At the Crossroads:
Reconciliation, Renewing Relationships and *The Great Binding Law*

Closing Arguments of the Assembly of Manitoba Chiefs
for the National Energy Board Hearings into Enbridge Pipeline Inc.'s
Line 3 Replacement Program

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EXECUTIVE SUMMARY

The Assembly of Manitoba Chiefs (AMC) participation in the National Energy Board (NEB) Line 3 Replacement Program (L3RP) public hearings represented a significant opportunity for regulators and proponents alike to recognize the importance of engaging and working with the Original People of this land.

The participation of the AMC was not about opposition to yet another pipeline project, rather it was and remains about balancing relationships between First Nations, governments, regulators, industry, and Mother Earth. It represented an opportunity for the NEB, Enbridge Pipelines Inc. (Enbridge) and the public to better understand First Nations' sacred and natural laws.

To that end, and guided by a group of highly respected Elders, the AMC sought to introduce *The Great Binding Law* into unfamiliar spaces. This law provides a framework to live in harmony with the land for generations to come. It tells us that if we look after the land, the land will look after us. *The Great Binding Law* is an extension of kindness to newcomers, including regulators and resource developers.

As the Elders have shown through *The Great Binding Law*, the traditional knowledge held by First Nations is not just some relic of the past. It offers regulators and resource developers vitally important information about the land and resources. This information cannot be discounted through an overly romantic view of storytelling. Elders and Knowledge Keeper's stories are the lifeblood of First Nations laws and traditions.

A more robust and fair regulatory process would have allowed more time between the end of the hearing and closing arguments for AMC to seek direction from the Elders on how to best implement *The Great Binding Law*. Rather, AMC is left with many questions about how if at all this Law can be translated into practical regulatory terms.

The NEB public hearing process could have been a hallmark of building strong and healthy relationships between First Nations, governments, regulators and resource developers. Instead, it was mired from the start by a flawed application from the Proponent and a flawed process from the regulator.

Enbridge's L3RP represents the largest project in Enbridge company history. It should also be the safest and rooted in an enduring, resilient and reciprocal relationship with First Nations people.

Time and again, the AMC sought to challenge the NEB to create a better process, one which would provide:

- a forum for the meaningful participation of First Nations;
- opportunities to learn about First Nations' worldviews and laws; and
- opportunities to renew relationships.

Instead the AMC was rebuffed at nearly every turn.

The AMC was also faced with a proponent intent on mischaracterizing major expansion efforts as a ‘replacement program’. A significant pipeline expansion and a change in the type of oil being transported cannot be construed as a simple replacement.

Enbridge missed opportunities to participate in a process with First Nations that involved listening to one another and meeting each others’ needs. This can only happen in a manner grounded in truth and intended to foster mutual respect.

A proponent concerned with making good faith efforts to establish the public necessity of the Project would have filed a complete application at first instance. They would have reached out to First Nations Elders, Knowledge Keepers and representatives much earlier in the process. This would have shown a commitment to standing in good relationships – a commitment which should extend through the life of the project.

Ecological and human health, emergency preparedness and response, and risk management appeared to have been an afterthought to a company that prides itself on its commitment to safety. It should be noted that Enbridge's commitment to safety did not stop over 800,000 gallons of oil from spilling into the Talmadge Creek and Kalamazoo River in 2010. Nor has it stopped Enbridge from ignoring its own environmental protection commitments in relation to the existing Line 3.

If Enbridge cannot be relied upon to operate its current line in a safe and trustworthy manner, what assurances do First Nations and the broader public have that significant environmental effects will not occur?

First Nations concerns must be fully addressed prior to any decision by the NEB to issue any approvals. By dictating a rigid and prescriptive process, the NEB has diminished and frustrated the ability for concerns of affected AMC member nations to be heard. Consultation with these First Nations cannot be an afterthought to a general public consultation.

A limited public hearing process cannot be used to fully discharge the Crown's duty to consult and accommodate directly with First Nations as rights-holders. While the NEB is the master of its own proceedings, it is not a body capable of independently discharging the Crown's duty to consult and accommodate.

The flaws in the underlying application and in the NEB’s treatment of L3RP have made it impossible for AMC to support the issuance of a Certificate of Public Convenience and Necessity. Before consideration of any specific project application, a renewed and balanced relationship between First Nations, governments, regulators and resource developers must be achieved.

Protection of the public interest demands that the NEB refuse to condone deficient project applications. Instead, the NEB should recognize the role it can play in encouraging reconciliation between First Nations, governments, regulators and resource developers. Legitimate environmental decision making is consistent with both the rule and spirit of laws, meets the expectations of participants and the general public, and reflects the best available scientific and traditional knowledge.

It may be too late to cure the illegitimacy of the process in this forum. In response, the NEB should

recommend against a Certificate of Public Convenience and Necessity. This course of action would be a step towards renewing relationships currently badly out of balance. It would also be in line with the Government's commitment to reconciliation with First Nations.[1]

As recently stated by Prime Minister Trudeau, “No relationship is more important to me and to Canada than the one with First Nations, the Metis Nation and Inuit Peoples.”

Conscious of the newcomers' legacy of broken promises and the taking of land and resources without consent, the AMC wish to see a new relationship based on the protection of the First Nations' alliance with Mother Earth.

While the Canadian regulatory laws and processes define these statements as “closing arguments”, in many ways, this is only the beginning of many of these discussions for AMC.

The spirit of *The Great Binding Law* will move forward.

1 The Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015), online at: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Summary Report]; Minister of Indigenous and Northern Affairs' Mandate Letter, online at: <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>.

INTRODUCTION

Recently, Prime Minister Justin Trudeau told the world "Indigenous peoples have known for thousands of years how to care for our planet. The rest of us have a lot to learn and no time to waste."[2]

This statement represents a key moment in history for the recognition of Original Peoples as caretakers of their ancestral lands. First Nations Elders are the true leaders and teachers in their communities. Their knowledge and expertise help First Nations people better understand their identities, worldviews and relationships towards all living beings, including Mother Earth.

As stated in the AMC letter to the NEB on 30 September 2015, the AMC receives guidance from the AMC Elders Council as part of its regular activities.[3] There has been increasing recognition that Elders' teachings are vital to good environmental decision making.[4] Given the Elders knowledge and expertise relating to the environment, the AMC was guided by a group of Anishinaabe (Ojibway), Nehetho (Cree) and Dakota Elders during its intervention in the Enbridge L3RP Hearing before the NEB.

The Elders who assisted the AMC include Oshoshko Bineshiikwe – Blue Thunderbird Woman, Osawa Aki Ikwe (Florence Paynter); Zoongi Gabowi Ozawa Kinew Ikwe – Strong Standing Golden Eagle Woman (Mary Maytwayashing); Nii Gaani Aki Inini – Leading Earth Man (Dave Courchene Jr.); Giizih-Inini (Dr. Harry Bone); Zhonga-giizhing – Strong Day (Wally Swain); Naawakomigowiinin (Dennis White Bird); Kamintowe Pemohtet – Spirit Walker (D'Arcy Linklater); Mah Pe Ya Mini (Henry Skywater).

At the invitation of AMC and prompted by the NEB Hearings into Enbridge Line 3, the Elders gathered over the course of several months with AMC staff and lawyers to work on a Statement. The AMC does not speak for the Elders. Elders speak with their own positions of strength and uncompromised voices. Their Statement - *The Great Binding Law* - was prepared in ceremony at Turtle Lodge at Sagkeeng First Nation, Manitoba. It describes the Elders' deep understanding and love for Mother Earth. It calls on everyone to stand in good relationships with all living beings.

A short while ago, an open invitation was extended by the Elders to attend a Gathering at the Turtle Lodge for the public release of *The Great Binding Law*.[5] Those who attended were given an important learning opportunity. Guests were invited to participate in ceremony and listen to *The Great Binding Law*. The interconnectedness of ceremonies/spirituality and the substance of the Elders' laws and teachings was illustrated. As described by Elder Dave Courchene Jr. during the hearing in Winnipeg:

> In ceremony, we brought in the tree, the water and the soil of Mother Earth to come and listen to the words that were spoken in the lodge, and we asked the song of the drum to carry our message all over the world because the message that we hold as the original

2 The AMC asks the NEB to take judicial notice of: Bruce Cheadle, COP21: Trudeau Says Climate Change Fight Begins At Home, 'No Time To Waste'. *Huffington Post Politics Canada*, (2015, November 30), online at: Huffington Post <http://www.huffingtonpost.ca/2015/11/30/trudeau-arrives-for-busy-day-of-meetings-as-un-climate-conference-gets-underway_n_8679618.html>.

3 Exhibit C3-13-02 – AMC Notice of Motion September 30, 2015.

4 See, for example, Exhibit C3-18-01 - AMC letter to NEB 16 November 2015.

5 Exhibit C3-19-01 – Letter to the NEB re Invitation to attend Elders Gathering November 17, 2015.

> people of this part of the world has been denied a voice for a long time. [6]

For First Nations, the tree which was brought into the Turtle Lodge represents all trees which are given the responsibility to carry messages to the Creator. The message carried to the Creator is that Mother Earth and all living beings are out of balance.

Once *The Great Binding Law* had been spiritualized in ceremony, it was presented by the Elders at the NEB hearings in Winnipeg. The Elders shared a water ceremony, water song and spirit song with those in attendance. Before *The Great Binding Law* was read for the record, Elder Dave Courchene Jr stated that the most important part of the presentation had already happened:

> what you have witnesses in the beginning of our presentation, we feel, is the most important part of our presentation that is reflected in prayer and song because it is an acknowledgement of the spirit and it is an acknowledgement of the land that we receive our songs.[7]

This statement emphasizes the interconnectedness between process and substance for First Nations. This may be difficult for regulators and proponents to understand, however First Nations are frequently called to move within processes that are not their own, such as this NEB hearing process. As stated by the AMC Grand Chief Derek Nepinak in the National Energy Board hearings in Winnipeg,

> It's a very difficult thing for us to try to bring together our ceremony into the secular spaces of the regulatory proceeding that we're here with today. [...] So what you're hearing is a reflection of our human experience and what we know through ceremony. That may be very difficult to reconcile, as I said, within this regulatory type of setting, but nonetheless, it has to happen.[8]

Given the Elders desire to teach and have *The Great Binding Law* as part of the formal record, they agreed to participate in the hearings. For multiple reasons, the decision to participate was difficult for Elders and the experience was uncomfortable.

> I hope you look upon the document as an extension of our kindness. It is written in the English language [so] that you may understand some of what it's trying to say, but believe me when I say that the great power of our cermeony is what has guided this process throughout, and some of you had witnesses that at the Turtle Lodge earlier within the last few days.[9]

As peaceful people, the strength of First Nations people is in ceremonies and teaching lodges. It is the rattles, drums, songs, and languages that also give First Nations strength.

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6 National Energy Board, Transcript for Hearing Order OH-002-2015 in the matter of Enbridge Pipelines Inc. Line 3 Replacement Program. (November 30, 2015) at para 94, online at: National Energy Board, <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/2404881/2545522/2858485/2858384/15-11-30_-_Volume_1_-_A4W0E2.pdf?nodeid=2858785&vernum=-2>.

7 *Ibid* at para 91.

8 *Ibid* at para 76-78.

9 *Ibid* at para 81.

The laws and teachings of Elders remain relevant today. Indigenous people throughout the world are delivering similar messages. Those paying attention to the Climate Change Conference in Paris may have noticed that the Joint Statement released by Indigenous people of the world bears close resemblance to the messages in *The Great Binding Law*.[10]

The AMC fully supports the Elders work and endorses *The Great Binding Law*. While it may be difficult to translate the fundamental values and insights of *The Great Binding Law* into practical regulatory terms, the AMC is both humbled and honoured by the opportunity to present its understanding of the Elders' teachings.[11]

As the AMC reflects on the Elders' messages, it is left with many challenging questions:

- how can AMC ensure the spirit of *The Great Binding Law* remains alive, while recognizing that some translation is needed for regulators and governments to undertake concrete actions?

- what if anything is lost in the act of translating a spiritual document into secular spaces?

- what are the parameters of the relationship between First Nations law and Canadian regulatory laws?

The Elders have extended an invitation to governments, proponents and the general public to take time to pause and reflect.

> *It is only the human being that has severed its natural connection to Mother Earth and lost its connection to her Natural Laws.*
>
> *[...]*
>
> *Nature is always giving us signs to bring us messages. Right now, the human beings are behaving out of balance, and Mother Earth is reflecting that imbalance through climate change.*
>
> *[...]*
>
> *All of humanity needs to make a journey to the land, to sacred sites, places of healing, teaching and connection, to find peace.*
>
> *[...]*
>
> *Our ancestors prophesized of this time- a time of climate change, a time of crosssroads, a time of self-examination, and a time of choice. Our choice is is not a choice of words, it is a*

10 Native News Online Staff , Indigenous Peoples Release Joint Statement to UN Talks in Paris on Climate Change. *Native News Online*, (November 30, 2015), online at: Native News Online <http://nativenewsonline.net/currents/indigenous-peoples-release-joint-statement-to-un-talks-in-paris-on-climate-change/>.

11 AMC recognizes that there is an act of translation happening. As Aaron Mills says “More and more of us identify an act of translation happening and worry about what gets translated out.” see Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today”, forthcoming, at 6.

choice of action.
[...]

We need to stand strong now in alliance with Mother Earth. [...] It will require a peaceful journey back to the Earth, to find our direction for our survival.[12]

Relationships (between First Nations; governments, proponents and regulators) are badly out of balance. The NEB process and filing relating to Enbridge's L3RP exemplifies this imbalance in many ways.

The Great Binding Law teaches us to stand in good relationships. AMC also hopes that it will assist regulators and governments to better comprehend its decision not to support Enbridge's L3RP Project Application at this time.

Relationships must be renewed before AMC can discuss any specific project application. It is for this reason that AMC cannot agree to the issuance of a Certificate of Public Convenience and Necessity for the Enbridge Line 3 Project Application.

12 Exhibit C3-21-01 – Florence Paynter et al, "Ogichi Tibakonigaywin, Kihche'othasowewin, Tako Wakan: *The Great Binding Law*", *Turtle Lodge Gathering 2015* (Sagkeeng, MB: November 28, 2015) [*The Great Binding Law*].

PART ONE:

OGICHI TIBAKONIGAYWIN,
KIHCHE'OTHASOWEWIN,
TAKO WAKAN
THE GREAT BINDING LAW

Overview[13]

Part One begins with an overview of the relationship of Canadian laws to First Nations laws. It asks regulators and governments to put their understanding of First Nations people and laws in abeyance while First Nations laws and worldviews are explained.

Following this discussion, three major points are made relating to relationships:

- First Nations laws are all about relationships;
- Many important lessons are gleaned from basic principles of 'good relationships' which can be applied to environmental decision-makers; and
- Relationships between governments, regulators, proponents, First Nations and Mother Earth are badly out of balance.

This section concludes by describing *The Great Binding Law* in four major movements. The *Law* is presented in this way to assist governments and regulators in better understanding its potential practical implications. *The Great Binding Law* can assist us all in achieving more balanced relationships.

The Relationship of Canadian Laws to First Nations Laws

There is an understanding held by most Canadians that First Nations people and laws should fit within the *Canadian Constitution* and courts. Those who promote this understanding point to the 'recognition of existing aboriginal and treaty rights' in section 35 of the *Constitution*. They may also look to Canadian case law relating to 'Aboriginal peoples' in Canada, including but not limited to: *St Catherine's Milling and Lumber Co v The Queen*[14]; *Calder v British Columbia (Attorney General)*[15]; *Guérin v The Queen*[16]; *R v Sparrow*[17]; *R v Badger*[18]; *Delgamuukw v British Columbia*[19] and *Tsilhqot'in Nation v British Columbia*[20].

While section 35 of the *Constitution* and Canadian case law have impacts on the daily lives of First

13 The Public Interest Law Centre would like to thank Aaron Mills for his significant assistance with Part One of our closing arguments.

14 [1888] UKPC 70. This decision found that Aboriginal title over land was allowed only at the Crown's pleasure and could be taken away at any time.

15 [1973] SCR 1349. This decision represents the first time that Canadian law acknowledged that Aboriginal title to the land existed prior to the colonization of the continent and was not merely derived from statutory law.

16 [1984] 2 SCR 335. This decision states that the government has a fiduciary duty towards the First Nations of Canada and establishes aboriginal title to be a sui generis right.

17 [1990] 1 SCR 1075. This decision states that the aboriginal rights that were in existence in 1982 are protected under the Constitution of Canada and cannot be infringed without justification on account of the government's fiduciary duty to the Aboriginal peoples of Canada.

18 [1996] 1 SCR 771. This case sets out a number of principles regarding the interpretation of treaties between the Crown and Aboriginal people of Canada.

19 [1997] 3 SCR 1010. This decision is recognized as the most definitive statement on the nature of Aboriginal title in Canada.

20 [2014] 2 SCR 44. This decision is the first declaration of aboriginal title by the Supreme Court of Canada.

Nations people, the AMC asks that one set aside this understanding for a moment.

A fundamental challenge in the relationship between First Nations people and newcomers is the failure to recognize that *not everyone* shares the understanding that First Nations peoples and laws must fit *within* Canadian laws and courts. Rather, AMC asks that governments, regulators, proponents and the general public focus on *how* Canadian laws and courts *relate to* First Nations law.

According to Trudeau Scholar Aaron Mills,

> It's becoming part of the orthodoxy of legal education in Canada that Canadian law needs to relate with indigenous legal orders. The centre of the dialogue on that relationship is thus now beginning to shift to *how* they ought to relate with one another. [21]

Moving towards this understanding involves Canadian laws and courts acknowledging that First Nations laws exist and can have real implications. This must be done in a balanced, inclusive and respectful manner.

As stated in Dr. Ken Coates' report prepared for the AMC intervention:

> it is vital to recognize that the traditions remain alive today and that First Nations elders play an honoured role within their societies as repositories and stewards of First Nations historical, cultural and legal knowledge.[22]

For many years, First Nations people in Canada (and Indigenous people throughout the world), have gone to great efforts to learn foreign languages and laws. Today, AMC asks the same in return from governments, regulatory bodies, industry and the general public.

Relationships are everything

Everything is about relationships.

From this worldview, humans and non-humans alike, are all connected through relationships. Humans and non-humans (such as the waters, plants, animals, birds, fish species, and rocks) have relationships with one another.

Relationships can be complicated. They are uncertain and cannot be assumed. Relationships are not always easy and require ongoing work. They require truthfulness, honesty and mutual respect. Relationships involve listening to one another and considering each others' needs. It is only when the needs of *all parties* are met that relationships are healthy.

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21 According to Aaron Mills "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today", forthcoming, at 6: "It's becoming part of the orthodoxy of legal education in Canada that Canadian law needs to relate with indigenous legal orders. The centre of the dialogue on that relationship is thus now beginning to shift to *how* they ought to relate with one another"

22 Exhibit C3-09-02 - Dr. Ken Coates, *First Nations, Infrastructure and Indigenous Participation With Major Resource Projects*, (2015) at p 8 .

Healthy relationships must be renewed periodically. Just as silver should be polished before it gets tarnished, relationships should be renewed before they become irreparable. Renewing relationships also encourages understanding. The more parties meet, the more they can learn about and from one another. Frequent and open dialogue leads to accepting rather than fearing each others differences.

First Nations laws are all about relationships.[23] These laws explain the parameters and governance of relationships, aiming at achieving good relationships. They teach that everything is related and one cannot think about the impacts of decisions to humans without considering the impacts and needs of all living beings.

Relationships are badly out of balance

The relationships between First Nations people, regulators, governments, proponents and Mother Earth are badly out of balance.

A closer examination of the historical relationship is needed to better understand the origins of this imbalance.

For many First Nations people, the *Royal Proclamation of 1763* and signing of treaties commencing in the 1870s represented a foundation for their relationship with the 'Crown'. It was a framework for how the parties were going to relate to one another. Historical accounts speak of relationships which would be based on peace, mutual respect and nation to nation governance.[24]

The process of treaty making was and remains an acknowledgement of the sovereignty of First Nations people. The fact that settler governments felt that they had to enter into Treaty is proof of recognition of sovereignty of First Nations people. If the land did not belong to anyone (or was truly '*terra nullius*') then settlers would have had no reason to enterinto Treaty with First Nations.

For First Nations, the treaty-making process outlined the framework of relationship between settler governments and First Nation governments for the purpose of accessing lands. Understandings were reached in order for these settler governments to begin settlement, including with agricultural land use and the construction of railways.[25] Many of the questions relating to the treaty-making process and the different understandings of this relationship remain unanswered.

In the AMC Elders Council book *Dtantu Balai Betl Nahidei: Our Relations to the Newcomers* (2015), what followed treaty-making and treaty-signing has been characterized by:

> **broken promises** and the introduction of government policies and laws that resulted in **mostly negative impacts** on First Nations peoples' lifestyles, livelihoods, and **their relationship with the land**. As a result, the relationship with the Federal Government, as

23 For a further discussion, see for example: John Borrows, Drawing Out Law: A Spirit's Guide (Toronto: University of Toronto Press, 2010) at 8; Aimée Craft, Breathing Life into the Stone Fort Treaty, (Saskatoon: Purich Publishing, 2013) at 16; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today"forthcoming, at 10.

24 See, for example, Coates, *supra* note 22, at p 8; D'Arcy Linklater & Harry Bone et al, "Kaa'esi Wahkstonumanhk ski: Our Relations with the Land:Treaty Elders' Teachings" (Volume II) AMC 2014.

25 See generally Coates, *supra* note 22.

> shared by the Elders, was not always harmonious, characterized by standard personal relationship issues such as lack of communication and the **lack of respect and understanding each others importance in the relationship**.[emphasis added][26]

The enactment of the *Indian Act,1876*, the residential schools system[27], and economic development and resource activities on Mother Earth have all had serious negative impacts on relationships.[28] These negative repercussions cannot be over-emphasized.

On 7 December 2015, Prime Minister Trudeau spoke to the Assembly of First Nations Chiefs in Assembly and committed to work with Indigenous Nations and Treaty Partners on a "nation to nation" basis.[29] As the AMC reflects on what "nation to nation relationships" may look like, it is reminded by the Elders that renewing relationships between First Nations and non-First Nations peoples and governments necessarily involves renewing our relationships with Mother Earth.

The Great Binding Law

An invitation was extended by the Elders working with AMC to learn about *The Great Binding Law*. The purpose of sharing this Statement was not to speak in favour or against the Enbridge's L3RP. Rather, *The Great Binding Law* was shared by the Elders as a gift and teaching exercise.

The Great Binding Law tells us that if we look after the land, the land will look after us. It tells us that we are all connected through a web of relationships. *The Great Binding Law* explains that the way we treat one another is law.

For the purposes of assisting the regulator, proponent and the general public in comprehending *The Great Binding Law*, we have divided it into four movements. We use the word "movement" deliberately to illustrate their interconnectedness.

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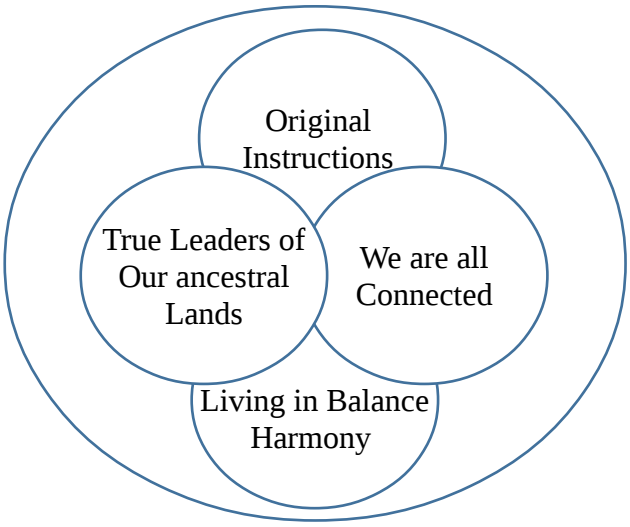
26 Joe Hyslop, Harry Bone et al, "Dtantu Balai Betl Nahidei: Our Relations to the Newcomers" (Treaty Elders Teachings Volume III) (2015) at p 22.

27 The first residential school opened in 1851 and the last ones closed in 1997. See TRC Summary Report, *supra* note 1, at 357, 359, 360, 361.

28 Hyslop, *supra* note 26 at p 10.

29 Joanna Smith "Trudeau Commits to 'nation-to-nation relationship' with First Nations" (2015, December 8) *The Star.com*, online at: The Star <http://www.thestar.com/news/canada/2015/12/08/trudeau-commits-to-nation-to-nation-relationship-with-first-nations.html>.Specifically, the Prime Minister committed to 1) launch a national public inquiry into Missing and Murdered Indigenous Women and Girls; 2) make significant investments in First Nations Education ; 3) lift the two per cent cap on funding for First Nations programs; 4) implement all 94 recommendations of the Truth and Reconciliation Commission; 5) repeal all legislation unilaterally imposed on indigenous people by the previous government. The commitment to work with Indigenous people on a nation to nation basis was included in the TRC recommendations. The AMC asks the Board to take judicial notice of this.



1. Original instructions

In the beginning, when time started, a long, long time ago, Kizhay Manitou, the Great Spirit, gave us one universal law – Ogichi Tibakonigaywin – a Law that connects us all. Through this Law we were all given our unique languages, songs, ceremonies, ways of life, teachings, and stories. We were all given our ways of loving and taking care of Mother Earth.

Kizhay Manitou put spirit in Mother Earth and all of life. We come from the spirit world and flow through the Earth. We will all return to the spirit world and to the Earth when our journey on Earth has been completed.

Mother Earth is alive and she is the Original Mother of life. She has a living spirit and she is sacred. Mother Earth is so beautiful – she is the most beautiful creation – the most beautiful woman of all.

As the Mother of life, Mother Earth gives birth, and gives us everything we need to live- the food, the water, the medicines, the clothing, the shelter, and most of all, the love, kindness and teachings that a mother gives to her child.

Her teachings are reflected in Natural Laws – the balance of nature in the rising and setting of the sun, the patterns of the weather through the winds, the rains, and the elements of life, the natural flow of the blood of the Earth through the rivers and the oil beneath her, the cycles of the moon and the breaking of the waters when a child comes, as woman gives life in the most natural of ways. As long as we are breathing this beautiful air, whether we realize it or not, there is an invisible umbilical cord that always connects us to our Original Mother – our life source, Mother Earth.[30]

30 *The Great Binding Law, supra* note 12.

In this first movement, the Elders tell us that the Creator gave *The Great Binding Law* to the Original Peoples of this land.

At that time, the Original Peoples were given their original instructions through their languages, songs, ceremonies, ways of life, teachings and stories. These original instructions provided that the Elders would be the keepers of Mother Earth. They would be responsible for caring for Mother Earth and ensuring her survival.

The *Spirit Trail of Life* story in Appendix A to *The Great Binding Law* describes what is meant when First Nations say that they are part of Mother Earth. The story explains that the Creator put spirit in all living beings, including in Mother Earth. Once we die, our body goes back to the Earth and our spirit leaves us, then returns to the heavens.

To demonstrate that humans are part of Mother Earth, First Nations point to the fact that we are born in water, one of nature's most basic elements. The story in Appendix C: *You are Like Mother Earth* also makes this point:

> *Your flesh and body represents Mother Earth.*
> *Your bones represents the stones.*
> *Your hair represents the Tree Nation.*
> *Your fine hair on your body represents the medicines and grasses.*
> *Your small veins represents all rivers.*
> *Your heart represents all the lakes.*
> *Your liver represents the oceans.*
> *Your four limbs represents four brother winds.*
> *Your head represents the heavens.*
> *Your blood flows the same way as the waters.*
>
> *We should look after Mother Earth like we look after ourselves.*[31]

This story teaches us that what we do to Mother Earth we do to ourselves. Mother Earth is alive and gives us everything we need to live. The Elders explain how Mother Earth's teachings are reflected in Natural Laws. As stated in *The Journey of the Spirit of the Red Man*:

> Since time immemorial, the Red people survived by following Laws of the Land, also known as natural laws, which helped us to live in balance and harmony. Reflected in the circle and cycles of life, laws and are learned by observing Mother Earth [...] Nature keeps repeating herself so that we come to understand balance. We are supposed to follow Laws.[32]

Natural Laws teach First Nations that there are many events and actions that are beyond human control. This includes but is not limited to the way the water flows, the rise and setting of the sun and the timing of precipitation. Natural laws also teach humans and other living beings how to relate to each other.

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31 *Ibid.*
32 Harry Bone et al, *The Journey of the Spirit of the Red Man*,(Turtle Lodge: Trafford, 2012) at p 29.

2. We are all connected and we are all relatives

> *In Nehetho, the word Waskaawe siweno (was- kaah-way-see-win) means "Everything around you" and describes how we are all connected.*
>
> *In Dakota, Mitakuye Owasana means "All my relations – we are related." We are related to the starts in the sky, the birds, the fish, the animals and the plant life.*
>
> *In Anishinaabe, Nikanisitook acknowledges, "All my relatives in life."*
> *[...]*
>
> *As unique Dakota, Nehetho, and Anishinaabe Peoples, we speak with one voice. We have respect for each other. As the Original People we welcome you. We come forward to share with you. We come to share that love with you. We bring our shared understanding and that is this:*
>
> > *We are all brothers and sisters and we have a sacred responsibility to take care of and make an alliance with Mother Earth.*[33]

In the second movement, the Elders tell us that as people, we are all connected to one another and to all living beings (including the animals, the land, water and the air). From this perspective, the environment must be viewed holistically. One cannot think of a living being without considering the impacts to the environment as a whole.

First Nations understand all living beings as relatives. As demonstrated by the Story in Appendix B - *The Selfish Son/Greedy Son*[34], human actions have a direct impact on Mother Earth. When the Elders speak about their concerns for Mother Earth, they speak about humans, air, the plants and animals, medicines, water, and all other living beings.

Not only are we all connected but we are all relatives and we are all equal. Humans and non-humans are important and must all be considered of equal value in decision-making to live a balanced life.

3. Living in Balance and Harmony

> *With the exception of the human being, all of the other living beings of creation have continued to follow their Original Instructions and live in balance and harmony with Natural Laws. It is only the human being that has severed its natural connection to Mother Earth and lost its connection to her Natural Laws.*
>
> *We cannot continue to disrupt the Natural Laws of life. If even one of us disrespects that Great Binding Law, if affects us all, and it will come back to us. Nature's Laws are self-enforcing. What we put into our circle always returns to our web of life. Mother Earth will have the final say because she is the Mother to us all.*

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33 *The Great Binding Law, supra* note 12.
34 *Ibid.*

Nature is always giving us signs to bring us messages. Right now, the human beings are behaving out of balance, and Mother Earth is reflecting that imbalance through climate change.

We are the Earth. We are the voice of the Earth. In our Original Instructions as human beings, Kizhay Manitou gave us the responsibility to respect, take care of, and most importantly to make a journey to Mother Earth, to connect to the land and learn how to live.[35]

In the third movement, the Elders tell us that some of us have chosen not to follow the Original Instructions which help us stand in good relationships with all. With the exception of human beings, all other living beings have continued to follow their Original Instructions and live in balance and harmony with Natural laws.

The Great Binding Law reminds us that our actions have consequences. Mother Earth is giving us signs that she is out of balance. One of these signs is climate change. As the Original Peoples of the ancestral lands, First Nations have the responsibility to be the voice of Mother Earth.

4. True Leaders of our Ancestral Lands

We are the free and independent Original People of this land. As the roots of this land, we are the true leaders of ancestral lands – Manito Ka Apit – Where Kizhay Manitou – the Great Spirit – sits.

We come from the Dakota, Nehetho, and Anishinaabe Nations who have lived on our ancestral lands since Kizhay Manitou placed us here with our languages, songs ceremonies, teachings and ways of life. We have always been here.

[...]

Kizhay Manitou had a vision of a world filled with peace and love. It is through the land that we can find that peace and love.

All of humanity needs to make a journey to the land, to the sacred sites, places of healing, teachings and connection, to find peace.

We make an invitation to the whole human family, and all the children, to come to our lodges so we can teach them to love the land, connect to the land, and take care of the land. Our journey begins with gratitude to the Earth and to the Spirit. Kizhay Manitou gave all of us gifts to share with each other, to take care of the Earth and all life.

In our lodges, the children will hear the teachings, feel the ceremonies and feel the love for Mother Earth.

Our ancestors prophesized of this time – a time of climate change, a time of crossroads, a

35 *Ibid.*

time of self-examination, and a time of choice. Our choice is not a choice of words, it is a choice of action. We need to stand strong now in alliance with Mother Earth.

We are all in this together. Today, we call on all Nations of the world to join us in the spirit of our Original Instructions to care for Mother Earth together, and find true peace.

It will require a peaceful journey back to the Earth, to find our direction for our survival.

In the fourth movement, the Elders emphasize that the Original Peoples have lived on this land since the Creator placed them here. First Nations continue to live on their ancestral lands. The languages, songs, ceremonies, teachings and ways of life that were given to First Nations at that time still exist today.

First Nations are deeply connected and related to the land. They are the true leaders of their ancestral lands.

First Nations people are concerned about the effects of resource development on the environment. The impacts of these economic activities have unbalanced Mother Earth. All humans have a responsibility to right the balance within Mother Earth. However, the Elders play a leadership role in reaching a level of balance and harmony. The Elders extend their invitation to all to join them in their lodges and ceremonies to learn about the importance of good relationships with Mother Earth. Hearing the drum in ceremony will remind all children and their families of the heartbeat in their mother's womb and the heartbeat of Mother Earth. This is necessary for our survival and for all future generations.

PART TWO:

Flawed Application, Flawed Process, and Flawed Results

Overview

Part Two begins with an overview of the deficiencies in the regulatory framework. It questions the decision of the NEB to adopt an impoverished public hearing process. It identifies the relationship tensions amplified by a limited regulatory process, namely:

- a hollow relationship between Enbridge and First Nations, further exacerbated by Enbridge's questionable safety record; and
- unlawful Crown actions in an already flawed regulatory process, particular with respect to the Crown's duty to consult directly with First Nations rights-holders.

Following this discussion, there is an analysis of the way in which process and substance are inevitably intertwined. The AMC's continuing concerns around the illegitimacy of the public hearing process, in some ways, cannot be separated from substantive concerns about the project application. The process and substantive concerns are one and the same.

This section concludes with a description of the broad environmental concerns borne by AMC in this process. Namely, the absence of:

- a holistic consideration of environmental effects;
- equal value between western scientific knowledge and traditional knowledge;
- an assessment of cumulative and downstream effects; and
- an understanding that environmental effects do not end at international or other borders.

The Defective Regulatory Framework

AMC's submissions have been driven by a recognition of the importance of standing in good relationships with all. This focus on good relationships extends to the relationship between First Nations and regulatory and licensing bodies, like the NEB, who have been tasked with considering project applications around pipeline expansions and development.

The framework for the NEB's consideration of project applications like L3RP comes from both the *National Energy Board Act*[36] (*NEBA*) and the *Canadian Environmental Assessment Act, 2012*[37] (*CEAA 2012*). However, statutory directions under *NEBA* and *CEAA 2012* are inherently limiting.

In particular, there are significant concerns about the manner in which CEAA 2012 deals with environmental assessments. Changes to the legislative landscape in 2012 resulted in a narrower regulatory reach for environmental assessments, limits on factors to be considered, shorter timelines and the reduction in participation. All of these changes unravel opportunities for the environmental

36 RSC 1985 c N-7.
37 SC 2012, c 19, s 52.

process to be a way for affected parties to influence decisions. The amendments ignore the needs of First Nations who are directly impacted by the regulators. The current restrictions further damage the relationship with First Nations and undermine the public trust and legitimacy and openness of the federal environmental assessment process.[38]

Legislators have been driven by a narrow view[39] of the parameters of the Canadian legal system. This narrow view discounts the existing and ancestral First Nations laws – sacred, natural, human – of the Original People.

The Choice to Adopt an Impoverished Process

The issues raised by the Enbridge application are complex and of fundamental regulatory importance. Faced with complex proceedings of fundamental importance, other regulators have chosen to adopt relatively robust public processes.

Notwithstanding its underpinnings in a narrow legislative view, the NEB has been given wide-ranging powers as a court of record.[40] The NEB has made clear that it is the master of its own procedures.[41] Yet, even with the broad discretionary powers afforded to it, the NEB continues to create public hearing processes that are seriously constrained and not in keeping with some of the more robust public processes available across jurisdictions and amongst comparatively sophisticated regulators.[42]

An impoverished public hearing process exacerbates the legitimacy gap. First, the currently narrow legislative view of the role of a national pipeline regulator[43] undermines the credibility and legitimacy of the NEB itself. Then, to make matters worse, unnecessary and procedurally unfair hearing limitations drive the NEB further towards an over-reliance on western legal and scientific traditions. Despite the legislative bias towards these traditions, the NEB has failed to incorporate even these limited traditions in a manner which upholds the spirit and intent of the principles of natural justice and the rule of law.

More troubling yet, the over-reliance on western legal and scientific traditions comes at the expense or marginalization of equally valuable First Nations legal and scientific traditions and effectively silences First Nations. This silencing effect must be understood within the broader context of the reality of Indigenous-newcomer relationships – encumbered by this country's legacy of colonization.

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38 Kirschoff, D, & Tsuji, LJS "Reading between the lines of the 'responsible resource development rhetoric: The use of omnibus bills to 'streamline' Canadian environmental legislation" (2014) 32(2) Impact Assessment and Project Appraisal, 108-120 at page 110.

39 For additional discussion of this issue, see for example, Exhibit C3-09-02. Dr. Ken Coates, *First Nations, Infrastructure and Indigenous Participation With Major Resource Projects* at section 1.2, page 7, paragraph 4.

40 See for example, Part I of the *NEBA*, *supra* note 36 and section 4 of the *National Energy Board Rules of Practice and Procedure*, 1995 (SOR/95-208).

41 See, for example, Exhibit A049 – National Energy Board – Ruling No. 15 and Order AO-002-OH-002-2015.

42 See, for example, the Canadian Radio-Telecommunications Commission and its process for challenging responses to information requests ; the Manitoba Clean Environment Commission and the Manitoba Public Utilities Board for its more robust public participation model. See also, previous NEB processes, including the McKenzie Valley Pipeline, Northern Gateway, and Alberta Clipper Expansion Project.

43 Exhibit C3-08-08 – Dr. James Robson and Dr. Patricia Fitzpatrick, *A Critical Analysis of the L3RP Aboriginal Engagement Process*, at para 7.

At the first incarnation of Enbridge's Line 3, proponents and governments had little to no regard for First Nations voices. In fact, it had only been a few short years since First Nations people had received the right to vote in Canada. Continuing to silence First Nations knowledge and laws sends a strong message to First Nations that their knowledge and expertise is less worthy to regulators and governments.

Not only was there no consultation with First Nations, according to Enbridge there was simply no specific assessment for the original pipeline.[44] For all Canadians, and in particular, all First Nations, this is the first time in the 50 plus year history of this pipeline, that their voices can be heard before the NEB.

Enbridge has characterized this project as a replacement program, on primarily privately tenured lands and in a busy development corridor – already busy at the time of initial construction and still busy today.[45] This characterization fails to reflect the sad reality that this line was planned and constructed with no known consultation or engagement with the First Nations whose ancestral lands the pipeline crosses.[46] Constitutional affirmation and recognition of "aboriginal and treaty rights" was still two decades away.

The Amplification of Tensions in the Relationship between First Nations and Regulators

The limits of the regulatory process – both inherent and self-imposed – lead to tension between rights-holding First Nations, rights-defending First Nation political organizations like the AMC, and regulators like the NEB. The amplification of these tensions is three-fold:

(1) when the relationship between the project proponent and First Nations is out of balance;

(2) when there are many outstanding questions and uncertainties with the relationship; and

(3) when the Crown intends to rely upon the NEB's process to fulfill its duty to consult and accommodate rights-holding First Nations in good faith and with the honour of the Crown.

A Hollow Relationship with the Proponent

When proponent-led project-specific engagement efforts are not part of an ongoing relationship built on mutual respect, a lack of trust emerges. A lack of confidence that development will unfold in a responsible manner is an impediment to building and continuing healthy relationships between First Nations and proponents.

When relationships between governments, proponents, and First Nations are not renewed on a regular

44 Exhibit B18-02 - Enbridge Response to AMC IR No. 1 at 1.27 at page 34.
45 See, for example, Exhibit B35-02-Reply Evidence of Enbridge, pages 9-10, paragraph 19.
46 Coates, *supra* note 22 at section 4.0, page 11, paragraph 9.

basis, differences may grow. The lack of opportunities to openly discuss differences and speak about potential solutions creates conflicts. In this case, the imbalanced relationship between Enbridge as resource developer and First Nations peoples as the Original People of this land spills into the regulatory arena.

A less than laudable safety record

Enbridge's own safety record does not instill confidence. The 2010 Kalamazoo River spill included a rupture that was not discovered or addressed for over 17 hours. Despite activated alarms, Enbridge twice pumped additional oil into the line – this additional oil accounted for over 80% of the release.[47]

The US National Transportation Safety Board recognized "pervasive organizational failures" that made the rupture and prolonged release possible, including:

- deficient integrity management procedures;
- inadequate training of control centre personnel;
- insufficient public awareness and education; and
- failure to identify and ensure the availability of well-trained emergency responders with sufficient response resources.[48]

Concerns around Enbridge's actual safety track record, particularly in light of the alarming nature of the Kalamazoo River spill, have gone largely unanswered by the corporation, save for platitudes like "safety is the number one priority."[49] AMC is less concerned with Enbridge's stated priorities and more concerned with its actions and inactions, including its actual ability to operate safely and demonstrate it can be trusted.

These concerns are not alleviated by significant administrative monetary penalties (AMP) recently levied against Enbridge, especially with respect to the existing Line 3. As recently as March of this year, Enbridge was fined $200,000 in relation to its failure to ensure that construction activities did not create a hazard to the public and its failure to follow through on environmental protection commitments made earlier in the year with respect to Line 3.[50]

At the same time, the company was fined $64,000 for making design changes to storage tanks associated with a Plains Wascana project, which changes had not been approved as required.[51] Only a few short months later, Enbridge was again fined for its failure to ensure that a pipeline was designed,

47 Exhibit C3-09-01 – Gerry Kruk, *Public Policy and The Pipeline Industry: Regulatory Best Practices Re Pipeline Integrity and Emergency Response Measures*,at paras 5-12.

48 National Transportation Safety Board, *Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release,* Marshall, Michigan, July 25, 2010, online at: NTSB <http://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf>., as cited in Kruk, *ibid*.

49 Exhibit B35-02 - Reply evidence of Enbridge, page 10, paragraph 25.

50 National Energy Board, *Administrative Monetary Penalties Regulations*, online at: National Energy Board <http://www.one-neb.gc.ca/bts/ctrg/gnnb/dmnstrtvmntrypnlts/index-eng.html>.

51 *Ibid*.

constructed, operated or abandoned as prescribed – this time, $52,000 relating to Line 4 in Strome, Alberta.[52]

Enbridge's recent failure with respect to it environmental protection commitments is particularly disturbing as described by the NEB itself. As reported by the Financial Post:

> According to details of the penalties provided by the NEB, when work on Line 3 dragged further into 2014 than Enbridge had initially planned, the board asked for an update to the company's environmental protection plan. But Enbridge's response in March "provided inconsistent status statements to what inspectors would later observe on site in July," the board said.
>
> What resulted were "numerous non-compliances observed both on and off the construction (right-of-way) causing environmental damage to wetlands and property damage to a substantial amount of agricultural land."[53]

Enbridge's troubling safety record and frequent regulatory penalties assessed against its operations contribute towards a lack of trust in the company.

The Honour of the Crown has not been upheld

As stated by AMC Grand Chief Nepinak,

> And when I talk about consultation, I'm not just referring to the consultation between proponents and our communities or from the Board and our communities, but I'm talking about a Crown consultation as a duty owed to the treaty people from these territories. As I've mentioned, we're in Treaty One Territory, and there has to be a degree of consultation between the Crown and who we are to respect that treaty-based relationship that we're from. [sic][54]

Restrictions placed by the NEB on Intervenor participation significantly limited parties' ability to raise issues and concerns related to Enbridge's L3RP. A limited public hearing process cannot be used to discharge the Crown's duty to consult and accommodate in whole and directly with First Nations as rights-holders. While the NEB is the master of its own proceedings, it is not a body capable of independently discharging the Crown's duty to consult and accommodate.

The AMC recognizes that Parliament may chose to delegate certain procedural aspects of the duty to consult to tribunals. In this case, the previous federal government advised that it would rely on the NEB hearing, to the extent possible, to fulfill its duty to consult First Nations on Enbridge's project. The

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52 *Ibid*.

53 The NEB may take judicial notice of its own comments in Lauren Krugle, "Enbridge racks up $264,000 in National Energy Board penalties this month", Financial Post, March 20, 2015, online at: Financial Post <http://business.financialpost.com/news/energy/enbridge-racks-up-264000-in-national-energy-board-penalties-this-month?__lsa=4c1f-2dbb>.

54 National Energy Board, Transcript for Hearing Order OH-002-2015 in the matter of Enbridge Pipelines Inc. Line 3 Replacement Program at para 84.

newly elected federal government has not clearly stated otherwise.

In certain cases and within very particular sets of circumstances, the Supreme Court of Canada has accepted that an environmental assessment process is sufficient to satisfy the procedural requirement of the duty to consult.[55] This is not the case. It is unacceptable to expect to replace the duty to consult with an environmental assessment. If procedural aspects of the duty to consult and accommodate are being delegated to the NEB, the NEB's public hearings must reflect a more robust public process. Its actions must be consistent with the honour of the Crown. The honour the Crown has not been upheld.

Consultation as an Afterthought

The reliance here on the NEB's process in whole demands increased regulatory vigilance over an already-criticized public hearing process. The AMC is not aware – through its member or any other First Nations – of any efforts on the part of the Crown to engage in a consultation process directly with rights-holding First Nations with respect to Enbridge's L3RP. Any direct engagement or dealings by First Nations with Enbridge should not be confused with the Crown's own obligations around consultation.

The Crown, as represented by the Government of Canada, owes a duty to consult AMC's member nations affected by the proposed Project under section 35 of the *Constitution Act, 1982*. The Crown must engage in direct consultation with affected First Nations, rather than rest on the limited public engagement offered by the NEB.

The duty to consult is grounded in the honour of the Crown – the NEB process in its current form cannot be understood to satisfy the procedural requirements of the duty to consult and accommodate. To rely on such a process, without more, would be unconscionable and inconsistent with the honour of the Crown.[56]

An effective consultation process should be collaborative. The NEB rules of procedure were made without input from First Nations. These First Nations now have to live with rules that they did not have any say in and which limit their ability to communicate concerns related to the Project.

The AMC is concerned that by relying wholly upon a process that cannot, in its current form, provide a legitimate forum for First Nations to express their views about the proposed L3RP, the Crown will be without the necessary information to appropriately engage with First Nations with respect to Enbridge's proposal.

First Nations concerns must be fully addressed prior to any decision by the NEB to issue a certificate of approval to Enbridge's L3RP. The needs and gifts of each of the parties must be discussed for a true consultation process to occur. By dictating a rigid and prescriptive process, the NEB has diminished and frustrated the ability for concerns of affected AMC member nations to be heard. Consultation with these First Nations cannot be an afterthought to a general public consultation.[57]

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55 See, for example, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74.

56 The Supreme Court of Canada has stated that it would be unconscionable for the Crown to ignore the oral terms of treaties and rely only on written terms. See *R v Marshall*, [1999] 3 SCR 456, at para 12.

57 See, for example, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage,* 2005 SCC 69 at para 64.

Consultation as an afterthought is both unacceptable and unlawful when one considers the state obligations recognized in the *United Nations Declaration on the Rights of Indigenous People* (*UNDRIP*). Article 32 of *UNDRIP* specifically recognizes that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[58]

The federal government has stated its intention to implement the recommendations of the Truth and Reconciliation Commission, starting with the implementation of *UNDRIP*.[59] Regulators and resource developers alike can no longer ignore the reality of the requirement for First Nations' free, prior and informed consent in relation to resource development projects.

The NEB has a choice. Challenged with the reality that the Crown is heavily relying on it to discharge its own constitutional duties, the NEB has an opportunity and indeed an obligation to implement a process that reflects the honour of the Crown and the weight of the Crown's duties.

Continuing on its current path, with limited public hearings and unnecessary restrictions on First Nations' meaningful participation, will only lead the NEB further astray. The NEB must make best efforts to address its ongoing legitimacy crisis.

Process and Substance Cannot Be Separated

The AMC is faced with coming to the NEB when its underlying relationship with Enbridge, and the NEB, and governments is largely out of balance. This places an even greater burden on the NEB in terms of its obligations within the broader scope of the public interest[60] and the potential cumulative effects of Enbridge L3RP.[61]

The initial project application was bereft of necessary details and entirely missing key components, including, but not limited to:

- information about any prior assessments, including baseline and subsequent assessments through the life of the current line;
- detailed explanations of the change in capacity of the line;
- complete assessments of affected land parcels, and information as to whether studies on land

58 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online at: <http://www.refworld.org/docid/471355a82.html>.

59 The NEB may take judicial notice of both the Minister of Indigenous and Northern Affairs' Mandate Letter, online at http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter and the TRC Summary Report, *supra* note 1. Calls to Action 43 and 44 speak specifically to the implementation of UNDRIP.

60 *NEBA*, *supra* note 36 at s 52(2)(e).

61 *CEAA 2012*, *supra* 37 at s 19(1)(a).

parcels missed in 2013 and 2014 were ever completed;

- an ecological and human health assessment;
- detailed explanations of engagement activities (including a detailed understanding of engagement outcomes as opposed to a laundry list of activities without description);
- direct First Nations voices and plans to directly integrate these voices;
- specific information on how traditional knowledge was used to enhance the assessment process and the results;
- detailed and robust monitoring programs as opposed to compliance-directed statements;
- determination of where proposed decommissioning activities would take place;
- specific greenhouse gas (GHG) calculations on potential spills, leaks or ruptures;
- detailed information about potential oil spills, leaks or ruptures and Enbridge's response plan.

Nor had preliminary engagement efforts occurred in a timely fashion.[62] As a result of the deficiencies in the initial filings and in Enbridge's engagement efforts, the NEB's ability to discharge its duties is hampered.

While it would be difficult to craft a regulatory process that could adequately cure the deficiencies in Enbridge's initial filing, these difficulties were compounded when the NEB deemed the application complete on February 4, 2015. This discretionary decision started the clock on the NEB's regulatory duties, setting an ultimate deadline for submission of the NEB's report to its Minister.[63]

Faced with an artificial timeline for completion attached to a deficient project application, the NEB crafted a process that significantly limited the parties' ability to raise issues and concerns related to Enbridge's L3RP. The process effectively required Intervenors to bear the onus of ensuring that Enbridge submitted a complete project application, never mind a defensible one. As a result, what have been characterized as process concerns cannot be separated from substantive concerns with respect to Enbridge's L3RP.

Throughout the regulatory process, AMC has raised concerns about the legitimacy of the NEB's public hearing process and the lawfulness of any decision made as a result. Notwithstanding the NEB's addition of a second round of information requests and the permission to make closing arguments both orally and in writing, the AMC's continuing concerns, broadly stated, are the limited scope of the oral hearings and unnecessary limits placed on Intervenor participation:

- Enbridge is not required to present a project overview in a public forum;

62 Robson, *supra* note 43.
63 *NEBA*, *supra* note 36 at s 52(4).

- Enbridge is immunized from cross-examination and its evidence cannot be adequately tested – information requests without a procedural mechanism to ensure a full and fair answer by the party questioned do not adequately replace the need for cross-examination;

- Intervenors are unable to respond to the whole of Enbridge's filings:
    - Enbridge is allowed to file evidence which will not be subject to information requests by Intervenors;
    - Enbridge is allowed to file evidence after opportunities for Intervenors to file expert evidence in response have been exhausted;
    - Independent expert evidence was not respected or given its full weight. Its value was unnecessarily limited through a lack of testing of the evidence;

- There are unnecessary limits on the oral hearing process:
    - The oral hearings are limited to the NEB's version of "oral traditional evidence" which is is unduly restrictive and does not respect the expertise of Elders and Knowledge Keepers; and
    - Expert evidence, outside of the expertise offered by those giving the NEB's definition of "oral traditional evidence" will not be presented at the oral hearings.

Given ongoing concerns, the NEB's public hearing process is not lawful. AMC's participation in closing arguments should not be understood or construed as approval of this public hearing process or support of Enbridge's L3RP.

Presentation of Project Overview in a Public Forum

As stated above, the initial filings by Enbridge were so lacking in detail that the public hearing process was triggered prematurely. Without a succinct public presentation of its applications, parties are left with a piecemeal filing that creates confusion as opposed to building trust or developing a concrete understanding of the company's intentions.

Immunization from Cross-Examination and Inadequacy of Information Requests

The failure to include oral cross-examinations as part of the public hearing process undermines the credibility of the NEB. It also ensures that the hearing has lacked necessary accountability and transparency.

The AMC is left in the position of having to submit its closing arguments without the benefit of testing the veracity and accuracy of Enbridge's evidence. The inadequate testing of evidence also impacts the NEB's ability to make a competent decision defensible to the public interest.

The meaningful participation of Intervenors is hampered further by the NEB's decision to have written closing arguments due the same day as Enbridge's scheduled reply panel on the oral hearing, notwithstanding objections by multiple parties. Such a decision does not respect the complexity of the matters being considered.

The stand-alone process of Information Requests is not a reasonable replacement for the analytical

rigour afforded by cross-examination. There is no incentive for proponents like Enbridge to appropriately and fully answer Information Requests because they know they will not face any further scrutiny.

These issues are exemplified in AMC's experience in this hearing process. On multiple occasions, Enbridge's responses to Information Requests were vague, evasive and inadequate. One example considers the probability of spills during the lifetime of the Project:

> AMC IR 1.35(a): What is the probability of a spill happening on the Manitoban portion of Line 3 during its 50-year lifetime?
>
> Enbridge Response: … **extremely low**.
>
> AMC IR 2.9(a): Define, in quantifiable terms what is meant by "extremely low" and base the response on past incidents along the entirety of Line 3 and all other Enbridge pipelines.
>
> Enbridge Response: According to the NEB, the industry wide average rupture failure rate in failures/mile-year is 4.37E-05. With Line 3 being a brand new pipeline which will be constructed using industry best practice utilizing the latest modern technology and operating procedures, the resulting failure rate per mile-year would be **considerably lower**.

Without the opportunity to cross-examine Enbridge, AMC is left with the understanding that the probability of a spill is less than 4.37E-05. This is despite having asked a direct question seeking a quantifiable answer through two separate rounds of Information Requests. Enbridge's refusal to provide the requested answer is evasive at best and obstructionist at worst.

Another example arises with AMC's concerns around leak detection. When Mr. Kruk recommended that Enbridge incorporate regular use of acoustic ILI's to detect very small leaks, Enbridge advised that it would employ acoustic in-line leak detection technology where appropriate.[64] Without the benefit of cross-examination, AMC is left without an understanding of what Enbridge views as the "appropriate" use of leak detection technology, or even an example of a specific high consequence area where this technology would be deployed. Best practices with respect to small leak detection is inclusive of this technology.

Another evasive and inadequate response came in relation to the estimated costs of a large spill. In Enbridge's Response to NEB IR No. 2.44, Enbridge had indicated that it "has determined estimates in the range of release costs to vary between a few million CAD and approximately 2 billion CAD within a range of high consequence areas."[65]

64 Exhibit B35-02 - Reply Evidence of Enbridge at p 13.
65 Exhibit B16-02 – Enbridge Response to NEB IR No 2.44(a) at p 131.

In response to NEB IR No. 4.30, Enbridge was asked by the NEB to provide the analysis and supporting calculations.[66] Enbridge did so in part by providing a calculation example run for L3RP's Souris River Crossing:

> Enbridge advised that the volume out calculated at the Souris River crossing location was 12,937 bbl, resulting in a total spill cost of $884,500,000 in cleanup measures, including drinking water cleanup, water cleanup, health and safety, and external business costs.[67]

During the second round of information requests, AMC asked Enbridge a series of focusing on the estimated costs of a large spill. One such requested asked Enbridge to:

> Please provide all consequence models run for Line 3. Include the following: spill quantities, type of product, nearest sectionalizing valves, costs split into the categories of impacts listed above, and range of high consequence areas and other receptors that may be impacted by a release.

Enbridge responded by referring the AMC to Attachment 1 to IR No 2.1.(a):

> for a diagram which provides the consequence model results based on existing Line 3 data, including: volume out profile, valve locations, costs split into the categories of impacts, and range of high consequence areas and other receptors that may be impacted by a release. Note that the consequence model results are not currently available for those portions of the replacement line 3 that deviate from the existing line 3.[68]

This answer raises two concerns. First, the AMC is left wondering as to why, at this stage in the regulatory process, there are no consequence model results for the portions of the new Line 3 which deviate from the existing path, which deviations are not minor.

Secondly, the diagram provided to AMC was almost unreadable, provided in mile posts as opposed to kilometre posts, and did not provide the information that was requested. Potential spill scenarios and consequences are a significant concern around L3RP. Enbridge's response did little to clarify the actual risks. Cross-examination is the only reasonable tool to address such an inadequate response.

Inability to Respond to the Whole of Enbridge's Evidence

The NEB has created a process whereby western experts were only able to participate in writing. Subsequent to the written evidence filing deadline of 30 September 2015, there was an additional round of Information Requests for Intervenors and multiple Information Requests from the NEB.

Enbridge continued to file evidence in relation to the Project Application and yet Intervenors' experts were unable to consider this evidence in the rendering of their opinions. In addition, AMC experts were not provided sufficient information in Enbridge's filing to fully analyze the impacts of Enbridge's L3RP

66 Exhibit B27-02 - Enbridge Response to NEB IR No 4.30 at p 70.
67 *Ibid*, atp 71-73.
68 Exhibit B31-02 - Enbridge Response to Assembly of Manitoba Chiefs IR No 2.1(a), at p 2.

Project Application. Instead, the experts were relegated to analyzing a deficient filing and making recommendations in the hypothetical. This serves to devalue the contributions of the experts. It also raises the question of whether the expert evidence is properly considered by the NEB, if the NEB is content to have the experts analyze an incomplete picture of the Project.

Limitations on the Oral Hearings

It remains unclear how the NEB determined its version of "oral traditional evidence". The description did not accord with any other understandings of this kind of evidence, for example, as understood through the Federal Court Guidelines on Elder Testimony and Oral History evidence.[69]

The NEB eventually agreed that the Elders invited by the AMC to participate in the hearing would not be required to agree to the unnecessary limits placed on their testimony. However, the AMC is left to ask

- what kind of chilling effects did the initial requirements have when one considers the number of First Nations Intervenors versus the number of First Nations who gave evidence at the hearing; and

- what justifies the uneven application of the restriction on oral traditional evidence contained within the Notice of Intention to Provide Oral Traditional Evidence.

Environmental Concerns

Holistic consideration of environmental effects

As the Original Peoples of this land, First Nations view themselves in relation to and as part of the environment. As stated in *The Great Binding Law*, "We are the Earth."

First Nations view the environment in a holistic way. This holistic worldview comes from the natural laws which teach First Nations everything that needs to be known about living a good life. These natural laws are taught through generations of environmental monitoring and observations; living at one with the land.

Equal value between western scientific knowledge and traditional knowledge

There is a recognition in Canada that First Nations peoples have "unique knowledge about the local environment, how it functions, and its characteristic ecological relationships.[70]

As the Elders have shown through *The Great Binding Law*, the traditional knowledge held by First

69 Federal Court – Aboriginal Law Bar Liaison Committee, *Aboriginal Litigation Practice Guidelines*, October 16, 2012, at part IV, p 11, online at: Federal Court <http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf>.

70 Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *CEAA, 2012*, Canadian Environmental Assessment Agency Policy and Guidance Papers, updated March 2015, online at: Canadian Environmental Assessment Agency <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=C3C7E0D3-1>.

Nations is not just some relic of the past.

Traditional knowledge offers regulators and resource developers vitally important information about the land and resources. This information cannot be discounted through an overly romantic view of storytelling. Elders and Knowledge Keeper's stories are the lifeblood of First Nations laws and traditions.

The Great Binding Law speaks of the close interrelationship between First Nations peoples and their lands. They have been passed down through blood memory for thousands of years. Regulators, resource developers, and students of the western scientific tradition must respect the First Nations' ancestral knowledge and law.

A holistic worldview places equal weight between both western scientific and First Nations traditional knowledge. An integrated and collaborative approach has many benefits. It:

- recognizes the gift of First Nations as keepers of Mother Earth;
- respects the time-honoured knowledge of First Nations;
- requires extensive public engagement;
- broadens the scope of considerations which would otherwise be unnecessarily limited if approached through the western scientific tradition alone;
- provides relevant environmental information that may otherwise be unavailable;
- identifies possible environmental effects;
- avoids, reduces, or mitigates potential adverse effects associated with large scale pipeline developments;
- properly situates cumulative effects as a necessary and important part of the assessment of the public convenience and necessity of any project;
- contributes to the building of strong relationships between First Nations, regulators and resource developers;
- leads to better outcomes for the resource developers and better decisions by the regulator.

First Nations have been actively engaged with the land and all that it encompasses. Detailed scientific information is contained in First Nations' languages, place names and stories. This traditional ecological knowledge cannot be separated from the larger body of First Nations knowledge, also encompassing cultural, economic, political and spiritual inter-relationships.

Too often, this knowledge is undervalued. This undervaluing of traditional ecological knowledge permeates Enbridge's filing with respect to the proposed Project.

For instance, First Nations could have played an active role in:

- the collection of baseline information;
- the consideration of environmental effects of the proposed Project;
- the evaluation of cumulative effects of the proposed Project;
- the identification or modification of mitigation measures;
- the design and implementation of any monitoring and/or emergency response programs; and more.

Instead, it appears that Enbridge views engagement as something to be done to, as opposed to with, First Nations. Where Enbridge may have had more substantive interactions with First Nations, Enbridge has claimed that those dealings are confidential.[71] The vague project application and engagement log and the secrecy over Enbridge's dealings with First Nations makes it difficult to get a clear picture of the incorporation of traditional knowledge into the project design.

One need only look at the number of traditional land use studies that remain outstanding at the close of this hearing. The appropriate inference to be drawn is that the information provided by First Nations played little to no part in Enbridge's application.

Importance of assessing cumulative and downstream effects

As a result of the unnecessary segmentation of the proposed Project, both the NEB and Enbridge have wilfully turned a blind eye to the cumulative effects of the Project.

A cumulative effects assessment of GHG emissions has been expressly omitted from consideration.[72] In doing so, the NEB has abdicated its role in assessing cumulative environmental effects, in frustration of s. 19(1)(a) of *CEAA 2012*.

The Great Binding Law speaks to the imbalance the world is in. The land, water, and all living beings are suffering. Climate change is a symptom of that imbalance. Without a consideration of cumulative effects, including upstream and downstream effects, GHG emissions and climate change, there is little hope of restoring balance to the environment.

Real action on the devastating effects of climate change is squarely within the public interest, in particular when it comes to determining the public necessity and convenience of the Project.

In order to truly determine whether a project is worthy of a Certificate of Public Convenience and Necessity, upstream and downstream effects of the proposed Project must be addressed.

71 See, for example, Exhibit B18-02 - Enbridge's response to AMC IR 1.43.

72 Exhibit B5-10 - Environmental and Socio-Economic Assessment Line 3 Replacement Program, Enbridge Pipelines Inc., at section 7.1.1.

Environmental effects do not respect international borders

The idea that consideration of environmental effects should end at arbitrarily drawn borders is offensive to the First Nations holistic worldview of the environment. Relationships between the land, water, air, plants, animals, medicines and others do not end because a Proponent has drawn a study boundary, a government has implemented land tenure, or a nation has drawn borders.

All living beings on Mother Earth are related and must be considered equally in environmental decision-making.

In addition to wilfully ignoring upstream and downstream effects of the proposed project, the Project Application does not take into account potential effects on the United States in its cumulative effects assessment. *CEAA 2012* requires consideration of environmental effects outside of Canada,[73]

The Project runs from Hardisty, Alberta to Superior, Wisconsin. Cumulative effects along the entirety of the corridor should be taken into consideration. When Enbridge was asked directly to describe all environmental effects taken into account by Enbridge on the United States segment of the Project, Enbridge responded as follows:

> The potential effects related to Enbridge Energy Partners L.P.'s replacement of Line 3 in the United States are expected to be similar to those identified in the Line 3 Replacement Program Environmental and Socio-Economic Assessment for the Project. These potential environmental effects on the United States segment will be considered, and assessed as warranted, in relation to the applicable regulatory requirements of the jurisdictions where that project will be constructed and operated.[74]

This wilful disregard for the requirements of *CEAA 2012* should not be condoned by the NEB. As stated above, environmental effects do not respect international borders. Regulatory provisions aimed at assessing effects outside of Canada recognize this fact. *The Great Binding Law* speaks to the interconnectedness of all beings, and that actions have consequences. These consequences are unlikely to respect international borders either.

In order to have a complete cumulative effects assessment, the upstream and downstream effects of the Project must be considered, including across jurisdictions.

A limited public hearing process does little to overcome the currently narrow legislative view of the role of a national pipeline regulator.[75]

73 *CEAA 2012*, *supra* note 37 at s 5(1)(b)(iii).
74 Exhibit B31-02 – Enbridge Response to Assembly of Manitoba Chiefs IR No. 2.4(a), pages 7 and 8.
75 Robson, *supra* note 43, at para 7.

PART THREE:

Recommendations

AMC Position on the Certificate of Public Convenience and Necessity

Enbridge's L3RP represents the largest project in Enbridge's company history. It should also be the safest and rooted in an enduring, resilient and reciprocal relationship with First Nations people.

The AMC participation in the Enbridge L3RP hearing was not about opposition, rather it was and remains about balancing relationships between First Nations, governments, regulators, industry, and Mother Earth. It represented an opportunity for the NEB, Enbridge and the public to better understand First Nations' sacred and natural laws.

Time and again, the AMC sought to challenge the NEB to create a better process, one which would provide:

- a forum for the meaningful participation of First Nations;
- opportunities to learn about First Nations' worldviews and laws; and
- opportunities to renew relationships.

Instead the AMC was rebuffed at nearly every turn.

Legitimate environmental decision making is consistent with both the rule and spirit of laws, meets the expectations of participants and the general public, and reflects the best available scientific and traditional knowledge.

Restrictions placed by the NEB on Intervenor participation significantly limited parties' ability to raise issues and concerns related to Enbridge's L3RP. A limited public hearing process cannot be used to discharge the Crown's duty to consult and accommodate in whole and directly with First Nations as rights-holders. While the NEB is the master of its own proceedings, it is not a body capable of independently discharging the Crown's duty to consult and accommodate.

Before consideration of any specific project application, a renewed and balanced relationship between First Nations, government, regulators and resource developers must be achieved. Healthy relationships between the Original Peoples and newcomers are not possible without healthy relationships with Mother Earth.

The Certificate of Public Convenience and Necessity should not be issued at this time as much work needs to be done to achieve balance in relationships. The flaws in the underlying application and in the NEB's treatment of Enbridge's L3RP have made it impossible for AMC to support Enbridge's L3RP Project Application. It is too late to cure the illegitimacy of this process in this forum.

Conditions

The AMC is not in a position to offer specific recommendations for the conditions relating to the issuance of a Certificate of Public Convenience and Necessity with respect to Enbridge's L3RP. Had the process been fair, meaningful and analytically rigorous, AMC would have had the necessary information to give thoughtful consideration to Enbridge's L3RP Project Application.

Instead, the AMC is providing information on best practice environmental assessment in the hypothetical.

1. Relationships

Practically speaking, achieving healthy relationships requires the needs of all living beings' to be met. Recognizing that relationships are uncertain, the Elders have reminded us that all living beings have needs which must be considered. Healthy relationships also requires proponents, governments and First Nations to meet on a regular basis about their respective needs.

- To stand in good relationship with First Nations, governments and proponents must consider the 'needs' of Mother Earth in their environmental decision making. Recognizing that these needs may change overtime, governments and proponents should meet regularly with First Nations Elders and Knowledge Keepers to discuss these needs.

- Applying *The Great Binding Law* and standing in good relationships means 'taking only what you need' from Mother Earth. For example, when old pipelines are decommissioned, they should not be left in the ground.

- As part of this discussion, consideration could be given to the Public Trust Doctrine (PTD). The foundation of the PTD is that "everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks".[76] The public trust is not just an "affirmation of state power", but a "duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust".[77]

- Healthy relationships involves a consideration of the needs of both parties. Many First Nations communities have high rates of poverty and unemployment. Training and employment opportunities should be canvassed early on in the life cycle of project planning, to ensure that First Nations peoples can meaningfully participate at all levels of a project, if they so choose.

76 Syridon and LeBlanc, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action,* 6 Tul Envtl L J 287 (1993), as quoted in *Sierra Club* v *Kiawah Resort Associates*, 456 SE 2d 397 (1995).

77 *National Audubon Society v Superior Court of Alpine County,* 33 Cal. 3d 419 (1983).

2. Ancestral Lands

- Proponents and governments must recognize that the Canadian legal concept of private tenure does not abrogate or derogate from First Nations rights and responsibilities.

- Proponents and governments must recognize that First Nations people are the Original Peoples of this land. Governments and proponents should learn directly from Elders to better understand the First Nations concept of "ownership". Within the First Nations worldview, ownership is linked to stewardship rather than individual property rights. Educational opportunities should be explored within First Nations teaching lodges such as Turtle Lodge at Sagkeeng First Nation, Manitoba.

- Through direct engagement with First Nations, agreements should be drawn up for First Nations to have effective control and ownership of human remains and sacred sites on their ancestral lands.

3. Elders and "Oral traditional Evidence"

As stated in AMC's letter dated 6 November 2015, the Elders expertise goes beyond "traditional matters" and can include "technical and scientific information." Elders have expertise into the holistic worldview of First Nations peoples, including the environment, spiritual and traditional laws and relationships. Their experience is fundamentally shaped by their languages, spirituality and value system.

- The NEB should learn from First Nations Elders and Knowledge Keepers around the ways in which its procedural guidelines impact the meaningful participation of First Nations in its regulatory processes, including but not limited to the way it defines and receives 'oral traditional evidence'.

- The NEB should immediately amend s. 36(6) of the Rules of Practice and Procedure to allow Elders and Knowledge Keepers to demonstrate the truthfulness of their testimony through ceremonial protocols. Alternatively, the NEB should employ s. 4(1)(a) of the NEB Rules of Practice and Procedure to dispense with the requirement to swear or affirm under oath.

- Acknowledging the relationship of First Nations with Mother Earth, the NEB and proponents should recognize Elders and traditional land users as experts.

- The NEB and proponents should attribute equal weight, importance and value to western science and traditional knowledge.[78]

78 See for example the Clean Environment Commission of Manitoba report for the Keeyask and Wuskwatim Hydroelectric Projects which said expressly that western and traditional knowledge must be treated as equal knowledge. Clean Environment Commission of Manitoba. *Report on Public Hearing – Keeyask Generation Project* at p 41, online at: Clean Environment Commission of Manitoba <http://www.cecmanitoba.ca/resource/hearings/39/Keeyask %20WEB.pdf>.

4. Engagement

As stated in Drs. James Robson and Patricia Fitzpatrick's report, meaningful ongoing engagement includes information sharing for education purposes and "includes active and critical exchange of ideas among proponents, regulators and participants."[79]

- First Nations should have the opportunity by governments and proponents to drive engagement processes in *their* environments.

- Governments and proponents should engage in learning activities on an ongoing basis with First Nations Elders and Knowledge Keepers to provide opportunities for each of the parties to discuss their current needs.

- Proponents should undertake extensive pre-construction engagement with First Nations whose ancestral lands and nations are impacted. Engagement should be done in relation to project proposals and implemented at every stage with these First Nations.

- For many years, First Nations peoples have pushed aside their knowledge and languages to learn within foreign environments and in foreign languages. Governments and proponents should make all efforts necessary to learn First Nations languages to better engage with First Nations.

5. Consultation

- Regulators must recognize the necessity of free, prior and informed consent in their decision-making processes.

- When regulators are relied on in the Crown's discharge of its duties of consultation and accommodation, it must conduct its activities in accordance with the honour of the Crown.

- Governments and regulators must understand that meaningful section 35 consultation requires early and equal discussions with First Nations about the parameters of consultation. First Nations should have the opportunity to inform the Crown how they wish to engage in consultation activities.

- While proponents do not independently carry constitutional duties around consultation, they nonetheless have obligations around consultation and engagement as it relates to both the environmental assessment process and a proponent's social licence to operate. Proponents must engage early, often and in a manner that allows for meaningful inclusion of traditional knowledge.

79 Robson, *supra* note 43, at para 7.

6. Oil Spills

- Proponents should develop and make public their criteria for the use of leak detection technology. The NEB should require proponents to work directly with First Nation knowledge keepers in the development of the criteria and subsequent monitoring.

- Proponents should create Emergency Response Plans in consultation with First Nations people and governments.

- All training and emergency response exercises must be extended to affected First Nation governments and nations.

7. Adaptive Management

As stated in Dr. Patricia Fitzpatrick's report on Adaptive Management, “follow-up is not meant to serve as a 'make up' for incomplete information for an environmental assessment. However, it can and should be used to build better systems and relationships.”

- Proponents should develop transparent and accessible planning models that support evaluation of alternative operating models for projects.

- Proponents should directly include Knowledge Keepers and Elders in decision making and monitoring for Projects.[80]

- Monitoring should be done consistent with First Nations' worldview. For example, in the Wuskwatim Project, meeting and monitoring cycles were done according to the moon cycle.

- Governments and regulators should require proponents to do annual reporting. Unlike the current PCEM reports, adequate annual reporting is publicly available, accessible through the project website, and inclusive of enough detailed information to be meaningful. For example, annual reports should include contemplation of the accuracy of predictions.

- Proponents should develop robust monitoring programs. These programs should reflect true monitoring efforts as opposed to compliance-driven reports.

- Although there have been commitments by Enbridge in these proceedings to maintain a project-specific website, any proponent websites should be updated frequently and publicly available to ensure transparent sharing of information. It should also include a link to the NEB archives of any related process and subsequent reports to the NEB.

- Regulators and proponents should recognize that a third-party evaluation commissioned by the proponent is not the same as independent post-hoc project evaluation. Best practices would require true independence and post-hoc evaluation of the accuracy of an impact statement.

80 For more information about the elements of an effective oversight program, see Exhibit C3-20-01 - AMC Response to NEB Information Request No 1.