An agreement to share

understanding the implications of the MMTP on Indigenous Peoples in a Treaty One context

A report prepared for Wa Ni Ska Tan
By Aimée Craft
May, 2018

A long time ago when the Treaties were made, one of the Chiefs got up and pointed towards the heavens and he said, "The sun is my father, and the land is my mother. They teach us we have a responsibility in our generation, in our lifetime. […] Up to the horizons, beyond that is the seven generations, as far as you can see, that's our responsibility – to teach those generations about our wisdom and our knowledge about our people." We have a responsibility to keep the Treaty alive in our lifetime for future generations.

- Elder Harry Bone

Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs, *Dtantu Balai Betl Nahidei: Our Relations To The Newcomers*, vol 3, by Anishinaabe Elder Harry Bone, in Joe Hyslop, Harry Bone and the Treaty & Dakota Elders of Manitoba, with contributions by the AMC Council of Elders (Winnipeg: TRCM & AMC, 2015) [TRCM vol 3].

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About the author and retainer

Aimée Craft is an Indigenous (Anishinaabe-Métis) lawyer (called to the Bar in 2005) and an Assistant Professor at the Faculty of Common law, University of Ottawa. She received her BA LPh from the University of Manitoba in 2001, her LLB from the University of Ottawa in 2004 and her LLM from the University of Victoria in 2012.

Professor Craft'S primary area of research is in Anishinaabe and Canadian Aboriginal law. She is a leading researcher on Indigenous laws, treaties, and water. Craft co-leads a major research grant on Decolonizing Water Governance. Professor Craft has published peer-reviewed articles and book chapters in the areas of Treaties, Indigenous laws, reconciliation and Indigenous research methodologies. Craft's award-winning 2013 book, *Breathing Life Into the Stone Fort Treaty,* focuses on understanding and interpreting treaties from an Anishinaabe inaakonigewin (legal) perspective.

Craft is the former Director of Research at the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) and the founding Director of Research at the National Centre for Truth and Reconciliation. In her decade of legal practice at the Public Interest Law Centre, Craft worked with many Indigenous peoples on land, resources, human rights and governance issues.

In early 2018, Craft was invited to present evidence to the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress. In 2017 she was engaged by the National Centre for Historical Memory in Colombia as an advisory on the Truth and Reconciliation Commission for Colombian Indigenous Organizations.

Professor Craft teaches courses on treaties, constitutional law, property, gender and Indigenous legal traditions. She has also presented at numerous conferences, notably on treaties, Indigenous laws and reconciliation.

Professor Craft was retained by Wa Ni Ska Tan to provide an analysis of Potential impacts of the Project on Aboriginal Interests (Issue 9 in the List of Issues), from the perspectives of obligations that derive from Treaty One and Crown-Indigenous relationships.

This report was prepared with the assistance of two law students : Rayanna Seymour-Hourie for editing, formatting and footnoting assistance; as well as Brittney Fehr for case law research.

Declaration

I understand that my duty in providing written and oral evidence is to help the National Energy Board and that this duty overrides any obligation to the party by who I am retained or the persons who have paid or are liable to pay me. I confirm that I have complied with and will comply with my duty.

I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

I acknowledge that it is my duty to provide:

- evidence that is fair, objective and non-partisan
- evidence that relates only to matters within my expertise or specialization
- such additional assistance to the National Energy Board as it may reasonably require to determine relevant issues.

Executive summary

OVERVIEW

This report aims to situate the National Energy Board's hearing and decision-making regarding the construction of the Manitoba-Minnesota Transmission Project ("MMTP") in an Indigenous context, with attention to the particular context of Treaty One.

Manitoba Hydro has stated that the proposed MMTP will be located entirely within Treaty One territory (with proximity to Treaty Three territory). Treaty One (also known as the Stone Fort Treaty) was negotiated in 1871, with the Anishinaabe people of the region, now known as Southern Manitoba and was an agreement that allowed for legitimate settler presence within the territory.

There are constitutionally protected Treaty and Aboriginal Rights that are vested in the Indigenous Nations in Manitoba. There are also harvesting rights guaranteed to "Indians" (also referred to as First Nations people) by the Natural Resources Transfer Agreement and Act that are constitutionally protected. Where there may be an impact on those rights, the Crown has a duty to consult and accommodate. This duty flows from the broader duty of the Crown to act honourably. The Crown and all its delegates have a duty to act honourably in relation to Indigenous peoples.

Given the current imperative of reconciliation, the adoption of UNDRIP (endorsed by both Manitoba and Canada) and the recognition of Indigenous laws in Canada, this duty to act honourably must be enforced to a high degree. It requires that Indigenous perspectives of the Treaty (an agreement to share in the land and resources), UNDRIP, the NRTA and Indigenous perspectives and laws be taken into account in the decision-making process.

The intent of this report is not to assess the scope or adequacy of consultations by the Crown or its delegates. However, it is important to note the significant level of consultation and accommodation required relating to the Indigenous interests identified in this report.

RECOMMENDATIONS

The recommendations contained in this report are provided to the NEB to aid in its determination of the application before it. It is important to note that these recommendations are presented by the author. Wa Ni Ska Tan does not endorse any particular recommendation, nor the suite of recommendations as a whole; and, while each recommendation listed here is designed to improve the consultation and decision-making process regarding the MMTP, the list should not be considered exhaustive.

The following recommendations are put forward for consideration by the NEB:

- **Recommendation 1**: That the NEB adopt a framework of reconciliation (modeled on the TRC principle for reconciliation and the Government of Canada's relationship principles) for the conduct of the hearing, analysis and decision-making.

- **Recommendation 2**: That the NEB adopt the United Nations Declaration on the Rights of Indigenous Peoples as a framework for the conduct of the hearing, analysis and decision-making.

- **Recommendation 3**: That the NEB seek submissions as to how Indigenous legal principles apply and the it seek submissions on a decision-making matrix that reflects both the common law and Indigenous perspectives from both a procedural and substantive standpoint.

- **Recommendation 4**: That the NEB find that Manitoba Hydro is subject to the Honour of the Crown and must demonstrate a high standard of conduct in relation to Indigenous peoples that are potentially affected by the MMTP.

- **Recommendation 5**: That the NEB conclude that the unresolved treaty interpretation issue requires resolution before the disposition of Crown land, in accordance with UNDRIP standards of free, prior and informed consent. In the alternative, that the NEB conclude that a high standard of consultation is required where an unresolved interest in the land is asserted.

- **Recommendation 6**: That the NEB satisfy itself through this process that Indigenous harvesting interest of all "Indians" in the Province, guaranteed by the NRTA, are not infringed by the MMTP.

- **Recommendation 7**: That the NEB engage all Indigenous nations and people that are potentially affected by the project (using a broad and self-generated understanding of affected nations, including those from Northern Manitoba) in order to determine what Indigenous perspectives and laws are in relation to the disposition of land, and the impact on kinship relationships (human and non–human).

I. Introduction

1. This report aims to situate the National Energy Board's hearing and decision-making regarding the construction of the Manitoba-Minnesota Transmission Project ("MMTP") in an Indigenous context.

2. Manitoba Hydro has applied to the National Energy Board ("the Board") for a certificate to build and operate the MMTP, an international power line ("IPL") from Dorsey Converter Station near Rosser, Manitoba to the border of the U.S., crossing near Piney, Manitoba. The applied-for new IPL is a 500-kilovolt alternating current power line with 213 kilometres of new transmission line consisting of approximately 121 kilometres of new right-of-way.

3. I was retained by Wa Ni Ska Tan to provide evidence pertinent to Issue 9, from the List of Issues: Potential impacts of the Project on Aboriginal Interests. This report considers the proposed MMTP from the perspective of Treaty Relationships, the Honour of the Crown, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Indigenous legal orders, and reconciliation theory. The report is based on leading primary and secondary resources on Indigenous and non-Indigenous legal understandings of Treaties; including oral histories, Canadian Aboriginal law, reconciliation theory, and Indigenous laws. I have reviewed the materials filed by the proponent and other documents in the NEB filing, as well as the report and selected filing of the Clean Environment Commission MMTP hearings.

4. Manitoba Hydro developed criteria for potentially impacted communities:

    (i) signatories to Treaty No. 1;
    (ii) not signatories to Treaty No. 1, but located in the area encompassed by Treaty No. 1;
    (iii) located within 40 km of the Project region;
    (iv) expressed an interest in MMTP (through webpage, phone, email, etc.);
    (v) Aboriginal organizations with interests or mandates related to the Project region.[1]

5. Indigenous concerns with the proposed project were identified through the self-generated ATK studies. One of the concerns raised was the adequacy of time to develop the reports. According to Manitoba Hydro the ATK reports received had an impact on the transmission line routing. Manitoba Hydro expects that reports received later will help inform the Environmental Protection Program.[2] The Clean Environment

[1] MH Application - p.50-51 (section 5.4.2. (a))
[2] Clean Environment Commission of Manitoba, *Report on Public Hearing, Manitoba-Minnesota Transmission Project*, (September 2017), at p.29.

Commission recommended that for future projects, ATK studies be completed in time to be incorporated into the EIS (recommendation 6.2).

6. For the purposes of Crown consultations, Manitoba (Conservation and Water Stewardship) created a list of identified communities[3] and added others to the list thereafter.[4]

TREATY AND THE MMTP

7. Manitoba Hydro has stated that the proposed MMTP will be located entirely within Treaty One territory. According to Manitoba Hydro, "The Manitoba-Minnesota Transmission Project (MMTP) runs through the traditional territories that are addressed in Treaty 1 and therefore Treaty 1 is significant in relation to MMTP."[5]

8. Manitoba Hydro has acknowledged that: "The numbered Treaties in Manitoba are the cornerstone of the relationship between the First Nation signatories and the Crown."[6] According to their response to Information Requests, Manitoba Hydro has considered Treaty One for the purposes of determining which First Nations "may have interests or concerns related to the project and who should be engaged."[7] There is no evidence on the record as to Manitoba Hydro's understanding of the terms of the Treaty or the rights and obligations that flow from the Treaty.

9. Treaty One (also known as the Stone Fort Treaty) was negotiated in 1871, with the Anishinaabe people of the region, now known as Southern Manitoba (including what is now the city of Winnipeg). The Treaty is the agreement that allowed for legitimate settler presence within the territory that was being used and occupied by Anishinaabe people.[8]

10. The proposed MMTP is also in proximity to Treaty Three territory. Implications for Treaty three lands and citizens are similar but differ slightly from those related to Treaty One and will not be discussed in this report. However, potential impacts of the

[3] Brokenhead Ojibway Nation; Buffalo Point First Nation; Dakota Ojibway Tribal Council; Dakota Plains Wahpeton First Nation; Dakota Tipi First Nation; Long Plain First Nation; Peguis First Nation; Roseau River Anishinabe First Nation; Sagkeeng First Nation; Sandy Bay Ojibway First Nation; Swan Lake First Nation; Aboriginal Chamber of Commerce; Assembly of Manitoba Chiefs; Manitoba Metis Federation; Southern Chiefs Organization.
MH Application - p.50-51 (section 5.4.2. (a)(i))
[4] MH Application - p.50-51 (section 5.4.2. (a)(iii))
[5] MH Response To Intervenor IR: NEB_WNST-IR-001.3 (lines 6-8)
[6] MH Response To Intervenor IR: NEB_WNST-IR-001.3 (lines 1-2)
[7] MH Response To Intervenor IR: NEB_WNST-IR-001.3 (lines 10-11)
[8] Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One* (Saskatoon: Purich, 2013) [Craft, "Breathing Life"].

proposed project on potentially affected Treaty 3 Nations should be considered and should be the subject of Crown consultation and accommodation.

REPORT OUTLINE

11. The first part of this report will set out some foundational approaches (or frameworks), rooted in reconciliation theory, the TRC final report, the TRC's Calls to Action, and UNDRIP.

12. The following sections of the report will address four thematic questions:
    a) What is the honour of the Crown and how does it apply in a Treaty context, with respect to the proposed MMTP and:
        - Manitoba Hydro
        - The Province of Manitoba
        - The Federal Government
        - The National Energy Board
    b) How can/should the National Energy Board engage with Indigenous legal traditions in considering the proposed MMTP?
    c) How is Treaty One (the Stone Fort Treaty) to be understood (key concepts) and applied in the context of the proposed MMTP?
    d) What, if any, special obligations arise from the Natural Resources Transfer Agreement and Act?

13. Note that there are a variety of other issues that should be engaged in considering the impact of the proposed MMTP on Indigenous people in Manitoba. Although such issues are beyond the scope of this report, they include the exercise of:
    a) Treaty rights as recognized and affirmed by s.35 of the Constitution and as generally defined in the case law and the Treaty Land Entitlement Framework Agreement;
    b) Aboriginal rights, as recognized and affirmed by s.35 of the Constitution and as generally defined in the case law, including claims of unextinguished Aboriginal title.

II. A Framework for Reconciliation

14. According to the Truth and Reconciliation Commission of Canada (TRC), reconciliation is rooted in "the establishment and maintenance of mutually respectful relationships."[9] This requires, amongst other things, the recognition of Indigenous self-determination and Indigenous legal orders. It necessitates real engagement with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and it calls for real societal change.[10]

15. During its mandate, the TRC detailed ten principles of reconciliation that it viewed as essential for Canada to "flourish in the twenty-first century".[11] These principles informed the TRC's work and shaped the TRC's *Calls to Action*. The TRC suggested that the United Nations Declaration on the Rights of Indigenous People is the framework for reconciliation. The TRC Final Report states, "Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and into its civic institutions in a manner consistent with the principles, norms, and standards of [UNDRIP]."[12]

16. The Federal Government has committed to (elaborated on below):
    a) The full implementation of the TRC Calls to Action
    b) The adoption and implementation of UNDRIP
    c) Creating a list of reconciliation principles.

17. This report aims to build on the framework for reconciliation as put forward by the TRC and endorsed by the federal government, while applying it to the particular context of the proposed MMTP.

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[9] Canada, Truth and Reconciliation Commission, *Canada's Residential Schools: Reconciliation,* vol 6, The Final Report (Montreal : McGill-Queens University Press, 2015) at 11-12 [TRC, *Final Report*].
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid* at 28.

TRC PRINCIPLES OF RECONCILIATION[13]	PRINCIPLES RESPECTING THE GOVERNMENT OF CANADA'S RELATIONSHIP WITH INDIGENOUS PEOPLES[14]
1. The *United Nations Declaration on the Rights of Indigenous Peoples* is the framework for reconciliation at all levels and across all sectors of Canadian society. 2. First Nations, Inuit, and Métis peoples, as the original peoples of this country and as self-determining peoples, have Treaty, constitutional, and human rights that must be recognized and respected. 3. Reconciliation is a process of healing of relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms. 4. Reconciliation requires constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' education, cultures and languages, health, child welfare, the administration of justice, and economic opportunities and prosperity. 5. Reconciliation must create a more equitable and inclusive society by closing the gaps in social, health, and economic outcomes that exist between Aboriginal and non-Aboriginal Canadians. 6. All Canadians, as Treaty peoples, share responsibility for establishing and maintaining mutually respectful relationships. 7. The perspectives and understandings of Aboriginal Elders and Traditional Knowledge Keepers of the ethics, concepts, and practices of reconciliation are vital to long-term reconciliation.	The Government of Canada recognizes that: 1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government. 2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*. 3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples. 4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government. 5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect. 6. Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources. 7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations. 8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive

[13] Canada, Truth and Reconciliation Commission, *What we have Learned: Principles of Truth and Reconciliation* (TRCC, 2015) at 3-4 [TRC, "Principles"].

[14] Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous peoples" (modified 14 February 2018), Government of Canada (website), online: <**http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.**

8. Supporting Aboriginal peoples' cultural revitalization and integrating Indigenous knowledge systems, oral histories, laws, protocols, and connections to the land into the reconciliation process are essential. 9. Reconciliation requires political will, joint leadership, trust building, accountability, and transparency, as well as a substantial investment of resources. 10. Reconciliation requires sustained public education and dialogue, including youth engagement, about the history and legacy of residential schools, Treaties, and Aboriginal rights, as well as the historical and contemporary contributions of Aboriginal peoples to Canadian society.	climate for economic partnership and resource development. 9. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships. 10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

18. Manitoba Hydro has clearly stated its commitment to reconciliation with Indigenous people who are impacted by hydro-electric development in Manitoba:

> "We continue to be committed to working with Aboriginal communities affected by our development and operations in a spirit of reconciliation."[15]
>
> Scott Thomson, President and CEO of Manitoba Hydro

19. Reconciliation itself, while a timely and important project aimed at repairing and rebuilding relationships, has been fraught. There have been, and continue to be conflicting views between Crown perspectives and Indigenous understandings of reconciliation:[16]

> What is clear to this Commission is that Aboriginal peoples and the Crown have very different and conflicting views on what reconciliation is and how it is best achieved. The Government of Canada appears to believe that reconciliation entails Aboriginal peoples' accepting the reality and validity of Crown sovereignty and parliamentary supremacy

[15] Manitoba Government issues apology over past hydro development, Press Release, Province of Manitoba, January 20, 2015 http://news.gov.mb.ca/news/index.html?item=33753 (accessed May 3, 2018)
[16] TRC, *Final Report, supra* note 9 at 25.

> in order to allow the government to get on with business. Aboriginal people, on the other hand, see reconciliation as an opportunity to affirm their own sovereignty and return to the 'partnership' ambitions they held after Confederation.

20. In the *Mikisew Cree Nation* case, Justice Binnie (for the court) pointed out that the relationship between the Crown and Indigenous nations has been poisoned over time and this has been destructive to any hope of reconciliation. Justice Binnie observed that "[the] multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies."[17]

21. Particularly with respect to land use and development, or "economic reconciliation" the TRC found that:[18]

> …sustainable reconciliation on the land involves realizing the economic potential of Indigenous communities in a fair, just, and equitable manner that respect their right to self-determination. Economic reconciliation involves working in partnership with Indigenous peoples to ensure that lands and resources within their traditional territories are developed in culturally respectful ways that fully recognize Treaty and Aboriginal rights and title.

22. Courts and the TRC have clearly identified the importance of Indigenous laws in the process of reconciliation. In its final report, the TRC observed:[19]

> Unfortunately, Canadian law has discriminatorily constrained the healthy growth of Indigenous law contrary to its highest principles. Nevertheless, many Indigenous people continue to shape their lives by reference to their customs and legal principles. These legal traditions are important in their own right. They can also be applied towards reconciliation for Canada, particularly when considering apologies, restitution, and reconciliation.

23. The TRC rejected Canada's unilateral Crown-based approach to sovereignty and called for a shared sovereignty based on the recognition of Indigenous sovereignty to give

[17] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1 [*Mikisew Cree]*.
[18] TRC, *Final Report*, *supra* note 9 at 207.
[19] *Ibid* at 78.

effect to reconciliation:[20]

> The most significant damage is to the trust that has been broken between the Crown and Aboriginal peoples. This broken trust must be repaired. The vision that lead to this breach in trust must be replaced with a new vision for Canada – one that fully embraces Aboriginal people' right to self-determination within, and in partnership with, a viable Canadian sovereignty.

24. In the *Daniels* decision, Justice Abella notes that Parliament's goal is reconciliation with Indigenous peoples. This would recognize Indigenous people as equal partners in Confederation, rather than subjects of it:[21]

> The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.

25. Justice Abella wrote that the *Daniels* decision itself "represents another chapter in the pursuit of reconciliation and redress in that relationship". She defined the relationship in the context of the "history of Canada's relationship with its Indigenous peoples" and recalls that "the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a *mutually respectful long-term relationship*".[22]

26. Indigenous sovereignty and laws are to inform the reconciliation process. Leading Indigenous legal scholar John Borrows explains that "Canada cannot presently, historically, legally, or morally claim to be built upon European-derived law alone."[23] The TRC understood and applied this insight, concluding that:[24]

> Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.

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[20] Truth and Reconciliation, *supra* note 9 at 20.
[21] *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, [2016] 1 S.C.R. 99 at para 37 [*Daniels*].
[22] *Ibid* at para 34 [emphasis added].
[23] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 15 [Borrows, *Indigenous Constitution*].
[24] TRC, *Final Report*, *supra* note 9 at 11-12.

27. The TRC also found that "Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and into its civic institutions in a manner consistent with the principles, norms, and standards of [UNDRIP]."[25]

28. In Call to Action 50, and in keeping with UNDRIP, the TRC called upon the "federal government, in collaboration with Aboriginal organizations, to fund the establishment of *Indigenous law institutes* for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada."[26]

29. TRC Call to Action 45 (iv) points to the need for a Royal Proclamation on reconciliation that commits to:[27]

> Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

30. There is a Canadian imperative for reconciliation that is working towards support for the self-determination of Indigenous peoples, implementation of UNDRIP and the recognition of Indigenous legal orders. This requires the implementation of Treaty agreements in ways that reflect Indigenous perspectives and laws, which were vital to the making of those Treaties. Further, reconciliation requires a robust application of the honour of the Crown, which extends to all agents of the Crown, including Crown Corporations, as will be discussed further below.

[25] *Ibid* at 28.
[26] Canada, Truth and Reconciliation Commission, *Calls to Action,* (Truth and Reconciliation Commission of Canada, 2015) [TRC *Calls to Action*].
[27] *Ibid* [emphasis added].

III. The United Nations Declaration on the Rights of Indigenous Peoples

31. In May 2016, Carolyn Bennett, Minister of Indigenous and Northern Affairs officially endorsed UNDRIP at the United Nations Permanent Forum on Indigenous Issues.[28] This distinguished the previous governments position, which held UNDRIP to be aspirational and not legally binding. Canada has declared that it plans to fully implement UNDRIP and has implementation legislation (Private Members Bill C-262), introduced by Member of Parliament, Romeo Saganash.

32. While the full impact of UNDRIP is somewhat uncertain in domestic law, it is likely to influence the interpretation and implementation of s.35 of the Constitution, treaties, and Indigenous laws:

> After years of uncertainty, the SCC now seems to coalescing around the notion that the *Canadian Charter of Rights and Freedoms* should encompass all of Canada's binding international human rights obligations. Whether this clarification will have an impact on how section 35 of the *Constitution Act,* 1982 is interpreted in light of UNDRIP has yet to be seen. In particular, questions remain about how rights *declared* in UNDRIP (as compared to rights covenanted in a treaty) will influence the interpretation of section 35 of the *Constitution Act,* 1982 as well as the *Charter,* and what this will mean for the future relationship between international law, Indigenous peoples' laws and Canadian constitutional law. [29]

33. As stated earlier, the TRC recommended UNDRIP as the framework for reconciliation. UNDRIP is founded on the recognition of Indigenous Peoples as self-determining.

34. In its preamble, UNDRIP considers that "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous peoples and States." Article 37 provides for the right of Indigenous peoples to "recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their

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[28] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <www.northernpublicaffairs.ca/index/fully- adopting-undrip-minister-bennetts-speech/>.

[29] *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws,* Special Report, (Waterloo: Centre for International Governance Innovation, 2017) at 2.

successors and to have States honour and respect such treaties, agreements and other constructive arrangements."[30]

35. In addition to explicit recognition as Treaties as foundational to relationships between Indigenous peoples and the Crown (as representative of the state), article 26 of UNDRIP affirmed the land rights of Indigenous peoples and the states obligation to recognize and protect those lands, in accordance with Indigenous systems of land tenure.

> Article 26:
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. [31]

36. UNDRIP acknowledges the right of Indigenous people to create land policies, priorities and strategies relating to the use and development of their lands, territories and resources.[32] UNDRIP also requires consultation and cooperation through Indigenous governance mechanisms prior to project approvals relating to Indigenous lands and resources.[33]

37. UNDRIP also calls for the free, prior and informed consent of Indigenous peoples, prior to the approval of projects affecting their lands, and redress where this consent has not be obtained.[34]

38. Read together, the rights contained in UNDRIP demonstrate a clear intention to ensure states honour agreements that have forged relationships between Indigenous Peoples

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[30] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 13 September 2007, 61/295 at art 37 [*UNDRIP*].
[31] *Ibid, art* 26.
[32] *Ibid,* art 32 (1) "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources".
[33] *Ibid,* art 32 (2) "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".
[34] *Ibid*. articles 32 and 28.

and the state and to recognize the ability of Indigenous people to determine and consent to the use of their lands, territories and resources.

39. The NEB should consider the commitment to full implementation of UNDRIP as part of the framework for decision-making with respect to the MMTP application.

IV. What is the honour of the Crown and how does it apply in a Treaty One context, with respect to the proposed MMTP?

THE HONOUR OF THE CROWN

40. The Constitution Act, 1982 recognizes and affirms Treaty and Aboriginal rights, ensuring that those rights cannot be infringed without justification, and grounds their recognition and implementation in accordance with the honour of the Crown.

41. The Honour of the Crown is a constitutional duty that has permeated the interpretation of s.35 of the Constitution Act, 1982. It "refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign".[35]

42. The honour of the Crown applies to the Crown in all its forms, including the Federal and Provincial Crown, and to others who act as representatives of the Crown in various capacities. The duty applies to Manitoba Hydro and the National Energy Board, each in their capacity as agents of the Crown for particular defined purposes.

43. The honour of the Crown gives rise to a duty of of diligent, purposive fulfillment of the Crown's promises, meaning the Crown must interpret legislation affecting section 35 rights in a purposive manner, and the Crown must diligently try to fulfil the purpose underlying its constitutional obligation.[36] "From the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[37]

44. Reconciliation is the purpose underlying the honour of the Crown.[38] The honour of the Crown requires that the Crown (a) broadly and purposively interprets their promises made under section 35, and (b) that it act diligently to fulfil this purpose. This precludes the crown from engaging in sharp dealing or creating legislation that is contrary to reconciliation.

45. There are various duties that flow from the Honour of the Crown, including the duty to consult and accommodate. The duty to consult is "an essential corollary to the honourable process of reconciliation".[39]

46. The Province of Manitoba has engaged in Crown consultations with respect to the

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[35] *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14, at para 65 [2013] 1 SCR 623 [*Manitoba Metis Federation*].
[36] *Ibid.*
[37] *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73 at para 16, [2004] 3 SCR 511 [*Haida Nation*].
[38] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),*2004 3 SCR 550 at para 24 [Taku River].
[39] *Mikisew Cree*, *supra* note 17 at para 38.

MMTP.[40] The purpose of this report is not to assess the required scope or adequacy of Crown consultations, however it is worth noting that this will be of primary importance to the NEB in fulfilling its duties.

47. As discussed below, the federal duty to consult and accommodate has been delegated to the NEB and must be discharged accordingly.

THE HONOUR OF THE CROWN AND THE NEB

48. The Crown can delegate the duty to consult to a regulatory body. Where the Crown intends to rely on the regulatory body's process, it should be made clear to the affected Indigenous group.[41]

49. A regulatory body can fulfil the Crown's duty to consult by demonstrating institutional expertise and by having the appropriate powers. For example, (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights.[42] If these terms are met, the body's process can be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.[43]

50. In *Clyde River*[44]*,* the Court found that the NEB had extensive powers that permitted the Board to engage in extensive consultation. The Board could conduct hearings, elicit information to further the public interest and make orders and subject them to preconditions, and require that studies be undertaken, conduct environmental assessments and fund programs to facilitate public participation. These qualified the NEB to incur the Crown's duty to consult.[45] In this case, the NEB was found to have considerable expertise in conducting consultation.[46]

51. Regulatory bodies with final decision-making power are subject to the duty to consult. Therefore, they are necessarily vested with the underlying duty of the honour of the Crown.

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[40] See filing at 5.4.4
[41] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2007 SCC 41 at para. 44, [2017] 1 SCR 1099 [*Chippewas*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* 2017 SCC 40 at para 23, [2017 1 SCR 1069 [*Clyde River*].
[42] *Clyde River*, *ibid* at par. 30; *Chippewas*, *ibid* at para 32.
[43] *Clyde River, ibid* at para 34.
[44] *Ibid.*
[45] *Ibid* at para 31.
[46] *Ibid at* para 33.

52. The Government of Canada has confirmed[47] with the NEB that it intends to rely on the NEB certificate process to fulfill the Crown's federal duty to consult with Indigenous people. "The letter also states that the Minister has directed Natural Resources staff to finalize a project agreement to ensure clear roles for consultation with Indigenous Peoples. The Agreement will form part of the Record before the Board in this proceeding."[48] There is no evidence that that agreement was finalized at the time of writing this report.

53. The NEB has noted that "As part of its decision on the Project, the Board will assess the completeness of its process to ensure all potentially affected Aboriginal groups were identified, notified, and had a fair opportunity to make their concerns known to the Board."[49] It will seek to not duplicate consultation that has already taken place (by the Province of Manitoba) and will consider evidence of consultation that is introduced onto the record.[50]

54. As mentioned above, the intent of this report is not to assess the scope or adequacy of consultations by the Crown or its delegates. However, it is important to note the significant level of consultation and accommodation required relating to the interests identified in this report relating to the understanding of the Treaty as a sharing agreement, the obligations under the NRTA, as well as other interests identified by Indigenous peoples through the MMTP process.

THE HONOUR OF THE CROWN AND MANITOBA HYDRO

55. Crown Corporations may be delegated some or all of the Crown's duty to consult.[51] The Supreme Court of Canada in *Rio Tinto* found that BC Hydro (a Crown corporation) was an agent of the Crown: "It acts in the place of the Crown" (in this case for the purpose of making an agreement with Alcan for the purchase of energy).[52] It was therefore subject to the Crown's duty to consult.

56. Manitoba Hydro indicated in its application to the NEB (and elsewhere) that it views the First Nations and Métis Engagement Program (FNMEP) "as distinct from Crown consultations conducted pursuant to section 35 of the Constitution Act, 1982 ("section 35 consultations"). Manitoba Hydro submits that the legal obligation to undertake

[47] March 20, 2018 letter from Minister in response to the Board's October 31, 2017
[48] [Filing A91387]
[49] *Ibid.*
[50] *Ibid.*
[51] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 S.C.R. 650 [*Rio Tinto*].
[52] *Ibid* at para 81.

section 35 consultations with respect to MMTP lies with Canada and the Province of Manitoba and has not been delegated to Manitoba Hydro.[53]

57. In the *Sapotaweyak Cree Nation et al. v. Manitoba et al* case, Justice Bryk of the MBQB confirmed that "Hydro is a Manitoba Crown corporation established pursuant to *The Manitoba Hydro Act,* C.C.S.M., c. H190 ("Hydro Act"), and pursuant to s. 4(2) of that Act is an agent of Her Majesty."[54] However, he distinguished the *Sapotaweyak* case from the *Rio Tinto* case, finding that Manitoba Hydro did not have a duty to consult and accommodate the Sapotaweyak First Nation. Justice Bryk went onto say:

> [42] In *Rio Tinto Alcan,* the trial court decided that B.C. Hydro had been specifically charged with the responsibility and duty to consult and that under those circumstances, its proposal to enter into an agreement to purchase electricity from Alcan amounted to Crown conduct. It was because of those unique circumstances that the trial court concluded that B.C. Hydro acted in place of the Crown.
>
> [43] There was no similar delegation of authority between Manitoba and Hydro. Moreover, in these circumstances, the law of agency does not establish that the obligations of the principal Manitoba automatically apply to its agent Hydro.
>
> [44] I have not been directed to any jurisprudence which would indicate the requirement for two separate simultaneous consultations by two separate entities.[55]

58. Justice Bryk found "that the duty on Crown corporations to consult only arises when that Crown corporation is specifically charged with a duty to act in accordance with the Honour of the Crown. [The Supreme Court of Canada] did not say that all Crown corporations under any circumstances are charged with the responsibility to consult."[56]

59. With respect, there appears to be some conflation of the concept of the honour of the Crown and the duty to consult in the *Sapotewayak* case. While they are connected, the honour of the Crown is an underlying section 35 duty that engages the honourable fulfilment of constitutional obligations (with the purpose of promoting reconciliation), whereas the duty to consult is a specific duty that arises where there is potential impact on Treaty and Aboriginal rights.

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[53] Project application [Filing A81054]
[54] *Sapotaweyak Cree Nation et al v Manitoba,* 2015 MBQB 35 at para 13 [*Sapotaweyak*].
[55] *Ibid* at paras 42-44.
[56] *Ibid* at para 41.

60. Manitoba Hydro does not have all of the duties of the Crown in right of Manitoba. However, Manitoba Hydro does, as an agent of the Crown, have a duty to act honourably in its dealings with Indigenous people.

61. In the *Sapoteweyak* case, Manitoba Hydro did not claim that it did not have a duty to act honourably. Manitoba Hydro's claim was that it did not have a constitutional duty separate and apart from the Province to consult and accommodate the rights and interests of the impacted First Nations.

> *Hydro accepts that it is an agent of the Crown. However, Hydro says there is nothing in statute or in case law suggesting it, as an agent of the Crown, has a duty to consult grounded in the Honour of the Crown as a separate or distinct obligation from that of the Crown.*[57]

62. There is a reasonable inference that Manitoba Hydro, as a Crown corporation and agent of the Crown has an obligation to act honourably in all of its dealings with Indigenous people.

63. The duty to act honourably is heightened in the context of hydro-electric development, because in the majority of approvals related to hydro projects, Manitoba Hydro (an agent of the Crown) is the proponent, and Manitoba (the Crown) is the decision-maker, as well as the consultative body which aims to fulfill the consultative aspect of the honour of the Crown.

64. Therefore, the NEB should find that Manitoba Hydro is subject to the Honour of the Crown and should hold Manitoba Hydro to a high standard of conduct in relation to Indigenous peoples that are potentially affected by the MMTP.

[57] *Ibid* at para 9.

V. How can/should the National Energy Board engage with Indigenous legal traditions in considering the proposed MMTP?

65. The recognition of Indigenous Legal traditions and laws is taking a more prominent place in the law and political discourse in Canada. The Truth and Reconciliation Commission of Canada has set out a framework for reconciliation that requires the revitalization of Indigenous law and legal traditions:

> Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process. [58]

66. UNDRIP recognizes Indigenous people's laws, traditions and customs, exercised in pair with the self-determination of Indigenous peoples.

67. The Supreme Court of Canada has acknowledged that customary laws survived the assertion of sovereignty by the Crown.[59] For example, in the *Tsilhqot'in Nation v. British Columbia* case, the SCC found that "the question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507."[60] The aboriginal perspective includes the "laws, practices, customs and traditions of the group (Delgamuukw, at para. 148)."[61]

68. Indigenous laws and legal traditions are relevant in this particular context in four distinct ways.

69. First, Indigenous laws are an important interpretive tool for the understanding of treaty perspectives. Indigenous laws are essential to understanding how Indigenous people entered into the Treaty relationship with the Crown, as will be discussed below.

70. Second, Indigenous laws depict very different relationships to lands and resources than what common law perspectives offer. For example, jurisdictions, boundaries and geographies depart from non-Indigenous and state perspectives relating to lands and resources.[62] The significance of impacts is viewed differently and more holistically from

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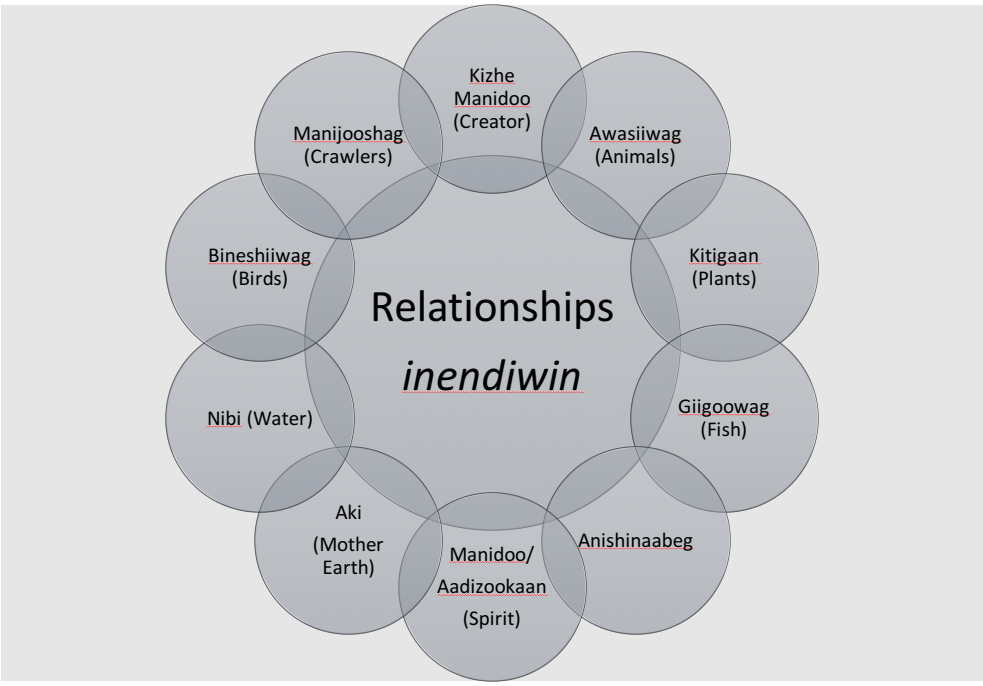
[58] TRC, *Final Report*, *supra* note 9 at 11-12.
[59] *Mitchell v Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911.
[60] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].
[61] Affirmed in *Tsilhqot'in, ibid* at para 35.
[62] See for example, Sarah Hunt, "Ontologies of Indigeneity : the politics of embodying a concept" (2013) 0:0 Cultural Geographies in Practice 1; Michelle Daigle, "Awawanenitakik: The spatial politics of recognition and

an Indigenous perspective, as evidenced in previous environmental hearings and explained below by the Clean Environment Commission of Manitoba:

> Given that a WSK environmental assessment seeks to find no residual effects after mitigation on individual VECs, when viewed from a global ecosystem perspective, this can be seen as a flawed process. ATK, on the other hand, places paramount importance on protecting the whole of the ecosystem. Incorporating the two approaches could well provide great benefits to our environment. [63]

71. Third, Indigenous laws are based in complex systems of kinship. These systems of kinship extend to both human kinship and non-human kinship.

Figure 1: Anishinaabe legal relationships[64]



72. Human kinship relationships extend far beyond the boundaries of the treaty territories, traditional territories, reserves or state boundaries (such as provincial or nation-state boarders). Historically, mobility along the rivers, pre-dating and including the fur trade

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relational geographies of Indigenous self-determination" (2006) The Canadian Geographer 1-11; Lindsay Naylor, et al., "Interventions: Bringing the decolonial to political geography" (2017) Political Geography (2017).

[63] Clean Environment Commission of Manitoba, *Report On Public Hearing Keeyask Generation Project*, (Commission & Manitoba, April 2014) at 160.

[64] Figure reproduced from Craft, A. "Neither infringement nor justification – the SCC's mistaken approach to reconciliation", in Renewing Relationships: Indigenous Peoples and Canada, Brenda Gunn and Karen Drake, eds., Native Law Centre, University of Saskatchewan (approved – forthcoming spring 2018).

period, have made relations amongst the communities in extended territories. Through kinship alliances and inter-marriage, relationships between Indigenous people in the southern and northern part of the province have been fostered for multiple generations, pre-dating the existence of the Province.

73. Fourth, Indigenous principles of sustainability are an integral part of Indigenous perspectives. In particular, intergenerational principled decision making is referred to in Anishinaabe worldview in the context of 7 generations. They place the individual in a web of responsibilities to all of creation.[65] Elders continue to teach us that reconciliation has to take place with the Earth, our mother, before it can happen between people.[66] We find guidance for this within many Indigenous legal systems.

74. Therefore, Indigenous nations that use and occupy the territory and/or are descendants of signatories to Treaty One should be engaged in the decision-making process relating to MMTP in accordance with their worldview, including their Indigenous legal and normative values.

> A narrow approach to doing this will not succeed. The work must be collaborative with Aboriginal communities, with academics and with groups across the country who are also pursuing respect for and incorporation of ATK and Aboriginal worldviews into environmental decision-making.[67]

75. Their engagement should be in accordance with their own decision-making processes and on the basis of their law. This would include engagement with Indigenous procedural and substantive laws.[68]

76. The TRC found that "Aboriginal peoples need to become the law's architects and

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[65] See for example, Craft, A. "Giving and Receiving Life from Anishinaabe Nibi Inaakonigewin (Our Water Law) Research", in *Methodological Challenges in Nature-Culture and Environmental History Research*, Jocelyn Thorpe, Stephanie Rutherford, L. Anders Sandberg, Eds. (New York: Routledge, 2016); Deborah McGregor "Anishinaabe Environmental Knowledge" in Kulnieks A., Longboat D.R., Young K. (eds) *Contemporary Studies in Environmental and Indigenous Pedagogies* (Rotterdam: SensePublishers, 2013); Basil Johnston, *Honour Earth Mother* (Cape Croker Reserve, Wiarton, ON: Kegedonce Press, 2003); Kyle Whyte, Joseph Brewer II & Jay Johnson, "Weaving Indigenous science, protocols and sustainability science" (2016) 11: 25 Sustainability Science 25.

[66] Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs, *Untuwe Pi Kin He – Who We Are: Treaty Elders' Teachings,* vol. I, by Doris Pratt in Joe Hyslop, Harry Bone and the Treaty & Dakota Elders of Manitoba, with contributions by the AMC Council of Elders (Winnipeg: TRCM & AMC, 2014) [TRCM vol1]; See also, D'Arcy Linklater in the TRCM vol 1.

[67] Clean Environment Commission of Manitoba, *Report On Public Hearing Keeyask Generation Project*, (April 2014) at p.160.

[68] Craft, "Breathing life", *supra* note 8 at 83.

interpreters where it applies to their collective rights and interests."[69]

77. The NEB should seek submissions as to how Indigenous legal principles apply in a decision-making matrix that reflects both the common law and Indigenous perspectives from both a procedural and substantive standpoint.

78. In addition, the NEB should engage the Indigenous nations that are potentially affected by the project (using a broad and self-generated understanding of affected nations) in order to determine what Indigenous perspectives and laws are in relation to the disposition of land, and the impact on kinship relationships (human and non–human).

[69] TRC *Final Report*, *supra* note 9 at 51.

VI. How is Treaty One (the Stone Fort Treaty) to be understood and applied in the context of the proposed MMTP?

79. The Stone Fort Treaty was negotiated in the summer of 1871 between the Crown and the Anishinaabe of the region that are now known as parts of southern Manitoba. The MMTP proposes a transmission line that runs entirely within the Treaty One territory.

80. Courts have attempted to interpret and define treaties many times over. Through a series of cases that span over a few decades, the Supreme Court of Canada (SCC) has developed principles for Treaty interpretation and view treaties as unique agreements, or a solemn exchange of promises, made by the Crown and Indigenous peoples. The SCC has found that Treaties do not fit into International law boxes or regular contractual type arrangements. Treaties are: "sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfill its promises."[70] In order to honour those sacred promises, ambiguities are to be resolved in favour of Indigenous people[71] and "aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions."[72] Legal duties, such as the Honour of the Crown and fiduciary obligations serve as protections to the solemn promises that were made as part of the Treaties.

81. Historic Treaty relationships in Canada are founded in two distinct legal systems coming together to forge a relationship, particularly in relation to the terms of how to live well together within the same territory.[73]

82. Oral versions of the Treaty negotiations, as expressed through oral history evidence, are essential to the Treaty interpretation process. Courts have indicated that strict rules of evidence have to be adapted to place oral history on equal footing with historical evidence (which largely consists of historical documents).[74] Courts will consider contextual factors that surround the Treaty negotiation in order to derive a common intention that reconciles the interests of both parties at the time the Treaty was made.[75]

83. Understanding the Treaty relationship and promises, therefore requires that both Indigenous and non-Indigenous perspectives apply to the interpretation and implementation of Treaties.

84. As I argue in my work, for example, *Breathing Life Into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One*, Treaty interpretation and implementation

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[70] *R v Badger*, [1996] 1 SCR 771 at para 47 [*Badger*].
[71] *Nowegijick v The Queen,* [1984] 1 SCR 29 at para 36 [Nowegijick].
[72] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 Dickson J.
[73] Craft, "Breathing Life", *supra* note 8.
[74] *R v Taylor and Williams,* 1981 ONCA, at para 120, 62 C.C.C. (2d) 228, cited with approval in *Delgamuukw v British Columbia* [1997] 3 SCR 1010,
[75] *R v Sioui,* [1990] 1 SCR 1025 at 1068-69 [*Sioui*],

should take into account the Indigenous laws and legal systems that helped make treaty and those Indigenous laws that continue to uphold Treaty promises today.[76]

85. Understood in accordance with Anishinaabe law, Treaties are jointly negotiated agreements between nations confirming promises to live in relationships of sharing, grounded in respect, renewal and reciprocity.[77]

> Nationhood and sovereignty were not extinguished by the Treaty One negotiations. What was to be "added onto what we already had" was given effect through the application of *aagooiidiwin* and the negotiation of a relationship of kinship that would be in addition to existing sovereignty. This was an important example of how reconciliation was given effect through the making of the Treaty, in accordance with Anishinaabe law. Anishinaabe inaakonigewin confirmed the principles of non-interference (not deciding for the other) and equality (true equality amongst all children of the Queen—both red and white). The treaty aimed at the building of a long lasting and renewable relationship. The Anishinaabe entered into a relationship with the Queen for the benefit of all her children, for the purpose of equal sharing amongst the children of the Queen.[78]

86. Treaties were made by Indigenous nations and representatives of the Crown in order to settle land questions. For example, the Anishinaabe of Treaty One petitioned the Lieutenant Governor of Manitoba to enter into a Treaty negotiation in order to ensure protection against the encroachment of white settlers who were taking timber from their lands.[79]

87. Indigenous perspectives and oral histories are often met with strict legal interpretations

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[76] Craft, "Breathing Life", *supra* note 8.

[77] See, for example, Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research Journal 145 at 156; Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich, 2007). See also Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007); John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 173; Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace,1600–1800* (New York: Routledge, 1999) at 12.

[78] Aimée Craft, "Neither Infringement nor Justification: The SCC's Mistaken Approach to Reconciliation" Special Publication, Native Law Centre [forthcoming in 2018].

[79] Jean Friesen, "Grant Me Wherewith to Make My Living," in Kerry Abel & Jean Friesen (eds), *Aboriginal Resource Use in Canada* (Winnipeg: University of Manitoba Press, 1991) 141; Jean Friesen, "Magnificent Gifts: The Treaties of Canada with Indians of the Northwest, 1969-76" (1986) 5:1 *Transactions of the Royal Society of Canada* 41.

of the Treaties that picks up the language of "cede, release, surrender and yield up". However, the Indigenous legal concepts articulated by the Anishinaabe of Treaty One show that surrender of land is not possible when one is "made of the land" or "belongs to the land".[80]

88. Anishinaabe law tells us that land is not to be owned. Rather, we are in a relationship of respect with the land, with a sense of belonging to the land or "being of the land".[81] Non-Indigenous legal systems, however, are primarily based on ideas of land ownership and possession.

89. This is a relationship of connection to land, rather than possession of it. There is no evidence that the words of surrender were invoked at the Treaty negotiation itself, which supports the Anishinaabe legal perspective that a sharing agreement was concluded.[82]

90. When the Treaty Commissioner and the Lieutenant-Governor of Manitoba entered into the Treaty One negotiations with the Anishinaabe, they referred to the Queen as a mother to the Anishinaabe promising that she would treat all of her children equally.[83] The word for mother was easily translated between English and Anishinaabe and the Chiefs responded that through the words of the Crown negotiators, they could "hear their mother's voice":[84]

> I take all my Great Mother's children here by the hand and welcome them. I am very much pleased the myself and my children are to be clothed by the Queen and on that account welcome every whiteman into the country.
>
> *Chief Kakekapenaise, 1871*[85]

91. The concept of a mother and child relationship is universally understood. However, this universality was deceiving in a context where different legal orders were being simultaneously invoked. The Queen's representatives would have understood the position of the child as one of inferiority, not being able to decide anything or have any rights until the age of majority. The Anishinaabe however, would have understood the mother's role as one of kindness, love and caring for a child in a way that would foster autonomy. This Anishinaabe perspective would align with a modern articulation of a

[80] Craft, "Breathing Life", *supra* note 8 at 51-65.
[81] *Ibid* at 94-100.
[82] *Ibid* at 64-65.
[83] Craft, "Breathing Life", *supra* note 8 at 50.
[84] *Ibid.*
[85] The Manitoban (1871) Provincial Archives of Manitoba (as transcribed by the Manitoba Treaty and Aboriginal Rights Research Centre (TARR), 1970) (the newspaper account of the Treaty One negotiations (July-August 1871).

sharing Treaty in which Indigenous self-determination is prioritized.[86]

92. Key elements arise from the Anishinaabe legal understanding of the Treaty One negotiations:
    a) There was no surrender of land, only an agreement to share;
    b) The Anishinaabe retained jurisdiction over their citizens; and
    c) The Anishinaabe requested two-thirds of the Province as "reserved" land (and drew a map of these territories). There is no indication that this position was reversed during the negotiations.[87]

93. In summary, the Anishinaabe understanding that Treaty One is that the land was not surrendered, but rather that there was an agreement to share in the bounty of and responsibility for the land. The basis of Treaty One, from the Anishinaabe perspective is an agreement to share in the land, in a way that recognizes Anishinaabe jurisdiction over its citizens and responsibility for the territory. It is not a surrender of land, but rather an agreement to share. That agreement and the development of the kinship relationship with the Queen engaged the Honour of the Crown, which has over time, come to be exercised by the Queen's delegates.

94. However, the Crown continues to view the Treaty as a land surrender and the land as a possession of the Crown acquired through the Treaty.

95. There is an unresolved treaty interpretation issue that requires resolution before the disposition of land, whereby the Honour of the Crown is engaged. This obligation is heightened in relation to the permanent disposition of Crown land for the purposes of development, such as with the MMTP. Further, UNDRIP requires that in light of contested ownership, that the free, prior and informed consent should be obtained by the Crown, prior to any development within the territory.

[86] Craft, "Breathing Life", *supra* note 8 at 86-93.
[87] *Ibid.*

VII. What, if any, special obligations arise from the Natural Resources Transfer Agreement and Act?

96. In Manitoba (as well as Saskatchewan and Alberta), jurisdiction over natural resources was transferred from the federal government to the provinces in 1930.[88] In all three provinces, a clause was included in the NRTA to protect the right of "Indians"[89] to harvesting for food throughout the year.

97. The NRTA transfer was concluded, subject to any existing trusts (section 1). The Treaty agreement to share in lands and resources is a trust that pre-dates the transfer of resources from the federal government to the provinces and therefore subjects any use of resources to that agreement to share in resources.

98. Harvesting rights under the NRTA permit hunting, trapping, fishing and gathering throughout the year, on Crown lands and lands to which "Indians" have a right of access:[90]

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

99. According to the Province of Manitoba, lands where NRTA harvesting rights (hunting) may be exercised, include:[91]

- Indian Reserves, Wildlife Management Areas, Provincial Forests, areas of Provincial Parks where licensed hunting is permitted, unoccupied Crown lands, and other Crown lands where licensed hunting or trapping is permitted;
- Private land with the permission of the landowner or occupant; and

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[88] *The Manitoba Natural Resources Transfer Act Amendment Act,* RSM 1987, c N60 [*NRTA*].

[89] "Indians" as defined by law, are persons registered as Indians under the terms of the *Indian Act*, RSC 1985, c I-5, s 2(1). Note that the SCC has ruled that the *NRTA* does not apply to Métis Harvesters. *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236. The Métis have a Harvesting Agreement with the Province of Manitoba, see Province of Manitoba, News Release – Manitoba, "Province Partners with Manitoba Metis Federation to Uphold Métis Harvesting Rights, Natural Resource Conservation" (29 September 2012), online: <http://news.gov.mb.ca/news/?item=15364&posted=2012-09-29>.

[90] *NRTA, supra* note 88, s 13.

[91] Province of Manitoba, "The Rights and Responsibilities of First Nations People", *Manitoba Hunting Guide* (website), online: <http://www.gov.mb.ca/sd/wildlife/hunting/firstnations.html>.

- Federal lands, such as community pastures open to the public for hunting, or with the permission of the Pasture Manager.

100. Timber harvesting can take place with a Timber Permit, free of charge, "for their own use from the traditional use area of their First Nation."[92]

101. The NRTA has shaped the relationship between the Crown (Manitoba) and Indigenous people. In the context of the NRTA, the honour of the Crown is engaged and heightened in the following ways by the obligations created in the harvesting clause. First, the NRTA broadens the entire territory available to status Indians exercising their harvesting rights to the whole of the Province. Second, it allows for harvesting throughout the year (unrestricted by seasonal hunting regulations). Third, harvesting is not restricted to unoccupied Crown lands or reserves, but rather includes other lands to which Indians may have a right of access.

102. The right to harvest is met with corresponding obligations for the Crown to act honourably when it is allocating lands for purposes that may be incompatible with harvesting.

103. By extending the rights of status "Indians" to harvest throughout the province as a whole, Crown dispositions and development in any area of the Province may potentially impact any or all Indigenous people within the Province. For example, developments in the North may impact the harvesting rights of Nations in the South, and vice versa.

104. Further, given that harvesting rights may be exercised throughout the Province, it is possible that Indigenous people who are not easily identified with the proposed development area are potentially impacted. Some Indigenous harvesters travel to other regions of the Province for harvesting based on kinship ties, their current residence (including urban areas such as the city of Winnipeg) and in accordance with the NRTA rights. This was identified in the Clean Environment Commission hearing.

> Some First Nations participants made the point that, in the early stages of planning for engagement, proponents should not limit their contacts to First Nations in proximity to the study area First Nations members often travel long distances to engage in traditional uses In the case of the MMTP, it traverses areas that may be used by First Nations people who live in Winnipeg but are members of First Nations from other regions For Manitoba Hydro to contact First Nations that are located in Treaty One territory or that were signatories to Treaty One, it was argued, made

[92] Province of Manitoba, "Fishing, Hunting & Gathering The Rights and Responsibilities of First Nations People in Manitoba", (website), online: <https://www.gov.mb.ca/sd/firstnations/hunting_fishing_oct_09.pdf>.

proximity a *de facto* criterion for involvement in engagement.[93]

105. In Manitoba, NRTA harvesting rights are exercised similarly to Treaty rights to harvest. In the *Grassy Narrows* case, the Supreme Court of Canada clearly expressed that if the taking up of land (which is permitted in the written text of the Treaty) were to result in no meaningful right to harvest, there could be an action for infringement against the Crown:[94]

> ... if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.

106. The potential impact on treaty rights as well as harvesting rights protected by the NRTA throughout the province, is sufficient reason to consider the impacts of the whole of hydro-electric development and operations Manitoba, rather than in fragmented projects.

107. There is no mention of NRTA harvesting rights in the MH Hydro Application for the MMTP project.

108. The NEB will have to satisfy itself through this process that Indigenous harvesting interest, guaranteed by the NRTA, are not infringed by the MMTP.

[93] Clean Environment Commission of Manitoba, *Report on Public Hearing, Manitoba-Minnesota Transmission Project*, (September 2017) at pp 29-30.

[94] *Grassy Narrows First Nation v Ontario (Natural Resources)* 2014 SCC 48 at para 52, [2014] 2 SCR 447 [*Grassy Narrows*] as cited in *Mikisew Cree, supra* note 17 at para 48.

VIII. Conclusion

109. In summary, the Anishinaabe understand Treaty One not as a land surrender, but rather as an agreement to share in the bounty of and responsibility for the land. This agreement recognized Anishinaabe jurisdiction over its citizens and responsibility for the territory.

110. The agreement to share in land, and the development of a kinship relationship with the Queen engaged the Honour of the Crown, which has over time, come to be exercised by the Queen's delegates.

111. However, the Crown continues to view the Treaty as a land surrender and the land as a possession of the Crown acquired through the Treaty.

112. There is an unresolved treaty interpretation issue that requires resolution before the disposition of land, whereby the Honour of the Crown is engaged. This obligation is heightened in relation to the permanent disposition of Crown land for the purposes of development, such as here with the MMTP. Further, UNDRIP requires that in light of contested ownership, that the free, prior and informed consent should be obtained by the Crown, prior to any development within the territory.

113. Manitoba Hydro, as a Crown corporation and agent of the Crown has an obligation to act honourably in all of its dealings with Indigenous people.

114. In a context of overlapping duties and interests, such as with hydro-electric development in Manitoba, with potential impacts on Indigenous rights and interests, the duty to act honourably must be exercised to its fullest. By virtue of the Honour of the Crown, both Manitoba and Manitoba Hydro are also subject to the underlying purpose of s.35, which is reconciliation between the Crown and Indigenous people.

115. The NEB also must act in accordance with the honour of the Crown, as a federal decision-maker. In addition, the NEB has to fulfill the Crown duty to consult and accommodate, as delegated to it by the government of Canada.

116. The Honour of the Crown requires a robust understanding of the treaty and corresponding obligations and relationships within this decision-making context. This requires understanding of obligations and responsibilities that flow from the Treaty, including the obligations that are rooted in the Indigenous understanding and Indigenous laws that form part of the Treaty agreement.

117. Unilateral dispositions of Crown land within Treaty One territory, without the engagement of Treaty One First Nations, is a breach of the Treaty agreement. Crown lands are Indigenous lands with unresolved interests relating to understanding of Treaties. These interest can be considered existing trusts, as per the NRTA, because

they are existing trusts at the time the resources were transferred to Manitoba in 1930. The Crown (in this case, the Crown as representative of Manitoba in the granting of Crown land) has a duty to engage with Treaty One First Nations on the basis of partners in a sharing agreement, and in accordance with UNDRIP.

118. UNDRIP expresses the right of Indigenous peoples to have their Treaties recognized, observed and enforced. In order to do so, Treaties must be placed in their historical, political, and cultural context. Although Indigenous people and nations continue to bring claims for breaches of terms of Treaty (known as "specific claims" under Canadian policy), these claims are frustrated by government imposed policy and evidentiary limits.

119. The law of Canada has been employed as a tool of dispossession in relation to Indigenous peoples, lands and resources. Indigenous peoples view Treaties not as a fixed set of terms, but rather as relationships of respect and reciprocity that are meant to be renewed. The Treaty relationship was meant to evolve over time, based on non-interference and respect for each other and the land that was shared.

120. Treaties are legal instruments that confirm obligations between nations, constitutional documents and living, breathing affirmations of relationships between nations of people. The law however, as applied by Canadian courts and governments, has disproportionately been used to allow for the infringement and erosion of Treaties. This undermining of Treaty promises and disregard for Indigenous understandings of the Treaty relationship persisted in Canadian law to the point where, in some cases, there is no more meaningful ability to exercise the rights that the Treaty aims to protect.

121. The greatest breach of Treaties however, remains in the inability of non-Indigenous governments to understand the fundamental relationship that Indigenous people have with the lands and waters that they have been in relationships with for millennia. Treaties were made in a sacred and spiritual way (with the help of the Creator, as a third party to the agreement). The spirit and intent of Treaties is articulated through the understanding and application Indigenous laws.

122. The honour of the Crown, reconciliation, case law and UNDRIP all point to the inclusion of Indigenous laws to guide the decision-making process relating to Indigenous lands, territories and resources, both procedurally and substantively.

123. Therefore, the following recommendations are put forward for consideration by the NEB:

- **Recommendation 1**: That the NEB adopt a framework of reconciliation (modeled on the TRC principle for reconciliation and the Government of

Canada's relationship principles) for the conduct of the hearing, analysis and decision-making.

- **Recommendation 2**: That the NEB adopt the United Nations Declaration on the Rights of Indigenous Peoples as a framework for the conduct of the hearing, analysis and decision-making.

- **Recommendation 3**: That the NEB seek submissions as to how Indigenous legal principles apply and the it seek submissions on a decision-making matrix that reflects both the common law and Indigenous perspectives from both a procedural and substantive standpoint.

- **Recommendation 4**: That the NEB find that Manitoba Hydro is subject to the Honour of the Crown and must demonstrate a high standard of conduct in relation to Indigenous peoples that are potentially affected by the MMTP.

- **Recommendation 5**: That the NEB conclude that the unresolved treaty interpretation issue requires resolution before the disposition of Crown land, in accordance with UNDRIP standards of free, prior and informed consent. In the alternative, that the NEB conclude that a high standard of consultation is required where an unresolved interest in the land is asserted.

- **Recommendation 6**: That the NEB satisfy itself through this process that Indigenous harvesting interest of all "Indians" in the Province, guaranteed by the NRTA, are not infringed by the MMTP.

- **Recommendation 7**: That the NEB engage all Indigenous nations and people that are potentially affected by the project (using a broad and self-generated understanding of affected nations, including those from Northern Manitoba) in order to determine what Indigenous perspectives and laws are in relation to the disposition of land, and the impact on kinship relationships (human and non–human).

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