

Written submissions of the Assembly of Manitoba Chiefs
submitted to the Expert Panel for the National Energy Board
Modernization

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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 National Energy Board (“NEB”) Modernization is symptomatic of the larger concerns about the negative impacts of Western laws and processes on Indigenous people and Nations. 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 mean 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.² 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 peoples, 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.

² 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.”³

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

³ 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 to 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. **The NEB cannot conduct environmental assessments:** Within holistic environmental decision-making, the NEB is not well-placed to conduct environmental assessments. The AMC does not recognize the legitimacy of the NEB. The NEB does not have a history of environmental assessment capability, it has traditionally been close to the industry it regulates and is less friendly to public participation.
5. **If the NEB continues to exist, the following must be implemented:**
 - i. The NEB's mandate must reflect the commitment to nation to nation relationships;
 - ii. The NEB's role should be clarified within the environmental decision-making framework;

- iii. There must be Indigenous representation at all levels of the NEB;
- iv. Engagement with Indigenous people and nations must be ongoing;
- v. The NEB cannot fulfill the duty to consult and accommodate; and
- vi. Adequate participant funding must be available.

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 First 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 EKH, including experts on the environment and 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 on 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.

The AMC has also participated in the ongoing federal reviews of the Environmental Assessment Processes, the *Fisheries Act*, and the *Navigation Protection Act*.

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 Kelly⁴

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.⁵

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;⁶
- the **branches are the legal traditions** which include the processes and institutions that “create, sustain, and unmake law”⁷;
- the **trunk represents the society's constitutional order**

⁴ Assembly of Manitoba Chiefs Assembly and Conference, 30 November 2016.

⁵ For scholarly articles written on this topic, see Aaron Mills “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847; 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.

⁶ Mills, *supra* note 5 at p 862.

which is the organizing structure generated by the roots; and

- 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.”⁸ 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 told 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 peoples 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.

According to Mills,

It's becoming part of the orthodoxy of legal education in Canada that Canadian law needs to

⁷ *Ibid.*

⁸ *Ibid.*

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)⁹

Without an understanding of the worldviews and cultures of Indigenous peoples, one has no hope of understanding the laws.¹⁰ 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 legal system of Canada, the federal jurisdiction over “Aboriginal People” is contained in section 91(24) of the 1867 *Constitution of Canada*. Section 35 of the Constitution Act, 1982 recognizes and affirms Aboriginal and Treaty rights. Canadian courts have found that based on this constitutional recognition First Nations have Aboriginal title and valid claims to land.¹¹ These laws and rights have been used successfully by Indigenous Nations to “win” Canadian court battles over lands and resources 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 systemic 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 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

⁹ Mills, *supra* note 5 at p 856.

¹⁰ *Ibid* at p 852.

¹¹ *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.

responsibility to protect.

The NEB Modernization is symptomatic of the larger issue

Overview

The review of the NEB structure, role and mandate pursuant to the *National Energy Board Act*¹², which is being undertaken by the NEB Modernization Expert Panel¹³ is symptomatic of the overarching failure of Western laws and processes to:

- respect Indigenous Legal Orders;
- protect Mother Earth; and
- manage climate change impacts.

Indigenous Nations are faced with the deep challenge of having to navigate within foreign systems and processes which make decisions about Mother Earth and impact their daily lives. Foreign decision making bodies which are provided governing authority under Western laws impact Indigenous people and nations. As protectors of Mother Earth, navigating 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 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', demonstrating 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, C-38 and -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 engagement with Indigenous peoples. The omnibus bills led to the politicization of the previously independent NEB, 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.¹⁴

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

¹² *National Energy Board Act*, RSC, 1985, c N-7 [*NEB Act*].

¹³ National Energy Board Modernization Expert Panel Terms of Reference, online: <<http://www.neb-modernization.ca/terms-of-reference>>.

¹⁴ 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.

teach-ins, rallies and protests across the country. While the Idle No More movement began as a way to protest the omnibus bills, its legacy has changed the social and political landscape of Canada.¹⁵

Following the announcement of the omnibus bills, 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 the AMC's current activities relating to the environment after 2012.

Changes to the National Energy Board

(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 NEB's structure, role and mandate under the *National Energy Board Act*. The goal is expressed to be to restore public confidence in what is known as the federal "environmental assessment" process and modernize the NEB.¹⁶

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

(ii) The National Energy Board

Created by Parliament in 1959, the NEB receives its authority and mandate from the *National Energy Board Act* ("*NEB Act*"). Historically, the *NEB Act* was enacted to remove regulatory processes relating to interprovincial and international pipelines from politically charged debates. The NEB was infused with quasi-judicial authority and granted independence from political influence and interference.

In June 2012, when omnibus budget Bill C-38 received royal assent, the overall effect on the NEB was to limit its independence by increasing the role of the federal government in the process of approving or denying pipeline projects. Prior to 2012, the NEB had decision-making authority with respect to national pipeline projects. Final decision making power now rests with the federal Cabinet following recommendations from the NEB.¹⁷

The 2012 amendments to the *NEB Act* limit public participation to parties that are "directly affected" by proposed projects. In order to "increase efficiency", the amendments also impose mandatory timelines on the NEB to issue its recommendations, and narrow the scope of issues the NEB may consider in hearings. The NEB is no longer able to consider all relevant information. Rather, it is now

¹⁵ Idle No More, "The Story", online: <<http://www.idlenomore.ca/story>>.

¹⁶ 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.

¹⁷ Rowland J Harrison, QC "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory "Independence" Mean? Should We Pursue It?" (2013) 50:4 *Alta L. Rev* 757 at 758, 771, 776.

limited to relevant considerations and those that appear to be directly related to the pipeline.¹⁸

The NEB itself has the discretion whether to consider upstream or downstream impacts of pipeline development, Greenhouse Gas emissions or climate change.¹⁹

Summary of Changes to the National Energy Board Act in 2012²⁰	
Pre-2012	Post-2012
NEB had decision-making authority to approve or reject proposed projects. Cabinet (Governor in Council (“GIC”)) could deny final approval for a project that the NEB approves, but would not approve a pipeline if the NEB rejected it.	Cabinet (GIC) has final decision-making authority to approve or reject proposed projects based on recommendations of the NEB.
No timelines for NEB to decide on a proposed project.	Recommendations to GIC must be rendered within 15 months of a project application being deemed complete, and the GIC must issue a final decision within 3 months of receiving NEB recommendations.
Any “interested person” was able to participate in the review process.	Only parties who are “directly affected” or offer “relevant information or expertise” can participate in the review process.
The NEB could take into consideration any information.	The NEB can take into account all considerations that are relevant and directly related to the application.
Transport Canada considered projects effects on navigation, including navigation safety.	The NEB considers projects effects on navigation, including navigation safety.
Up to six temporary NEB members could be appointed.	No limit on the number of temporary NEB members that may be appointed.
Mandatory hearings for Gas Export licences, and the NEB could consider environmental matters.	Hearings for Gas Export licences held at the discretion of the NEB, and when reviewing an application for a license, the NEB can only consider whether the quantity to be exported is surplus to Canadian needs, taking into account trends in discovery of the resource. The Board shall not

¹⁸ *NEB Act, supra* note 12, s 52(2)

¹⁹ Sonya Savage, “Bill C-38 and the Evolution of the National Energy Board: The Changing Role of the National Energy Board from 1959 to 2015” (2016) Canadian Institute of Resources Law, at 13

²⁰ Table created using information compiled from: Sonya Savage, “Bill C-38 and the Evolution of the National Energy Board: The Changing Role of the National Energy Board from 1959 to 2015” (2016) Canadian Institute of Resources Law; and, Natural Resources Canada, “Briefing Material to NEB Modernization Expert Panel: FAQ – 2012 Changes to the National Energy Board Act” online: <http://www.neb-modernization.ca/system/documents/attachments/a3c9ab47316f506352d3ed2a3dd09f5b4f7490cc/000/005/419/original/FAQ-2012_Changes_to_the_NEB_Act_v3_EN.pdf?148581139>.

	consider environmental matters.
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The 2012 changes to the scope and role of the NEB have not occurred in isolation. Amendments to the *Canadian Environmental Assessment Act* (“CEAA”), the *Navigable Waters Protection Act*, (“NWPA”), the *Fisheries Act*, and the *Indian Act* have similarly weakened the environmental and consultative provisions of Canadian legislation.²¹

Amendments to the *NWPA* and the *Canada Oil and Gas Operations Act* have also removed the requirement for additional approval of pipeline projects crossing navigable waters from the scope of Transport Canada and added authority for these projects to the NEB. 2012 amendments to the *Species at Risk Act* have removed from the purview of the NEB any consideration for the potential impacts of a proposed pipeline on the critical habitat of Canada’s species at risk.

Changes to *CEAA 2012* mean that there are no longer joint panels given that where a *CEAA* eligible project also falls under the NEB's jurisdiction, the NEB process prevails.²²

The NEB does not have legitimacy

AMC does not consider that the NEB has ever garnered legitimacy when contemplating decisions impacting ancestral and treaty lands. Legitimacy is earned through healthy and respectful relationships by conducting ongoing engagement. This does not exist between Indigenous peoples and the Federal Government's NEB. Indigenous people were marginalized and pushed aside while the energy sector damaged Mother Earth throughout their ancestral lands.

Decisions made by the NEB focus on economic interests without any consideration for the relationship between land and humanity. Within a relationship, reciprocity is fundamental. Failing to promote balance through reciprocity has created a significant imbalance which threatens the sustainability of humanity on the surface of the Mother Earth.

AMC's recent experience at the NEB during the Enbridge Line 3 hearing was a result of the illegitimacy of the NEB, and proved the NEB's lack of respect for Indigenous EKH. The AMC and EKH were not provided an adequate opportunity to be heard. The disregard shown to the Great Binding Law was glaringly apparent throughout the process which led to a flawed decision.

²¹ The changes to the *Indian Act* made it possible for Indigenous Nations communities to lease designated reserve lands based on a majority of votes from those in attendance at a meeting or in a referendum, instead of waiting for a majority vote from all eligible voters. Concerns were raised among Indigenous Nations regarding these changes because the Harper government was unilaterally changing laws that impact reserve lands without any consultation. In addition, while the Government said the changes would make it easier for Indigenous Nations to enter into lease agreements and generate revenue, concerns were raised regarding lowering the bar for community approval on leases that could potentially have long-term impacts on reserve lands. See for example, Janyce McGregor, “22 changes in the budget bill fine print”, 26 October 2012, online: CBC, <<http://www.cbc.ca/news/politics/22-changes-in-the-budget-bill-fine-print-1.1233481>>; APTN, “Conservative proposed omnibus Indian Act changes would allow bands to lease out reserve lands without majority community support”, online: APTN, <<http://aptn.ca/news/2012/11/21/conservative-proposed-omnibus-indian-act-changes-would-allow-bands-to-lease-out-reserve-lands-without-majority-community-support/>>.

²² Ecojustice, “Legal Backgrounder: The National Energy Board (1985), online: Ecojustice, <https://www.ecojustice.ca/wp-content/uploads/2015/03/SEPT-2012_FINAL_NEBA-backgrounder.pdf>.

Time and again during the Enbridge Line 3 hearing, 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. AMC could not separate its continuing concerns around the illegitimacy of the public hearing process, from substantive concerns about Enbridge Line 3. The following were absent from the NEB process:

- respect for the and basis acknowledgement of the existing of the Great Binding Law;
- 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 NEB Modernization Terms of Reference

The terms of reference of the Expert Panel for the NEB Modernization²³ demonstrate a continuing imposition of Western laws and processes and disrespect for Indigenous legal orders. The terms of reference include a number of inherent, but unstated assumptions in the scope of the review itself, including that:

- the federal government has the authority to create the NEB and to make decisions with respect to Mother Earth;
- the NEB is the appropriate body to regulate “energy” in Canada and to decide on behalf of Canada what is in the public interest;
- the NEB should continue to exist;
- positioning the NEB as a “modern, efficient energy regulator” will “regain public trust”; and
- strengthening the NEB is in the best interests of Canadians into the future.

The Terms of Reference of the Expert Panel outline areas of focus for the Expert Panel, each of which are flawed and do not suggest that First Nations are to be respected as active and equal partners in a “modernized NEB”. Indigenous traditional knowledge and information cannot simply be “integrated” into the NEB application and hearing processes.²⁴ The federal government must understand that Indigenous legal orders are not an external set of rules but are an internal way of life that governs all relationships.

The federal government's assumption that the existing decision-making process with respect to Mother Earth is fair and neutral is fundamentally incorrect and disrespectful. The continuing failure and refusal

²³ See NEB Modernization Expert Panel, Terms of Reference, online: <http://www.neb-modernization.ca/terms-of-reference>.

²⁴ See Indigenous Engagement in the NEB Modernization Expert Panel, Terms of Reference, online: <http://www.neb-modernization.ca/terms-of-reference>.

to engage with an Indigenous led decision-making process in the manner in which Indigenous peoples choose is not respectful of the nation to nation relationship and further damages any existing relationships. Engagement with Indigenous people and nations must be done within Indigenous people's environments and proper protocols must be followed.

While Indigenous Engagement is identified in the Terms of Reference of the Expert Panel, it does not consider that Indigenous peoples have their own legal orders and processes for environmental decision-making, and that requiring participation in a federal process in order to be heard is another example of the damaged relationship. This federal review itself unilaterally imposes conditions on Indigenous peoples, just as the NEB has done and the federal government continues to do.

Challenges to AMC's participation in the National Energy Board Modernization

In addition to its fundamental challenges in navigating in Western systems, AMC has faced barriers in its participation of the NEB Modernization.

AMC submitted its application for funding for the review of the NEB on 9 September 2016. On 25 November 2016 AMC was approved for funding at a lower amount than it requested for costs incurred as of 25 November 2016 and up until 31 March 2018. The funding allocation was divided, with 75% of the funding available in year 1 between 1 April 2016 and 31 March 2017, with the remainder available in year 2 between 1 April 2017 and 31 March 2018. 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.

For AMC the initial uncertainty regarding funding added barriers to participation particularly with respect to its planning and conducting of meaningful engagement with AMC member Nations, many of which are located in northern Manitoba, and some of which are remote and isolated.

PART TWO: METHODOLOGY OF AMC FOR PARTICIPATION IN THE NATIONAL ENERGY BOARD MODERNIZATION

“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 National Energy Board Modernization

To prepare for its participation in the review of Federal environmental assessment laws and of the NEB, including in the NEB Modernization, 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 that 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 protection of 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."²⁵ 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.²⁶

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, N hiyawak, 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

²⁵ Turtle Lodge, "About the Turtle Lodge", online at: Turtle Lodge, <<http://www.turtlelodge.org/about/>>.

²⁶ 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 were 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 NEB Modernization.

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.²⁷

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 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.

²⁷ 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 White²⁸

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.²⁹ 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.³⁰

²⁸ Anishinaabe Nibi Inaakonigewin, Report, Water Laws Gathering June 20-23, 2014, Roseau River Manitoba, at p 8 [ANI Report].

²⁹ For a further discussion, see for example: Borrow, *supra* note 5 at p 8; Craft, *supra* note 5 at p 16; Mills, *supra* note 5 at p 852.

³⁰ 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 of the Land are learned by observing Mother Earth [...] Nature keeps repeating herself so that we come to understand balance. We are supposed to follow Laws of the Land.³¹

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.³²

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.³³ 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:

³¹ Bone et al, *supra* note 3 at p 29.

³² 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).

³³ See generally Coates, *supra* note 32.

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]³⁴

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,³⁵ and economic development and resource activities on Mother Earth have all had serious negative impacts on relationships.³⁶ 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.³⁷

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

³⁴ 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].

³⁵ 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.

³⁶ Treaty Elders Teachings Volume III, *supra* note 34 at p 10.

³⁷ 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.³⁸

³⁸ See TRC Summary Report, *supra* note 35, 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.³⁹

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.⁴⁰

³⁹ Dave Courchene Jr, “Sharing Indigenous Knowledge on Survival in Times of Climate Change” (18 November 2016).

⁴⁰ 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 individuals and 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*⁴¹, 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

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

⁴¹ See Appendix B to Appendix 1.

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.”⁴²

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 as well as representative decision making bodies

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.**

⁴² 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) 61:4 McGill LJ847;
- 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*, 2nd 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 Borrows, “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, as well as the current federal environmental reviews, are 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 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'.

Environmental assessment can no longer continue to be conducted in a fragmented manner. Environmental decision making cannot only consider the specific project at issue. Rather, it must be done in a holistic manner, considering the impacts to ALL living beings equally. For environmental decision-making to attract public confidence, broader policy concerns, such as cumulative effects, regional and strategic planning mechanisms, effects on Indigenous rights and the requirement for obtaining free, prior and informed consent of potentially affected Indigenous peoples, must be primary considerations. Environmental decision-making must include collaboration and coordination between and among the various players to gain public confidence in the process and ensure that decisions made take into account all interests.

Additionally, 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. All environmental laws, including 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.⁴³

⁴³ The Great Binding Law – see Appendix 3.

(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.”⁴⁴ As the EKH have shown through The Great Binding Law, the traditional knowledge held by Indigenous Nations is not 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 their expertise:

- demonstrates respect for the Great Binding Law;
- 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

⁴⁴ 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>>.

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 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.”⁴⁵

- 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*;
- 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; 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) The NEB cannot conduct environmental assessments

Within the context of holistic environmental decision-making, the NEB should not be a responsible authority under the *Canadian Environmental Assessment Act* and, as a result, should not conduct federal environmental assessments.⁴⁶

As seen in recent environmental assessment reviews conducted by the NEB⁴⁷, significant challenges have impeded opportunities for meaningful public participation in proceedings, thereby restricting public confidence in the NEB process. The NEB is not positioned to take into consideration the necessary elements of holistic environmental decision-making. The focus of the NEB in the past has

⁴⁵ 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.

⁴⁶ *Canadian Environmental Assessment Act*, SC, 2012, c 19, s 52. The Expert Panel also heard this recommendation during the engagement sessions in Winnipeg.

⁴⁷ For example, the AMC's experience in the Enbridge Line 3 Replacement proceedings before the NEB.

been on regulatory matters with less attention given to broader environmental and cumulative effects. In addition, the NEB does not have a history of environmental assessment capability. Both the NEB and the Canadian Nuclear Safety Commission have been “traditionally close to the industries they regulate, and their proceedings are generally more formal and less friendly to public engagement than those of the old CEEA panels.”⁴⁸

As a regulator, the NEB is not well suited to engage the public, including Indigenous nations, in “a true planning process that considers whether the proposed project is the most appropriate way to meet societal needs and how its contribution to sustainability can be maximized.”⁴⁹

In order for public confidence to be gained in the context of environmental decision-making, Indigenous worldviews, decision making processes, and decision makers – must be respected on an equal basis.

(5) If the NEB continues to exist, the following must be implemented:

(i) The NEB's mandate must reflect the commitment to nation to nation relationships

The NEB's public interest mandate must be reflective of the Federal government's commitment of working with Indigenous people on a nation to nation basis and implementing the TRC Calls to Action as well as UNDRIP and the right to free, prior and informed consent.⁵⁰ In addition, the NEB should undertake further engagement with EKH to better understand they types of considerations which should be included in the definition of the “public interest”.

A revised NEB mandate reflecting the commitment toward nation to nation relationship cannot be limited to a hollow promise. Concrete changes must be made to the NEB's mandate and decision-making role to give life to this commitment. While further discussions are needed with EKH and youth to identify how this will be done in practice, the following comments should be considered in the NEB's revised decision-making role, which is committed to nation to nation relationship.

(ii) The NEB's role should be clarified within the environmental decision-making framework

Under the current decision-making framework set out in the *NEB Act*, the NEB has up to 15 months to submit its recommendation report to the Minister of Natural Resources following receipt of an application determined to be complete by the NEB, and the GIC has up to three months to make a final decision.⁵¹

Within the context of nation to nation relationships, both the federal government and Indigenous

⁴⁸ 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 p 185.

⁴⁹ Meinhard Doelle “The Evolution of Federal EA in Canada: One Step Forward, Two Steps Back?” (2014), online: <https://ssrn.com/abstract=2384541>, at p 10.

⁵⁰ The Expert Panel also heard during its engagement sessions in Saskatoon and Toronto that the principles of UNDRIP should be formally adopted into the NEB renewed mandate.

⁵¹ *NEB Act*, *supra* note 12 at s 52(4).

nations must have equal say in decisions affecting the environment.⁵² Decision-making must be completed in accordance with UNDRIP and the requirement of free, prior and informed consent. EKH must be involved in these discussions as experts and proper protocols must be followed in doing so within Indigenous environments. Indigenous led decision making processes must be central to the process.

Wherever the NEB engages with Indigenous peoples, including when determining priorities relating to energy information and dissemination, engagement must occur within Indigenous people's environment and proper protocols must be followed.

The NEB must consider the true cost of climate change, spill remediation, and inflation in applications from proponents.

Independent third party economic assessments should be required before applications are deemed to be complete. In many cases, proponents may be motivated by economic gain to underestimate the true cost of projects on the environment. Current environmental decision-making is motivated by economic gain and is based on managing the negative and positive impacts, which is causing irreversible damage to our environment and to Mother Earth.

Wherever the NEB engages with Indigenous peoples, including when determining priorities relating to energy information and dissemination, engagement must occur within Indigenous people's environment and proper protocols must be followed.

In addition, under no circumstances should the NEB or a proponent enter or acquire Indigenous land without the free, prior and informed consent of the affected individuals and First Nations.⁵³

(iii) There must be Indigenous representation at the NEB

The NEB is currently comprised of up to nine permanent Board Members who are appointed by the Governor in Council (“GiC”) on recommendation of the Minister of Natural Resources Canada (“NRCan”).⁵⁴ The NEB Act does not contain provisions relating to Board Member expertise, language capabilities, regional representation, gender or ethnicity.⁵⁵

There is no requirement that Indigenous people be involved in the Board appointment process, yet Indigenous peoples are fundamentally affected by decisions of the NEB. If the NEB continues to exist, Indigenous people must be represented within the NEB, including as members of the NEB panel and technical staff.⁵⁶ Without Indigenous representation, it will continue to be a struggle to adequately

⁵² The Expert Panel heard during its engagement session in Vancouver that Indigenous nations must be formally involved in actual decision-making.

⁵³ This recommendation was also made in the Expert Panel's engagement sessions in Toronto and Winnipeg.

⁵⁴ *NEB Act*, *supra* note 12 at s 3(1)-3(4).

⁵⁵ However, the Mandate letter of the Minister of Natural Resources states that the Minister should ensure that the NEB's composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge, see online: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>.

⁵⁶ This recommendation was also made to the Expert Panel in its engagement sessions in Saskatoon, Toronto, Winnipeg

consider Indigenous views. Indigenous representation on the NEB could represent a significant step toward nation to nation relationship and toward respecting Indigenous legal orders as equal to Western laws.

For Indigenous peoples there is power and authority in their own languages which connects them directly to the Creator and to Mother Earth. Indigenous representation on the NEB should include Indigenous language speakers. In order to respect the federal government's commitment to a nation to nation relationship, Indigenous participants in the NEB process must be welcome and encouraged to participate in their own languages.

The locations chosen for engagement and for participation opportunities are significant. Hearings and engagement opportunities should take place not only in large urban centres, but also in smaller urban centres and rural and remote communities, as well as First Nations that are affected by projects and/or by cumulative effects. Engagement with Indigenous peoples and nations must be done within Indigenous peoples' environments and proper protocols must be followed in order for meaningful engagement to occur.

(iv) Engagement with Indigenous people and nations within the NEB process must be ongoing

As part of its process, the NEB should conduct ongoing engagement with Indigenous peoples and nations. This engagement must be done within their environments and proper protocols must be followed.⁵⁷

In addition, Indigenous peoples should be involved throughout the lifecycle of projects⁵⁸, including with regard to monitoring safety and environmental protection.

(v) The NEB cannot fulfill the duty to consult and accommodate

Currently the NEB is accountable to Parliament through the Minister of NRCan. In order to respect the nation to nation relationship, legislation should expressly state that the NEB is also accountable to First Nations.

The NEB cannot, under any circumstances, be relied upon by the Federal government to fulfill the duty to consult and accommodate with First Nations.⁵⁹ Treaties were signed with the Crown, which is now represented by the government of Canada. Further erosion of this relationship cannot occur.

The duty to consult has been relegated to an afterthought to general public consultation in the current NEB process and in cases where consultation remains an issue, applications have been approved nonetheless using various justifications.⁶⁰ Where the NEB does not adequately evaluate the effect of

and Vancouver.

⁵⁷ This recommendation was also heard during the Expert Panel's engagement sessions in Vancouver.

⁵⁸ The Expert Panel also heard this recommendation during the engagement sessions in Vancouver.

⁵⁹ This recommendation was also heard during the Expert Panel's engagement sessions in Toronto and Vancouver.

⁶⁰ Sari Graben and Abbey Sinclair, "Tribunal administration and the duty to consult: A study of the National Energy Board" (2015) 65:4 UTLJ 382. This article found that justifications given by the NEB include (i) that it lacks the

consultation on rights, then it effectively takes on a role that the Crown cannot take: “it plays a role in authorizing conduct that infringes rights.”⁶¹

Consultation as an afterthought is both unacceptable and unlawful when one considers the state obligations recognized in 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.

Meaningful consultation with Indigenous nations cannot be limited to a conversation during a project approval process, but must be an ongoing discussion and practice. Indigenous consultation and engagement is distinct from public engagement given the principles enshrined in the *Constitution*, jurisprudence and UNDRIP. Indigenous consultation and engagement should include ongoing participation in construction, monitoring and remediation activities.

The federal government has stated its intention to implement the recommendations of the Truth and Reconciliation Commission, starting with the implementation of UNDRIP. When consultation is done through a distinct process facilitated by the Government, it must be adequate, meaningful and follow UNDRIP principles of requiring free, prior and informed consent.

(vi) Adequate participant funding must be available

Adequate funding must be provided to First Nations to allow for meaningful participation in processes.⁶² Public participation “actualizes fundamental principles of democracy and strengthens the democratic fabric of society.”⁶³ The benefits of public participation in environmental assessment processes are numerous and include, but are not limited to:

- enhancing the credibility and legitimacy of proposed projects by increasing the transparency of decision-making;
- helping to identify solutions and alternative options;
- increasing accountability for decisions made;
- facilitating challenges to illegal or invalid decisions before they are implemented;
- assisting in gaining public support for a particular decision;
- increasing ease of implementation;
- providing avenues for conflict resolution for affected parties and stakeholders; and

jurisdiction to consider the consultation at issue; (ii) that outstanding consultation can be addressed through ongoing consultation; and/or (iii) that there are no impacts on rights.

⁶¹ *Ibid*, at 384.

⁶² This recommendation was also heard during the Expert Panel's engagement sessions in Vancouver.

⁶³ Jennifer M P Stewart and John Sinclair, “Meaningful public participation in Environmental Assessment: Perspectives from Canadian Participants, Proponents, and Government” (2007) 9:2 *Journal of Environmental Assessment Policy and Management* 161 at p 162.

- reducing the level of controversy associated with a problem or issue.⁶⁴

Reducing financial barriers to participation supports increased public participation and facilitates the consideration of a greater diversity of concerns, perspectives and worldviews.

Participant funding should be available to encourage participation by the public and Indigenous peoples and nations in every project, not only those deemed to be designated projects by the federal government. Opportunities for public participation should be increased and should not be limited to parties or individuals who are “directly affected” as this definition is too narrow in scope. There should be no restrictions on which parties and individuals can participate in a hearing before the NEB given that NEB-regulated projects are linked to climate change and regional cumulative effects.

⁶⁴ John Sinclair and Alan Diduck, “Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions” in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation* (Toronto: Oxford University Press, 2005) 53 at p 54-55; Dr James P Robson and Dr Patricia Fitzpatrick, “A Critical Analysis of the L3RP Aboriginal Engagement Process”, A report prepared for the Assembly of Manitoba Chiefs, at p 1-2; Praxis, “Public involvement: Planning and implementing public involvement programs” (1988), at Executive Overview 3-7.

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.⁶⁵

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

⁶⁵ 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. **The NEB cannot conduct environmental assessments:** Within holistic environmental decision-making, the NEB is not well-placed to conduct environmental assessments. The NEB does not have a history of environmental assessment capability, has traditionally been close to the industry it regulates and is less friendly to public participation.
5. **If the NEB continues to exist, the following must be implemented:**
 1. The NEB's mandate must reflect the commitment to nation to nation relationships;
 2. The NEB's role should be clarified within the environmental decision-making framework;
 3. There must be Indigenous representation at the NEB;
 4. Engagement with Indigenous people and nations must be ongoing;
 5. The NEB cannot fulfill the duty to consult and accommodate; and
 6. Adequate participant funding must be available.