



# WA NI SKA TAN

## An Alliance of Hydro Impacted Communities

June 2, 2021

To Minister of Crown-Indigenous Relations Carolyn Bennett

Dear Honourable Minister Bennett,

We are a group of academics and First Nations' members who have spent years documenting the adverse impacts of hydroelectric projects on Manitoba First Nations. We work collectively through a community-academic research partnership called *Wa Ni Ska Tan: An Alliance of Hydro Impacted Communities*, whose membership includes researchers, academics, hydro-affected community members, concerned citizens, and members of the NGO community in Manitoba. Some of our members are also Treaty rights holders with constitutionally-affirmed and protected rights. For the last seven years we have been documenting the impacts of hydro power on First Nation communities, land, water, and livelihoods with the goal of increasing awareness of the impacts of hydroelectric projects among the general public and fostering social/environmental change.<sup>1</sup> We seek a meeting with Minister Bennett to outline the current unacceptable situation and to map out an appropriate federal response.

At this writing, we are particularly concerned that Manitoba Conservation and Climate has issued a final licence to Manitoba Hydro for operation of the Churchill River Diversion (CRD) without consultation. The decision to issue this license was made in a "closed-door" and secretive manner which was not transparent or conducive to reconciliation with Indigenous peoples. The Federal Government's fiduciary duty to First Nations has been well established by the Courts. We remind you of your constitutional duty to uphold the Aboriginal and Treaty rights of First Nations peoples in northern Manitoba, including the right to harvest from the land and water. The Sparrow decision noted that "Section 35(1)... also affords aboriginal peoples constitutional protection against provincial legislative power" (SCC, 1990). We are calling on the Federal Government to take active and immediate steps to fulfill its fiduciary and constitutional duty to hydro-affected First Nations peoples in northern Manitoba.

Cree communities in northern Manitoba have seen their once-lucrative commercial fisheries destroyed; the waterways which were integral to their livelihoods and cultures are severely

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<sup>1</sup> Please see our website for more information: <https://hydroimpacted.ca>

damaged and unsafe. Drinking water has become contaminated. A number of waterways have become hazardous for navigation, which limits recreational and traditional use. Access to lands and waters, which are critical for the exercise of harvesting and hunting activities, has become difficult and sometimes impossible; harvesting rights depend, in part, on healthy animal populations yet severe damage has occurred to environments on which animal populations rely. Extraordinary cultural and social damage has resulted from hydro impacts in northern Manitoba. These direct impacts of hydro power are clearly contrary to both the spirit and the letter of Treaty 5, which the Cree parties understood as a protection of their livelihoods, cultures, and ways of life.

A number of the current legal and institutional arrangements concerning hydro power were put in place before the patriation of the Constitution and development of the Charter of Rights and Freedoms. In the 1970s and 1980s, courts were beginning to understand the sacred and perpetual character of treaties, which they previously treated as long-terminated real estate deals. They were just starting to recognize the multiple provisions of treaties, especially their guarantee of economic activities, the gap between Indigenous and government understandings of these agreements, and the need for safeguards to ensure that governments lived up to their treaty obligations. The legal and constitutional situation today is radically different from the limited, colonial understanding that prevailed when the Manitoba government established the Manitoba hydroelectric system and the Water Power Act, which allows Manitoba the “right” to alter rivers and waterways. The old colonial practices, however, are still firmly in place here. The honour of the Crown has not been upheld; consultation has been limited or non-existent; and Treaty 5, as well as the Northern Flood Agreement, are being violated on an ongoing basis.

The Churchill River Diversion (CRD) project was, at the time of its construction, a massive undertaking aimed at “harnessing” the power contained in the rivers of northern Manitoba; Canada was party to early studies and some of the subsequent agreements, after the project was completed. Manitoba Hydro, the public utility in Manitoba responsible for the construction and operation of the CRD, was granted an Interim licence by the Province of Manitoba in 1973. This Interim Licence allowed the utility to operate the CRD and was granted at a time when Aboriginal rights discourse was only just coming to the forefront of national attention.

The 1973 Interim Licence, granted by Manitoba to its Crown corporation, effectively sanctioned the forcible diversion of waters from South Indian Lake (SIL), through the Rat and Burntwood River systems into the Nelson River; its impact would cause 10-foot flooding of SIL, harmful and unpredictable water fluctuations, and destruction of shoreline along its route. This resulted, and continues to result, in a total upheaval of Cree lives and livelihoods, and catastrophic cultural, environmental, aquatic, social, and economic impacts, including the forced relocation of the community of SIL and its residents. The project was completed in 1977 and two years later, Manitoba Hydro asked the government to allow testing of the diversion operations with an increased range of water level fluctuations. This testing officially became known as the Augmented Flow Program in 1986, replacing the original terms of the licence. There was no consultation with impacted communities at that time, and only minimal notification after the fact.

The Augmented Flow Program, or AFP as it has come to be known, allowed Manitoba Hydro to “deviate” from the terms of the 1973 CRD Interim Licence significantly. The Interim Licence permitted Manitoba Hydro to fluctuate South Indian Lake only 2’ in any 12-month period, much

like in nature. The AFP “deviation” allowed MB Hydro 6” of additional flooding, 1’ further dewatering and a 4.5’ fluctuation at any time. This is a very destructive hydraulic operation that, under the AFP, was approved annually through a simple letter request and then authorized by the Minister responsible, with no public consultation with the affected communities, no environmental review or impact assessment. The signing of the Final License has, sadly, occurred in the same manner, and includes all the deviations that the AFP had made from the Interim Licence. The only modification made to this Final Licence, effectively differentiating it from the AFP, is the removal of the clause “Manitoba Hydro will fully mitigate impacts of all levels and flows”. With the removal of this mitigation clause, the Manitoba Government has approved a Final Licence that is worse than what had previously existed.

Further, Manitoba and Manitoba Hydro signed an agreement in 1992 with the community of South Indian Lake with predominantly First Nation members, many years after the initial forced relocation. This agreement articulated the AFP but also has terms for its removal. Schedule “D” of the Community Association of South Indian Lake (CASIL) Agreement of 1992 states: “Manitoba agrees to terminate its program and decrease diversion flow to appropriate levels if at any time it appears that the above noted conditions may be violated, or if conditions arise which would present a hazard to local residents”. CASIL has written a number of letters to Manitoba requesting AFP termination, but despite the Government of Manitoba being a signatory to the CASIL Agreement, these calls were ignored. South Indian Lake was recognized formally as a First Nation by Manitoba and Canada in 2005. Manitoba and Manitoba Hydro have ignored several formal requests to honour and implement the clauses in the CASIL agreement and both Manitoba and Manitoba Hydro have, by their actions, refused to talk to the Agreement holders and their members since 2013.

The environmental impacts of the flooding to South Indian Lake are extensive. The entire hydrological system has been altered as a result of this project, resulting in disastrous sudden flushes of water down the Lower Churchill at high water times – sometimes raising the levels of lakes on the river system as much as 5.8m (19’), causing major reductions in water flows and harming aquatic habitats downstream of Missi Falls, causing excessive shoreline erosion along the impacted waterways, discharging suspended sediment and floating wood debris from the erosion into Split Lake, and inundating hundreds of documented culturally significant sites. Fish habitats have been especially affected, with the decimation of the previously lucrative Lake Whitefish fishery. In the decade prior to the CRD, the annual catch averaged about 400,000 kg; in the past decade it has been less than a tenth of this. There has also been near extinction of a distinct and culturally-vital species of Sturgeon, and a rise in fish mercury levels to the point that they were not fit for human consumption. This list of impacts is not exhaustive, but is meant to give an overview of the extent to which the ecosystem has been altered without proper environmental assessments or consultation with the affected communities.

Importantly, the 1973 Interim Licence says nothing about Aboriginal and Treaty rights. In the intervening years, the Churchill River Diversion proved to have devastating effects for Indigenous communities along the Churchill, Rat, Burntwood and Nelson Rivers. Furthermore, the licence itself specified clear restrictions on water level variability on South Indian Lake. These variations have been routinely violated by Manitoba Hydro through its Augmented Flow Program, and those violations have been approved by annual letters of permission from the Province. We have just

learned that these violations have been made permanent with the signing of the CRD Final License which includes identical hydrological limits as the AFP. Please see Table 1 at the end of this letter which highlights that the final license is identical to the AFP despite requests to the contrary by leadership of the affected communities.<sup>2</sup>

Section 35 Consultation, which is a Constitutional requirement along with accommodation where necessary, has not been undertaken in at least two First Nations with respect to the CRD Final Licence that was just signed. Further, Manitoba has ignored their own legislation – the Path to Reconciliation Act, 2016 – which affirms commitments to (among others) building trust with Indigenous peoples, affirming historical agreements, and following the principles set out in the United Nations Declaration on the Rights of Indigenous People (UNDRIP). UNDRIP, as is well-known, clearly stipulates the requirement to consult in good faith and obtain free, prior, and informed consent before implementing any legislative or administrative measures that may impact Indigenous peoples. It appears that Manitoba has violated all of these requirements, has ‘shut the door’ on consultation, and has made permanent a system of hydroelectric regulation that is known to be destroying livelihoods. In our opinion this is a breach of the Constitution and the duty to consult, and, importantly, violates the honour of the Crown.

We are extremely concerned that a Final Licence has been signed as noted above, without any meaningful consultation with affected First Nation communities, and at a time when those impacted communities are dealing with pressing issues related to Covid-19. There was no public hearing for a license that allows water variances to severely harm a culture, a fishery, and a way of life. This was a once-in-a-generation opportunity to have an open, public debate about the real human and environmental costs of this project, but it has now been wasted. And, finally, we are concerned that the federal government appears to have abdicated its constitutional responsibilities to Indigenous, hydro-affected communities in northern Manitoba as it has failed to play any role whatsoever.

The Royal Proclamation of 1763 (affirmed in Sec. 25 of the Constitution Act, 1982) did not merely recognize ‘Indian’ land rights; it also established a principle that the highest governmental authority should be responsible for Indigenous issues. Otherwise, colonial governors would allow and even encourage rapacious ‘developers.’ This logic was affirmed in the BNA Act (1867), which said at 91(24) that ‘Indians and lands reserved for Indians’ were an area of federal responsibility. The courts, notably in *Guerin* (1984), have said such responsibility is sui generis, trust-like and fiduciary-like. Our view is that the Natural Resources Transfer Acts (1930) do not diminish said responsibility, and that the dynamic in place in the 1760s remains in place to this day: regional governments demand ‘development’ at all costs, and the federal government has a responsibility to ensure Indigenous cultural and land rights are respected. We note, in terms of precedents, that federal acknowledgement of a degree of responsibility, shown by its funding of legal costs, was demonstrated to the Northern Flood Committee in the 1970s, leading to the negotiation of the

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<sup>2</sup> Please see the public requests for these changes made by Shirley Ducharme, Chief of O-Pipon-Na-Piwin Cree Nation and Doreen Spence, Chief of Tataskweyak Cree Nation on April 15, 2021: <https://www.winnipegfreepress.com/opinion/analysis/hydro-project-seeks-licence-to-destroy-574209142.html>

Northern Flood Agreement at that time. Similar engagement from the federal Crown is now needed urgently.

Based on the foregoing, we call on the federal government to hold the Province of Manitoba accountable for its actions with regard to the lack of meaningful consultation and the ongoing violation of treaty and Aboriginal rights. The Federal Government must apply its own mechanism for public hearings and conduct a federally-overseen, global review of the Churchill River Diversion Project. We also call on the Federal Government to provide financial and legal assistance to Indigenous communities to ensure their views and needs are adequately reflected in the long-term water and hydropower regime in Manitoba. Any Final Licence should have learned from the mistakes of the past and acknowledged, at a minimum, that if the project is to continue it must do so on the basis of robust recognition and fulfillment of Sec. 35 Constitutionally enshrined Aboriginal and Treaty rights.

The Federal Government has declared an era of reconciliation; the honour of the Crown is at stake in treaty rights violations; meaningful consultation is now a constitutional requirement for the Crown. Given all these commitments and binding legal obligations, the federal government must promptly issue a statement of concern and intervene to ensure the protection and fulfillment of Aboriginal and Treaty rights. Anything less is a constitutional and, in our view, a moral abdication.

Please let us know when the Honourable Minister is available to meet with us to discuss these matters.

Sincerely,



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Professor and Principal Investigator  
University of Manitoba  
Wa Ni Ska Tan Alliance of Hydro-Impacted Communities

CC Prime Minister Justin Trudeau

Minister of Indigenous Services Canada Marc Miller

Minister of Northern Affairs Dan Vandal

MP Niki Ashton

Senator Mary Jane McCallum

Eric Melillo, Conservative Party of Canada, Critic for Northern Affairs & Federal Economic Development Initiative for Northern Ontario

Jamie Schmale, Conservative Party of Canada, Critic for Crown-Indigenous Relations

Gary Vidal, Conservative Party of Canada, Critic for Indigenous Services

Rachel Blaney, New Democratic Party, Critic for Crown-Indigenous Relations & Indigenous Services

Mumilaaq Qaqqaq, New Democratic Party, Critic for Northern Affairs, Deputy Critic for Natural Resources

Leah Gazan, New Democratic Party, Critic for Children, Families, and Social Development, Deputy Critic for Immigration, Refugees, and Citizenship

Jenica Atwin, Green Party of Canada, Critic for Crown-Indigenous Relations and Indigenous Services

<b>Table 1: A Comparison of Interim Licence/AFP versus Final Licence Limits</b>		
<b>Licence parameter</b>	<b>Interim Licence plus the Augmented Flow Program</b>	<b>Final Licence issued on May 13, 2021</b>
Max. level of Southern Indian Lake (in feet ASL)	847.5	847.5
Minimum Level of Southern Indian Lake (in feet ASL)	843	843
Maximum drawdown of Southern Indian Lake	4.5 ft	4.5 ft
Maximum discharge at Notigi Control Structure, May 16 to Oct 31	35,000 cfs	35,000 cfs
Maximum discharge at Notigi Control Structure, Nov 1 to May 15	34,000 cfs	34,000 cfs
Minimum releases at Missi Falls Control Structure in open water season	500 cfs	500 cfs
Minimum releases at Missi Falls Control Structure during ice cover period	1,500 cfs	1,500 cfs
Please note: ASL = Altitude above Sea Level; cfs = cubic feet per second		