***the hidden costs of the keeyask and conawapa dams: report for the manitoba public utilities board nfat hearings***

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This report will examine the Keeyask and Conawapa proposals from the perspective of the hidden costs associated with potential aboriginal title and rights liabilities and from the perspective of the costs associated with the continuing deeply detrimental social impacts of these developments on the local indigenous communities. While the latter point is clearly within the mandate of the Board (see 2h in the terms of reference: "The socio-economic impacts and benefits of the Plan and alternatives to northern and aboriginal communities") a few words about the relevance of the former may be in order. Both the so-called 'partnership agreements' between Manitoba Hydro and its community partners (the proponents) and the scope of section 35 Aboriginal consultation are specifically excluded from the Board's review. However, Aboriginal and treaty rights are not specifically excluded and it should be noted that the duty to consult is a mechanism to protect Aboriginal and treaty rights and does not comprise the right itself. It is the contention here that potentially unfulfilled Aboriginal and Treaty right obligations may, indeed must, be understood as potentially significant economic liabilities that would fit within the scope of 2e:

"The reasonableness of the scope and evaluation of risks and the benefits proposed to arise from the development and the reasonableness and the reliability of Hydro's interpretation of the most likely future outcomes as a result of climate change, interest rate fluctuations, export market prices, domestic load fluctuations, drought, competing technologies, fuel prices, carbon pricing, technology developments, economic conditions, Hydro's transmission positions and other relevant factors."

And 2g:

"The financial and economic risks of the Plan and export contracts and export opportunity revenues in relation to alternative development strategies"

How significant are the economic liabilities of unfilled Aboriginal and Treaty rights? Depending upon which of various claims we examine these can reach into the hundreds of millions of dollars; therefore they would have to be seen as materially significant and certainly within the scope of the Board's review.

**Aboriginal and Treaty Rights: Three Challenges**

Outstanding Aboriginal rights or title claims, and outstanding or unfilled Treaty rights or claims, can be understood as contingent liabilities, significant unfilled debts that Manitoba Hydro does not routinely account for. A representation by the interior B.C. First Nations to the World Trade Organization in the early part of our century, during the softwood lumber dispute with the U.S., first raised the prospect of using Aboriginal rights as a contingent liability. That the brief was officially received and heard by WTO, gaining significant traction there and at subsequent NAFTA discussions over the softwood lumber dispute, is itself significant and an indication that the international community may have doubts about Canada's dealings with its First Nations. Arthur Manuel, who prepared the brief (and whom KPRIG would have brought before this Board had they been granted intervener status), also met with Standard and Poor officials

in New York, who in principle agreed that with proper research support it could likely be shown that provincial and federal governments in Canada had for some years been avoiding standard accounting transparency issues by not reporting outstanding Aboriginal and treaty rights issues as contingent liabilities.

Although there are likely other significant Aboriginal and treaty right claims that may arise in the indigenous communities affected by the Keeyask and Conawapa projects, three deserve specific attention here: the lack of signatures on Treaty 5 by Tataskweyak representatives; the non surrender of water rights in Treaty 5; the lack of constitutional amendments supporting the so-called implementation agreements associated with liabilities arising from obligations made in the Northern Flood Agreement. While they cannot be given the attention they each deserve in this report, a few comments about each are in order as a way of illustrating the magnitude of the problem and associated liabilities.

An Adhesion to Treaty 5 surrendering land rights was purportedly signed by the Chief in Tataskweyak (then Split Lake) in 1908. In fact, the Chief's signature was never affixed to the Treaty Adhesion. As reported by the treaty Commissioner and recounted by scholar Frank Tough in his *As Their Natural Resources Fail*, the Commissioner handed the Chief the wrong document, an individual adhesion rather than the adhesion for his people. At least, that is the story the Commissioner told on his return to the south without the appropriate signature in the appropriate place. Given the extraordinary efforts made by the Canadian government to secure proper signatures in the proper places on treaty

documents and treaty adhesions, this is a significant omission. It has never been corrected. This would mean, at the minimum, some form of modern signing to correct the mistake and at its maximum, that Tataskweyak First Nation has never, through the whole period of hydro development in its traditional territory and for the proposed developments, lost or surrendered its Aboriginal title to its lands. A comprehensive land claim or modern treaty for a territory and community the size of Tataskweyak would likely be in the amount of tens of millions and perhaps over a hundred million dollars. However, the Cree Nation would also be in a position to claim additional significant damages for the resource extractions, including existing hydro projects, above and beyond what they have already received. Here the amounts defy speculation but they could likely be in the hundreds of millions of dollars range. Further projects will only serve to defer and increase this liability, which will be a responsibility of both levels of government and Manitoba Hydro.

Secondly, the surrender or extinguishment clause of Treaty 5 which affects all of the communities involved in the Keeyask and Conawapa projects states that the Cree "do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits". The Treaty, even when given a strict literal interpretation, purports to surrender 'rights, titles and privileges' to lands, but says nothing of aboriginal interests, rights or title to waters. It should be noted that in comprehensive land claims, or modern treaties, similar clauses (often called 'extinguishment clauses') exist with notable changes. The wording in the

James Bay and Northern Quebec Agreement, the Western Arctic Agreement, the Nunavut Agreement, the Gwi'chin Agreement and the Sahtu Treaty all use the wording 'lands and waters'. The last of these, the Sahtu Treaty (1992), serves as an example:

"In consideration of the rights and benefits provided to the Sahtu Dene and Metis by this agreement, the Sahtu Dene and Metis cede, release and surrender to Her Majesty in Right of Canada all their aboriginal claims, rights, titles and interests, if any, in and to lands and waters anywhere within Canada."

If the Government of Canada since the mid 1970s recognizes that indigenous peoples may have water rights, to enough of an extent that it is concerned to have those rights surrendered in modern treaties, what does this say about the non-surrender of water rights through Treaty 5? Further, it should be noted that the Supreme Court of Canada, in the Van der Peet decision (1996) has said that an Aboriginal right is any 'custom, practice or tradition that is integral to the distinctive culture' of the indigenous peoples in question while earlier, in the Sioui decision (1990) it had already held that treaties have to be interpreted in a "liberal and generous" manner. Since use of waterways was beyond a doubt 'integral' to northern Cree, who are documented to have charged rights of passage, and since Hydro developments including the proposed two clearly infringe, in fact utterly destroy, these rights, a very substantial claim will likely come forward regarding outstanding Aboriginal title to water; again, if past breaches of the rights were to be compensated the amount would likely be in the multiple hundreds of millions of dollars.

Thirdly, the previously cited Sioui decision (1990) also applied a 'liberal and generous' standard in the interpretation of what specific document could be called a treaty. There can be no doubting that if the logic of the Sioui decision is applied, the Northern Flood Agreement has the legal status of a Treaty. Since 1982 Treaties have been protected by the Canadian Constitution (s 35 'existing Aboriginal and Treaty rights are recognized and affirmed'). In fact, the Honourable Eric Robinson of the governing party in this province has confirmed in the House that he believes the NFA is a treaty. That would mean that any documents that purport to limit the liabilities established under the NFA cannot serve that purpose without an enabling constitutional amendment. Both York Landing and Tataskweyak are parties to the Northern Flood Agreement and have subsequently negotiated so called 'Implementation Agreements'. It should be noted that the NFA did contain a scheduled provision calling for research that would assist in working towards the 'alleviation of mass poverty and unemployment' in the signatory communities, which many in the communities still take as a substantive commitment. Properly fulfilling the liabilities incurred through the NFA could be a substantial undertaking, particularly if the standards mandated by the Supreme Court of Canada ('liberal and generous' and noting that the 'honour of the crown' is at stake in such undertakings); this again could be valued in the hundred or hundreds of millions of dollars.

In the period 1990 to the present the Supreme Court of Canada has taken strong positions in defense of Aboriginal and Treaty rights, the significance of which seems to have been largely lost on decision makers in this province. Given the dire circumstances

of most of the indigenous peoples living in hydro-affected communities, we should not doubt that legal challenges along the lines outlined here will be part of the reality our children and grandchildren will have to live with if we do not deal with them now, just as we are now dealing with the legacy of chicanery around the relocation of St Peter's reserve or in the administration of Metis land rights (issues that perhaps as little as fifty years ago we would have not given much legal credence to). It is to the unfortunately dire circumstances of the people living in hydro affected communities that this report must now turn.

**The Socio-Economic Reality**

Communities affected by hydro development in northern Manitoba do not rank as healthy models of community development. Arguably they are some of the worst off communities in the province. The creation of a few temporary jobs in a racially stratified work force and potentially the eventual development of a small pool of capital to be managed by a very small local professional class will do nothing to alleviate the dire poverty and will do a good deal to exacerbate it. This situation poses a strong economic challenge to the province, which will have to pick up much of the cost of managing the destitution, and an even stronger moral challenge as a society of 'haves' and 'have nots' along a racial line is created and perpetuated. At the very high or broad level of social analysis demanded by this process it is clear that the kind of social disparities created through Hydro's past activities, and given the pattern are likely to be repeated in the proposed developments, are not acceptable. They impose an enormous

burden on future generations of Manitobans that will have enormous economic and social consequences.

At least a few small stories should make the extent of the problem clear. In Tataskweyak a severe housing crises lead to a local uprising in the spring of 2012. Children in the temporary trailers that serve as a school were reported to be playing with mouse droppings in classrooms. Newer trailers were being constructed on foundations of plywood. E-coli had been found in the water of eight houses, and one was so infested with cockroaches that it had to be destroyed. In Gillam, the Fox Lake Cree Nation members live in trailers while their mostly white hydro employee neighbors live in immaculate houses. The stark inequality there creates its own dynamic of social dysfunction. The Fox Lake Cree Nation has refused to release its own report on the social impacts of hydro development (the so called SCHIP Report) because the findings were so dramatically poor. Meanwhile, Manitoba Hydro has publically stated that 'mobile modular units' (that is, trailers) remain the most 'cost effective' form of housing for First Nations communities, all the while blithely building detached permanent houses for its employees, and planning more. The Public Utilities Board must not repeat the blindness to this disparity that infects Manitoba Hydro's decision makers. If Hydro employees deserve high quality housing, so do First Nations citizens. Period.

This situation persists after decades of promises that hydro development would improve the well being of people. Promises of jobs and prosperity for northern indigenous communities have been made since the NFA in the seventies, the

Implementation Agreements and Compensation Agreements of the nineties, and with each new project in each of the last four decades. Today those promises are being repeated. The reality of politically created poverty and a racial redistribution of wealth is instead what has been the end consequence. If the 'proof is in the pudding', Manitoba Hydro's efforts as a spur to community development and well being has consistently been a complete fiasco, with northern Cree peoples bearing in their everyday lives the persistent misery that has been the exclusive result for them of Hydro's grandiose schemes. Put bluntly, Manitoba Hydro should not be given a license to build new projects until it can show that its existing infrastructure will benefit all the affected northern indigenous peoples. Their quality of life, their social and material infrastructures, should be dramatically invested in and improved before new projects are contemplated. Any talk of rate increases should be engaged in to support material and social infrastructure improvements in Cree communities rather than to support new project construction. Anything less involves a moral abdication of responsibility for northern indigenous communities in Manitoba. This moral abdication leads to direct social and economic costs borne by taxpayers in producing a continuous stream of 'band aid' program solutions to a problem that is created entirely as a result of Manitoba Hydro's activities.

Additionally, it must be noted that a particular community based social and economic cost of the Keeyask and Conawapa projects is the disproportionate impact of these projects on traditional land based indigenous peoples. They are often the social mainstays of their communities, holders of the culture, speakers of the language and practitioners of their ways. Their activities are the ones that will be most affected by

these projects, which will be built adjacent to some of the last functioning trap lines in the immediate proximity of Tataskweyak and Gillam. Not only will these projects exacerbate the deleterious social impacts of previous projects, especially during the construction period; they will also make the land based lifestyle that continues to be practiced by the remaining traditionalists even harder: perhaps impossible. Somehow, somewhere, this must be taken into account.

A final word in this regard is that the economic value of the cultural and environmental loss increases with the passing of time. In a growing homogenous world, where large forests and intact ecological systems become increasingly rare, the places left will become increasingly valuable. The same can be said with cultures: those that have a land base that increases their odds of survival will become more valuable, in strict economic terms as well as in broader social and cultural terms, as their rarity increases. These hydro projects would, therefore, destroy value over a long term, though calculating this value (which may be incalculable) is obviously a difficult proposition.

**Conclusion**

The Public Utilities Board has already witnessed startling evidence of the appalling poor quality of Manitoba Hydro's base knowledge of indigenous communities in northern Manitoba. In the pre-hearing for this NFAT held on May 16, 2013, Ms Ramage and Ms Boyd as counsel for Hydro suggested that Peguis First Nation, the Manitoba Metis Federation, and Pimicikamak could all make their interventions through

the auspices of the Manitoba Keewatinowi Okimakinak or the Consumers Association of Canada. Without in any way showing disrespect to MKO or CAC, for Manitoba Hydro to not recognize the distinctiveness of each of these voices, which represent entirely distinct indigenous nations with a distinct set of concerns and distinct positions on the viability of these projects, represents either a crassly cynical maneuver or a deeply ignorant one. Such ignorance – it is preferable to give them the 'benefit of the doubt' here -- does not bode well for an agency whose key 'partners' are indigenous communities in northern Manitoba. Although the final decision in these matters made by the PUB does not necessarily reflect well on it, it does not have the same resources or pretend the same history of partnership with these communities as Manitoba Hydro does. If the statements made on May 16 illustrate the knowledge base of senior Manitoba Hydro representatives, they are a remarkable testimony to how shallow that knowledge base is and more troubling, bode very poorly for the future well being of hydro impacted indigenous communities.

These projects will continue a pattern that impoverishes northern indigenous communities, will incur or exacerbate a variety of hidden contingent liabilities in the form of outstanding Aboriginal and Treaty rights or claims, will destroy the future value of lands and culture. The power is not needed by Manitobans at this time. In another decade or two, if Hydro proves it is genuinely concerned about the indigenous communities it purports to 'partner' with by investing in their immediate well being, a discussion of new projects could be initiated. By then the power might be needed here or elsewhere. Under the current circumstances, the Public Utilities Board should

recommend against the construction of the Conawapa and the Keeyask projects as proposed at this time.