
**Presentation of Councillor D'Arcy Linklater
Portfolio Councillor Responsible for Treaty Land Entitlement
Nisichawayasihk Cree Nation**

**to the
Manitoba Clean Environment Commission**

***Traditional Knowledge, Partnerships, Hydropower
and Treaty Land Entitlement : A Path to Our Future***

Thompson, Manitoba
March 23, 2004

Good afternoon Mr. Chairman and members of the panel, I appreciate the opportunity to speak to you today. I also would like to welcome you to the traditional territory of the Nisichawayasihk Cree Nation.

At the outset, I would like to say that I am in favour of the proposed Wuskwatim Generation and Transmission projects. I have been identified in these proceedings as an elected Councillor of the Nisichawayasihk Cree Nation and as an advisor and contributor to some of the documents jointly prepared by Manitoba Hydro and the Nisichawayasihk Cree Nation as part of our application regarding the proposed Wuskwatim Generation and Transmission Projects.

I am also the NCN Portfolio Councillor responsible for Treaty Land Entitlement and wish to make this preliminary statement for the record and according to my separate responsibilities for Treaty Land Entitlement.

My relatives, the citizens of the Nisichawayasihk Cree Nation continue to occupy and inhabit our traditional lands in north central Manitoba as we have for many centuries before the arrival of European fur traders in the 1680's. For all of this time, our strength, peace and well-being has come from our faith in the Creator, from our sense of community and from our stewardship of the lands, waters and resources. Our survival on the land has been guided by the collective knowledge of our ancestors, Elders and community members, passed on from generation to generation, growing and becoming more valuable with each new experience.

We have continuously used and occupied our homelands for at least 7,500 years. Much of this period of occupation was recently confirmed by our discovery of the largest and oldest burial cache of human remains, animal bones and specialized tools ever found in the boreal forest of Canada - in our traditional territory.

"Nelson House" is the name given by the Hudson Bay Company and other traders to the trading posts built in our territory at least as early as 1802 at the place where the Burntwood, Footprint and Rat Rivers meet.

In recognition of our Aboriginal title to our traditional lands, on July 30, 1908, my ancestors, including my great-grandfather the late Chief Peter Moose, and Her Majesty's Treaty Commissioners entered into an adhesion to the Lake Winnipeg Treaty No. 5. The terms of our Treaty confirm a solemn promise that the lands, waters and resources within our traditional territory would be shared forever between our Nation and the settlers entering our territory.

The oral histories of my family, our ancestors and our Elders also say that the Treaty secures the promise that the use and management of the lands, waters and natural resources within our traditional territory would continue to be subject to the inherent authority and jurisdiction of the Nisichawayasihk Cree Nation.

Between 1910 and 1917 and almost immediately after entering into our Treaty, Canada cut through our southern lands by building a railway between The Pas and Kettle Rapids, setting in motion the first of many disruptions and changes to the undisturbed use of our homelands that we had enjoyed for thousands of years.

In 1930, the federal government violated our Treaty by the unilateral transfer of control over our lands and resources to the provincial government through the *Manitoba Natural Resources Transfer Agreement*. By the late 1930's, the provincial government was providing new settlers with allocations of fur resources, trapping areas, timber and large tracts of land for homesteading.

In 1956, the International Nickel Company struck a large nickel ore body in the southeast area of our traditional territory. Over 5,000 claims were staked, and the company's townsite quickly changed from a few tent camps to a modern city of over 15,000 people, becoming Manitoba's third largest city.

The Kelsey Generating Station, completed in 1961 to supply power to the mine, mill and smelter operations and to the City of Thompson, was the first hydro project on the Nelson River.

Between 1971 and 1974 the Town of Leaf Rapids was carved out of the northwest region of our traditional lands to serve employees of the newly opened Ruttan Mine, then owned by Sherritt Gordon Mines. Both developments were approved by Manitoba without our involvement, without our approval, without our consent.

In 1972, Manitoba designated the Paint Lake provincial park and park reserve without our input or consent and Manitoba isolated even more of our traditional lands, hunting and fishing areas through recreational, marina and cottage developments.

Even the impacts of road, rail, mine, smelter, townsite and park developments on two sides of our traditional lands does not compare to the impacts caused by the Churchill River Diversion Project, announced by Manitoba Hydro in 1966. The provincial government approved the interim licences for the diversion plans in 1972 and 1973, once again, without our input or consent. Our home waters on the Rat and Burntwood Rivers became a diversion channel for hydropower production. The Churchill River Diversion project would bring irreversible environmental impacts to our camps, families and communities.

In 1975, an "Inter-Church Task Force on Northern Flooding" was convened to examine the potential effects of flooding at Nelson House and other locations. The Task Force recommended compensation for direct losses and provision for future losses through a negotiated agreement.

At this time, it was recognized that placing a dollar value on the partial destruction of our centuries-old way of life would be very difficult. It is still very hard to put on value on these things.

It was not until December 1977 that Manitoba, Manitoba Hydro and Canada entered into the *Northern Flood Agreement* with the Nisichawayasihk Cree Nation and four other First Nations directly affected by Manitoba Hydro's water regulation projects.

The Northern Flood Agreement was intended to address, mitigate and provide compensation for the substantial environmental and socio-economic effects imposed on our communities by projects approved by Manitoba and Canada to serve the broader public interest.

In the Cree language, the word *nisichawayasihk* means “where three rivers meet”.

Over the past twenty-five years, our community, our relatives and our families have grieved. This has been expressed in this Commission’s hearings in Winnipeg. We have come to recognize that the impacts of the Churchill River Diversion can never be reversed or fully mitigated. New generations will only know of the community site our ancestors so carefully chose and sought to protect in the Treaty through our traditional knowledge and through the sharing of our oral history.

Much has been accomplished since the Churchill River Diversion project was developed, and more can, and is, being done. As a community, we may never entirely accept the impacts of past developments, but we are making efforts to turn things around wherever we can. We have already established new community fishing camps on nearby rivers and lakes not affected by hydroelectric development.

We have set up and operate a country foods program for our Elders and community members. We have our own community wellness centre. We have our own personal care home, so that our elders do not have to leave our community.

The unemployment rate has declined in our community.

We have continued to document the traditional knowledge of our Elders and community members, which knowledge supports our community and strategic planning. We are fortunate that our ancestors established our traditional territories over such a rich and varied landscape. Our leaders recognize the present opportunities to build upon the knowledge and wisdom of our ancestors and of our community.

In applying this knowledge, we believe we have something called “Indian science”, which is a pool of wisdom that exists in our community and beyond us in other communities.

We use both our traditional knowledge, the native science, as well as western science to build a better future for our people, for our children, for our unborn. In applying this knowledge, we have selected parcels of land as partial compensation for past development.

On March 16, 1996 NCN signed a comprehensive agreement to implement the provisions of the 1977 Northern Flood Agreement. Article 6 of the 1996 Comprehensive Agreement provides for the establishment of a resource management board and for the development of a land use plan and resource management plan for the NCN Resource Management Area. In part through the completion of these plans, NCN intends to reassert our authority within our traditional lands.

On May 29, 1997, NCN signed the Manitoba Treaty Land Entitlement Framework Agreement. The TLE Framework Agreement is a Treaty implementation agreement and confirms the constitutionally-protected Treaty right of NCN to select an additional 79,435 acres of Crown lands in accord with the per-capita provisions of Treaty.

On July 30, 1998, the ninetieth anniversary of the day on which my great-grandfather signed the adhesion to Treaty 5, NCN entered into its Treaty Entitlement Agreement and initiated our community process to select lands in partial fulfillment of the Treaty promises made in 1908.

On September 25th, 2001 the Nisichawayasihk Cree Nation and Manitoba Hydro entered into an Agreement in Principle which provides us with an opportunity to acquire an equity position in the proposed Wuskwatim hydroelectric project. Through the joint development of the project, it is our intention that the environmental impacts of the past will not be repeated. Our Agreement in Principle also provides for the training and employment of our community members in project construction and operations.

Through our partnership with Manitoba Hydro and government, the Nisichawayasihk Cree Nation will directly share in and benefit from future development within our traditional territory.

The well-being of the Nisichawayasihk Cree Nation has always been tied to the land and to the natural resources within our traditional territory. In order fully restore our self-reliance, we must achieve and maintain economic self-sufficiency. We also recognize that our traditional pursuits must be maintained and that the degree of our influence over decisions concerning natural resource developments and management - as well as the quality of our environment - are directly tied to the social, cultural and economic future of our community.

As with the choice of our compensation lands, our Treaty entitlement lands have been selected to extend our influence throughout our traditional territory and to enhance our economic opportunities. I am honoured to have been entrusted with the responsibility to carry out the wishes of my great-grandfather by making sure that these Treaty entitlement lands will benefit and provide for the next generations of our people and our children.

In accord with the TLE Framework agreement, NCN has a Treaty right to select lands along the Developed Waterway where those lands are not physically required by Manitoba Hydro at the 16 specific sites identified by the TLE Agreement for future development. These 16 sites are identified at Schedule "E" of the TLE Framework Agreement and are the same as the 16 sites at Figure 4.1, "Geographical Location of Potential Sites" of the *Need for and Alternatives to the Wuskwatim Project*.

In accord with our traditional use and occupancy and with our cultural, spiritual and economic interests, many of the 40 NCN TLE selections are of lands on the Developed Waterway. 13 of these selections, or 33% of the total NCN TLE selections, are confirmed to be eligible for immediate transfer to become NCN reserve lands, subject to an easement in favour of Manitoba Hydro.

These selections include several sites of cultural significance on Wuskwatim Lake and on the Burntwood River. While some of these 13 selections are of interest for future hydroelectric development, they are not reserved to Manitoba Hydro under the TLE Agreement.

NCN has requested that the easement lines for these 13 selections are determined by Hydro as being landward from the ordinary high water mark which results from the terms of the Interim Licence for the Churchill River Diversion, plus the Augmented Flow Program. Applying the ordinary high water levels resulting from existing licence authorizations represents the actual present water levels, would be consistent with the water regimes noted in the Agreement in Principle and would be consistent with the water levels resulting from the proposed Wuskwatim development as presented in the Application presently before the Commission.

For example, it is NCN's expectation that the Hydro easements for our TLE selections on Wuskwatim Lake will be determined by using the proposed Wuskwatim project elevation of 234 metres for Wuskwatim Lake as the ordinary high water mark.

Chief Primrose has noted that NCN's insistence in confirming the present low-head Wuskwatim configuration at 234 m was a major item during the AIP negotiations.

In addition to the water regime commitments in the AIP and Application, Manitoba Hydro has also presented a nominal scheme of development for a project at each of the sites noted at Table 4.1 and Figure 4.1 of the *Need for and Alternatives to the Wuskwatim Project*. Using a low-head approach to follow the present Wuskwatim proposal in order to achieve nearly the full potential between Notigi and Manasan, there would be additional projects at Early Morning Rapids and Kepuche Falls, neither of which projects are identified in the *Need for and Alternatives to the Wuskwatim Project*. NCN has made a TLE selection at the Kepuche Falls site.

Manasan means "where the people used to go to harvest clams" in the Cree language.

Prior to the AIP and the present Application, Manitoba Hydro had considered developing the full potential between Notigi and Manasan with "high head" projects including a Wuskwatim development at 810 feet (246.8 m) and a Manasan development at 700 feet (213.36 m). The Wuskwatim project option at 810 feet and with a capacity of 350 MW is not identified as an alternative in the *Need for and Alternatives to the Wuskwatim Project* report and the 265 MW Manasan option presented appears to be 2 m lower than a full development option at 700 feet.

However, in determining the easements for the 13 NCN Treaty entitlement selections that are otherwise eligible, Manitoba Hydro is seeking to protect its ability to proceed with the full-development options of a Wuskwatim project at 810 feet and a Manasan project at 700 feet by applying these high-head project elevations to the determination of easements.

It is clear that construction of a Wuskwatim project at 810' (246.8 m) would not be possible should the current proposal proceed. A Manasan scheme at 700' (213.36 m) would not likely be proposed under the current planning constraints as the project would involve extensive flooding of the airport, roads and other lands near Thompson. Therefore, neither project will be formally proposed or approved during the completion of our TLE selection process.

However, Manitoba Hydro is still seeking to preserve its option to proceed with these alternative projects by establishing full-development easements for NCN's TLE selections on the developed waterway. As part of the process to determine the eligibility of NCN's TLE selections, Manitoba has formally advised NCN that a future project elevation of 810 feet would be applied to all NCN TLE selections between Taskinigup Falls and Notigi and that a future project elevation of 700 feet would be applied to all NCN TLE selections between Manasan and Taskinigup Falls.

The application of full-development elevations to all NCN TLE selections on the developed waterway will result in several NCN TLE selections becoming ineligible, as the majority of these selections would be covered by lands under easement, including the sites of cultural significance chosen by community Elders on Wuskwatim Lake. Wuskwatim Lake is an original community location within NCN traditional territory.

As part of the discussions under Article 10 of the AIP, NCN and Manitoba Hydro have been discussing the importance of confirming the eligibility of all NCN selections, including the requirement for Manitoba to fully justify Manitoba Hydro's intention to apply full-development elevations. In light of the discussions taking place under Article 10 of the AIP, Manitoba has deferred a final determination of the eligibility of NCN's TLE selections on the developed waterway pending the outcome of these discussions.

NCN has advised Manitoba Hydro that the selection of Treaty entitlement lands by NCN and the transfer of these lands to reserve status is a right recognized and affirmed under s. 35 of the *Constitution Act, 1982*. In its decision in *R. v. Sparrow* and subsequent similar decisions, the Supreme Court of Canada established the doctrine that the exercise of an Aboriginal or Treaty right may not be infringed by the Crown without a valid and compelling justification.

The constitutional duty of the Crown to justify any infringement of the exercise of an Aboriginal and Treaty right has been described by some as a "fiduciary consultation" or a "section 35 process". The Supreme Court held in subsequent decisions that the duty to justify an infringement also applies to the provincial governments. In applying a process of fiduciary consultation, the following determinations must be made:

1. is there an Aboriginal or Treaty right that may be affected by a decision?
2. is the right infringed by any Government decision?
3. is the infringement justified?
4. if there is a justifiable expropriation of the right, is compensation available?

Manitoba Hydro's intention to determine easements by applying full-development water levels of 810 feet to all TLE selections above Taskinigup Falls and of 700 feet to all selections above Manasan would result in the ineligibility of several selections due to the provisions of the TLE Framework Agreement. Should Manitoba support Manitoba Hydro's intended approach to the determination of these easements, this will result in an infringement of the exercise of a Treaty right of the Nisichawayasihk Cree Nation.

The development of a Wuskwatim project at 810' (246.8 m) has not been proposed. It is not identified by Manitoba Hydro as a future option at Table 4.1 and Figure 4.1 of the *Need for and Alternatives to the Wuskwatim Project* and will not be possible should the current proposal proceed. NCN will argue that Manitoba cannot justify the application of full-development water levels to all NCN TLE selections between Taskinigup Falls and Notigi.

Therefore, should Manitoba agree that Manitoba Hydro may apply full-development water levels to the determination of easements for all NCN TLE selections on the developed waterway between Notigi and Manasan, NCN will argue that Manitoba has unjustifiably infringed the exercise of our constitutionally recognized and affirmed Treaty right to select lands and to transfer these lands to reserves.

As TLE Portfolio Councillor, I must ensure that the exercise of NCN's Treaty right to select our remaining entitlement lands is not infringed without full justification.

The prosperity of NCN citizens will be determined by the extent to which NCN directly participates in, manages and benefits from decisions affecting the use and development of lands and from future resource developments within our traditional lands, including sites with potential for hydroelectric development.

For example, should the low-head Wuskwatim project proceed, it will commit Manitoba Hydro to other low-head projects upstream of Wuskwatim, thus preventing the additional potential environmental and socio-economic effects of a Wuskwatim development with a forebay level some 42 feet (12.9 m) higher than the presently proposed project. In part through our TLE selections at other eligible sites with hydroelectric potential, NCN is also seeking to ensure that only low-head projects are proposed in the future for the sites downstream of Wuskwatim that are within our traditional lands.

As Portfolio Councillor Responsible for Treaty Land Entitlement, I must take every step to ensure that future generations of NCN members will be in same position as are the present generations to negotiate with Manitoba Hydro and to determine their own futures.

In order to respect the teachings of my ancestors, to honour my great-grandfather's Treaty commitments and to fulfill the Crown's Treaty promises, I cannot accept anything less. For I am also speaking on behalf of our children, the unborn, who are watching us from the spirit world.

I ask for your mutual understanding and respect.

Ekosani.