea-change in the new era of their association with Manitoba Hydro, is that projects are developed only with the **prior, free and informed** consent of the inhabitants of the area flooded by the reservoir and **most** affected by the construction of the dam.

In doing so I needlessly thought I might be required to enter the discussion prompted by Ms. Saunders' very well delivered argument, which I admired, on behalf of the Manitoba Metis Federation that it has been wrongly disregarded, both in terms of consultation and sharing of benefits. This ground too was fully and more completely covered by the CEC, and rejected.

However, I note that Ms. Saunders nor Mr. Orle for MKO did not go so far as to argue that the MMF, or others, be partners in Keeyask or Conawapa. I am relieved that she stopped short of that argument because we would now have had to hold a long discussion about the Constitution of Canada, the fact that the MMF is not an entity which has Section 35 rights, which belong only to, "established Metis communities" of the existence of which, in the shadows of Keeyask and Conawapa no evidence has been provided at this hearing. We also would have to have added a discussion that the Section 35 duty to consult is only that of the Province in any event. Fortunately, we do not have to have those discussions so I will go on.

Our clients are pleased that the very affirming reports of the CEC and CEAA have been filed in evidence at this hearing so that they feel no need to make extensive arguments on environmental, macro-environmental or socio-economic benefits, since the CEC, in particular, heard **all** of what has been heard in the course of this hearing, from **all** of the same witnesses who also testified at the CEC hearing, the evidence there being magnified by a factor of 100, and they suggest respectfully that it would be appropriate for this Board simply to adopt its conclusions and recommendations on all of those matters.

I want now to come back to the issue of the sea-change effected by the recognition of the need for the prior, informed and free consent of the appropriate, most affected communities in the vicinity of the projects.

In that regard, it is important to recognize that Keeyask is being built in the Split Lake Resource Management Area and Conawapa will be built in the Fox Lake Resource Management Area. Resource management areas, as a matter of public record, were created so as to have the resources of a traditional area managed by a resource management board, membered by

representatives of the Province and the relevant, **single** First Nation. They have investigative and recommendatory powers to the Province on development, resource use and land use in those areas. On top of that, some of the agreements define the traditional territories of the First Nations for the purposes of determining many things but one of them is to be helpful in determining which First Nations need to be consulted **more** and **less** closely on proposed developments like Hydro projects. In the case of Keeyask, the four Nations most affected by it: Tataskweyak in its Split Lake Resource Management Area (hence its majority share of the Cree participation), and all four in their traditional territories, were the parties with whom Manitoba Hydro rightly agreed to partner on Keeyask, remembering, in fact, that it was Tataskweyak which first proposed the commercial partnership to Hydro..

It is the view of our clients that the appropriate partners in such commercial endeavors with Manitoba Hydro are those who are most and significantly impacted by those developments; those who live in the very shadow of the dams. There perhaps might be other forms of benefit sharing with others, but the in-vicinity Nations are the ones who are entitled to partner in and benefit from the exploitation of the resources in their Resource Management Areas or Traditional Territories since they are the ones who have always been there, have truly been the ones who have suffered most and who have a valid claim to those resources.

On the issues of "consent" and reward" our clients have very strong views and principals. Let me refresh your memories of the testimony.

- KAREN ANDERSON

"But I do want to affirm that we, at Fox Lake, valued and encouraged debate and critical dissent. We always try to find consensus and we get as close as we can to a consensus when we can. We did so in our approval of Fox Lake entry into the Keeyask partnership. In fact, after

many decades of my own experience, it is my view that, to the extent that some people did not choose to vote in the referenda (sic) at Fox Lake, we would consider there may be two (2) reasons for the abstention.

One (1) would be that the member did not care one way or the other. And the other would be that the member was not objecting to the outcome, leaving it instead to the leadership of our community which had been invested with a duty to do so to the best that could be done for the community.”

– Karen Anderson (Pgs. 3551-3552 NFAT Transcripts)

- Ted Bland, now Chief at York Factory First Nation, when speaking about the extensive consultation of community members which preceded the community referendums to approve the JKDA and AEAs in each First Nation, testified as follows:

“We have negotiated the terms of the JKDA over many years. We have many, many meetings with our members. We spoke with each other about the project, what it means to us as individuals and as people, what it means for our children and generations not yet born.

We discussed the potential environmental and social impacts of Keeyask, and the potential benefits of the project. We made our decision with open eyes, understanding the environmental and social changes Keeyask will bring. We chose to support Keeyask because we believe it’s the best interest of our nation.

Before Chief and Council signed the JKDA and our Adverse Effects Agreement, we held a vote...; 87 percent of the ballots cast supported Chief and Council signing the agreements. While this was a strong majority of voters, we recognize the choice was not unanimous. Others voted yes and did so with mixed feelings. It is important to acknowledge and respect the perspectives of all of our members.”

– Ted Bland (Pgs. 3557-3558 NFAT Transcript)

- Similarly, Victor Spence of the Cree Nation Partners (Tataskweyak Cree Nation and War Lake First Nation) testified:

“I have a whole text here that I could read, but the words of my people are in my heart. It hurts many times when we chose, as people, a path where somehow there are others that seems to question how an Indian should think, how an Aboriginal should talk and make choices for their own people. We chose as a nation, a sovereign nation, as members of a nation. We are not merely objects

within the hydro operational system. We are people. We cry. We feel pain. We have needs to better housing, better education, better healthcare services for our people, our Elders, our youth.

That is why TCN choose the path it did in regards to do this development. If it was based on economics, just solely on economic, we would have said, No, to Keeyask or any development, but it gave more. It provides hope. An opportunity to say, We are involved. We continue to be involved. There's a new vision."

In our written submission to the Board we remember the testimony about the various benefits flowing to our clients through Keeyask, and which similarly will flow to them through Conawapa, as well as listing the benefits achieved through the various adverse effects agreements. But, on questions of both consent and rewards, our clients will not let us stop without referencing here their continuing displeasure with the testimony of Drs. Buckland and O'Gorman, at the behest of the Consumers Association, on a number of matters - three in particular.

First, as each of our clients has repeated over and over again, dissent and critical analysis is valued. But our clients are dismayed and distressed when the Consumers Association through the good two doctors, who I know are well-meaning, take a non-randomized sample of, let me be generous, less than 20 people out of a population of 6,000 and based ,(Page 38 of their *written submission*),on an analysis of words repeated in the CEC proceedings, counting **only all** of the words of those who **support** their position, but stopping the count on those who **oppose** their position attempt to conclude that there is a polarization of perspectives in our clients' communities on Keeyask. To be sure, not everyone agrees on each point. But, our clients are miffed that having held fundamentally sound and fair democratic processes which resulted in approvals, that there continues to be a suggestion of a huge, divisive gap rather than a normal **not** extraordinary gap.

I remind you of the cross-examination of Dr. O'Gorman (*Pgs. 8918-8919, Lines 23-25, Lines 1-5*) in which Dr. O'Gorman conceded that of those eligible voters who voted in the four Referenda, about 75% overall in the four communities voted in favour and about 25% did not. Even if we did not take into account Ms. Anderson's testimony that in her long experience, the likelihood is that those who did not vote, did not vote because they either did not care or simply trusted the leadership, at least, though I am not a statistician, one would have to concede that of the people who did not vote something resembling the same 75/25% percentage would apply. Yet, the Consumers Association through the two good doctors, who have the best of intentions, continued to employ the notion of a "polarization" as opposed to a "difference of opinion of a minority". Moreover, our clients reject the implied notion that since less than 50% of all eligible voters voted the results are somehow suspect. Evidence was filed with the Board on the normalcy of low rates of participation in on reserve voting.

Secondly, our clients continue to be disturbed by the two good doctors' persistence in implying that the benefits of the projects flowing to the four Nations are inadequate and that the anticipated jobs are short term and gone.

I will not read them to you, but beginning at page 8888 of the transcript and continuing on, Dr. O'Gorman conceded that her calculation of return on investment and economic benefits had been inadvertently misstated in her evidence and she agreed to check on the numbers. At page 8889, the good doctor conceded that on a 2.5% preferred unit holding, the return on investment would be 20% which, she also then conceded was "a pretty high return" and nothing like the GIC investment which Dr. Grant had earlier been led to believe was the nature of the return.

Moreover, it became apparent that Dr. O'Gorman had changed her presentation of the Table of benefits from the way she had done them for the CEC, so as now to exclude from the

calculation the net benefit of long term, operational jobs in the Hydro system which are targeted in the JKDA for members of our clients to be 182. She undertook to revise her numbers to take into account the value of the omitted operational jobs which also speak to the mistaken suggestion that the JKDA only will produce jobs that are short term and gone.

In order to ensure there were no further discrepancies, Dr. O'Gorman met off line with a couple of us to go over the numbers so that the Board would have proper numbers before it and no dispute as to the accuracy of the numbers.

Please bring up CAC 85, Table 6.

Dr. O'Gorman did in fact file the results of her Undertaking and "Information subject to Check" as Exhibits CAC #83 and #85. On reading the first page of CAC 83 you would find that the agreed value of the promised 182, long term, operational jobs throughout the Hydro system, amounts to \$112,211,022.00 on the high end and \$56,105,511.00 on the low end. And, in Table 6 of CAC 85 before you, Dr. O'Gorman estimated the Total Annual Economic Benefits (direct and indirect) for the KCNs from the Keeyask Project, assuming selection of a preferred unit equity option. You will see that Dr. O'Gorman perhaps rightly asserts the caveat that in her view it is not proper to consider **total economic benefits** as **investment income** though that was acknowledged by her to be exactly what she had done when providing exactly the same table at the CEC hearings. In any event, whether one accepts her qualification or not, you will note at the bottom of the Table that **during** the construction phase the estimated total annual benefits produce a return on the low end of 456% and on the high end at 919%, which both Dr. O'Gorman and we would suggest are meaningless. But in the two preferred equity holding possibilities - 1.9% and 2.5%, six years **post** construction, the returns at the low end are 38% and the highs are 80-85%. They speak for themselves.

Our clients wanted to ensure that I brought to the attention of the Board the more accurate numbers so that the Board would have a proper appreciation of the value of **one** aspect of the project to them. But, they also wanted to bring to the attention of the Board that the economic and other tangible and intangible benefits flowing to them from Keeyask, which will also flow from Conawapa, justify the affirmative response of their communities to their participation in projects which once would have subjugated them but now provide them with the possibility, the first step perhaps, of economic independence.

Members of the Board, I end where I began..... with the quintessential argument of our clients. They ask this Board to ensure that, in making your recommendations, nothing gets in the way of their future; That means: Keeyask 2019 with the 750 MW Intertie, **post haste** and Conawapa 2026.