

**Presentation to the Clean Environment Commission hearing on Manitoba
Hydro's application for a permanent licence for the
Lake Winnipeg Regulation Project**

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Canada signed, and is bound by, treaties with First Nations throughout Manitoba and much of the rest of the country. The First Nations around Lake Winnipeg are Treaty 5 peoples who made treaty with Canada between 1875 and 1908.

Changes since 1970

Canada was a very different place 45 years ago, especially with respect to Aboriginal and treaty rights. In practice, these rights were almost completely unenforced in 1970, when the temporary licence to regulate Lake Winnipeg was issued to Manitoba Hydro. Courts had largely refused to support treaty rights and Aboriginal people had been banned from hiring lawyers for several decades (1927-51). In that time, Canadian courts and governments largely lost sight of Aboriginal people's rights and interests. Governments and corporations in Canada took for granted the ability to advance their plans without consulting Aboriginal people or the treaties Canada had made with them.

Today, by contrast, these rights are buttressed by the constitution and a long series of court rulings. In the 1970s, Canadian courts began to affirm that Aboriginal and treaty rights existed and that the rights promised in treaties were meaningful and enforceable. In 1982, the Constitution and the Charter of Rights and Freedoms were put in place. The Charter contains two particularly important sections in relation to Aboriginal and treaty rights. First, Section 25 declares that rights and freedoms guaranteed in the Charter "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ...". Second, Section 35 recognizes and affirms "existing Aboriginal and treaty rights." The charter's creation inaugurated an era of much more robust recognition and enforcement of the rights guaranteed by treaties.

It seems to me very important that this changed legal context should be taken into account in this re-examination of Manitoba Hydro's licence to regulate the water levels in and around Lake Winnipeg. The extensive impact of this regulation on water levels, water quality, and ice conditions, which often drastically affect fish and animal populations, is directly relevant to Aboriginal people's ability to exercise their treaty rights to hunt and fish.

I do not understand why this issue would be separated from this hearing, as though it were a separate matter. It is not separate for First Nations - rather, Lake Winnipeg Regulation is directly relevant to their treaty hunting and fishing rights.

Previous court rulings

In *Nowegijick v. The Queen*, the Supreme Court of Canada made it clear that treaties are to be interpreted broadly rather than narrowly, and that due regard must be had to the understanding of the Aboriginal parties who signed them. Justice Dickson, as he then was, stated for a unanimous court that "treaties and statutes relating to Indians should be liberally construed, and doubtful expressions resolved in favour of the Indians."

In *R. v. Badger*, the court declared that "any limitations which restrict the rights of Indians under treaties must be narrowly construed."

In relation to hunting, a particularly important ruling was contained in *Simon v. The Queen*, concerning the extent to which a 1752 treaty between the British Crown and the Mi'kmaq secured hunting rights to the Mi'kmaq that precluded the application of provincial hunting legislation. Chief Justice Dickson ruled that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians." More specifically, with reference to hunting, he found that the interpretation of the treaty right to hunt should be "sensitive to the evolution of changes in normal hunting practices" and should "[ensure] that the treaty will be an effective source of hunting rights." Further, "the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself."

Treaty 5

Treaty 5 makes a number of significant guarantees.

First, it guarantees to the Aboriginal signatories "that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes ...". Legal scholar Patrick Macklem has carefully analysed the significance of this clause with respect to Treaty 9, made in Ontario in 1905-6. He demonstrates, among other things, that only the federal government may make regulations with respect to hunting and fishing, not provincial governments. He also shows that treaty rights to hunt, fish, and trap have been ruled by courts to include activities reasonably incidental to these occupations. It is reasonable to argue that this would include, for instance, the ability to travel through the land and to access territories for hunting, trapping, and fishing. Moreover, Macklem shows that "The right to fish entails a recognition of a right approximating a treaty right to water."

Another important feature of Treaty 5 is the following clause:

"It is further agreed between Her Majesty and Her said Indians that **such sections of the reserves** above indicated **as may at any time be required** for public works or buildings, of what nature soever, **may be appropriated** for that purpose by Her

Majesty's Government of the Dominion of Canada, **due compensation being made for the value of any improvements thereon.**"

This clause clearly establishes a set of principles concerning the appropriation of Aboriginal lands by government. First, it implies that notice will be given of the government's intention to appropriate lands. Second, it establishes that compensation will be paid for such lands. It is reasonable to suggest that the Aboriginal peoples who signed Treaty 5 expected these basic principles to be followed any time they lost further lands.

Finally, Treaty 5 stated the following:

"It is further agreed between Her Majesty and the said Indians that the sum of five hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets, for the use of the said Indians ..."

This provision clearly showed that the government expected the Aboriginal signatories of Treaty 5 to make their living in part by fishing and hunting. The clause would undoubtedly reinforce in the minds of the Aboriginal peoples their expectation of continuing their ancient livelihoods living off the land.

The significance of treaty hunting, fishing, and trapping rights

Patrick Macklem's study of Treaty 9 includes the significant observation that the peoples of northern Ontario who were involved in the treaty would not have known about hydroelectric power. This is a safe assumption to make about Treaty 5 signatories in Manitoba as well. Macklem investigates the meaning of the provision that Aboriginal hunting, trapping, and fishing rights were curtailed on lands that had been "taken up for settlement, mining, lumbering or other purposes." Clearly hydroelectric power is not listed among the expected uses of land. While there is the potential to argue that it should be included under the phrase "other purposes," Macklem opposes the validity of this approach, stating,

"Given that the Supreme Court of Canada has embraced the proposition that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians,' the phrase 'other purposes' should not be interpreted to include activity not comprehended let alone understood by Aboriginal peoples at the time of signing."

Finally, according to Patrick Macklem's careful analysis of Treaty 9 and the relevant case law, existing Canadian jurisprudence "supports the conclusion that Aboriginal peoples have, by virtue of treaties establishing reserves in exchange for the surrender of ancestral lands, not only rights to an uninterrupted flow of water through reserve land but also rights to water to sustain hunting and fishing rights."

Given the guarantee of Aboriginal hunting, trapping, and fishing rights contained in Treaty 5 and the constitutional protection these rights enjoy under the Charter of Rights and Freedoms since 1982, I submit that the Clean Environment Commission, the Manitoba government, and Manitoba Hydro need to undertake a careful study of the ways in which the construction and operation of the Lake Winnipeg Regulation project has affected and still affects First Nations around the lake. Indeed, these facts reveal the need for a more extended investigation of the impact of the whole vast hydroelectric system on First Nations in Manitoba.