

Written submissions of the Assembly of Manitoba Chiefs  
submitted to the Expert Panel for the Review of the Environmental  
Assessment Processes

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## EXECUTIVE SUMMARY

*“It’s time for them to wake up. We have our own ways of doing things. We still stand firm.”*  
– Elder Wally Swain

The Review of the Environmental Assessment Processes is symptomatic of the larger concerns about the negative impacts of Western laws. Indigenous Nations are faced with the deep challenge of having to operate within foreign systems which make decisions impacting their daily lives. Navigating within these systems is endlessly frustrating as they criminalize the behaviours of Indigenous people while perpetuating violence against Mother Earth and ignoring the signs of climate change.

The biggest challenge facing Indigenous and Settler Nations has been the historic and ongoing failure to implement nation to nation relationships.

Nation to nation relationships means that both Settlers and Indigenous Nations are acknowledged as being unique but equal. One nation does not control or validate the other. It requires the recognition of the Great Binding Law as a distinct but equal constitutional legal order.<sup>2</sup> These laws pre-date contact with settlers and continue to exist today.

The Assembly of Manitoba Chiefs (“AMC”) rejects the notion that Indigenous Nations must fit *within* Western laws. The Great Binding Law originates from the worldviews and cultural contexts of Indigenous Nations. It is a way of life and encompasses many laws. It guides us in ways of achieving good relationships with all our relations. It teaches us that everything is related and one cannot think about the impacts of decisions on humans without considering the impacts and needs of all living beings.

**The exercise of trying to fit elements of the Great Binding Law within Western laws is destined for failure as it is impossible.**

We must move the dialogue towards a better understanding of how Indigenous and Western laws *relate to one another* rather than how they fit into one another.

Reconciliation requires settlers to acknowledge that their laws and systems are not neutral. Existing federal “environmental assessments” are based on Western worldviews and laws, which are foreign to Indigenous people.

Western laws have had **negative effects on all relations** including Indigenous people, settlers, Mother Earth, water, animals and fish. Western laws have tried to unilaterally regulate the identities of Indigenous Nations and manage the lands upon which they live. They have created a system of dependency which has caused several negative impacts on Indigenous Nations.

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<sup>2</sup> The Great Binding Law is the overarching “Indigenous law” which encompasses many laws. The EKH have said that it is only some of these laws which can be written. However, it must be noted that the concept of “laws” as described by Western systems does not exist within Indigenous languages.

**The relationships between all relations are badly out of balance - Indigenous people, settlers, Mother Earth, the water, animals, fish, etc.**

It is time to shift the onus. It is now up to settlers (including the Federal Government) to come to Indigenous institutions of learning like sacred lodges and listen to the Elders and Knowledge Holders (“EKH”). Settlers should learn Indigenous languages and fully respect The Great Binding Law as distinct but equal to Western laws.

The EKH can guide us and are willing to engage in building knowledge and awareness. They can assist in creating change as a way of living in harmony with Mother Earth.

There is a prophecy which says that “there will come a time when the [EKH] will be needed to restore us to health.”<sup>3</sup>

*“They said that they would come and they are beginning to come.” - Elder Dave Courchene Jr*

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<sup>3</sup> Harry Bone et al, *The Journey of the Spirit of the Red Man*, (Turtle Lodge: Trafford, 2012) at p 39.

## **A ROAD MAP FOR AMC'S SUBMISSIONS**

### **Part One – Introductory Words Framing AMC's submissions:**

The purpose of this section is threefold:

1. It provides background information on the AMC;
2. It describes the two main challenges facing society – (a) failure to respect The Great Binding Law as separate and distinct from Western laws (b) the negative impacts of Western laws on all relations.
3. It frames the discussion of environmental assessment processes as symptomatic of a larger problem – Western laws are hurting Mother Earth and perpetuating climate change.

### **Part Two – Methodology for the Review of Environmental Assessment Process**

This section describes the methodology used by AMC in the preparation for its submissions to the Expert Panel. This information is shared as part of the process of education and awareness about the way of life of Indigenous people. The methodology is explicitly outlined for the consideration of the Federal Government when it engages with Indigenous Nations and EKH.

### **Part Three – Living in Good Relationships with Mother Earth**

This section describes the importance of living in good relationships with Mother Earth and all relations. It argues that it is time to shift the onus on the Federal Government to learn from Indigenous Nations within their sacred spaces and learning environments.

### **Part Four – Recommendations**

We are currently living in a state of chaos, uncertainty and transition.

While many recommendations cannot be identified at this time as the EKH have said that it is important not to overstep the Spirit, the EKH have assisted AMC in identifying certain recommendations which can guide us in achieving healthier nation to nation relationships.

1. **Renewed relationships:** Renewing nation to nation relationships requires that Settlers (including the Federal Government) listen and learn from Indigenous Nations about their cultures and worldviews. The Great Binding Law and Western laws must be respected as equal and distinct. It requires joining the EKH in sacred spaces to feel The Great Binding Law to demonstrate commitment to nation to nation relationships.
2. **Reconsider your relationship with Mother Earth:** It is necessary for Settlers to reconsider

their understanding that Mother Earth can be managed and owned. This understanding has damaged Mother Earth and perpetuated the negative consequences of climate change. Mother Earth must be respected. She is a living being, not a “thing” that can be owned or sold.

3. **A Commitment to Action is Required:** As a necessary starting point, it is recommended that the Federal Government commit to a four year dialogue with EKH as a recognition of their role as leaders and teachers of Indigenous Nations. The methodology which is described in Part Two of the submissions can assist the Federal Government in identifying the proper protocols and way forward in preparing the gatherings with the EKH.
4. **Active and Ongoing Learning is Required:** Renewing relationships is not a passive exercise. The AMC suggests a list of reading materials which can be used by Federal Ministries to encourage the process of education and awareness.

Recognizing that we are in a period of transition, certain short term recommendations are needed to assist us in dealing with the current crisis situation for the benefit of all relations.

1. **Environmental assessment must be done holistically:** The current approach to 'environmental assessment' is fragmented and filled with inefficiencies. It is Indigenous Nations and Mother Earth who suffer the most from these arbitrary processes. Accountability is needed for the (in)actions of the Federal Government. It is recommended that a Principle akin to Jordan's Principle be created which prioritizes the honour of the Crown and relationships with Indigenous Nations and Mother Earth over all (internal or external) jurisdictional disputes.
2. **EKH and Oral Traditional Evidence must be given equal weight to Western experts and Western evidence:** Oral traditional evidence provided by Indigenous Nations EKH and Land Users must be given equal weight and treated as expert evidence within 'environmental assessment' processes.
3. **Meaningful ongoing engagement and consultation with Indigenous Nations:** “Meaningful” engagement and consultation with Indigenous Nations requires such things as early and ongoing exchange of information, active and critical exchange of ideas, and engagement within the spaces of Indigenous Nations. Consultation must happen on a nation to nation basis with the goal of acquiring free, prior and informed consent of Indigenous Nations before any decisions are made or actions are taken.
4. **Environmental assessment processes must be enhanced and expanded, including before, during and after assessments are conducted:** In deciding which projects will be approved, it is important to consider the impact of projects to all relations early in the process. Environmental assessment processes should respect that Mother Earth and the environment are not something to be owned. Environmental assessment should include not only a review of the impacts of a development project on all relations but also economic, social, cultural and health related factors. Once a project has been approved, it is important to ensure that impacts of decisions are continuously and effectively monitored with the assistance of Indigenous knowledge and traditional knowledge holders.

## **PART ONE: INTRODUCTORY WORDS FRAMING AMC SUBMISSIONS**

### ***Overview***

The following section aims to:

1. introduce the Assembly of Manitoba Chiefs (“AMC”) and outline its activities relating to its overarching concerns about serious impacts of climate change and suffering of Mother Earth;
2. expand upon the biggest challenge facing Indigenous and settler communities today - the failure to implement nation to nation relationships through the recognition of The Great Binding Law as a separate but equal constitutional legal order; and
3. frame the discussion around environmental assessment processes as symptomatic of the larger issue – Western laws are damaging all relations including Mother Earth and we are all suffering as a result.

### ***Background on AMC***

The AMC was formed in 1988 by the Chiefs in Manitoba to advocate on issues that commonly affect all Indigenous Nations of Manitoba. The AMC represents 62 of 63 First Nations in Manitoba which includes representation from the Anishinaabe (Ojibway), Nehetho (Cree), Oji-Cree, Dene and Dakota Nations.

AMC's Constitution recognizes that the Creator's laws govern all our relationships, and enable us to live in balance and harmony. It also recognizes and accepts that First Nations have inherent and fundamental relationships with the land and natural environments. Included in AMC's advocacy mission is the promotion, preservation and protection of “Aboriginal and Treaty rights” for First Nations in Manitoba. Through its relationships with its member nations and conversations with leadership and community members, the AMC gains local community insight about various issues.

In addition, and importantly, the AMC receives guidance from Elders, including the AMC Elders Council as part of its regular activities. The AMC acknowledges that the Elders' teachings and guidance are not relics of the past but rather, they continue to be very relevant today and can assist in all decision making. Elders are the true experts and leaders of our Nations and carry knowledge which can help us better understand the laws, identities, and worldviews of Indigenous Nations.

The AMC has an overarching and increasing concern about the current and future state of Mother Earth and climate change. It sees the impacts of human “development” on climate change and Mother Earth as threatening the survival of not only Indigenous people, but all people, throughout Canada and the world. Based on its ongoing concerns regarding the failure of Western laws to protect Mother Earth, the AMC has focused a significant amount of activities to fulfill its responsibilities as protectors of the Mother Earth:

- From 29 February to 10 March 2015, the Grand Chief of the AMC was in Colombia to meet with the Indigenous people from that region. The Indigenous people of Colombia shared information about the sacredness of the water and the negative impacts of drought to health.
- In September 2015, AMC began preparing for its intervention in the Enbridge Line 3 Replacement Project (“L3RP”) hearing before the National Energy Board. AMC sought guidance from a group of Anishinaabe (Ojibway), Nehetho (Cree) and Dakota EKH who prepared a Statement in alliance with Mother Earth – *Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law*. The Statement was shared publicly on 28 November 2015.
- In October 2015, AMC Grand Chief supported the “Treaty Alliance” formed by the Mohawk Council of Kanésatake in their efforts to oppose TransCanada's Energy East Line.
- In November 2015, the AMC Secretariat was directed to develop coordinated strategies for addressing climate change and other environmental and cultural impacts of tar sands.
- In March 2016, the First Nations Health and Social Secretariat of AMC and AMC co-hosted a joint Assembly which resulted in a Resolution to disengage from the *Indian Act* and reclaim traditional forms of governance.
- In February 2016 and May 2016, the AMC hosted two 'Tea and Bannock' dialogues to initiate conversations about how Indigenous Nations can reclaim traditional governance.
- Beginning in August 2016, the AMC engaged in discussions with the Lummi Nation for a Totem Pole to make its journey from the Coast Salish Territory in the State of Washington to its final destination on sacred lands at the Turtle Lodge in Sagkeeng First Nation, Treaty One Territory.
- In November 2016, the AMC hosted a public Gathering at the Turtle Lodge in Sagkeeng First Nation whose main purpose was for the EKH to share their knowledge about their worldviews, identifies and laws in order for the EKH to be respected as true leaders and experts.
- From 29 November to 1 December 2016, the AMC hosted a Special Chiefs Assembly and Conference on Climate Change and the Environment which involved over 20 Manitoba First Nations signing on to the Treaty Alliance.

For a more detailed explanation of AMC's activities relating to the protection of Mother Earth and Climate, see Appendix 1.

## *What is the problem?*

### **(1) The failure to respect The Great Binding Law as Equal and Distinct from Western laws**

*“The Canadian Constitution is not our Constitution, it is theirs.” - Elder Fred Kelly<sup>4</sup>*

One of the main challenges has been the historic and ongoing failure to respect the knowledge and laws of Indigenous Nations as equal to Western knowledge and laws. Specifically, Indigenous Nations have distinct constitutional orders. AMC rejects the notion that Indigenous peoples and The Great Binding Law must fit *within* Western laws. This recognition is fundamental because, to date, the Federal Government/Crown has only been willing to see Indigenous peoples and laws within Western systems.

Since the enactment of the Canadian *Constitution* in 1867, Canadians have been told that Canada has a bijuridical system of law – Common Law and Civil Law. Within this system, Indigenous peoples and laws have been made to fit within Western laws, processes and courts. This understanding fails to respect that Indigenous Nations have their own systems of laws which are distinct from Western systems of laws.

The Great Binding Law pre-dates contact with settlers and continues to exist today.

**The AMC challenges the Federal Government to acknowledge that Indigenous Nations have their own laws and processes which protect Mother Earth. These laws are unique and distinct from Western laws.**



The Great Binding Law does not come from *within* Western laws. Indigenous constitutional orders draw their origin and jurisdiction from their own worldviews and cultural contexts.<sup>5</sup>

Trudeau Scholar, Aaron Mills, describes the relationship between the worldviews (or “lifeworld” as he calls it) and law with the image of a tree. He explains that:

- the **leaves are the laws** which are created and just like leaves, laws change periodically;<sup>6</sup>
- the **branches are the legal traditions** which include the processes and institutions that “create, sustain, and unmake law”<sup>7</sup>;
- the **trunk represents the society's constitutional order** which is the organizing structure generated by the roots; and

<sup>4</sup> Assembly of Manitoba Chiefs Assembly and Conference, 30 November 2016.

<sup>5</sup> For scholarly articles written on this topic, see Aaron Mills “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) McGill LJ 61:4 [forthcoming]; Jeremy Webber “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167; Jeremy Webber “The Grammar of Customary Law” (2009) 54:4 McGill LJ 579.

- the **roots of the tree are the stories each society tells** about their creation - “what a person is, what community is, and what freedom looks like” for that community.

Mills further explains that the trunk “conditions” the branches – it does not “determine” what they look like but it will “powerfully shape them.”<sup>8</sup> Just like a tree, depending on different conditions – the object, scope or issue - the legal traditions and laws will change. The roots of the tree which represent the Creation stories are deeply grounded and “wrapped tightly against the earth”.

Based on this analogy, at the “root” of the Western legal system, is the story we tell about the creation of the *Constitution Act of 1867*. This includes the description of Canada as '*terra nullius*', inhabited by “uncivilized” First Nations who were in need of a legal structure because no legal system was in place. In this story, the legal structure was based upon the supremacy of God and the rule of law. The organizing structure (the “trunk”) is the *Constitution of 1867* and *1982* which are said to be the 'Supreme Law of Canada'. The institutions and processes (the “branches”) were created by the *Constitution* and include parliament, the legislature, and the judiciary - the Common Law and Civil law traditions and their court systems (appointments and role of judges and lawyers). The leaves are the laws and regulations which are created by these systems.

At the “root” of the Indigenous legal system is the Creation Story and the Great Binding Law. While Indigenous Nations tell different versions of the Creation Story, they always explain the sacred connection of all living beings to the Creator and their relationship to Mother Earth. The organizing structure (the “trunk”) represents the gifts which were given to Indigenous people by the Creator including the songs, languages, ceremonies, ways of life, teachings and stories. The legal traditions (the “branches”) are the way of learning from Mother Earth, how we relate to one another and the responsibilities we carry. The laws (the “leaves”) describe an internal way of being and living in good relationships with all relations which includes the seven (7) teachings and Natural Laws.

Using the analogy of the tree is helpful to illustrate why inserting certain elements of the Great Binding Law *within* Western environmental laws is a superficial exercise which fails to do proper justice to both Western legal systems and the systems of laws of Indigenous Nations. Given the fundamental differences between the trees (or “Nations”), it is not enough to take the leaves (or “laws”) which have deeply rooted constitutional orders and insert them onto a different tree. This exercise is destined for failure as it is impossible.

**Just like different nations, each tree finds its strength in its uniqueness. The trees stand side by side in the forest while respecting each others' space.**

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<sup>6</sup> Mills, *supra* note 5 at p 862.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

According to 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**. (emphasis added)<sup>9</sup>

Without an understanding of the worldviews and cultures of Indigenous peoples, one has no hope of understanding the laws.<sup>10</sup> The process for understanding will necessarily involve listening and learning from one another.

## **(2) Western Laws have had negative effects on all Relations**

*“They say that their laws do environmental protection [...] Your laws are destroying our lands and livelihood.” – Elder Joe Hyslop*

Within the Western Common Law tradition, the federal jurisdiction over “Aboriginal People” is stated in sections 91(24) and 35 of the *Constitution* of Canada. Canadian courts have recognized that on this jurisdiction, based First Nations have Aboriginal rights and title and land claims.<sup>11</sup> These laws and rights have been used successfully by Indigenous Nations to “win” Canadian court battles over lands, resources and property to name a few.

However, this foreign constitutional order has also been used to regulate and govern the identities of Indigenous Nations and the lands upon which they live. Along with other relevant legislation such as the *Indian Act*, they have been used to unilaterally ban and destroy Indigenous Nations' cultures and identities. The Western laws and (in)actions by the Federal Government/Crown have had several negative impacts on Indigenous Nations: residential schools, high rates of poverty and child apprehensions, suicide, inadequate housing, unsafe drinking water, lower levels of education and violence against Indigenous women and girls. Western laws have also created a system of dependency through the welfare and other social programs.

For Indigenous Nations, the violence against women and girls and the epidemic of missing and murdered Indigenous women and girls is a symptom of the violence which has been committed

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<sup>9</sup> Mills, *supra* note 5 at p 856.

<sup>10</sup> *Ibid* at p 852.

<sup>11</sup> *St Catherine's Milling and Lumber Co v The Queen* [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; *Calder v British Columbia (Attorney General)* [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; *Guérin v The Queen* [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; *R v Sparrow* [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; *R v Badger* [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; *Delgamuukw v British Columbia* [1997] 3 SCR 1010. This decision is recognized as the most definitive statement on the nature of Aboriginal title in Canada; *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 44. This decision is the first declaration of aboriginal title by the Supreme Court of Canada; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

towards Mother Earth. The Western systems and laws relating to “environmental decision making” have been used to “manage” and destroy the environment which Indigenous Nations have the responsibility to protect.

### ***The Environmental Assessment Process is symptomatic of the larger issue***

#### **Overview**

The Review of federal Environmental Assessment Processes associated with the *Canadian Environmental Assessment Act, 2012*, which is being undertaken by the Expert Panel appointed by the Minister of Environment and Climate Change, and ultimately the federal government, is symptomatic of the overarching failure of Western laws to protect Mother Earth and to manage climate change impacts.

Indigenous Nations are faced with the deep challenge of having to navigate within foreign systems which make decisions impacting their daily lives. As protectors of Mother Earth, operating within these systems is endlessly frustrating as Western laws and institutions continue to perpetuate violence against Mother Earth and ignore the signs of climate change. As evidenced by the recent events at Standing Rock, Indigenous people are criminalized when they stand up as protectors of Mother Earth.

The unilateral changes to Federal Environmental laws in 2012 reduced 'environmental protection' and demonstrates the failure of Western laws and processes to protect Mother Earth.

#### **Unilateral Changes to Environmental Laws**

In 2012, when the Harper Government introduced the omnibus budget bills, Bill C-38 and Bill C-45, many Indigenous Nations opposed the proposed changes. The concerns stemmed from the erosion of environmental protection and Indigenous sovereignty, as well as the lack of consultation with Indigenous peoples. The omnibus bills led to significant reductions in federal environmental reviews for waterways, changes to the definition of an aboriginal fishery, reductions in protection of fish habitats and amendments to the *Indian Act* related to leasing reserve property.<sup>12</sup>

Bills C-38 and C-45 fuelled such discontent among Indigenous communities that in the fall of 2012, four Saskatchewan women started Idle No More, a movement that grew rapidly and led to hundreds of teach-ins, rallies and protests across the country. While the Idle No More movement began as a way to protest the omnibus bills that would erode Indigenous sovereignty and environmental protections, its legacy has changed the social and political landscape of Canada.<sup>13</sup>

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<sup>12</sup> Mia Rabson, “A Guide to the Idle No More movement, treaties and legislation” 26 January 2014, online: Winnipeg Free Press, <<http://www.winnipegfreepress.com/opinion/fyi/movers-and-shakers-188470781.html>>. These concerns were clearly articulated in a judicial challenge brought by two First Nations, Mikisew Cree and Frog Lake First Nation, in 2013, see *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2014 FC 1244. Their application for judicial review of the changes to the *Fisheries Act* and the *Navigable Waters Protection Act* in Bills C-38 and C-45 was based on the government's lack of fulfilling its constitutional duty to consult with aboriginal groups about decisions that may adversely impact lands, waters and resources that are subject to aboriginal or treaty claims.

<sup>13</sup> Idle No More, “The Story”, online: <<http://www.idlenomore.ca/story>>.

At that time, the Grand Chief of the Assembly of Manitoba Chiefs went to Ottawa to protest the unilateral changes to federal laws, including the environmental assessment laws currently under review.

The energy and actions during this period of time were an impetus for much of their current activities relating to the environment after 2012.

### **Gutting protections under the *Canadian Environmental Assessment Act, 2012***

#### **(i) Overview**

In June 2016, the Federal Government announced reviews of the *Canadian Environmental Assessment Act, 2012*, the *Fisheries Act*, the *Navigation Protection Act* and the National Energy Board -with the goal of restoring public confidence in what is known as the federal “environmental assessment” process and modernizing the National Energy Board (“NEB”).<sup>14</sup>

These review processes were in part prompted by concerns expressed by Indigenous Nations about the legitimacy of environmental decision making given the exclusion of Indigenous worldviews.

#### **(ii) The Review of the Environmental Assessment Process**

“Environmental assessment” is described in the literature as an approach to mitigate damage, to halt developments and undertakings that are likely to cause serious problems and, in some cases, to compare alternatives and identify the “most desirable options”.<sup>15</sup> The most entrenched form of environmental assessment is project-level environmental assessment. In 1973, Canada followed the example of the USA and introduced environmental assessment process at the federal level – the Federal Environmental Assessment and Review Process.<sup>16</sup>

In 1995 the original *Canadian Environmental Assessment Act* (“*CEAA*”) came into force. The academic literature has pointed to the following challenges with the original *CEAA*: unwieldy and sometimes late triggering; an exclusive focus on projects (neglecting strategic-level undertakings); a confusing and incomplete approach to the scope of ‘environmental’ considerations to be addressed; merely discretionary requirements to examine purposes and alternatives; ineffective mechanisms for ensuring adequate follow-up, monitoring and enforcement; and significant implementation difficulties that undermined efficiency, effectiveness and credibility.<sup>17</sup>

Omnibus Bills C-38 and C-45 included significant amendments to the *Canadian Environmental Assessment Act*, greatly limiting an already flawed process for federal environmental assessment of proposed projects. Bills C-38 and C-45 were both passed by the federal government in 2012 with

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<sup>14</sup> AMC’s understanding of “environmental assessment” is that it is “minimal regret planning” which considers the positive and negative impacts of a development project before it is built.

<sup>15</sup> Denis Kirchoff, Holly L Gardner & Leonard J S Tsuji, “The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples” (2013) 4:3 *The International Indigenous Policy Journal* 1 at 2.

<sup>16</sup> *Ibid.*

<sup>17</sup> Robert B Gibson, “In full retreat: the Canadian government’s new environmental assessment law undoes decades of progress” (2012) 30:3 *Impact Assessment and Project Appraisal* 179, at 179-180.

neither debate<sup>18</sup> nor consultation with Canada's Indigenous nations or people,<sup>19</sup> even though implemented changes greatly affect their rights, livelihoods and ability to participate in environmental decision-making processes.<sup>20</sup>

*CEAA 2012* has drastically reduced the number of projects that are required to be evaluated with environmental assessment, from an “assess every project unless exempted” approach<sup>21</sup> to a “project list” approach, where an environmental assessment is only required for particular projects included in the list of “designated projects”, with the list created at the discretion of the Minister of the Environment.<sup>22</sup>

Under the previous version of *CEAA*, projects or activities were subject to one of three main levels of environmental assessment: screenings (least rigorous), comprehensive studies (more rigorous) or panel reviews (most rigorous). Following the 2012 amendments, environmental assessments are now subject to a “one-size-fits-all process.”

The scope of environmental assessment has also been significantly limited, from a focus on a range of adverse environmental effects of proposed projects on the biophysical environment, to a focus on “significant adverse environmental effects” on a tightly restricted range of ‘environmental components’ under federal legislative authority, including fish, aquatic life and migratory birds, federal lands and Aboriginal communities.<sup>23</sup>

Under the original *CEAA*, the federal government made efforts to coordinate federal and provincial assessments.<sup>24</sup> *CEAA 2012* signalled a rejection of both coordination and harmonization in favour of reliance on and delegation to the provinces to conduct environmental assessments.<sup>25</sup>

Finally, while *CEAA 2012* maintains some openings for public involvement, reduction of assessed projects, narrowing of the assessment scope and tight timelines all serve to restrict public and Indigenous participation opportunities.<sup>26</sup>

Indigenous nations and people have faced significant challenges to effective participation in Western environmental assessment processes. The particular challenges include: the scarcity of resources (i.e.

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<sup>18</sup> John Fraser, former Fisheries Minister, quoted as calling the lack of debate and consultation “bad democracy” in Mark Hume, “Four Former Ministers Protest Taking the Guts Out of Fisheries Act”, *Globe and Mail*, May 28, 2012, online: <http://www.theglobeandmail.com/news/british-columbia/four-former-ministers-protest-taking-the-guts-out-of-fisheries-act/article4217013/>.

<sup>19</sup> *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, Hughes J.

<sup>20</sup> Denis Kirchoff & Leonard J S Tsuji, “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 at p 117.

<sup>21</sup> *Ibid*, at p 181.

<sup>22</sup> Ecojustice, “Legal Backgrounder: Canadian Environmental Assessment Act (2012): Regulations”, August 2012 at p 2 [Ecojustice Legal Backgrounder].

<sup>23</sup> Gibson, *supra* note 17 at p 182; Ecojustice Legal Backgrounder, *supra* note 22 at p 2.

<sup>24</sup> Gibson, *supra* note 17 at p 185.

<sup>25</sup> *Ibid*, at p 185; Kirchoff & Tsuji, *supra* note 20 at p 113.

<sup>26</sup> Gibson, *supra* note 17 at p 184.

money, expertise, time), remoteness of some communities and cuts in funding for Indigenous organizations in 2012 which further reduced Indigenous capacity for participation.<sup>27</sup>

<b>Summary of Changes to the Canadian Environmental Assessment Act<sup>28</sup></b>	
<b>1995</b>	<b>2012</b>
In all projects that involve federal decisions the Act, and the EA process, apply	A project must be on a “designated project” list, with much Ministerial discretion, for the EA process to apply
Screenings, comprehensive studies, and mediation processes	One-size-fits all EA process
Broad scope of federal assessment - look at a range of adverse environmental effects of proposed projects	Narrow scope of federal assessment - focused on “significant adverse environmental effects”
“Environmental effects” included any effect a project had on the biophysical environment	“Environmental effect” is effect on things within federal jurisdiction: fish, aquatic species, migratory birds, federal land, “aboriginal people”
Screening process to trigger an EA could be conducted by any federal agency	Screening process to be conducted by the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) or the Canadian Environmental Assessment Agency (CEA Agency)
Cooperative approach with provinces designed to encourage one comprehensive EA process	Delegation to the provinces to conduct EAs to avoid duplication
Actively engage members of the public in the planning stage of project development	Parties require a “direct interest” in a project to have input into project planning or decision-making

The 2012 legislative changes to the *Canadian Environmental Assessment Act* have not occurred in isolation. Amendments to the *Navigation Protection Act* (including changing its name from the *Navigable Waters Protection Act*), *Fisheries Act* and the *Indian Act* have similarly weakened the environmental and consultative provisions of Canadian legislation

These legislative changes represent a continued unilateral imposition of Western laws on Indigenous peoples and nations.

<sup>27</sup> *Ibid.*

<sup>28</sup> Table created using information compiled from: Meinhard Doelle, “CEAA 2012: The End Of Federal EAAs We Know It?” (2012) 24 *Journal of Environmental Law and Practice*.

### **iii. Challenges to AMC's Participation in the Review of the Federal Environmental Assessment Processes Associated with the *Canadian Environmental Assessment Act, 2012***

In addition to its fundamental challenges relating to the foreign nature of Western environmental systems, AMC faced significant barriers in its participation of the Review of the federal Environmental Assessment Processes associated with the *Canadian Environmental Assessment Act, 2012*.

On 9 September 2016, AMC submitted its application for funding for the Review of federal Environmental Assessment Processes. On 6 October 2016 AMC was approved for funding at a lower amount than it had requested, subject to a finalized contribution agreement. A contribution agreement was finalized on 18 November 2016. The contribution agreement indicated that costs incurred prior to 18 November 2016 would not be covered and only costs incurred after that date would be included.

The funding agreement remains effective until 30 September 2017. While it had planned to organize significant engagement with First Nations across Manitoba, as a result of the reduction of funding, AMC has had to limit its activities in preparation for the Review of federal Environmental Assessment Processes. The funding granted to applicants in this review and other federal environmental reviews has not reflected the actual cost to meaningfully participate in this review.

On 17 November 2016, the day before the contribution agreement was finalized, Grand Chief Derek Nepinak presented to the Expert Panel on the review of *CEAA, 2012*. This has proven problematic given that the preparation for Grand Chief's presentation, consisting mostly of engagement with Elders and resource-users, as well as legal research, was not funded under the contribution agreement.

On 18 November 2016, the AMC organized a public event, which was held at the Turtle Lodge in Sagkeeng First Nation (Manitoba). The Gathering was entitled "Sharing Indigenous Knowledge on Survival in Times of Climate Change". While an invitation was sent to the Expert Panel one month before the event, no members of the Expert Panel were in attendance. While representatives of the Canadian Environmental Assessment Agency and other federal agencies were in attendance, the Expert Panel's refusal to attend Turtle Lodge was seen by the AMC as an unwillingness to engage with EKH in *their own* environment and a failure to respect the Great Binding Law.

The process for the Review of Environmental Assessment Processes has also been far too rushed and discouraging for AMC throughout. The Expert Panel had unreasonable expectations of participants of the Review process. The combination of the rushed process and the inadequate funding created significant barriers to AMC's participation, particularly with respect to its planning and conducting of meaningful engagement with AMC's Indigenous Nations (many of which are located in northern Manitoba, and some of which are remote and isolated).

## **PART TWO: METHODOLOGY FOR THE REVIEW OF THE ENVIRONMENTAL ASSESSMENT PROCESS**

*“They have to come and understand our laws too.”* – Elder Joe Hyslop

### ***Overview***

This section outlines the methodology used by the AMC in preparation for their written and oral submissions. The Great Binding Law tells us that process and substance are equally as important. The AMC shares its methodology with the Expert Panel as part of the process of education and awareness which it has been guided to undertake. It also shares this information to demonstrate the differences between Western and Indigenous processes.

### ***Methodology of the AMC in the Review of Environmental Assessment Processes***

To prepare for its participation in the review of Federal environmental assessment laws and of the NEB, including in the Review of Environmental Assessment Processes, the AMC sought guidance from the following group of Anishinaabe (Ojibway), Nehetho (Cree) and Dakota EKH:

- Oshoshko Bineshiikwe – Blue Thunderbird Woman, Osawa Aki Ikwe (Florence Paynter - Sandy Bay First Nation, Treaty 1);
- Zoongi Gabowi Ozawa Kinew Ikwe – Strong Standing Golden Eagle Woman (Mary Maytwayashing - Lake Manitoba First Nation, Treaty 2);
- Nii Gaani Aki Inini – Leading Earth Man (Dave Courchene Jr. - Sagkeeng First Nation, Treaty 1);
- Giizih-Inini (Dr. Harry Bone, Keeseekoowewin Ojibway First Nation, Treaty 2);
- Zhonga-giizhing – Strong Day (Wally Swain - Keeseekoowenin Ojibway Nation, Treaty 2);
- Naawakomigowiinin (Dennis White Bird - Rolling River First Nation, Treaty 4);
- Kamintowe Pemohtet – Spirit Walker (D'Arcy Linklater - Nisichawayasihk Nehethowak, Treaty 5); and
- Mah Pe Ya Mini (Henry Skywater - Birdtail Sioux Dakota Nation).

Given EKH carry different areas of substantive knowledge, this particular group was selected based on their leadership and experience relating to the Great Binding Law and protecting the environment. The AMC recognizes the significant role of Elders for Indigenous Nations. EKH are mentors, teachers and knowledge holders of the Great Binding Law. AMC acknowledges that the EKH can help provide guidance to make better environmental decisions.

*“Elders know and understand what needs to get done.”* – Elder Mary Maytwayashing

The EKH gathered on several occasions from September 2016 to November 2016 with representatives from AMC and the Public Interest Law Centre (“PILC”). The purpose of these Gatherings was for the AMC and PILC teams to seek guidance from the EKH on issues relating to environmental decision making, including the protection of water.

The AMC and PILC were able to build on their existing relationships with the EKH as this was the same group that guided AMC's participation in the National Energy Board hearings relating to the proposed Enbridge Line 3 pipeline.

AMC also recognizes that it is within the lodges that EKH are most active. Gatherings with the EKH, AMC and PILC were held at the Turtle Lodge, situated in Sagkeeng First Nation. The Turtle Lodge "is a place for sharing our universal and ancient knowledge, for reconnecting ourselves to the Earth and Nature, and also, a place for sharing among people of all races and nations."<sup>29</sup> Elder Dave Courchene Jr. founded the Lodge in 2002. The Turtle Lodge has since earned an international reputation as a place of learning, healing and sharing for all people, and has been used by many to further their understandings including: Federal Court judges, international scientists and United Nations delegates and Special Rapporteurs.

For each of the gatherings, the protocols of the Lodge were observed by all in attendance. Before the beginning of each gathering, tobacco was passed to each of the EKH by a member of the PILC team. This important protocol is a recognition of the sacredness of tobacco and is followed to seek the guidance and help of EKH. For AMC, the importance of protocols cannot be overstated as they are a necessary part of showing respect for the expertise of EKH.

*"Every time we do a pipe ceremony, we are exercising our language, our nationhood and our sovereignty."* – Elder Harry Bone

The gatherings always began with pipe and water ceremonies, songs, the beating of the drum and the rattles. The importance of ceremonies is best explained by EKH themselves:

Our ceremonies are our ways of honouring and acknowledging our connection to the Creator and Mother Earth, our language, our way of life, and our teachings. [...] We stay connected to our Sacred Laws through ceremony. Our relationship with the land always includes prayer and ceremony in the recognition that everything has a spirit and is therefore sacred. Ceremony helps us to stay balanced and connected with the forces of the universe. Ceremony tells us how to live with other people and to honour the land, for example, by offering tobacco when we take plants and doing ceremony when we take animals.<sup>30</sup>

The AMC and PILC teams attended the Gatherings to receive guidance from the EKH and assist them as needed. Other technicians including professors and knowledge holders were also in attendance to provide support and to ask or answer questions where necessary.

Discussions during the Gatherings were always led by the EKH and were conducted in their original languages (Anishinaabemowin, Néhiyawak, Dakota oyate) and in English. EKH often spoke about the importance of speaking their languages as it was given to them by the Creator and it is through this language that they can best convey the spirit of their teachings.

*"How I speak with the Creator is in Anishinaabemowin."* – Elder Florence Paynter

<sup>29</sup> Turtle Lodge, "About the Turtle Lodge", online at: Turtle Lodge, <<http://www.turtlelodge.org/about/>>.

<sup>30</sup> Bone et al, *supra* note 3 at p 34.

*“You have to know your language. When you lose your language, you have to use someone else’s concepts to describe who you are.” – Elder Harry Bone.*

Guidance was provided by the EKH through the sharing of stories, dreams, prophecies and knowledge.

*“Legends are not just stories, they are law.” – Elder D’Arcy Linklater*

Decisions were made about what was presented and the way forward was established on a consensus basis. Where differences of opinion emerged, the EKH had an opportunity to address the issue. All those in attendance were invited to speak if they wanted.

The statements produced at these Gatherings are written by the EKH. Lawyers and professors offered technical support through the provision of oral and written background information on the environmental reviews, including the Review of the *Fisheries Act*.

### **Sharing the Gift of Knowledge**

*“Learn to listen.” – Elder Harry Bone*

The EKH were clear that if the Expert Panels and Standing Committees reviewing the Federal environmental assessment laws and the NEB wanted to hear from EKH, it needed to be done in *their* environment. This was a necessary condition as the EKH wanted to ensure that all in attendance would both listen and feel the love that they have for Mother Earth.

The EKH with the assistance of AMC and PILC organized a public event which was held at the Turtle Lodge in Sagkeeng First Nation (Manitoba) on 18 November 2016. The Gathering was entitled “Sharing Indigenous Knowledge on Survival in Times of Climate Change”. The Gathering was an opportunity for the EKH to **share their gift of knowledge for the benefit of and with all their relations including** the trees, water, animals, earth, settler society and Indigenous Nations.

The Master of Ceremonies at the Gathering was Knowledge Holder Katherine Whitecloud. Welcoming remarks were made by Chief Derek Henderson of Sagkeeng First Nation as well as Elder Dave Courchene Jr who explained the vision of the Turtle Lodge, the gifts and natural laws that have ensured the survival of Indigenous people. The day began with a Pipe and Water Ceremony, including explanations of the significance of the sacred pipe and its relationship to Indigenous sovereignty. Elder Florence Paynter described the importance of the water and the role of women in speaking on its behalf. Elder Mary Maytwayashing rendered a water song which she had received in a dream and Elder Wally Swain conducted a tree ceremony with a live tree that was brought into the Turtle Lodge. A youth representative, Zara Contin, delivered the Onijisay Aki (“The Earth is Changing”) Youth Statement which is attached to these submissions as Appendix 2. Youths Terrance Thomas and Chelsea Spence from Nisichawayasihk Cree Nation shared about the importance of traditional medicines.

The EKH presented the *Ogichi Tibakonigaywin, Kihche’othasowewin, Tako Wakan, Great Binding Law* which was written in preparation for the Enbridge Line 3 hearing and is attached as Appendix 3. The

Great Binding Law teaches us that as the Original Peoples, Indigenous Nations were given their original instructions through their languages, songs, ceremonies, ways of life, teachings and stories. These original instructions provided that EKH would be the keepers of Mother Earth.

Elder Henry Skywater shared about the importance of the headdress and rendered the Spirit Song. Elder Dave Courchene Jr made a Statement on implementing the Great Binding Law which focused on the role and leadership of EKH as peacemakers of Mother Earth. It says that “in order to reach peace, we must not overstep spiritual and natural laws.” The Statement indicates:

[w]e believe our Indigenous knowledge can help us collectively design, implement and change the narrative to establish a real national identity, inclusive to the contribution of the gifts of all people, including the contribution of the First Peoples.<sup>31</sup>

As part of the exercise in renewing relationships, others were also given the opportunity to speak. Statements of support were offered by AMC Grand Chief Derek Nepinak and Eileen Clarke, the provincial Minister of Indigenous and Municipal Relations. Participants each received a scroll copy of the Great Binding Law so that they could continue to engage with the information once they return home.

The event was open to the general public and was attended by over 180 guests including: Robert Falcon Ouellette (MP), Judy Klassen (MLA), Robert Altemeyer (MLA), Peter Watson (Chair and CEO of the National Energy Board), Cathy Hainsworth (Transport Canada), Cathy Gee (Department of Fisheries and Oceans), Serge Scarfield (Chair of the Clean Environment Commission), Jacinthe Morin (Canadian Environmental Assessment Agency), Annette Trimbee (President of the University of Winnipeg), Ken Champagne (Chief Provincial Court Judge), numerous professors from the Universities of Manitoba and Winnipeg, representatives from Manitoba Hydro and Enbridge and a number of non-governmental organizations, lawyers from across Canada, and many others.

The Gathering provided a venue for the EKH to demonstrate that the Anishinaabe (Ojibway), Nehetho (Cree) and Dakota ceremonies, oral traditions and teachings remain very relevant today. Attending gatherings in sacred lodges such as the Turtle Lodge is crucial to understanding Indigenous worldviews and laws. The inter-connectedness of ceremonies and spirituality and the substance of *The Great Binding Law* and teachings cannot be translated within secular environments.

*“We must respect and honour one another.”* – Elder Wally Swain

The gathering itself was an exercise in the Great Binding Law as it offered the chance to learn from one another and build relationships.

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<sup>31</sup> Dave Courchene Jr, “Sharing Indigenous Knowledge on Survival in Times of Climate Change” (18 November 2016).

## **PART THREE: LIVING IN GOOD RELATIONSHIPS WITH MOTHER EARTH**

*“They have to understand our worldview in order for environmental decision making to make sense.”*

– Elder D’Arcy Linklater

*“The only way that they will change is if they can know and understand what we know”*

– Elder Dave Courchene Jr.

### ***Relationships are everything***

*“The law is the responsibility we have as Anishinaabe. This idea needs to be embedded into what we write about the law, rather than trying to capture the law as an idea.”* - Elder Allan White<sup>32</sup>

The Great Binding Law is not comprised of external sets of written rules, but is an internal way of life. The Great Binding Law is all about relationships and outlines how we can achieve good relationships.<sup>33</sup> The laws within the Great Binding Law 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.

The *Spirit Trail of Life* story in Appendix A to *The Great Binding Law* 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, Indigenous Nations point to the fact that we are born in water, one of nature's most sacred elements. The story in Appendix C to *The Great Binding Law: 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.*<sup>34</sup>

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<sup>32</sup> Anishinaabe Nibi Inaakonigewin, Report, Water Laws Gathering June 20-23, 2014, Roseau River Manitoba, at p 8 [ANI Report].

<sup>33</sup> For a further discussion, see for example: Borrows, *supra* note 5 at p 8; Craft, *supra* note 5 at p 16; Mills, *supra* note 5 at p 852.

<sup>34</sup> See Appendix C to the Great Binding Law..

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 EKH 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.<sup>35</sup>

Natural Laws teach Indigenous 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.

### ***Relationships are badly out of balance***

The relationships between all relations are badly out of balance - Indigenous people, settlers, Mother Earth, the water, animals, fish, etc. A brief examination of the historical relationship can assist to better understand the origins of this imbalance.

For many Indigenous Nations and people, the *Royal Proclamation of 1763* and signing of treaties commencing in the 1700s 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.<sup>36</sup>

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

For Indigenous Nations, the treaty-making process outlined the framework of relationship between settler governments and Indigenous Nation governments for the purpose of accessing lands to the depth of the plow. Understandings were reached in order for these settler governments to begin settlement, including with agricultural land use and the construction of railways.<sup>37</sup> 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:

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<sup>35</sup> Bone et al, *supra* note 3 at p 29.

<sup>36</sup> See, for example, Exhibit C3-09-02 - Dr. Ken Coates, *First Nations, Infrastructure and Indigenous Participation With Major Resource Projects*, (2015), at p 8, as part of the Enbridge Line 3 Proceeding before the National Energy Board; D'Arcy Linklater, Harry Bone & The Treaty and Dakota Elders of Manitoba, *Ka'esi Wahkotumahk Aski – Our Relations with the Land: Treaty Elders' Teachings Volume II* (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014).

<sup>37</sup> See generally Coates, *supra* note 36.

**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 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]<sup>38</sup>

Western institutions continue to misrepresent treaty. Through Western laws, Indigenous Nations were displaced and dispossessed of their lands.

The enactment of the *Indian Act, 1876*, the residential schools system,<sup>39</sup> and economic development and resource activities on Mother Earth have all had serious negative impacts on relationships.<sup>40</sup> These negative repercussions cannot be over-emphasized.

The AMC and EKH are extremely worried about the damage that is being done to our relationships with Mother Earth through the current “environmental assessment process.” Current Western laws are based on managing, controlling and putting a price on Mother Earth. These laws are causing irreversible damage to Mother Earth. The Canadian government continues to associate the “environment” with economic health and growth.

As the Minister of Environment and Climate Change stated in January 2016 regarding strengthening Canada's environmental assessments:

To have the Ministers of Environment and Climate Change and of Natural Resources work in tandem on this sends an important message that a clean environment and a strong economy go hand in hand.<sup>41</sup>

### ***Speaking for Mother Earth***

*“They call their laws 'environmental protection laws' (...). Your laws are destroying our lands and livelihoods.” – Elder Joe Hyslop*

*“We were given a responsibility to speak for the land.” – Elder Harry Bone*

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<sup>38</sup> Joe Hyslop et al Dtantu Balai Betl Nahidei, *Our Relations to the Newcomers: Treaty Elders' Teachings Volume III* (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2015) at p 22 [Treaty Elders Teachings Volume III].

<sup>39</sup> The first residential school opened in 1851 and the last ones closed in 1997. See 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](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf) [TRC Summary Report], at 357, 359, 360, 361.

<sup>40</sup> Treaty Elders Teachings Volume III, *supra* note 38 at p 10.

<sup>41</sup> Speaking Notes for Catherine McKenna, Minister of Environment and Climate Change – Press Conference – Government of Canada Moves to Restore Trust in Environmental Assessment, January 27, 2016, online: <http://news.gc.ca/web/article-en.do?nid=1030229>.

The AMC and EKH are extremely worried about the way decisions are made about Mother Earth. Indigenous Nations have been given the role of Keepers of the Earth and have been provided with gifts to exercise this role. Other nations have also been given gifts and it is up to those nations to discover their gifts. Indigenous people exercise their gifts with kindness, peace and in a non-confrontational way.

Indigenous people have a deep connection with and love for Mother Earth as she is living. The EKH remind us that many Indigenous youth struggle with finding their true identity as they have lost their connection with Mother Earth because of the negative impacts of Western laws.

While Indigenous Nations remain concerned about the damage to Mother Earth and the worsening of climate change, it is believed that the EKH can assist in renewing relationships. They can also assist in teaching the youth and encouraging them to make their journey back to Mother Earth to learn from her.

### *Shifting the Onus*

Renewing relationships requires acknowledgement that Western laws and systems are not neutral. Existing federal environmental decision-making processes are based on Western worldviews and laws, which are foreign to Indigenous people.

For many years, Indigenous Nations and people in Canada (and Indigenous people throughout the world) have gone to great efforts to learn foreign languages and laws. **Indigenous Nations are frequently called to move within processes that are not their own.** The discomfort and disrespect felt by the EKH in participating in the NEB Hearings into Enbridge Line 3 offers a recent example. After participating in this foreign process, the EKH were clear that they would never return to the NEB. The EKH indicated that if the NEB wanted to hear from them, the NEB would need to enter *their* environment.

Today, it is time to shift the onus and demand the same in return from settlers and specifically, from the Federal Government.

*“If you want to base your implementation of reconciliation on section 35, I think it's best you open up the Constitution so I can decide what goes in section 35.” – Elder Joe Hyslop*

*“We will not go running to them for validation. We do not need to reflect their way of governance because it is flawed.” – Elder Dave Courchene Jr.*

The AMC requires a shifting of the onus to require settlers (including the Federal Government) to come to Indigenous institutions of learning like sacred lodges and listen to the EKH. It will require settlers to learn Indigenous languages and fully respect Indigenous legal orders. This notion is supported by the Calls to Action in the Truth and Reconciliation Commission Report which require the implementation of the *United Nations Declaration on the Rights of Indigenous People* and recognition of Indigenous legal orders and worldviews.<sup>42</sup>

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<sup>42</sup> See TRC Summary Report, *supra* note 39, Calls to Action 43, 44 and 47; see also United Nations Declaration on the Rights of Indigenous People, article 27, online at: <<http://www.refworld.org/docid/471355a82.html>>.

**In order for nation to nation relationships to begin, there must be recognition that:**

- (1) Western laws are not neutral as they are foreign to Indigenous Nations and made unilaterally;**
- (2) Western laws have had many negative impacts on Indigenous Nations and on the environment which they have the responsibility to protect; and**
- (3) The worldviews and laws of Indigenous Nations must be respected on an equal basis to Western worldviews and laws.**

## **PART FOUR: RECOMMENDATIONS**

*“It’s about time that they understand us. The Creator gave us laws. They don’t understand our relationships.” – Elder D’Arcy Linklater*

*“If we don’t share, then how are they going to hear.” – Elder Mary Maytwayashing*

*“We have to stay firm in our commitment to protect the land.” – Elder Florence Paynter*

### ***Overall Recommendations***

As stated by Elder Dave Courchene Jr,

We acknowledge the current reality that we are living in today is in need of change. We are living in an environment of chaos and uncertainty. We can continue to bury our heads in the sand, but the fury of nature will prevail. We cannot continue to walk the current path that threatens the future for us all.<sup>43</sup>

The following “overall recommendations” are necessary actions which will achieve better long term relationships among Indigenous Nations, settlers and Mother Earth. The recommendations cannot be “cherry-picked” and should be considered as a whole.

#### **(1) Renewing Relationships**

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.

Healthy relationships must be renewed periodically or they can become tarnished and irreparable. Renewing relationships 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. Recognizing that relationships are uncertain, the EKH have reminded us that all living beings have needs which must be considered. Practically speaking, achieving healthy nation to nation relationships requires the needs of all living beings to be met.

It also requires acknowledging The Great Binding Law as a distinct and unique constitutional order.

The Prime Minister of Canada, Justin Trudeau, has stated:

No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.<sup>44</sup>

<sup>43</sup> Dave Courchene Jr, “Sharing Indigenous Knowledge on Survival in Times of Climate Change” (18 November 2016).

<sup>44</sup> Rt Hon Justice Trudeau, “Minister of Indigenous and Northern Affairs Mandate Letter”, online:

One may ask what it means to have renewed nation to nation relationships. A necessary step in achieving this renewed relationship, is the need to understand one another. To understand one another, the Federal Government must sit, listen and engage with Indigenous Nations within their sacred spaces. Given the role of EKH as teachers and leaders, it is necessary for the Federal Government to sit and learn from them on a regular basis.

*“It’s time for them to wake up. We have our own ways of doing things. We still stand firm.”*  
– Elder Wally Swain

## **(2) Reconsider Your Relationship with Mother Earth**

*“[I] often wonder, when we speak up, are we really heard? Are we wasting our breath?  
No good if no one is listening.”*  
– Elder Henry Skywater

While Indigenous Nations are heterogeneous, they are all organized in a way that is reconcilable with Mother Earth. As the Original Peoples of this land, Indigenous Nations view themselves in relation to and as part of Mother Earth. As stated in The Great Binding Law, “We are the Earth.”

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.

Indigenous Nations understand all living beings as relatives. As demonstrated by the Story in Appendix B to the Great Binding Law - *The Selfish Son/Greedy Son*<sup>45</sup>, human actions have a direct impact on Mother Earth. When the EKH speak about their concerns for Mother Earth, they speak about humans, air, the plants and animals, medicines, water, rocks 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.

EKH 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, Indigenous Nations have the responsibility to be the voice of Mother Earth.

Indigenous Nations and 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 EKH play a leadership

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<http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>.

<sup>45</sup> See Appendix B to the Great Binding Law.

role in reaching a level of balance and harmony. The EKH 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.

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

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

According to Elder Dave Courchene Jr, the EKH “want to move towards finding a peaceful unified approach to current challenges, and show a way for all of us to become a culture of stewardship – a culture of gratitude, generosity, warmth and positivity.”<sup>46</sup>

As evidenced by the Federal Government's recent approval of pipelines, Western laws and worldviews describe Mother Earth as a “thing” which can be managed, sold and exploited. AMC challenges the Federal Government to reconsider this relationship through further engagement with EKH.

### **(3) A Commitment to Action is Required**

#### *i. Committing to a Four Year Dialogue between Federal Government and EKH*

As an essential starting point, the AMC recommends that the Federal Government commit to a four year dialogue with EKH for the purpose of renewing nation to nation relationships.

For the first and second years, the dialogue should take place four times a year at the beginning of each new season. During the third and fourth year, the gatherings should be held every two months. This specific timeline has been included as an illustrative example. The timelines should be established on a consensus basis between the EKH and the Federal Government.

Gatherings should always be done within sacred spaces and proper protocols must be followed by the Federal Government as (a) an active exercise in Indigenous laws and (b) a sign of respect for the expertise of the EKH.

#### *ii. Active and Ongoing Learning is Required*

Renewing relationships and living in good relationship is not a passive exercise. It requires constant work. In addition to meeting with the EKH in their sacred spaced, it is recommended that Federal Ministries gather internally once a month to engage with relevant readings which can serve to educate them about Indigenous Nations worldviews and cultures.

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<sup>46</sup> Dave Courchene Jr, “Sharing Indigenous Knowledge on Survival in Times of Climate Change” (18 November 2016).

Examples of recommended readings could include:

- Aaron Mills “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) McGill LJ 61:4; [forthcoming]
- Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One* (Saskatoon: Purich, 2013);
- Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976);
- D’Arcy Linklater, Harry Bone & The Treaty and Dakota Elders of Manitoba, *Ka’esi Wahkotumahk Aski – Our Relations with the Land: Treaty Elders’ Teachings Volume II* (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014);
- Doris Pratt, Harry Bone & The Treaty and Dakota Elders of Manitoba, *Untuwe Pi Kin He- Who We Are: Treaty Elders’ Teachings Volume I*, 2<sup>nd</sup> ed (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014);
- Fred Kelly, “Confessions of a Born Again Pagan” in Marlene Brant Castellano, Linda Archibald & Mike DéGagné eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008);
- Harry Bone et al, *The Journey Of the Spirit of the Red Man* (Turtle Lodge: Trafford, 2012);
- James St Arnold & Wesley Ballinger et al, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (2013);
- Joe Hyslop et al. Dtantu Balai Betl Nahidei, *Our Relations to the Newcomers: Treaty Elders’ Teachings Volume III* (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2015);
- John Borrow, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47:4 UTLJ 417;
- Leroy Little Bear, “Dispute Settlement among the Naidanac” in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 341; and
- Steven T Newcomb, “Pagans in the Promised Land: Decolonizing the Doctrine of Christian Discovery” (2013).

On an ongoing basis, it is recommended that Federal Departments and Ministries engage with Indigenous scholars who can assist them in identifying further suggested readings.

### ***Recommendations for a Transition Process***

The following recommendations would not meaningfully address nation to nation relationships. Meaningful change will not happen until we learn from one another, about our communities and ways of achieving good relationships with Mother Earth. This will not happen over night.

Given that to date, Western laws have failed to protect Mother Earth, it is helpful to consider certain recommendations which will assist us all during our period of transition. Many of the Indigenous Nations which AMC represents are in a constant state of reacting from one crisis to the next. Short term and immediate actions are needed to address this imbalance of power and exploitation of Mother Earth.

**(1) “Environmental assessment” must be done holistically**

AMC recognizes a long history of inefficiencies as a direct result of arbitrary bureaucratic lines of authority. The current 'environmental assessment' approach is fragmented and there is a lack of basic communication between and within Federal Ministries which are all said to represent the Federal Government of Canada. This ineffective process creates a lack of accountability and excludes Indigenous Nations from meaningful participation in 'environmental assessments'.

The AMC recommends that the Crown act in one mind before it presents itself to Indigenous Nations. Nation to nation relationships require a conversation between the Federal Government (speaking from a unified position) and First Nations. The onus must be on the federal government to come to Indigenous Nations with a unified perspective.

Indigenous Nations view the Mother Earth and all living beings in a holistic way. *All* aspects of the environment must be protected and cannot be viewed in isolation from one another.

The AMC recommends the creation of a principle akin to Jordan’s Principle which would require the Federal Government to prioritize the honour of the Crown and relationships with Indigenous Nations over inter and intra jurisdictional disputes about 'environmental assessments'.

An important part of holistic environmental assessment is the realization that climate change is happening. We must realize the imbalance that exists in our relationship with Mother Earth. Indigenous Nations are feeling the effects of climate change on the land and all environmental laws, laws relating to environmental assessment processes, must provide for adaptation to climate change and disastrous weather. As stated in The Great Binding Law:

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.<sup>47</sup>

**(2) EKH and “Oral Traditional Evidence” must be given equal weight to Western experts and evidence**

*“We are not part of the Review, our experts aren't sitting on [the Expert Panels]. That's not fair.”*  
– Elder Joe Hyslop

When EKH and Land Users willingly decide to participate in 'environmental assessment' hearings, the evidence they provide - whether written or oral- must be treated as expert evidence.

There is a recognition in Canada that Indigenous Nations peoples have “unique knowledge about the local environment, how it functions, and its characteristic ecological relationships.”<sup>48</sup> As the EKH have shown through The Great Binding Law, the traditional knowledge held by Indigenous Nations is not

<sup>47</sup> The Great Binding Law – see Appendix 3.

<sup>48</sup> Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the CEAA, 2012, Canadian Environmental Assessment Agency Policy and Guidance Papers, updated March 2015, online: Canadian Environmental Assessment Agency <<https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=C3C7E0D3-1>>.

just a 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.

Respecting the role of EKH and Land Users for its expertise:

- acknowledges the gift of Indigenous Nations as keepers of Mother Earth;
- respects the time-honoured knowledge of Indigenous Nations;
- provides relevant environmental information that may otherwise be unavailable;
- identifies possible environmental effects;
- avoids, reduces, or mitigates potential adverse effects associated with large scale 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 Indigenous Nations, regulators and resource developers; and
- leads to better outcomes for the resource developers and better decisions by the regulator.

Indigenous Nations have a deep relationship with Mother Earth. Detailed information is contained in Indigenous Nations' languages, place names and stories. This knowledge comes directly from land users and cannot be separated from the larger body of Indigenous Nations knowledge, also encompassing cultural, economic, political and spiritual inter-relationships.

### **(3) Meaningful ongoing engagement and consultation with Indigenous Nations is required**

Meaningful ongoing engagement includes information sharing for educational purposes and “includes active and critical exchange of ideas among proponents, regulators and participants.”<sup>49</sup>

- Indigenous Nations should have the opportunity to drive engagement processes within *their* environments and input provided should be able to influence or change the outcome/project being considered;
- Indigenous Nations should be provided with sufficient resources and information to meaningfully participate on *their terms*;

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<sup>49</sup> Exhibit C3-08-08 – Dr. James Robson and Dr. Patricia Fitzpatrick, *A Critical Analysis of the L3RP Aboriginal Engagement Process*, at para 7, as part of the Enbridge Line 3 Proceeding before the National Energy Board.

- Governments and proponents should engage in learning activities on an ongoing basis with Indigenous Nations EKH to provide opportunities for each of the parties to discuss their current needs;
- Proponents should undertake extensive pre-construction engagement with Indigenous Nations whose ancestral lands and nations are impacted. Engagement should be done in relation to project proposals and implemented at every stage with these Indigenous Nations, in keeping with the requirement for free, prior, and informed consent;
- Consultation must happen on a nation to nation basis and cannot be undertaken between Proponents or Environmental Review Boards and Indigenous Nations; and
- For many years, Indigenous 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 Indigenous Nations languages to better engage with Indigenous Nations.

**(4) Environmental assessment processes must be enhanced and expanded, including before, during and after assessments are conducted**

The 2012 amendments to *CEAA 2012* drastically reduced the number of undertakings that must undergo an environmental assessment before being approved. As one example, the number of active assessments was cut from about 3,000 in April 2010 to 70 in the first month of *CEAA 2012*.<sup>50</sup>

Indigenous Nations have the responsibility to speak for Mother Earth and for the water. AMC is significantly concerned by the fact that the federal government has turned its back on protecting Mother Earth and the water, as evidenced in the current state of federal legislation.

It is necessary to consider the impact of development projects to all relations when deciding which projects will be approved. Environmental assessment processes should acknowledge that Mother Earth and all living beings are not “things” which can be owned or acquired. They must be respected and they are all equally as important.

The Great Binding Law tells us that water is life and it has a spirit. Water is so important that it is sacred. Decisions about the water cannot be made without a holistic understanding of the effects on all living beings, including the water, birds, fish, medicines, sacred sites, etc. Natural laws tell us that we must respect water and that water can suffer when it is disrespected.

I'm very conflicted when we talk about the law of water. I don't really see a law on water that would interpret 'I own the water' [referring to written law]. But we all have a responsibility to acknowledge that water with the laws we were given – instruction from the Spirit. These are un-written. I don't need the government of Canada or Ontario telling me that I'm breaking the law by doing that – it's a gift that I have, given to me by the Spirit. If

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<sup>50</sup> Gibson, *supra* note 17 at 117.

we stop doing that, we're setting up a very bad example for future generations. No government can stop this Great Spirit Law. If I stop it, I'm setting up my children and grandchildren for failure. If you don't honour that Great Law of the Spirit, bad things will ensue.<sup>51</sup>

Elder Dennis White Bird has cautioned that “we need to give consideration to health and preservation of the water – for our own existence.”<sup>52</sup> The water needs a voice.<sup>53</sup> “I realized that to take care of the land, you have to take care of the water.”<sup>54</sup> Water is a living entity and water unites us all.

The consideration of the impact of a project to all relations must be given early in the process, as soon as the idea of the project is formed and before any significant planning and investment are made.

Environmental assessment should include a review of the impacts of all living beings, including but not limited to economic, social, cultural and health related factors.

Once a project has been approved, it is important to ensure that impacts of decisions are continuously and effectively monitored. A robust, open and transparent monitoring process should be included in all licenses approving projects and must:

- build in flexibility;
- be adaptive;
- provide for compliance and enforcement;
- provide opportunities for the involvement of Indigenous peoples; and
- provide for integration of recommendations by Indigenous peoples throughout the monitoring process.

Indigenous knowledge holders and land users must be included in the monitoring process and be recognized for their expertise.

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<sup>51</sup> Elder Allan White in ANI report, *supra* note 32 at p 21.

<sup>52</sup> *Ibid*, at p 27.

<sup>53</sup> *Ibid*, at p 28.

<sup>54</sup> *Ibid*, at p 28.

## CONCLUSION

*Our ancestors prophesized of this time – a time of climate change, a time of crossroads, a 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.<sup>55</sup>*

### AMC Recommendations

While many recommendations cannot be identified at this time as the EKH have said that it is important not to overstep the Spirit, the EKH have assisted AMC in identifying certain recommendations which can guide us in achieving healthier nation to nation relationships.

1. **Renewed relationships:** Renewing nation to nation relationships requires that settlers (including the Federal Government) listen and learn from Indigenous Nations about their cultures and worldviews. The Great Binding Law and Western laws must be respected as equal and distinct. Renewing relationships requires settlers to join the EKH in sacred spaces to feel The Great Binding Law, and to demonstrate commitment to nation to nation relationships.
2. **Reconsider your relationship with Mother Earth:** It is necessary for settlers to reconsider their understanding that Mother Earth can be managed and owned. This understanding has damaged Mother Earth and perpetuated the negative consequences of climate change. Mother Earth must be respected. She is a living being, not a “thing” that can be owned or sold.
3. **A Commitment to Action is Required:** As a necessary starting point, it is recommended that the Federal Government commit to a four year dialogue with EKH as a recognition of their role as leaders and teachers of Indigenous Nations. The methodology which is described in Part Two of the submissions can assist the Federal Government in identifying the proper protocols and way forward in preparing the gatherings with the EKH.
4. **Active and Ongoing Learning is Required:** Renewing relationships is not a passive exercise. The AMC suggests a list of reading materials which can be used by Federal Ministries to encourage the process of education and awareness.

Recognizing that we are in a period of transition, certain short term recommendations are needed to assist us in dealing with the current crisis situation for the benefit of all relations.

1. **Environmental assessment must be done holistically:** The current approach to 'environmental assessment' is fragmented and filled with inefficiencies. It is Indigenous Nations and Mother Earth who suffer the most from these arbitrary processes. Accountability is needed for the (in)actions of the Federal Government. It is recommended that a Principle akin to Jordan's Principle be created which prioritizes the honour of the Crown and relationships with

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<sup>55</sup> The Great Binding Law – see Appendix 3.

Indigenous Nations and Mother Earth over all (internal or external) jurisdictional disputes.

2. **EKH and Oral Traditional Evidence must be given equal weight to Western experts and Western evidence:** Oral traditional evidence provided by Indigenous Nation EKH and Land Users must be given equal weight and treated as expert evidence within 'environmental assessment' processes.
3. **Meaningful ongoing engagement and consultation with Indigenous Nations:** “Meaningful” engagement and consultation with Indigenous Nations requires such things as early and ongoing exchange of information, active and critical exchange of ideas, and engagement within the spaces of Indigenous Nations. Consultation must happen on a nation to nation basis with the goal of acquiring free, prior and informed consent of Indigenous Nations before any decisions are made or actions taken.
4. **Environmental assessment processes must be enhanced and expanded, including before, during and after assessments are conducted:** In deciding which projects will be approved, the impacts of projects to all relations must be considered early in the process. Environmental assessment processes should respect that Mother Earth and all living beings are not “things” which can be owned or acquired. Environmental assessment should include a review of the impacts of all living beings, including but not limited to economic, social, cultural and health related factors. Once a project has been approved, it is important to ensure that impacts of decisions are continuously and effectively monitored.