

Manitoba Clean Environment Commission

Review of the Lake Winnipeg Regulation and Jenpeg Final Licence Applications

FINAL ARGUMENT OF PIMICIKAMAK OKIMAWIN

May 1, 2015
N. Kate Kempton & Jeremiah Raining Bird
OLTHUIS KLEER TOWNSHEND LLP
229 College St., 3rd Floor
Toronto, ON M5T 1R4
Email: jrainingbird@oktlaw.com
Tel: 416-981-1333 (direct)
Tel: 416-981-9330 (reception)
Fax: 416-981-9350

OVERVIEW

1. Forty-five years ago, the Province of Manitoba announced its plans "to proceed with the development of Lake Winnipeg for flood control and the regulation of the Nelson River for power purposes."
2. The two predominant purposes of Lake Winnipeg Regulation ("LWR"), as recognized by Manitoba Hydro, were to reduce shoreline flooding on Lake Winnipeg and maximize hydro power production. Little to no consideration was given to downstream communities and peoples such as Pimicikamak at that time.
3. Construction of the Project began in 1972 under the authority of interim and supplementary interim *Water Power Act* licenses ("the Interim Licence"). The Interim License provides Manitoba Hydro with the authority to operate the Project within certain limited conditions. The main conditions require Manitoba Hydro to:
 - (a) Keep the water levels on Lake Winnipeg between 711 and 715 feet above sea level;
 - (b) Maintain a minimum outflow level of 25,000 cubic feet per second ("cfs"); and
 - (c) Ensure that the rate of change in outflow not exceed 15,000 cfs in any 24 hour period.
4. The decisions that Manitoba Hydro makes in order to keep its operations of the Project within these parameters are largely discretionary. Manitoba Hydro recognizes that there are "adverse impacts" to communities and peoples downstream of the Project, but the term "adverse impacts" does not do justice to the actual experiences of those communities and peoples.

5. Pimicikamak has occupied the land downstream of Lake Winnipeg, including the lands surrounding Cross Lake, since time immemorial. For the last 39 years, its people have witnessed first-hand the profound and lasting effects that the Project has had on their lands, waters, culture, society, and well-being.
6. At no time either prior to construction of the Project in 1972 or in the remaining years leading up to these hearings has Pimicikamak given its consent to the Project. In 1974, faced with a hydro project it did not approve and that was already being constructed, the Cross Lake band joined forces with four other affected bands and formed the Northern Flood Committee in an attempt to defend their rights and interests.
7. Given the choice, Pimicikamak and the Northern Flood Committee would have vetoed the Project at that time. 40 years later, Pimicikamak cannot give its consent to the Project in its current form.
8. However, Pimicikamak was not given that choice. Rather, the five NFC bands (including Cross Lake band under Pimicikamak's government) negotiated a set of measures intended to remediate, mitigate, and compensate for the devastating effects of the Hydro Project. Those measures were contained in the Northern Flood Agreement ("NFA"), a modern treaty.
9. As the Panel heard over the course of the hearing, the history of implementation of the NFA is one that is fraught with problems. Decades of litigation seeking to compel Hydro, Manitoba, and Canada to implement the NFA in good faith have left a legacy of distrust by Pimicikamak of those officials in charge of operating the Project and implementing

the terms of the NFA. It is within that context that Pimicikamak has participated in these hearings.

10. It is admitted by Hydro that more knowledge is needed in order to fully understand the "adverse impacts" of the Project, especially LWR, on Pimicikamak's rights, lands, culture, economy, society and people as well as the potential measures necessary to fully address the impacts. To this end, Manitoba Hydro has voiced a willingness to "strike a new balance" when the final license comes up for renewal in 2026. Hydro has also indicated that they may be willing to engage in the types of studies necessary to fill in knowledge gaps and prepare for potential environmental review whenever that occurs; if Hydro gets its way, in 2026 or beyond.
11. However, until at least 2026, Manitoba Hydro insists that the status quo prevail; business will go on as usual. They will say that varying the terms and the conditions of the licence is inappropriate. They will say that any call for a change in operating decision-making models should come from the legislature. "Adverse impacts" and their mitigation are to be addressed through agreements such as the NFA, and not through the licensing process, despite the fact that getting the NFA implemented has proven to be a massive struggle, with Pimicikamak saying that it has yet to be implemented to date. Rather than say what they really mean; Hydro wants no additional obligations and responsibilities, they make vague promises as to possible future commitments at speculative dates. All the while, Pimicikamak is asked to wait.
12. With respect, this is not good enough. Pimicikamak has waited 40 years for adequate remediation, mitigation, and compensation. It is eminently reasonable that Pimicikamak is fed up with a process that forces it to continually litigate and beg rather than cooperate.

It is eminently reasonable if it reacts with distrust to further promises that Pimicikamak's concerns will be addressed in the future. No one could fault them for approaching these hearings with a critical mind.

13. It is with a critical mind and an optimistic heart that Pimicikamak is here today. Critical in the manner in which it views the flawed process of engagement and review with regard to the Hydro system in Manitoba, yet optimistic that the Panel here today will respond to the opportunity placed before it.
14. Over the course of these hearings, it should have become very apparent that not only are the current licence conditions extremely prejudicial to downstream communities and peoples, but also that the knowledge required to address this prejudice is severely lacking. What should also have become clear is that the current regime for mitigating impacts downstream (the NFA and associated agreements) is also severely lacking. It has not been implemented in good faith. A costly and time consuming process of litigation has been required to compel its implementation.
15. Pimicikamak realizes that the Project isn't going anywhere. However, it also knows that improvement on the current regime is both necessary and possible.
16. In Pimicikamak's submission, the question that the Panel must ask itself, and the associated opportunity that it presents, is whether or not the status quo is good enough? Or, as Pimicikamak contends, whether recommendations should be made to the Minister to change the status quo; to require Manitoba Hydro to engage in additional studies and to honour agreements as conditions of its licence. Whether substantial changes should be made to the operating regime to allow for affected peoples to have a say in the day to day

operating decisions that have such a profound impact on their lives. It is with an optimistic heart that Pimicikamak asks the Panel to make such recommendations. (Pimicikamak's recommended licence conditions can be found at par. 64 of these submissions.)

THE EVIDENCE

17. The Panel was provided with evidence from Pimicikamak's members and experts about the following issues:

- (a) Adverse effects downstream of LWR and Jenpeg;
- (b) Mitigation measures that are not well assessed in terms of whether they are meeting objectives;
- (c) Gaps in current ecological monitoring; and
- (d) The history of NFA implementation.

No Consent to LWR

18. As stated repeatedly by Chief Merrick and Executive Council Member David Muswaggon, Pimicikamak was never consulted prior to construction of the Project, and Pimicikamak's consent was never given. In fact, Pimicikamak has maintained its opposition to the project from day one. It was forced upon them.

Reference: LWR Transcript, April 7th, 2015, p. 1735-1737, 1743, 1760

19. Pimicikamak had no input into the current license conditions and has no say in its day to day operations.

Reference: LWR Transcript, April 7th, 2015, p. 1737

20. The LWR licence conditions allow Manitoba Hydro and the Manitoba Government to inflict increased periods of flooding, at higher levels than possible pre-LWR on Pimicikamak lands and waters.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 3

21. Natural seasonal patterns of water flow, so critical for ecological processes, have been turned upside down, and have been rendered erratic from year to year. These manufactured fluctuations in water levels have had many profound negative ecological, sociocultural and economic implications for Pimicikamak and will continue long into the future.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 4

Adverse Impacts Downstream

22. The current license conditions result in unnatural water flow fluctuations downstream that lead to adverse effects such as:
- (a) ongoing severe shoreline erosion,
 - (b) probable increased sediment loads,
 - (c) degraded shoreline and marsh habitats for wildlife,
 - (d) poor aquatic habitat that may be related to declines in certain fish and animal populations,
 - (e) unsafe travel conditions, and

(f) permanent loss and degradation of the cultural landscape.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 14

23. As a result, Pimicikamak citizens have suffered a loss of their "cultural identity", incrementally losing their traditional ways of life, tradition, culture, and self-esteem. This loss of connection to Mother Earth has resulted in widespread hopelessness.

Reference: Margaret Robinson, LWR Transcript, April 7th, 2015, p. 1811

24. Despite an effort to bring it back through schooling, traditional knowledge is being lost as opportunities to use the land decrease. There is also a lack of knowledge of environmental science necessary to understand the impacts of hydroelectric developments in Pimicikamak territory.

Reference: Margaret Robinson, LWR Transcript, April 7th, 2015, p. 1815-1817

25. Manitoba Hydro acknowledges in its submission that the Project has adverse impacts downstream as a result of the reversal of seasonal patterns, however, in many cases, Hydro states the lack of scientific data renders any attempt to attribute actual impacts to LWR inconclusive. Hydro cannot on the one hand say that there is not enough information available and then on the other hand, use that lack of information as a reason to avoid undertaking further study for the next eleven years because you can't prove it's needed. Hydro then contends that the Cross Lake weir has "likely improved conditions", despite the lack of study evaluating this conclusion.

Reference: Manitoba Hydro - Document in Support of Manitoba Hydro's Request for a Final Licence under the Manitoba Water Power Act, Appendix 2

26. The Cross Lake weir was developed to attempt to lessen the effects of LWR on Cross Lake. Construction of the weir was completed in 1991.

Reference: Manitoba Hydro - Document in Support of Manitoba Hydro's Request for a Final Licence under the Manitoba Water Power Act, p. 44

27. Since installation of the weir, the average water level on the lake has increased while the range in water levels has decreased. The Cross Lake weir also allows greater discharge at high lake levels than was possible under natural conditions.

Reference: Manitoba Hydro - Document in Support of Manitoba Hydro's Request for a Final Licence under the Manitoba Water Power Act, p. 44

28. Dr. Luttermann points out that construction of the weir was not by itself meant to fully mitigate adverse impacts on Cross Lake and in fact, cannot do this for Cross Lake, or for other affected waterways throughout Pimicikamak territory. Important changes to the Interim Licence related to the operating regime were also recommended back in 1986. In Pimicikamak's submission, based on the evidence of Dr. Luttermann, those proposals must be thoroughly reviewed and considered in a transparent process. Necessary studies related to those recommendation might include:

- (a) The minimum allowable outflow of 25,000 cubic feet per second should be revised with additional provisions that this minimum cannot be permitted at any time of the year. There must be a provision requiring Manitoba Hydro to study the pattern of water levels in that year to date, consult with Pimicikamak on the potential effects of lowering lake levels at critical travel times, or critical times in the seasonal cycle for wildlife; and come to a collaborative decision on timing of a minimum flow that year;

- (b) the requirement for maximum discharge when Lake Winnipeg reaches 715 feet above sea level should be deleted and replaced with a provision allowing for consideration by the Minister in consultation with downstream peoples of the prevailing circumstances at the time;
- (c) the "November cutback" or ice stabilization program must be studied with regards to specific ecological and cultural effects. The 15,000 cfs rate of flow change in a 24-hour period must be studied in light of actual operations over the past 39 years, and better understood in terms of impacts on people and wildlife habitat. That maximum rate of change should not necessarily be permitted at any and all times of the year;
- (d) Objectives should be built into the operating regime that require minimization of negative impacts on aquatic and riparian wildlife of the Cross Lake area, and on water and ice travel by Pimicikamak and others.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 28

29. These changes, if put into the licence, would contribute to additional mitigation of adverse conditions such as "slush ice" as well as improve the environment for species such as beaver and muskrat.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 28

30. In Manitoba Hydro's reply evidence, Mr. Gawne addressed the decision of Manitoba Hydro to ignore these recommendations. He testified that, "Manitoba Hydro reviewed and considered those recommendations" and that Manitoba Hydro adopted a number of

them, but refused to adopt others for various reasons, the majority of which were Manitoba Hydro simply disagreed with them.

Reference: Kevin Gawne, LWR Transcript, April 15, 2015, p. 2523-2529

31. Again, this is an example of Manitoba Hydro making decisions on their own, without input from affected parties, or in a transparent fashion. It is emblematic of the way that LWR has operated since its inception and it needs to change.
32. While it may be unclear what the full nature and scope of all adverse impacts from LWR is, what is clear is that there is a need for increased scientific monitoring and study in order to determine if mitigation measures other than those recommended above are required in the future.

Gaps in Ecological Monitoring

33. Despite being in operation for almost 40 years, there is relatively limited formal study of the state of the downstream environment. Numerous gaps exist in our scientific understanding of the relationship between regulation of the Nelson River and LWR operations.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 5

34. Dr. Luttermann has stated that "it is imperative that a comprehensive, structured program of environmental research be established as soon as possible. This must be embarked upon through a collaborative planning, learning and implementation process involving affected parties up and downstream of LWR."

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 5

35. There has been inadequate study to determine the actual effects of flow regulation on downstream wildlife and habitats. It is therefore not possible to come to clear conclusions on the effects of LWR from year to year, or on what further mitigation is feasible.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 5

36. In her testimony, Dr. Luttermann highlighted a number of areas in which ecological monitoring could be improved, or environmental studies could be undertaken including:

- (a) Studies to determine whether the Cross Lake weir has achieved its objectives;
- (b) Studies on Lake whitefish habitat conditions and recruitment in relation to the seasonal hydrological regime experienced each year ; and
- (c) Studies on the condition of shoreline/riparian habitats in relation to the hydrological regime from year to year, and habitat use of wildlife such as muskrat, moose, amphibians, waterfowl and songbirds.

Reference: Dr. Luttermann, LWR Transcript, April 7th, 2015, p. 1776

Pimicikamak Submissions to the CEC, March 31, 2015, p. 14, 19

37. The lack of such types of studies was described at times as "quite surprising" to "astounding".

Reference: Dr. Luttermann, LWR Transcript, April 7th, 2015, p. 1780, 1782

38. Ongoing monitoring is necessary to gain a better understanding of the actual effects of various water level patterns from year to year on riparian and aquatic habits over time.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 31

39. Similar gaps exist in our knowledge of related impacts in Sipiwesk and Duck Lakes and Pipestone Lake, lakes of critical importance to Pimicikamak.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 32-35

40. There are also a number of issues with regard to water quality, where further study would be valuable. These include investigation into the potential changes in nutrient transport through the bypass channels as opposed to the natural outlet; residence time of water in Cross Lake during low water periods; and the effects of invasive species such as carp on turbidity in Cross Lake bays, as examples.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 40-41

41. Despite what is known about river regulation effects on shorelines, and despite what was predicted by the Nelson River Study Board, no long-term program of riparian habitat research and monitoring has been developed for the Nelson River. No study of these areas is being done that relates habitat condition with hydrological patterns from year to year.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 42

42. Despite the lack of formal study, Pimicikamak citizens have reported numerous observations relating to these impacts. The Panel was shown numerous pictures by Mr. Settee of the areas downstream of Lake Winnipeg and the observed impacts on the land, waters, and animals.

Reference: Darrell Settee, LWR Transcript, April 7th, 2015, p. 1790-1809

Exhibit 5 - Pimicikamak Okimawin. Downstream Inequity and the LWR Final Licence, p. 49-84

43. The problem of course with these observations, as pointed out by Dr. Luttermann, is that they are discounted and labelled as anecdotal.

Reference: Dr. Luttermann, LWR Transcript, April 7th, 2015, p. 1779

44. This speaks to the need for studies that are collaborative efforts to define the questions and methods, and incorporate both Aboriginal Traditional Knowledge and western science, and develop a mutual understanding of limitations from the outset.

NFA Implementation

45. In 1974, five bands directly affected by the northern Manitoba hydroelectric project formed the Northern Flood Committee (NFC) to facilitate discussion with Manitoba Hydro and the federal and provincial governments about their serious concerns about the ongoing and future impacts of this project. These five bands included the Cross Lake Band (an administrative arm of Pimicikamak).

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 9

46. In 1977, the five NFC bands, Manitoba, Hydro, and Canada signed the Northern Flood Agreement (NFA), which was intended to deal with the myriad direct and indirect adverse effects resulting from the modification of the water regime that accompanied the development of hydroelectric power in Northern Manitoba. This document is recognized by Manitoba and Hydro to be a "modern treaty". The NFA was, and is, supposed to remediate, mitigate, and "compensate" (through various benefits) the aboriginal parties.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 9

47. The NFA provides for a variety of compensatory benefits and remediation and mitigation measures to be provided to the signatory First Nations:

1. 4:1 replacement of reserve lands impacted by the Project (Article 3);
2. Clearing of debris from Project-affected waterways (Article 5.13);
3. Continuous supply of potable water (Article 6);
4. Protection of burial grounds from flooding (Article 7);
5. Control of water levels and flows to seek to minimize destruction of wildlife (Article 10);
6. Requirements for community infrastructure to be built to address or offset impacts on the community from the Project (Article 12);
7. Development and implementation of a wildlife management board, community development plans, and environmental plans to implement the study board report and programs to maximize First Nation employment in the Project (Articles 15 and 18);
8. Compensation for affected trap lines and fisheries (Article 19); and
9. Funding for remedial works (Article 22).

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 9

48. Executive Council Member David Muswaggon provided evidence on the history of NFA implementation. He testified that:

- (a) Pimicikamak had no choice but to make the best of a disastrous situation in signing the NFA as it was entered in to only after construction was completed;

- (b) NFA implementation has been an "onerous and unfair and grossly inadequate process";
- (c) "the Crown parties have used their position of power to impose LWR on us in direct contradiction of our stated wishes, and they have continued to use their position of power to minimize and limit their responsibilities to us and the lands entrusted to us";
- (d) The four to one replacement lands promised in Article 3 have yet to be transferred, other than 5 small parcels that were selected on a test basis;
- (e) What was supposed to be a planned process to "work together, sit down at a table and roll up our sleeves" hasn't happened. Instead, Pimicikamak has been forced to resort to the NFA litigation/arbitration process on a consistent basis.

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1742-1748, 1849

49. The Affidavit of Andrew Stobo Sniderman sets out in more detail the number and breadth of Pimicikamak's litigation/arbitration claims under the NFA.

Reference: Exhibit 4, Affidavit of Andrew Stobo Sniderman

50. In 1998, Pimicikamak citizens engaged in a partial blockade of Provincial Road 374, resulting in the signing of a 1998 political accord, which Pimicikamak views as a treaty and in which Hydro, Manitoba, and Canada pledged to stop pushing Pimicikamak towards a lump sum financial deal to cap the benefits under the NFA.

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1751

51. From 1998-2002, both sides sat down and worked on NFA implementation action plans. This process of mutually developing action plans ceased in 2005 when the NFA Crown parties including Hydro stopped supporting it.

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1752

52. Implementation of the NFA Treaty, in Pimicikamak's view, should start by determining what the obligations and responsibilities are and how they can best be met in determining the cost in allocating appropriate funds to it. Hydro's approach has been the opposite. Hydro has started with its own unilaterally-determined and arbitrary cap on annual funding for NFA implementation.

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1753

53. Recently, in late 2014, Pimicikamak members occupied the Jenpeg dam to bring attention to this flawed history of NFA implementation, resulting in the signing of a Process Agreement between Manitoba, Hydro and Pimicikamak.

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1754

Pimicikamak Submissions to the CEC, March 31, 2015, p. 12

54. Key terms of the Process Agreement include:

- Mutual development of action plans for NFA implementation on an ongoing basis;
- The consideration of more measurable and certain requirements for environmental remediation and mitigation measures, measures and programs for rejuvenating trapping, fishing, and other traditional pursuits of Pimicikamak as well as those for employment and business opportunities for Pimicikamak in the Project;

- Potential economic participation by Pimicikamak (and other affected peoples and communities) in the Project via revenue sharing and/or equity participation;
- Potential increased participation by Pimicikamak in operational decisions with regard to the Project;
- Development and implementation of measures to improve the financial and administrative capabilities of Pimicikamak; and
- Funding for the process costs of the above, from Manitoba and Hydro.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 12

55. It is important to realize that this agreement is a "first step" in a process that has no guaranteed outcomes. This has been acknowledged by Manitoba Hydro.

Reference: Pimicikamak Submissions to the CEC, March 31, 2015, p. 12

David Muswaggon, LWR Transcript, April 7th, 2015, p. 1754

Mark Sweeney, LWR Transcript, March 12th, 2015, p. 582

56. As stated by Mr. Muswaggon:

"Our people take that position of, we'll believe it when we see it. Too many times in the last so many decades, talk has been cheap and very little action. They had been betrayed too many times. So I do not blame my people."

Reference: David Muswaggon, LWR Transcript, April 7th, 2015, p. 1758

THE LAW

57. Section 20 of the *Water Power Regulation*, M.R. 25/88 provides that:

Every interim or final licence shall be deemed to incorporate and shall be subject to the provisions of the regulation in force at the time of the issue of the interim or final licence and to such other stipulations, provisos and conditions, as the minister may impose.

(emphasis added)

58. Section 41(2) of the same provides:

If the interim licensee fails:

(c) to comply with any other term or condition of the interim licence or of this regulation:

then the minister may, after considering the report and hearing referred to in subsection (3), cancel the interim licence or take such other action or make such other order as he shall deem suitable.

59. Finally, section 44 provides, *inter alia*:

The final licence shall embody the terms which were set out in the interim licence for incorporation into such final licence, and such other terms and conditions, as the minister may impose... (emphasis added)

60. Section 6(5) of the *Environment Act*, C.C.S.M. c. E125 states in part:

When requested by the minister, the [Clean Environment] commission must do one or more of the following in accordance with any terms of reference specified by the minister:

(a) provide advice and recommendations to the minister;

(b) conduct public meetings or hearings and provide advice and recommendations to the minister;

61. Section 6(3) of the *Environment Act* states in part:

The commission may on its own volition conduct an investigation into any environmental matter... and advise and make recommendations thereon to the minister.

62. The Terms of Reference for these hearings make it clear that while the CEC has not been asked to comment on whether a license should have been issued, they are to, *inter alia*:

(a) Hear evidence from Manitobans on the effects and impacts of the LWR since Hydro started using the LWR to generate electricity;

(b) Review of the successes and failures of the implementation of those broader public policy goals that led up to the issuance of the interim licence and the operation of the project; and

(c) Summarize and make comment on the concerns raised pertaining to the issuance of a final licence to Manitoba Hydro under the Water Power Act including but not limited to future monitoring and research that may be beneficial to the project and Lake Winnipeg.

63. It is Pimicikamak's submission that the combination of the above leads to the following conclusions:

(a) The Minister has the power and discretion to impose additional conditions on any final license issued to Manitoba Hydro, even if it has complied with the terms of its interim license;

- (b) The Terms of Reference for these hearings are broad enough and allow for the CEC to make recommendations, respecting various matters that could inform additional conditions on the license; and
- (c) The CEC has a residual jurisdiction to make recommendations of their own volition.

CONCLUSIONS

64. **It is Pimicikamak's submission that the CEC can and ought to make the following recommendations to the Minister:**

- (a) A licence condition be imposed requiring Manitoba Hydro to fully and in good faith implement the NFA through action plans developed mutually with Pimicikamak and through the provision of necessary funding to carry out these action plans;
- (b) A licence condition be imposed requiring Manitoba Hydro to fully and in good faith implement the Process Agreement including through the provision of necessary funding to carry out its objectives;
- (c) A license condition be imposed requiring Manitoba Hydro to balance downstream impacts, needs, and objectives in its operation decisions in a manner similar to Water Use Planning in British Columbia;
- (d) A license condition be imposed that Manitoba Hydro fund and engage in the requisite environmental studies required to fully assess LWR impacts and potential ways to address them, including:

- (i) the impacts on downstream aquatic and riparian habitats;
 - (ii) impacts on wildlife populations;
 - (iii) impacts on land use, traditional pursuits, culture, society, and economy of Pimicikamak; and
 - (iv) evaluation of the results of measures to taken to date to remediate or mitigate LWR impacts.
- (e) Establishment of a water governance board for the water basin which includes the watershed of Lake Winnipeg within Manitoba and the Nelson and Churchill Rivers as a whole with meaningful input into operational decision-making by all affected parties including Pimicikamak; and
- (f) A systematic review of the water governance regime in Manitoba with a comparative look at other jurisdictions in an attempt to modernize the current legislation.
65. It is undeniable that there have been multiple and substantial adverse impacts to Pimicikamak and other downstream communities and Manitoba Hydro, in fact, do not deny it.
66. Manitoba Hydro has also recognized the value in the types of studies that Pimicikamak is recommending in these proceedings.

Reference: Gary Swanson, LWR Transcript, March 12th, 2015, p. 564-568

David Cormie, LWR Transcript, March 12th, 2015, p. 570-574

67. Mr. Cormie has spoken of the need for a "new balance". He says that Manitoba Hydro will "do the right thing" and that they only need guidance, or a "road map" to inform them as to what that is. He acknowledges that the current "road map", or what has led to the current situation, is one based on the operation of LWR under current licence conditions. He recognizes that new licence conditions are one way of providing that new "road map" that Manitoba Hydro so desperately requires.

Reference: David Cormie, LWR Transcript, March 12th, 2015, p. 528, 570-574

68. However, he also maintains that now is not the time for any additional licence conditions, preferring to maintain the status quo until 2026, when a final license is renewed to get into the discussion of what this "new balance" will look like.

Reference: David Cormie, LWR Transcript, March 12th, 2015, p. 571

69. In Pimicikamak's submission, eleven more years is too long to wait when Pimicikamak has been forced to wait 40 years already for a proper balance to be struck; one that gives proper weight to the effects on and needs of communities and peoples and the environment downstream.

70. It is recognised that an environmental assessment would require at least 10 years of study. Therefore, in order to be ready when licence renewal becomes necessary, the studies must begin now. Otherwise, there will be a situation where licence renewal is delayed as has occurred with the Kelsey Dam licence. David Cormie acknowledged as much on cross-examination.

Reference: David Cormie, LWR Transcript, March 12th, 2015, p. 494, 572

71. These hearings have been useful in highlighting the areas in which further study is needed. Those studies should be undertaken now.
72. The evidence that the Panel has heard as to the history of NFA implementation should cause them to question any Manitoba Hydro assertion that downstream impacts have been satisfactorily addressed.
73. Pimicikamak submits that imposing new conditions of the sort recommended would provide added motivation for Manitoba Hydro to engage in the types of work that it has already stated it is willing to do. Failure to impose the conditions simply preserves the status quo; a "road map" paved with nothing but good intentions. Pimicikamak has been walking this road for far too long.
74. As pointed out by the CAC, Aboriginal and treaty rights are frequently explicitly recognized in legislation. Environmental objectives can be inserted into operational licenses as well. There is no reason why conditions of the type recommended here cannot be imposed in this case. This is especially so for licence parameters that allows a great deal of discretion in operating decisions.
75. Manitoba Hydro says that licence conditions designed to compel it to implement its "contractual obligations" are neither enforceable or appropriate.

Reference: Janet Mayor, LWR Transcript, April 16th, 2015, p. 2711

76. With respect, the NFA is not a contract but a modern treaty. It has been recognized as such in these hearings. Manitoba Hydro cannot treat it as such only when it is convenient for them to do so.

Reference: Mark Sweeney, LWR Transcript, March 12th, 2015, p. 577

R. v. Badger, [1996] 1 SCR 771, 1996 CanLII 236 (SCC), par. 41

77. Imposing a licence condition requiring that treaty obligations be honoured may be a novel idea, but that does not mean it is unenforceable or inappropriate. Rather, it is in keeping with modern legislation, which often recognizes and affirms existing aboriginal and treaty rights.

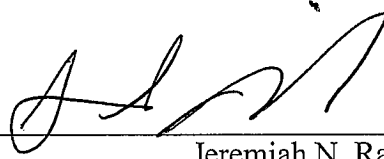
Reference: *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 5

78. Given that Manitoba Hydro has stated its willingness to "do the right thing", in the event that new and reasonable conditions are imposed, they will presumably be willing to follow them.

79. Again, it is with a critical mind, but an optimistic heart that Pimicikamak has participated in these proceedings. Pimicikamak is under no illusions as to the ultimate outcome of LWR; Jenpeg and the bypass channels are not going anywhere. However, it is Pimicikamak's submission that these hearings have shown that a new path is necessary and possible. One in which consideration is given to their rights and needs, and the needs of the ecosystem in the manner in which LWR operates. One in which they are able to exercise their responsibility as stewards of the lands to which they have been entrusted as a people. They are optimistic that the Panel sees that path as well.

All of which is respectfully submitted,

Dated at Toronto this 1st day of May, 2015



Jeremiah N. Raining Bird

Kate Kempton

Solicitors for Pimicikamak