

**NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, RSC 1985, c N-7, as amended, and the regulations made thereunder;

**IN THE MATTER OF** the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, as amended, and the regulations made thereunder;

**IN THE MATTER OF** an application by Enbridge Pipelines Inc. for a Certificate of Public Convenience and Necessity and other related approvals pursuant to the *National Energy Board Act*, and

**IN THE MATTER OF** Hearing Order OH-002-2015 and National Energy Board File Number OF-Fac-Oil-E101-2014-11 02.

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**ENBRIDGE PIPELINES INC.  
LINE 3 REPLACEMENT PROGRAM**

**FINAL ARGUMENT OF PEGUIS FIRST NATION**

**11 December 2015**

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*“Thank you for letting us come together so that we could look after and protect our land and the animals and all those things that need to protect and spoken for, because we know that you don't have a voice. It is our duty to share our voice for you. We ask in a humble way. ”*

***Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Line 1380)***

To: Ms. Sheri Young  
Secretary of the Board  
National Energy Board  
517 Tenth Avenue SW  
Calgary, Alberta T2R 0A8

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## Introduction

Pursuant to Ruling No. 19 issued by the National Energy Board (“NEB” or “Board”) on 4 December 2015<sup>1</sup> this is the final written argument of Peguis First Nation (“PFN”) for the Enbridge Pipelines Inc. (“Enbridge”) Line 3 Replacement Program (“Project”). PFN also intends to provide oral final argument and this written final argument should be considered complementary to those submissions.

PFN submits:

- a. the Project in its current form is not in the public interest as defined by section 52 of the *National Energy Board Act*<sup>2</sup> (the “*NEB Act*”) and the Board should recommend that the issuance of a Certificate of Public Convenience and Necessity (“Certificate” or “CPCN”) for the Project be contingent on the satisfaction of certain conditions to ensure that the rights and interests of PFN are appropriately addressed in relation to the Project;
- b. the Project is likely to cause significant adverse environmental effects referred to in subsection 5(2) of *Canadian Environmental Assessment Act, 2012*<sup>3</sup> (“CEAA 2012”) and the significant adverse environmental effects that the Project is likely to cause are not justified in the circumstances absent the imposition of additional measures to protect the rights and interests of PFN;
- c. the issuance of an order, pursuant to section 58 of the *NEB Act*, exempting the proposed new tanks, new pump stations and associated facilities from the provisions of paragraphs 30(1)(b), 31(c), 31(d) and sections 33 and 47 of the *NEB Act* should be subject to conditions requiring Enbridge and the Crown<sup>4</sup> to engage in further consultation with PFN and the date the order will take effect should be contingent on the results of those consultation and accommodation activities being approved by the Board;

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<sup>1</sup> A61-01 – Ruling No. 19 - Changes to Final Argument – A4W2W8.

<sup>2</sup> RSC 1985, c N-7.

<sup>3</sup> SC 2012, c 19, s 52.

<sup>4</sup> All references to the “Crown” are references to Her Majesty in right of Canada unless stated otherwise.

- d. the Board is required to assess whether the Crown has discharged the duty to consult and accommodate PFN in relation to the Project prior to issuing the relief sought by Enbridge and requires additional information to make an informed decision regarding whether the Project is in the public interest and should defer taking a final decision on the Project until such information becomes available; and,
- e. that further measures beyond those proposed by Enbridge in the application for the Project are necessary to ensure that the rights and interests of PFN are addressed and to assess whether those rights and interests can co-exist in relation to the Project and its potential effects on PFN and PFN members.

The present final argument of PFN highlights some of the key concerns raised by PFN and PFN members during the hearing process, including concerns about: the insufficient analysis of the effects of the Project on PFN; the lack of a traditional land use study assessing PFN current use of lands and resources for traditional purposes in relation to the Project; the absence of Crown consultation with PFN concerning the Project, and no assessment whatsoever of the significant rights to reserve lands of the PFN under its treaty land entitlement agreement and Treaty One.

In addition to the outline of key PFN concerns presented in these written comments, PFN invites the Panel to refer to the record of the public hearings for more detailed information on these and other categories of concern.

## Peguis First Nation

### 1. Overview of Peguis First Nation

PFN is an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*<sup>5</sup> (“Section 35”) and an Indian Band within the meaning of section 2 of the *Indian Act*,<sup>6</sup> as amended.

PFN asserts its inherent rights, treaty rights and Aboriginal rights, including title, to lands within its traditional territory, including the lands covered by Treaty One and Treaty Two. These rights have been upheld and recognized by the courts, including the provision of protection under Section 35. PFN is a signatory to the Selkirk Treaty and Treaty One. PFN’s traditional territory includes all of Treaty One in Manitoba<sup>7</sup> and southern Manitoba, however, PFN’s traditional territory is not limited to the geographic boundaries of Manitoba. As a result of Canada’s failure to allocate reserves to PFN in a manner consistent with Treaty One,<sup>8</sup> PFN has the right to acquire up to 166,794 acres of additional land in the Manitoba.<sup>9</sup>

In 1907 PFN’s St Peter’s reserve was illegally taken from PFN, and PFN was forced to relocate to the present reserve at Peguis 1B. Peguis 1B is not situated within the Treaty One boundaries.<sup>10</sup> PFN continues to assert its inherent rights, treaty rights and Aboriginal rights and title to lands within Treaty One and Treaty Two.

PFN’s current reserves are located in south central Manitoba. PFN has a registered population of approximately 10,000, most of which are Anishinaabe, Ojibwe, Cree or Inninew.<sup>11</sup> As a result of the opportunity to regain status through Bill C-3, PFN

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<sup>5</sup> being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

<sup>6</sup> RSC 1985, c I-5.

<sup>7</sup> C47-01-01 – Application to Participate – A4R9F8, Adobe p. 1.

<sup>8</sup> C47-02-10 – Treaty Entitlement Agreement Peguis First Nation 2006 – A4T8L8, Adobe p. 9.

<sup>9</sup> C47-02-10 – Treaty Entitlement Agreement Peguis First Nation 2006 – A4T8L8, Adobe p. 30.

<sup>10</sup> C47-02-12 Treaty One and Aboriginal Title Report - A4T8Q0, Adobe p. 12.

<sup>11</sup> Peguis First Nation, Wade Sutherland (Transcript, Volume 4, Line 1501).

anticipates that its population will grow to 13,000 or 14,000.<sup>12</sup> Currently, 4,000 people live on Peguis Reserve 1B.<sup>13</sup>

Numerous developments have occurred in PFN territory, including flooding, natural disasters and manmade disasters.<sup>14</sup> Developments, including highways, municipalities, and industrial developments, such as transmission projects and oil and natural gas pipelines, reduce PFN's members' ability to use and occupy their traditional and Treaty lands. PFN's already-impacted inherent rights, treaty and Aboriginal rights are at great risk of significant further harm, and these rights will be further impacted by the proposed Project.

## 2. PFN traditional land use and importance of the Land Study Area (LSA)

PFN members continue to exercise their rights through their traditional practices and rely heavily on resources in their traditional territory:

1592. As role of the instructor, I'm also an instructor for advanced wilderness remote first aid with the Red Cross. I'm also working with a lot of Elders and a lot of them call me a medicine man. And it took me 68 years to understand about the medicines and how important they are.

1593. In my journey, I had to learn the difference between male and female. I knew in life it's the woman that give life, and a lot of times that we look for is the plants that are female. A lot of the plants that are female, especially those ones that -- a taproot, you could only find the female in late fall. During the summer, you can't tell the difference. I certainly can't. It's the only time I can find them and that's the only time the Elders share those.

1594. We worked in that whole area on the map there at Spruce Woods Park there where we did a lot of traditional teachings, with not only First Nations but other -- the Red man, the yellow man, and the Black man from the university. And we shared their -- we were in culture camps with the university and we shared all those -- the plants and stuff in that area.

1595. It's really hard to explain a lot of those plants because our Elders tell us in the past, as soon as we share something, they turn around and sell it back to us. And that's why a lot of times we don't want to share some of the stuff, but there's so much medicine in that area which is really strong medicine. Like even the poison ivy that we use, and the poison ivy is used for HIV.

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<sup>12</sup> Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Line 1800).

<sup>13</sup> Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Line 1800).

<sup>14</sup> Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Line 1507).

1596. There's a lot of things that we wouldn't share because you have to know how to look after them and how to pick them. You just can't go out there, anybody, and pick them. There's certain ways of picking them and it takes a long time to understand from the Elders that they share them with you. A lot of them will give you -- share with a question so that you would have to figure it out.

1597. All the plants in that area, there's red willow, all which you use for the eyes. If you have trouble with your eyes we use red willow. It's a good eyewash, and we use that a lot for that. Not only that, you know, the red willow is also used for - a lot of the animals need that red willow in order to reproduce. And when you follow the moose and the deer and all those other animals as they go, you would see all where they just nibble at the trees. They don't -- you know, they don't kill it, they only take a little bit and then move on.

1598. And that's who our people learn from, because we don't pick all the medicine from this one area; we have to pick a little bit here and there. So it will be enough for our grandchildren, our great grandchildren.

1599. The water passings there too, as we all understand, I know, is that we're not to putting a fence around the water because the animals need to go there and drink. No structure. A lot of these things affect those animals, the birds, and all the other small animals, also.

**Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Lines 1592-1599)**

1650. MR. VINCENT ORVIS: Good day. My name is Vincent Orvis from Peguis First Nation. I'm a former Assiniboine Community College student from Brandon. I'm now living there. I used to go hunt down there, down by those pipelines and that. And it'd be a real shame there if that pipeline broke and killed all the wildlife. There'd be no hunting left down that way.

1651. I grew up commercial fishing on Lake Winnipeg with my grandfather, who was also a fisherman and a trapper. That's who taught me how to hunt and fish as a youth.

**Peguis First Nation, Vincent Orvis (Transcript, Volume 4, Line 1650)**

1784. You know, shortly after we settled there, Lord Selkirk and his people arrived. And we spent years providing him with food and sustenance because they didn't know how to hunt and trap to survive. So our people, our warriors would travel from one end -- one corner of Manitoba to the other in the southern part of the province hunting for food for them.

1785. And in doing so, many of the families continued to do that for the next several hundred years. And they still do that today, including the project area. Our people would go down there and they would spend the summer hunting and

gathering, smoking meat and fishing and bringing them back to feed the settlers of Lord Selkirk settlers. And we continued to do that year after year until the Europeans actually -- and government taken over the land and kind of, you know, stopped a lot of that hunting.

**Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Lines 1784-1985)**

Statements of PFN Elders and Land Users relating to their ability to harvest traditional resources are included in various sections throughout this final argument. PFN invites the Board to reflect carefully on the significance of those statements during the evaluation of the submissions presented.

Many of PFN Elders and Land Users who appeared before the Board possess a lifetime of experience and knowledge relating to the harvesting of traditional resources. That experience and knowledge is built upon traditional knowledge which has been developed over many successive generations of land use in the areas that will be affected by the proposed Project. PFN Elders and Land Users are talented, experienced and possess thorough knowledge of the lands from which they seek to harvest the resources discussed. The decline in available resources has immediate and significant impacts on PFN members' health and well-being and the culture and identity of PFN as a whole.

### **3. PFN's concerns relating to the environmental effects of the proposed Project are not limited to the Enbridge Line 3 Replacement Project Area**

PFN is concerned about potential adverse effects on lands and waters outside of the immediate vicinity of the Project arising from a failure of the pipeline. PFN is also concerned about potential indirect effects on the environment and on PFN rights and interests outside the proposed Enbridge Line 3 Replacement Project area (the "Project Area"). PFN is concerned that the downstream effects resulting from a pipeline rupture could have significant impacts on the ability of PFN members to exercise their Aboriginal, inherent and treaty rights in their preferred locations.

Risks to human health and the environment extend beyond the Land Study Area. In southeastern Manitoba, the pipeline crosses numerous river systems which directly flow towards Peguis Reserve 1B and Lake Winnipeg. PFN members rely on these waterways and Lake Winnipeg for sustenance and ceremonial purposes.

1815. We heard from the panel about spills and damages that are done. All the water that flows from southeastern Manitoba flows one way, and that's to Lake Winnipeg and to Lake Manitoba. And we live on the banks of those shores of those -- those lakes. So if there's a spill, then how are we to know we are going to be protected, not only by the people that live in that immediate area, but further downstream to the lake where we use to survive?

**Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Lines 1815)**

PFN also has concerns about the potential effect of the pipeline and associated increases in human activity in the area on flora and fauna, including disruptions to the migratory routes on the wildlife PFN members depend on for country foods and sustenance. The potential adverse effects of the pipeline on PFN and PFN members will be further addressed in later sections of this argument.

#### **4. Inherent right to self-government**

PFN assert inherent rights<sup>15</sup> over the lands that will be impacted by the proposed Project. PFN's inherent rights were rights bestowed upon them by the Creator who

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<sup>15</sup> According to *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* [the "Federal Policy Framework"]:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Part I – Policy Framework (Ottawa: INAC, 15 September 2010), available online at: <<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#PartI>>.

PFN understands that the Federal Policy Framework confirms the Government of Canada's position that inherent rights are protected under section 35 of the *Constitution Act, 1982*. PFN does not necessarily agree with the full content of the Federal Policy Framework as it relates to Inherent Rights.

placed them on Turtle Island (earth) and provided them with instruction on how to live. PFN's inherent rights are considered sacred, unassailable and immutable.

1449. Treaty 1 territory is situated in the southern half of the province of Manitoba and it is one small portion of land and territory that we call Turtle Island.

1453. This Anishinaabe traditional knowledge that will be shared is considered to be a gift according to our Anishinaabe teachings. This gift will contain information on Anishinaabe world view, intertwined with our inherent rights and responsibilities.

1454. The inherent rights we have received from the Creator are considered sacred and are therefore unassailable and immutable.

**Peguis First Nation, Chief Cynthia Spence (Transcript, Volume 4, Lines 1449, 1453, and 1454)**

PFN members understand that the Creator bestowed upon the Anishinaabe the responsibility to safeguard the environment as protectors. This responsibility includes strong advocacy and environmental stewardship over the land and waters of Turtle Island:

1456. Our panel members will share the Anishinaabe knowledge that the Creator bestowed upon the Anishinaabe, the role of stewards of Mother Earth. One of the negotiating Chiefs for Treaty 1 reminded others that the land cannot speak for itself; that the Anishinaabe people have to speak for it. It is part of our role as a people to ensure that the -- that we speak in regards to the environment and the issues surrounding it.

1457. As a result the Anishinaabe have a word that means protector, and that Peguis First Nation word is ogichidaa. The ogichidaa have to regain the role of protecting or looking after the environment as warriors. The people that we see here today that brought the water drum, the pipe, and the traditional teachings that they'll share with us are all considered to be part of the ogichidaa, along with the Anishinaabe people as a total. Our panel members that are seated here today will speak more on this responsibility. Sorry about that.

**Peguis First Nation, Chief Cynthia Spence (Transcript, Volume 4, Lines 1456 - 1457)**

PFN members understand that the Creator is manifested in all parts of the environment. As stewards of Mother Earth, PFN members are responsible for protecting all components of the environment:

1524. The Anishinaabe and their teachings were advised to be the stewards of Mother Earth. As protectors they were given the title of ogichidaa. The ogichidaa were protectors of all living things and all living things have a spirit which was given to them by the Creator. The Creator is everywhere and is manifested in our environment.

1525. I just want to do a quote here from Flying Down Thunderbird: “The Creator sleeps in the minerals, awakens in the plants, walks in the animals, runs in our veins and the rivers, flies with the winds and the winged ones, and thinks in Anishinaabe.”

1526. The spiritual connection among all living things created a universal bond or kinship and the Medewiwin [sic. *Midewiwin*] Society use relative terms such as grandfather to refer to plants and grandmother to other plants, but also to Mother Earth, the moon, and certain drums. When an Anishinaabe person receives his or her spirit name, that creates a stronger bond to the messengers such as the eagle and the thunderbird, and ultimately, the Creator.

1528. One final element of the Anishinaabe world view is the use of medicines, or mskiki [sic. *mashkiki*], for healing. These medicines are sacred to the Anishinaabe, and some medicines are used for ceremonies such as cedar, sage, sweet grass and tobacco. Other panel members will speak more on this subject.

**Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Lines 1524-1528)**

Major modification of the earth is a violation of PFN’s inherent rights, and is a serious concern to PFN members and their future generations:

1499. You know, the traditional philosophy of First Nations is centred on a holistic view that everything is interconnected. We as First Nations people live closer to the land and are more directly affected by environmental degradation than most other Canadians; therefore, we recognize the link between the health of the environment and the health of our people.

**Peguis First Nation, Councillor Wade Sutherland (Transcript, Volume 4, Line 1499)**

1571. Our children and our grandchildren need to be provided with clean water, you know, and I guess with the interruption of our earth it’s a very serious concern to me as a grandmother. And I lived in the area where this pipeline goes by.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4, Line 1571)**

PFN has been active in raising its concerns relating to the protection of the environment, and the need for PFN's land uses to be recognized by project proponents:

1804. One of the things that I've noticed as a leader in this community – a Peguis First previous leader in this community is that not one Section 35 consultation has went properly. We refer and Lloyd will refer to many Supreme Court cases when we sit with the Canadian Environment Commission hearing or with Aboriginal and Northern Affairs, with the provincial government, who fall within that jurisdiction to consult with First Nations. I mean, given that -- I guess that mandate to do that, not once has it been done properly.

**Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Line 1604)**

In summary, PFN asserts that its inherent rights include the right to self-government, rights to the land, and the right to practice its own culture and customs. The proposed Project violates PFN's inherent rights, PFN's responsibility to protect Turtle Island, as well as the environment it relies upon and the resources its future generations require.

## **5. Treaty rights**

### **5.1 Context**

PFN members understand their relationship with the Crown to be governed by the Selkirk Treaty of 1817, as well as Treaty One of 1871.

1459. Chief Peguis and the other Chiefs signed the Selkirk Treaty in 1817 with the Earl of Selkirk, essentially permitting the settlers to live within two miles of the Red and the Assiniboine Rivers. Treaty 1 was signed in 1871 and Red Eagle was signatory for the Saint Peter's Band, which is now the Peguis Band. ....

**Peguis First Nation, Chief Cindy Spence (Transcript, Volume 4, Line 1459)**

These treaties are understood by PFN members to be sacred documents. The Selkirk Treaty and Treaty One protect PFN's way of life and those protections are guaranteed in section 35 of the *Constitution Act, 1982*.

1461. Peguis is a signatory to Treaty 1 that was signed in 1871. The rights of the 1871 Treaty are considered sacred and were given Constitutional protection in 1982. The Treaty signed by our ancestors and the Crown that was to last forever

or until perpetuity; the words that were used in 1871 were, “As long as the sun shines, the grass grows, and the waters and the rivers flow.”

**Peguis First Nation, Chief Cynthia Spence (Transcript, Volume 4, Line 1461)**

## 5.2 Selkirk Treaty

The Selkirk Treaty includes lands within southern Manitoba, as depicted by the following map<sup>16</sup>:



The Selkirk Treaty did not extinguish PFN’s title or inherent rights. In *Manitoba Métis Federation Inc. v Canada (Attorney General)*,<sup>17</sup> the Manitoba Court of Appeal confirmed that the Selkirk Treaty did not extinguish Indian title:

[22] As will be explained in more detail, as the Red River Settlement grew, certain customary rights came to be accepted by settlers in an additional two-mile strip behind the settlement belt principally for haying purposes, but also for pasturing, wood lot activities, and even cultivation; this despite the fact that

<sup>16</sup> C47-02-03 – Lord Selkirk Grant 1817 Map – A4T8L1, Adobe p. 1.

<sup>17</sup> 2010 MBCA 71 [*Manitoba Métis MBCA*].

Indian title had not been formally extinguished by the Selkirk Treaty. This area of land soon became known as the Outer Two Miles (OTM) (emphasis added).<sup>18</sup>

And:

... Since Indian title had not been extinguished, there were no written instruments confirming any form of tenure outside the settlement belt (emphasis added).<sup>19</sup>

The proposed Project is partially situated within the boundaries of the Selkirk Treaty.<sup>20</sup> PFN further asserts that that the proposed Project may infringe PFN's title and harvesting rights located within the Selkirk Treaty area. PFN further asserts that its title and harvesting rights are protected by the *Constitution Act, 1982*, which gives rise to the Crown's duty to consult (and accommodate) PFN's treaty rights.

### 5.3 Treaty One

#### 5.3.1 No extinguishment of title

Treaty One covers large portions of the southern area of Manitoba. The boundaries include:

Beginning at the international boundary line near its junction with the Lake of the Woods, at a point due north from the centre of Roseau Lake; thence to run due north to the centre of Roseau Lake; thence northward to the centre of White Mouth Lake, otherwise called White Mud Lake; thence by the middle of the lake and the middle of the river issuing therefrom to the mouth thereof in Winnipeg River; thence by the Winnipeg River to its mouth; thence westwardly, including all the islands near the south end of the lake, across the lake to the mouth of Drunken River; thence westwardly to a point on Lake Manitoba half way between Oak Point and the mouth of Swan Creek; thence across Lake Manitoba in a line due west to its western shore; thence in a straight line to the crossing of the rapids on the Assiniboine; thence due south to the international boundary line; and thence eastwardly by the said line to the place of beginning.<sup>21</sup>

PFN submits that Treaty One did not relinquish Aboriginal title, or cede all lands except those specifically set aside for reserves.

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<sup>18</sup> *Manitoba Métis MBCA*, *supra* note 17 at para. 22.

<sup>19</sup> *Manitoba Métis MBCA*, *supra* note 17 at para. 28.

<sup>20</sup> C47-02-03 – Lord Selkirk Grant 1817 May – A4T8L1, Adobe p. 1.

<sup>21</sup> C47-02-07 – Treaties 1 and 2 text – A4T8L5, Adobe p. 2.

Treaty One has caused great consternation and dissatisfaction amongst affected Indians, particularly because verbal promises, known as the “outside promises”, were made during the treaty negotiations and were not included in the written text of Treaty One.<sup>22</sup> The text of Treaty One is a shorthand version of the full scope and content of the Treaty.

In the more recent Federal Court decision of *Brokenhead Ojibway First Nation v Canada (Attorney General)*, the Court interpreted Treaty One using a “natural common understanding of the parties at the time the treaty was entered into...”.<sup>23</sup> PFN submits that it’s understanding of Treaty One, at the time of the signing, it did not cede all lands except those specifically set aside for reserves, or relinquish its Aboriginal rights or title. Further PFN members understood that they would continue to enjoy full access to unallocated land beyond the confines of the reserves, that additional reserve lands would be made available and that large-scale immigrant encroachment was not foreseeable.

In summary, PFN submits that it did not cede, release or surrender title to its land when it entered into Treaty One. PFN asserts that by entering into Treaty One, the Crown entered into a sacred promise that requires the Crown to observe and act upon its solemn obligations.

### 5.3.2 Protection of the right to hunt and traditional way of life

The Alberta Court of Appeal in *R v Lefthand* recognized that verbal promises of hunting rights were made during Treaty One negotiations:

Treaties 1 and 2 do not reserve hunting rights, although verbal promises of hunting rights seem to have been made: R. Irwin, *Not Like the Others: The Regulation of Indian Hunting and Fishing in Alberta*, in R. Connors and J. M. Laws, eds., *Forging Alberta’s Constitutional Framework* (Edmonton: University of Alberta Press, 2005), at pg. 239.<sup>24</sup>

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<sup>22</sup> C47-02-12 – Treaty One and Aboriginal Title Report (A4T8Q0), Adobe p. 4).

<sup>23</sup> 2009 FC 484 at para. 24 [*Brokenhead Ojibway*].

<sup>24</sup> 2007 ABCA 206 at para. 4.

Adams Archibald, one of the lead negotiators for Treaty One and former Lieutenant-Governor of Manitoba and the Northwest Territories, in his opening speech promised Treaty One First Nations that they could hunt freely, continue their traditional way of life and use the same lands as they had in the past:

It is worth noting that in his opening speech, explaining the concept of reserve, Archibald said that When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go at all even for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and if you wish to farm you will go to your own reserve where you will find a place ready for you to live on and cultivate (emphasis added).<sup>25</sup>

Treaty negotiators on both sides understood that Treaty One protected the First Nations' continuing right to practice their traditional mode of life and practices without interference.

*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*<sup>26</sup> is a leading case on treaty interpretation. In this case, the Supreme Court of Canada confirmed that treaty interpretation is not constrained by a strict literal approach to the text or by rigid rules of construction. What the Court must look for is the natural, common understanding of the parties at the time the treaty was entered into. According to Justice Binnie:

[28] The interpretation of the treaty "must be realistic and reflect the intentions of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ... the completeness of any written record ... and the interpretation of treaty terms once found to

<sup>25</sup> C47-02-12 Treaty One and Aboriginal Title Report – A4T8Q0, Adobe p. 9.

<sup>26</sup> [2005] 3 SCR 388, 2005 SCC 69 [*Mikisew Cree*].

exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the [First Nation] interests and those of the Crown. [Citations omitted.]

Justice Binnie then cited the Supreme Court of Canada decision in *R v Badger*<sup>27</sup> for the principle that: "... the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [p. 799]". In reaching this finding, Justice Sopinka in *R v Badger* recognized that "[t]he treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement".<sup>28</sup>

The Supreme Court of Canada in *Mitchell v Peguis Indian Band* confirmed that courts must construe treaty provisions as they would have been understood by the Indians. Justice La Forest wrote:

I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.<sup>29</sup>

In *Manitoba Metis Federation Inc. v Canada (Attorney General)*, the Supreme Court of Canada found that "[t]he honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs' on pre-existing Aboriginal societies".<sup>30</sup> The honour of the Crown, particularly in a treaty context, requires it to act diligently in

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<sup>27</sup> [1996] 1 SCR 771, 1996 CanLII 236 (SCC) at para. 52.

<sup>28</sup> *Ibid.*

<sup>29</sup> [1990] 2 SCR 85 at para. 118.

<sup>30</sup> 2013 SCC 14, [2013] 1 SCR 623 at para. 67 [*Manitoba Metis (Supreme Court)*].

pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.<sup>31</sup>

PFN asserts that by entering into Treaty One, the Crown entered into a sacred promise that requires the Crown to act diligently in pursuit of its solemn obligations, by ensuring that:

1. PFN members will still be free to hunt over much of the land included in the Treaty;
2. PFN members can make use of the lands in the same manner as before the Treaty (i.e.: no forced interference with hunting);
3. PFN members will have plenty of land that is neither tilled nor occupied such that its members can go and roam and hunt as always done; and,
4. The agreed land quantum for reserve allotment would be fulfilled expeditiously.

PFN submits that these rights and activities are integral to the distinct culture and identity of the PFN, and are a critical component of the relationship between the PFN and the Crown.

PFN notes that, in its discussion on Treaty 8, the Chief Justice in *Mikisew Cree* expressly rejected the notion that Treaty rights are somehow “subject to” or “inferior to” the Crown’s ability to take up tracts of land from time to time for mining or other purposes (at paras. 133 to 135 and 150). PFN submits that the same principles should apply to Treaty One.

In summary, PFN submits that the proposed Project may infringe or adversely affect its Treaty rights because it will: reduce the area available to PFN members for traditional purposes and its rights to acquire land under the treaty land entitlement; result in changes in wildlife patterns caused by linear disturbances; lead to a diminution of the quantity and quality of wildlife harvest; further fragment wildlife habitat; loss of vegetation; and increase hunting pressures. The Project also generates new risks of

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<sup>31</sup> *Manitoba Metis (Supreme Court)* at paras. 78-79.

pipeline failure in areas relied upon by PFN and PFN members which could result in significant adverse effects on PFN Treaty rights, including its future reserves.

## 6. Aboriginal rights and title

The *Constitution Act, 1982* recognizes and affirms PFN's entitlement to use, rely on and exercise control over its land and traditional territory through the recognition of Aboriginal rights and title. The proposed Project has the potential to result in an unjustifiable infringement of PFN Aboriginal rights and title. This infringement is not in the public interest and is contrary to the constitutional protections afforded to such rights.

### 6.1 Aboriginal rights

Aboriginal rights are rights to engage in certain activities that are held by Aboriginal people as a communal group, pursuant to the integral role these activities play in the culture of the group holding the right. An authoritative definition of Aboriginal rights is found in Chief Justice Lamer's decision in *R v Van der Peet*:

In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.

[...]

In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question.<sup>32</sup>

The *Van der Peet* decision also provides some guidelines in determining the existence and scope of an Aboriginal right:

- The practice must have been integral to the culture prior to contact with European society;
- Incidental or occasional activities do not qualify. Nor do aspects of an Aboriginal society that are true to every society; and,

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<sup>32</sup> [1996] 2 S.C.R. 507 [*Van der Peet*].

- The scope and content of the Aboriginal right must be determined on a case-by-case basis.

An example of an Aboriginal right is the Aboriginal right of the Musqueam to fish for food, social and ceremonial purposes, as confirmed in *R v Sparrow*.<sup>33</sup>

The courts have recognized a host of Aboriginal rights, such as the right to fish for food,<sup>34</sup> the right to fish for limited commercial purposes<sup>35</sup> and the right to hunt.<sup>36</sup> There may also be Aboriginal rights to use areas for spiritual activities, the right to gather, the right to move goods for trade purposes, and the right to self-government. The existence, scope and nature of Aboriginal rights will turn on the unique history of each First Nation.

In *Mitchel v M.N.R.*, the Supreme Court of Canada examined a claimed right to bring goods across the St. Lawrence River for the purposes of trade. The Court decided that the claimant was not able to provide enough evidence supporting the existence of this right. Chief Justice McLachlin summarized the nature of Aboriginal rights as follows:

Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been 'integral to the distinctive culture' of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it. It must be a feature of 'central significance' to the peoples' culture, one that 'truly made the society what it was.' This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.<sup>37</sup>

The courts assess the existence of an Aboriginal right on a case-by-case basis, and then typically only when such a right is claimed to be infringed. The majority of the decisions that address and assess the existence of Aboriginal rights arise in the

<sup>33</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>34</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].

<sup>35</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].

<sup>36</sup> *R. v. Powley*, [2003] 25 S.C.R. 207, 2003 SCC 43 [*Powley*].

<sup>37</sup> [2001] 1 S.C.R. 911, 2001 SCC 33 at para. 12 [*Mitchell*].

provincial courts after an Aboriginal person exercises his or her asserted right and is subsequently charged criminally or administratively. For example, numerous prosecutions under the *Fisheries Act*<sup>38</sup> and its Regulations have created a body of case law dealing with the Aboriginal right to fish.

Aboriginal rights are not limited to the way those rights were expressed at the time of sovereignty or contact. In *Gladstone*,<sup>39</sup> the Supreme Court of Canada found that the Heiltsuk Nation has an Aboriginal right to engage in the commercial trade of herring roe. The trade in herring roe on kelp was found to have been a central and significant part of Heiltsuk society. The Aboriginal right was not limited to trade with the Heiltsuk Nation's pre-contact trading partners, but was found to have a modern manifestation which included trade in general.

The modern activity must be “the same sort of activity, carried on in the modern economy by modern means” as a traditional practice”.<sup>40</sup>

Prior to their constitutional protection in 1982, Aboriginal rights could only be extinguished by the federal government, and only then if there was a clear and plain intention on the part of the government to extinguish the right.

In 1982, Aboriginal rights were afforded constitutional protection. Section 35(1) of the *Constitution Act, 1982* reads:

Recognition of existing Aboriginal and treaty rights—The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.<sup>41</sup>

As such, these rights are protected. If they are interfered with or infringed, the infringement must be justified. An unjustified infringement of aboriginal rights would be unconstitutional and thus illegal (being beyond the Crown's constitutional jurisdiction).<sup>42</sup>

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<sup>38</sup> R.S.C. 1985, c. F-14.

<sup>39</sup> *Gladstone*, *supra* note 35.

<sup>40</sup> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220; 2005 SCC 43, at para. 25.

<sup>41</sup> *Constitution Act, 1982*, App. II, No. 4.4.

<sup>42</sup> *Sparrow*, *supra* note 33 at para. 71.

It is difficult to contemplate any extinguishment of Aboriginal rights as being constitutionally possible.<sup>43</sup>

The Supreme Court of Canada in *Sparrow* set out the definitive test for *prima facie* interference with an aboriginal right and the justification of such interference. The *Sparrow* test requires that the following questions be asked:

1. Does the legislation in question have the effect of *prima facie* interfering with an existing aboriginal right?
  - a. What are the characteristics or incidents of the rights at stake?
  - b. Is the limitation on that right reasonable?
  - c. Does the limitation impose undue hardship?
  - d. Does the limitation deny the users their preferred means of exercising the right?
2. If *prima facie* interference is found, is that interference justified? In other words, is the interference a legitimate regulation of a constitutional aboriginal right?
  - a. Is there a valid legislative objective?
  - b. If the objective is valid, is the nature and extent of infringement justified?

The onus of proving infringement is on the First Nation claiming the right. The onus of showing that the infringement is justified is on the Crown. The test for justification of infringement is an onerous one, requiring a valid legislative object and the ability to demonstrate that there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to measures being implemented.<sup>44</sup>

PFN asserts an Aboriginal right to gather for cultural and spiritual purposes. PFN further asserts that the proposed Project may infringe its Aboriginal right to gather for cultural and spiritual purposes.

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<sup>43</sup> *Sparrow*, supra note 33 at para. 44.

<sup>44</sup> *Sparrow*, supra note 33 at paras. 70-71.

1622. MS. BOYE: Thank you, Elder Floyd.

1623. When you were speaking, you mentioned that there are cultural camps along or close to the right-of-way area on the map in front of us, can you tell me where some of the culture camps are?

1624. ELDER FLOYD SUTHERLAND: They're right by the provincial park there in ---

1625. MS. BOYE: Are you referring to the Spruce Woods Provincial Park?

1626. ELDER FLOYD SUTHERLAND: Yeah, the -- yes, Spruce Woods.

1627. MS. BOYE: And is a part of that provincial park enclosed in the right-of-way?

1628. ELDER FLOYD SUTHERLAND: It's -- yeah, it partially -- it's there in -- there's other -- there's four other Sun Dances that are in that area, from different areas.

1629. MS. BOYE: So those areas are particularly important to you and close to that right-of-way or in that right-of-way?

1630. ELDER FLOYD SUTHERLAND: I think to all the ones that are in that area it's very important for them because -- yes it is. And there's a lot of different kind of medicines that grow along that area. And if there's ever a break in that area, like, what's going to happen; how far is it going to go? I think that's where, you know, we're -- it's nice to say that, you know, this will never happen. I don't know.

**Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Lines 1638-1639)**

PFN asserts an Aboriginal right to harvest plants, including medicinal plants. PFN further asserts that the Project may infringe its Aboriginal right to harvest plants, including medicinal plants.

1638. ELDER FLOYD SUTHERLAND: That's -- yeah, that's true. It's, you know, one of the things the more that you get in that area, the more that things will -- because when we also pick or go pick medicines we always wear moccasins so that we don't break the grass or the bushes or the shrubs, because they have to be looked after.

1639. And everybody's given special ways of picking or harvesting there, and some of the stuff that we don't get we share from other First Nations, like Sioux Valley down there, and there's guys have a lot of good medicine down there which we share with the sweet grass in exchange for sage and stuff like that.

**Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Lines 1638-1639)**

1563. I'm also wanting to talk about some of the medicines that we take care of, that we harvest, for the healing of our people, the medicines that we hope will be there for all of our generations to come.

1564. As many people know that diabetes is one of the diseases and illnesses that came to our people and many places the plants that we look for and have relied on are no longer there.

1565. An example that we have is disruption of the earth. We use to pick the medicine for diabetes at this one certain place and then gravel pits came in; we no longer had that medicine there and we had to go to other First Nation people to go to their territories to find that medicine because we haven't been able to find that one specific medicine that was given to us to use.

1566. And also in our own community we've lost because of, again, the taking of gravel, you know, for construction. We've lost the medicine that we had for minor ailments such as headaches. It used to grow so much and now it isn't there where we used to and we had to search a lot of -- many places, travel a lot of miles to find this medicine, where it used to grow just in our backyard.

1567. So medicines is very important to the wellness of our people.

1568. When I was preparing my information, you know, even the wetlands where we gather our medicines, like the weekays and the skutimos (ph), and the bulrush, those are three main medicines that we use on a regular basis, and it's something that we need to take care of to make sure that it continues to grow because if the water and the earth, the soil is contaminated it will not be a medicine for us; it will poison the earth and water will be contaminated, you know, where our children and our grandchildren will no longer have those medicines that we rely on.

1569. As I was growing up, you know, we used to go into our backyard and know what medicines were there for us just to pick, you know, and we would like the medicines to continue to be there for our children.

1570. And for the medicines that are specialized, like the cancer medicine that grows in the swampland, needs to be taken care of.

1571. Our children and our grandchildren need to be provided with clean water, you know, and I guess with the interruption of our earth it's a very serious concern to me as a grandmother. And I lived in the area where this pipeline goes by.

1574. MS. BOYE: Thank you for your comments, Elder Faylene.

1575. One of the issues that you spoke about, and I would like to ask you a few questions on, is medicines that are found in water.

1576. Can you describe some of the medicines that you harvest from water? You used bulrush as an example. Can you describe where you harvest bulrush from?

1577. ELDER FAYLENE SUTHERLAND: There is lots of medicines that go around the water and bulrush is one of the medicines that our little ones use, and right into adulthood. And it grows right along the shores of wetlands or along where there is water. And the other medicines that we have is weekays or weekay; I think it's called ginger root in English. That's a medicine that -- it's a natural antibiotic, so it provides medicine for many different kinds of illnesses.

1578. And also sweet grass. We have a braid of sweet grass sitting on the sacred buffalo skull. To us, it's the hair of our mother the earth, and it provides us with a lot of healing through the smudging, through the teas that we make from it, through the picking of our medicines. You know, it provides holistic healing for all of us.

1579. MS. BOYE: You mentioned that you are worried that your medicines could be destroyed or contaminated. Are you worried that your medicines could be destroyed by oil contamination?

1580. ELDER FAYLENE SUTHERLAND: That's my main worry when there is a pipeline close by that -- you know, the oil is not natural to our land so therefore, if it mixes in with the earth there will be a lot of contamination and destruction, not only of our medicine plants but the earth and the water and everything that has life around, should there have been catastrophe with the oil.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4, Lines 1638-1580)**

PFN asserts an Aboriginal right to hunt. PFN further asserts that the proposed Project may infringe its Aboriginal right to hunt.

1650. MR. VINCENT ORVIS: Good day. My name is Vincent Orvis from Peguis First Nation. I'm a former Assiniboine Community College student from Brandon. I'm now living there. I used to go hunt down there, down by those pipelines and that. And it'd be a real shame there if that pipeline broke and killed all the wildlife. There'd be no hunting left down that way.

[...]

1658. Vincent, I wanted to ask you a few questions in terms of hunting and the experiences that you've had with hunting. Could you tell us where you hunt?

1659. MR. VINCENT ORVIS: Like, on the map you mean?

1660. MS. BOYE: Yes. There is a pointer. So one thing that I could do is to ask you point out some areas on the map that are important to you for hunting.

1661. MR. VINCENT ORVIS: Like about there. Around here there's lots of deer and different animals there.

1662. MS. BOYE: So what I -- just for clarification, what I can see is that you're pointing to an area that is north of the pipeline but within the pipeline right-of-way area and in the Sioux Valley Nation where it's labelled Sioux Valley Nation.

1663. MR. VINCENT ORVIS: Yeah.

**Peguis First Nation, Vincent Orvis (Transcript, Volume 4, Lines 1650-1663)**

PFN asserts an Aboriginal right to fish for food and for social and ceremonial purposes. PFN further asserts that the proposed Project may infringe its Aboriginal right to fish for food and for social and ceremonial purposes.

1651. I grew up commercial fishing on Lake Winnipeg with my grandfather, who was also a fisherman and a trapper. That's who taught me how to hunt and fish as a youth.

[...]

1653. I'm concerned about the oil spills and getting into the fish and the food that we eat from that land. It's going to be affecting everything down that way if it does break or leak. What kind of -- what kind of guarantee can you make for us that this ain't going to be breaking on us? That would be my question for you.

[...]

1666. MR. VINCENT ORVIS: Well, there's a lot of people that depend on wild meat around this area, and if there was to ever be an oil spill they would have nothing. There would be no fish left or nothing for them to eat.

1667. MS. BOYE: Thank you.

1668. MR. VINCENT ORVIS: You're not going to be going eating a fish that's contaminated with oil or anything like that. Like, that's like scary, like the oil.

1669. MS. BOYE: Vincent, can I ask you just to repeat that last part? I think you said that it was scary.

1670. MR. VINCENT ORVIS: It would be scary to go -- not to be sure if what you're eating -- because you don't want to be eating a fish that's so contaminated with oil in it.

1671. MS. BOYE: M'hm.

1672. MR. VINCENT ORVIS: Like if there was ever to be a break there the fish would be one of the first things to go.

1673. MS. BOYE: M'hm. And in terms of hunting or fishing, can you tell us why that is important to you?

1674. MR. VINCENT ORVIS: It's important -- it's just the way I grew up. Like, that's like a freedom that everybody should have to go and experience to go hunting like -- and you don't always want to go to the store and buy a cow.

**Peguis First Nation, Vincent Orvis (Transcript, Volume 4, Lines 1651 - 1674)**

PFN submits that it has Aboriginal rights, including self-governance, and hunting, fishing, harvesting and gathering for food, social and ceremonial purposes. The proposed Project will interfere with these rights and will result in a *prima facie* infringement. Specifically:

- i. The authorization of the proposed Project through the *NEB Act* would apply a law in such a manner that it may infringe PFN members' ability to hunt for subsistence purposes;
- ii. The proposed Project will restrict PFN members' ability to choose where to hunt;
- iii. The authorization of the proposed Project may infringe, and would not accommodate PFN's rights or interests as it offers no direct benefits to PFN and will adversely affect lands relied upon by PFN members for subsistence harvesting, cultural and spiritual activities and the exercise of other Aboriginal rights;

- iv. The proposed Project will have adverse effects on the flora and fauna that PFN members rely on, including but not limited to large and small game, birds, fish and (medicinal) plants; and,
- v. The proposed Project will result in a direct interference with PFN members' ability to exercise their preferred Aboriginal rights.

PFN submits that neither the provincial nor federal Crown have attempted to have any direct engagement with PFN about the potential impacts of the proposed Project on PFN rights and interests and that the Crown has not discharged its duty to justify the proposed infringements of PFN's Aboriginal rights in a manner consistent with s. 35 *Constitution Act, 1982* framework.

## 6.2 Aboriginal title

Aboriginal title is an Aboriginal right to the land itself. PFN asserts Aboriginal title to the land that the proposed Project Proponent proposes to use for the proposed pipeline and right of way.

PFN submits that Treaty One is silent in relation to water. PFN did not relinquish Aboriginal title to water through Treaty One, and PFN continues to assert Aboriginal title to the water within the geographic boundaries of Treaty One territory:

First, the treaty only mentions "all the lands" included within its limits, and make no mention of waters. Contemporary treaty documents make reference to 'lands and waters', so this could be of some significance and indicates outstanding Aboriginal title to all waters within the treaty area.<sup>45</sup>

PFN further submits that Treaty One is geographically confined and did not affect PFN's Aboriginal title to land or water outside of the geographical boundaries of Treaty One:

Secondly, the treaty defines a specific area of land, roughly central and southern Manitoba, and does not surrender lands or waters outside of the area. This means that, for example, if Peguis and former St Peter's members used and occupied areas of land outside of the treaty area, they would still have unceded Aboriginal title to those tracts of land.<sup>46</sup> ...

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<sup>45</sup> C47-02-12 Treaty One and Aboriginal Title Report – A4T8Q0, Adobe pp. 11-12.

<sup>46</sup> *Ibid*, at Adobe p. 12.

PFN asserts Aboriginal title over land spanning from Sault Ste. Marie, Lake Superior, Minnesota and the Rocky Mountains:

1516. Our teachings tell us that the Anishinaabe migrated from eastern Canada and travelled west following the great miigis shell. The miigis shell was the beacon that led the Anishinaabe westward up the St. Lawrence River and eventually made the -- one of their last stops at Boweting, now known as Sault Ste. Marie.

1517. One group of Anishinaabe travelled north of Gitchigumi, also known as Lake Superior, and the other group followed the southern route of Lake Superior and settled in the northern states and also was into the Minnesota area. The Anishinaabe travelled west as far as the Rocky Mountains, and the tribe of Peguis settled around the Red River Valley in the late 1700s.

1518. Our history tells us that Chief Peguis came from the Sault Ste. Marie area, and I guess he followed the migration like the other Anishinaabe that we go west.

**Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Lines 1516-1518)**

1796. Some important points that I think I have to mention. Our people lived in the southwest Manitoba for years. Families travel throughout the land to gather, to hunt. As a young man, I lived in Rivers, I lived in Brandon. I hunted throughout that whole region. Just recently I lived in Southport. I hunted down and gathered down in the lake -- the provincial forest there just outside of Portage. And I did a lot of hunting there because that's who I am.

1797. You know, Chief Peguis warriors, as I stated, you know, hunted for the survival of those settlers 200 years ago. And our people still hunt there today. A friend of mine travels from Selkirk, Manitoba down out in the Souris area and he gets permission to hunt on private land. And he's been doing so all his life and he's 65. It's still -- we still carry that tradition from 200 years ago till today when we still go down there to hunt.

1798. Our people have -- went to school to Brandon University to be educated going back 35, 40 years, and they've hunted and they've gathered. Many of them stayed and lived up there.

1799. We have people living in Carman. We have people living in Portage la Prairie. We have family members throughout all of southerly -- southwestern Manitoba.

1800. You know, proximity, this question keeps coming up. Well, Peguis is way over here in the middle of Manitoba; what does it have to do down here? We are

10,000 strong, probably more. With Bill C-3, we'll be looking at 13 to 14 thousand membership. But only 4,000 people live on our First Nation community, so that means two-thirds of the population is living off our community.

1801. And where are they living? They're living in Brandon. They're living in Portage la Prairie. They've living in rivers. They're living in Winnipeg. They're living in Carman. All throughout the project area.

**Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Lines 1796-1801)**

1554. We have our brothers and sisters who live in Minnesota and other parts of the northern states where we're part of the same tribe, and they share their concerns with us as well, and we support them, they support our right to live healthy lives.

**Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Line 1554)**

PFN members occupy and use the lands affected by the proposed Project:

1735. Peguis First Nation members were asked to provide and collect information about land use and occupancy. We asked people who had lived in the area, worked in the area, travelled in the area, hunted, fished, trapped, gathered and practiced traditional knowledge and cultural practices near the Line 3 Replacement Project corridor.

[...]

1717. Most of the respondents live currently in Winnipeg, Peguis, or Selkirk. Respondents who completed the survey have lived in the past in Athabasca, Brandon, Dauphin, Fisher River, Germany, Medicine Hat, Morden, Peguis, Portage La Prairie, Rivers, Selkirk, Southport, Saint Ambrose, Swan Lake, Thompson, Wawanesa, and Winnipeg.

**Peguis First Nation, Jared Whelan (Transcript, Volume 4, Lines 1735 and 1717)**

1571. ... And I lived in the area where this pipeline goes by.

1572. My husband was in the police force and also went to University of Brandon. So in many of those areas, you know, we practice our traditional ways and did many ceremonies and attended teachings, cultural teachings. We also harvested a lot of the medicines that grow in this area that has been disrupted, and intrusion of the land is something that I, as a grandmother, need to think about and worry about.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4,  
Lines 1571-1572)**

If the proposed Project proceeds, it will be imposed upon PFN in violation of the PFN's choice of use for the affected lands.

Aboriginal title carries with it a right to choose the use to which the land is put. PFN has not chosen to use its Aboriginal title lands for the existing pipeline, or the proposed replacement and expansion of the pipeline.

1808. We sit here today presenting our argument to the National Energy Board, and we wonder and we wait. Are we ever going to get a Section 35 here? It should have been done last year or two years ago.

1809. All the projects that happened in the last 30 years with this pipeline and then, from what I understand, there's six pipelines on there. Never once were we given that opportunity to present our case -- our Section 35 until now.

**Peguis First Nation, Mike Sutherland (Transcript, Volume 4, Lines 1808 -  
1809)**

Aboriginal title is a collective Aboriginal right to land itself. It is predicated in exclusive pre-sovereignty use and occupation of the land by the Aboriginal claimants, inherently recognized in the *Royal Proclamation of 1763*.<sup>47</sup> Nomadic and semi-nomadic groups can establish title to land, provided they establish sufficient physical possession. Evidence of "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice.<sup>48</sup>

In *Delgamuukw v British Columbia*,<sup>49</sup> Chief Justice Lamer described the content of Aboriginal title:

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<sup>47</sup> *Royal Proclamation of 1763*, issued by King George III on October 7, 1763: "And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained."

<sup>48</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 66 [*Delgamuukw*].

<sup>49</sup> *Ibid.*

... the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>50</sup>

The *sui generis* nature of Aboriginal title informs its content and the extent to which Aboriginal title may, in some circumstances, be infringed. In discussing infringement and the manner in which infringement may be justified, Chief Justice Lamer stated:

The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take -- will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component (emphasis added).<sup>51</sup>

Thus Aboriginal title encompasses the right to choose to what uses the land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal people. The unanimous Supreme Court of Canada decision in *Tsilhqot'in Nation v British Columbia* confirmed that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes",<sup>52</sup> including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land.

The Supreme Court of Canada in *Tsilhqot'in* also confirmed that Aboriginal title was not confined to specific sites, but to areas regularly used for hunting, fishing or exploiting resources:

Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting,

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<sup>50</sup> *Ibid* at para. 117.

<sup>51</sup> *Ibid* at para. 166.

<sup>52</sup> *Ibid* at para. 117.

fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.<sup>53</sup>

PFN did not chose to have its Aboriginal title lands used for the original pipelines, or to continue to have its title lands utilized for further pipelines such as the proposed Project. PFN has other aspirations for the use of these lands. Not only is the use of these lands proposed by the Project proponent incompatible with PFN's desired use of the particular lands they will impact, it is also inherently incompatible with PFN's stewardship obligations for its entire traditional territory.

PFN submits that the proposed Project constitutes an infringement of the constitutionally protected Aboriginal title of the PFN. Specifically PFN submits that:

- i. The authorization of the Project through the *NEB Act* would curtail PFN members' ability to exercise their inherent rights, treaty rights and Aboriginal rights, and to benefit from the fruits of its lands and natural resources; and,
- ii. The authorization of the Project may infringe, and would not accommodate in any way, the rights or interests of PFN as it offers no direct benefits to PFN and will adversely affect the lands relied upon by PFN.

PFN further submits its Aboriginal rights and title were not extinguished by either the Selkirk Treaty, or Treaty One. The Crown has failed to assess the strength of its Aboriginal rights and title claim, treaty rights and inherent rights, and has failed to address the concerns of PFN in a meaningful way. Specifically, PFN submits that:

- i. The Crown's honour and the goal of reconciliation arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it; and,
- ii. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

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<sup>53</sup> *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 at para. 50 [*Tsilhqot'in*].

## 7. Treaty land entitlement

When Treaty One was signed in 1871, the members of St. Peter's, now PFN, were promised a certain quantum of land based on the size of its population. PFN did not receive its full amount of land promised under Treaty One.<sup>54</sup> As a result, a Treaty Land Entitlement Agreement (the "TLEA") was reached and signed in April 2008 for an additional 166,794 acres of land. Pursuant to the Treaty Land Entitlement Agreement, PFN is entitled to selection of up to 55,038 acres of Provincial Crown land, and up to 111,756 acres of Other Land Amount (private lands), including all of the lands in and under the proposed Project which are in southern Manitoba, which are lands within Treaty 1 and "other lands within Manitoba".<sup>55</sup>

PFN may select its Crown land from land within the boundaries of Treaty One or outside of the Treaty One boundaries but within the province of Manitoba. PFN may also acquire private lands from within the boundaries of Treaty One and Manitoba, or outside of the Treaty One boundaries but within the province of Manitoba.<sup>56</sup> Once a selection is made for a specific parcel of land, there is a process within the TLEA to transform these lands into "reserve lands"<sup>57</sup> for the use and benefit of PFN and its membership.

Once PFN has selected Manitoba Crown lands or acquired private lands, there are several steps that must be completed for those lands to be converted into reserve land status that require the involvement of Canada, Manitoba and PFN. More specifically (as outlined in the TLEA<sup>58</sup>) some of the key steps include:

1. Manitoba transfers jurisdiction over these lands to Canada where they become under *Constitution Act, 1867*, section 91(24) jurisdiction and any

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<sup>54</sup> Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Lines 1529); *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 13 [*Long Plain First Nation*].

<sup>55</sup> C47-02-10 - Treaty Entitlement Agreement Peguis First Nation 2006 - A4T8L9, Adobe p. 30 (section 2.01).

<sup>56</sup> C47-02-10 - Treaty Entitlement Agreement Peguis First Nation 2006 - A4T8L9, Adobe p. 31-32 (section 3.01(1) and (2)).

<sup>57</sup> *Indian Act* (R.S.C. 1985, c. I-5), s. 2.

<sup>58</sup> C47-02-10 - Treaty Entitlement Agreement Peguis First Nation 2006 - A4T8L9, Adobe p. 68-69 (section 8.01).

registerable instruments fall under the *Federal Real Property and Federal Immovables Act*,<sup>59</sup>

2. Canada and Manitoba confirm that the lands are eligible to be reserve lands;
3. An environmental assessment is undertaken for the lands (a process under the *Canadian Environmental Assessment Act, 2012*<sup>60</sup>, which will be far more significant and in-depth than is currently scoped in the current NEB process, particularly with respect to the potential impacts of bitumen and dilbit where the detailed chemical composition and their corresponding environmental impacts will be reviewed in detail. This will include cumulative and downstream effects on the aquatic environment, including Lake Winnipeg, given the PFN's close relationship through medicinal gathering, hunting, and fishing throughout Lake Winnipeg); and,
4. Canada undertakes to proceed with due diligence and to use its best efforts to set apart that land as reserve.<sup>61</sup>

Notably, there are a number of exclusions to the type of lands to which PFN may select or acquire for reserve land status under the TLEA, such as certain Manitoba Hydro uses and provincial roads or highways. None of these exclusions reference any pipeline project, either existing or proposed, and there is nothing in the TLEA which references any pipeline project taking precedent over the rights of PFN to acquire and develop lands under its terms.

The TLEA also provides PFN substantial financial resources to acquire these lands by providing \$64,425,000.00 as part of the TLE settlement, of which \$49,800,000.00 is earmarked as a "Land Acquisition Payment".<sup>62</sup> The TLEA contemplates a substantial amount of land being acquired, through selection of up to 55,038 acres of provincial Crown land for free (without purchase) and 111,756 acres of private lands by purchase.

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<sup>59</sup> *Federal Real Property and Federal Immovables Act* (S.C. 1991, c. 50), s. 5.

<sup>60</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 29), s.13.

<sup>61</sup> C47-02-10 - Treaty Entitlement Agreement Peguis First Nation 2006 - A4T8L9, Adobe p. 68-69 (section 8.01(1)(b)).

<sup>62</sup> C47-02-10 - Treaty Entitlement Agreement Peguis First Nation 2006 - A4T8L9, Adobe p. 98-100 (section 16).

PFN acquiring and developing a large quantum of lands as reserve lands means a number of important things to PFN which flow directly from Treaty One in today's context, a context with significant application to the proposed Project. First, PFN would no longer have reserve lands held in trust by Her Majesty for PFN as a mere complacent beneficiary fully reliant on Canada for the management and care of those lands. Rather, it would enjoy Aboriginal title and jurisdiction<sup>63</sup> over these lands as follows:

1. PFN may pass laws to manage the lands through regulation and zoning through a Land Management Code under the *First Nations Land Management Act*,<sup>64</sup> including determining appropriate activities and development of those lands through a development plan. For example, should PFN wish to establish a land management regime it could do so by adopting a land code<sup>65</sup> and PFN would have the power to manage that land<sup>66</sup>;
2. PFN may tax land users, rights of ways holders, and leaseholders through taxation and assessment bylaws under the *Indian Act*<sup>67</sup>;
3. PFN can build financial wealth and move towards economic independence through the development and taxation of property on its reserve lands, including long term financing through the resulting businesses and property tax revenue. The *First Nations Fiscal Management Act*<sup>68</sup> provides authority for PFN to make laws respecting taxation for local purposes of reserve lands, interests in reserve lands or rights to occupy, possess or use reserve lands<sup>69</sup>;
4. PFN can grow and build the socio-economic fabric of the PFN through the creation of the above referenced economic base, including building infrastructure for the benefit of its membership; and,

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<sup>63</sup> *Guerin v. The Queen*, [1984] 2 SCR 335.

<sup>64</sup> *First Nations Land Management Act* (S.C. 1999, c. 24).

<sup>65</sup> *Ibid*, s. 6.

<sup>66</sup> *Ibid*, s. 18.

<sup>67</sup> *Indian Act* (R.S.C. 1985, c. I-5), s. 83.

<sup>68</sup> *First Nations Fiscal Management Act* (S.C. 2005, c. 9).

<sup>69</sup> *Ibid*, s. 5(1)(a).

5. PFN reserve lands acquired are not subject to the expropriation or mandatory disposition provisions applicable to other lands in the context of an approved pipeline, including the proposed Project. Therefore, PFN's consent would be required for any required new rights of way under the terms of the TLEA.

The Federal Court of Appeal in *Long Plain First Nation* recognized the higher order of the TLEA as a constitutional obligation. The Court noted that Canada:

must be guided by the treaty land entitlement agreements it has signed, its commitment to the purpose of those agreements, and the concepts of honour, reconciliation and fair dealing. In this case, honour, reconciliation and fair dealing – often expressed as the obligation to avoid sharp dealing – are particularly important because of Canada's broken promise in Treaty No. 1.<sup>70</sup>

The Court stressed a purposive interpretation of the terms of the treaty land entitlement agreements, and stated that the agreements are not just commercial agreements; rather the agreements reveal a *bona fide* intention and commitment on the part of Canada to engage in a process to rectify Canada's broken promise, the unfulfilled land quantum, in Treaty No. 1.<sup>71</sup> Further highlighting the need to interpret these agreements in accordance with the objectives of honourable conduct, reconciliation and fair dealing with Aboriginal persons, the Court quoted from *Beckman v Little Salmon/Carmacks First Nation*:<sup>72</sup>

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important

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<sup>70</sup> *Long Plain First Nation*, *supra* note 54 at para. 112.

<sup>71</sup> *Long Plain First Nation*, *supra* note 54 at para. 117.

<sup>72</sup> 2010 SCC 53, [2010] 3 SCR 103 at para. 10.

than the past. A canoeist who hopes to make progress faces forwards, not backwards.<sup>73</sup>

The living, breathing, constitutional relationship that has been established between Canada and PFN through its TLEA cannot be ignored through the NEB's process in respect of the proposed Project.

1536. For Section 3.02(2)(a) and (b) [sic.] indicates that Peguis can acquire private land in the treaty area and also land within the Province of Manitoba. So we have a large area of selection or requisition for private lands in the province according to their right to select lands in the southern portion of the province still exists. The Peguis TLE Agreement is considered to flow from Section 35 of the Constitution Act (1982).

**Peguis First Nation, Mr. Lloyd Stevenson (Transcript, Volume 4, Line 1536)**

The Prime Minister's Mandate Letter of November 2015, addressed to the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, is a matter of public record.<sup>74</sup> The Mandate Letter stresses the importance of a "renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership" with a focus on making "real progress". This new relationship respects treaty rights and Canada's constitutional obligations.

Chief Spence addressed similar considerations in her remarks to the Board during the PFN presentation of oral traditional evidence. She stated:

1847. In his discussion regarding the Constitution and our Indigenous rights as outlined in the Constitution and about the -- you know, it made me think as well about the recent Truth and Reconciliation, the whole concept of reconciliation with First Nations. You know, it's been many years that our people have not been part of the consultation process. We've heard Mike talk about that, as well as some of the other panel members.

1848. And for us, as First Nations here in Canada, we want to be recognized as equal partners, whether it be taking part in discussions on the Environmental Act or discussions regarding the building of a pipeline or the replacing of a pipeline through our traditional territories. And so that's just part of what I wanted to bring to the attention of the Panel is the importance of the Truth and Reconciliation and the whole focus on a new beginning for Canada in regards to that reconciliation process.

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<sup>73</sup> *Long Plain First Nation*, *supra* note 54 at para. 118.

<sup>74</sup> Available online: <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

**Peguis First Nation, Chief Cindy Spence (Transcript, Volume 4, Lines 1847-1848)**

Since the treaty and constitutional relationship of reconciliation is a two-way street, PFN published, several years ago, its Policy on “Consultation and Accommodation”.<sup>75</sup> This Policy is intended to guide PFN as well as industry, governments, and governmental agencies (such as the NEB) as to PFN’s position and interests in pursuing reconciliation of its treaty and Aboriginal rights with project proponents and agents of the Crown, federal and provincial. The Policy includes PFN’s Section 35 rights and encompasses, among other rights, the treaty right to land through the TLEA and the right to land itself and to choose the uses to which it is put.<sup>76</sup> It also sets out a list of means of accommodation in relation to any activity that may infringe on Section 35 rights or interests of PFN, such as participation in future joint decision-making, revenue sharing and providing economic development opportunities or other economic measures to PFN’s members.<sup>77</sup> As noted earlier in this argument, the honour of the Crown, particularly in a treaty context, requires the Crown to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.<sup>78</sup> It is of great concern to PFN that there is no evidence on the record that indicates any such accommodations being provided or committed to PFN from the Proponent or the Crown in respect of the significant impacts arising from the proposed Project.

PFN’s land selection process is still in its early days, a process which includes potential selection of Crown and private lands near, in and under the Project right of way. Where these lands may become reserve lands, there will be a significant impact on the lands and the significant treaty and aboriginal rights to them caused by the proposed Project. PFN asserts that the TLEA entitles it to an on-going right to select lands in areas that will be negatively impacted by the proposed Project, including a potential spill from the proposed Project.

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<sup>75</sup> C47-02-11 – PFN Preliminary Consultation and Accommodation Policy May 2013 – A4T8L9.

<sup>76</sup> C47-02-11 – PFN Preliminary Consultation and Accommodation Policy May 2013 – A4T8L9, Adope p. 3-4, s. 2.1(d).

<sup>77</sup> C47-02-11 – PFN Preliminary Consultation and Accommodation Policy May 2013 – A4T8L9, Adope p. 10-11, s. 5.6.

<sup>78</sup> *Manitoba Metis (Supreme Court)* at paras. 78-79.

PFN submits the proposed Project will significantly harm its ability to acquire and develop lands to their proper full and intended potential contemplated in the TLEA because:

- i. The risk of a spill or contamination resulting from the pipeline exposes a wide range of lands in southern Manitoba, not only those lands adjacent to the pipeline, to greater risk and may well make these lands unsuitable for a TLEA selection. The proposed Project lengthens the lifespan of the existing pipeline, and expands the size, and carrying capacity, of the existing pipe (replacing the existing 863.6 mm O.D. (NPS 34) crude oil pipeline with a 914.4 mm O.D. (NPS 36) diameter crude oil pipeline),<sup>79</sup> resulting in a greater likelihood of a spill, and land damage, in the future;
- ii. The proposed Project will impact lands that are not presently impacted by pipeline infrastructure, and those additional lands will either no longer be available to PFN for a TLE selection or will be less desirable to PFN as possible land selections. The proposed Project will deviate from the existing mainline corridor and Alberta Clipper Expansion Project Right of Way for approximately 38 km north of Morden, Manitoba.<sup>80</sup> If the Project proponent is permitted to use these lands for the purpose of the proposed Project, these lands may not be available to PFN as TLE selection lands. Additional deviations from already impacted areas may be required, which would further reduce PFN's ability to acquire TLE lands in those areas;
- iii. The specific provisions, including, the spirit and intent, of the TLEA will be frustrated, if not placed in jeopardy, in its application over a large area of southern Manitoba by the proposed Project undermining PFN's land selection and acquisition priorities;

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<sup>79</sup> B1-05 – Chapter 2 Project Description – A4E4I7, Adobe p. 1.

<sup>80</sup> B2-01 – Chapter 11 Lands – A4E5E8, Adobe p. 1.

- iv. PFN has expressed concern that there is very little Crown land left in the southern part of the Province,<sup>81</sup> and the proposed Project may further limit the Crown lands available as TLE selection lands;
- v. If the lands are impacted by the pipeline infrastructure a limit is placed on what use the lands can be put to. This inhibits the purpose of PFN acquiring reserve land through the TLEA, which is to build a Nation and establish a growing economic base by exercising its own jurisdiction over those lands;
- vi. In the event that these significant environmental and rights impacts could be addressed, however unlikely, and in the event that PFN selected and acquired lands along the Proponent's proposed right of way, an early determination for an approval of the proposed Project by the Board, with or without conditions, would diminish the legitimate bargaining opportunities of PFN to determine in discussions with the Proponent PFN's consent for the use, environmental conditions, and other taxation terms for such portions of the right of way; and,
- vii. The proposed Project will impact the amount of land available through the TLE selection and as such does not further the goal of truth and reconciliation. Chief Cindy Spence spoke to the "focus on a new beginning for Canada in regards to that reconciliation process".<sup>82</sup> PFN wants to be regarded as an equal partner in the "discussions regarding the building of a pipeline or the replacing of a pipeline through our traditional territories".<sup>83</sup> No evidence on the record indicates such a partnership.

PFN requests the following remedies:

- i. Given the obvious conflicts between the Board's potential approval for the proposed Project and the TLEA, the TLEA should supersede because of Section 35 and the Board should take into account what powers it has to

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<sup>81</sup> Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Line 1533).

<sup>82</sup> Peguis First Nation, Chief Cindy Spence (Transcript, Volume 4, Line 1848).

<sup>83</sup> Peguis First Nation, Chief Cindy Spence (Transcript, Volume 4, Line 1848).

- resolve this conflict including those powers allocated to the Board by s. 15(3) of the *NEB Act*, including providing time for the Proponent and PFN to negotiate resolution of these conflicts; and,
- ii. The *NEB Act* sets out the powers of the Board and we recognize that all proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit.<sup>84</sup> Given this, we ask the Board to delay the determination six months to allow PFN to complete its land selection in southern Manitoba and allow PFN to come back to the Board and make further submissions regarding its land acquisition process. In the alternative, as a condition of the Board's approval, Enbridge should be ordered by the Board to enter into an accommodation agreement with PFN that takes into account, and gives full interest to, PFN's land selection along the proposed Project's right of way.

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<sup>84</sup> *supra* note 2 at section 11(4).

## United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (the “Declaration”) was adopted by the General Assembly of the United Nations on 13 September 2007. Canada initially voted against the Declaration but later issued a statement of support in favour of the Declaration on 12 November 2010.<sup>85</sup> Article 43 of the Declaration recognizes that the rights contained in the Declaration “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”.

The Declaration includes various articles that are relevant to the Board’s assessment of the Project and its potential impact on Indigenous Peoples, including PFN. Some of the relevant articles are reproduced below:

### *Article 24*

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

### *Article 29*

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for

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<sup>85</sup> Indigenous and Northern Affairs Canada, *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: INAC, 12 November 2010), available online at: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

[...]

*Article 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.
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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PFN submits that the Declaration provides clear standards against which to measure the potential effects of the Project on Indigenous Peoples, including PFN. PFN submits that further measures are required from Enbridge to ensure the conservation and protection of the environment.

## **Duty to Consult and Accommodate**

PFN submits that the hearing process of the NEB pursuant to the *NEB Act* does not permit the Board the necessary flexibility to fully address the concerns of PFN relating to the Project and direct consultation between the Crown and PFN is necessary to discharge the duty to consult and accommodate. PFN further submits that as a regulatory body charged with the power to decide matters of law the Board is empowered to decide constitutional questions and is obliged to assess whether the duty to consult and accommodate PFN in relation to impacts arising from the Project has been discharged by the Crown.

PFN asserts that, despite Crown participation in the hearing process, the duty to consult and accommodate PFN has not been fulfilled. The granting of the relief sought by Enbridge prior to consultation and accommodation in relation to the environmental, cultural and rights-based concerns of PFN would violate the Crown's constitutional obligation to consult and accommodate PFN.

### **1. PFN Concerns about the Hearing Process**

PFN has expressed concerns to the Board that the hearing process set out by the Board did not permit PFN to express the full scope of its concerns about the Project:

1550. Certainly the restrictions put a muzzle on what we'd like to share with the National Energy Board. We felt the door wasn't fully open. We felt the door was open only a crack and that only certain information could be shared with the hearing process here today.

1551. What we need is a full open-door policy so everything can be shared to make -- so the Board could make a full and impartial recommendation. We're not sure whether this is really what you would call a consultation process because the restrictions we felt it's not a meaningful consultation, if it is being perceived as a consultation process.

1552. You know, we had other things we wanted to share but because of the censorship and the restrictions -- you know, we did like to talk about the Proponent's track record as well but, you know, we see that as a technical piece of information that I guess the Board really didn't want to hear from us but we know the information's out there.

**Peguis First Nation, Lloyd Stevenson (Transcript, Volume 4, Lines  
1550-1552)**

The Board is an independent, quasi-judicial body. The nature of the Board's powers and the limited scope of the application before the Board constrain the ability of the Board to address some of PFN's many concerns relating to the Project. A non-exhaustive list of examples of the limitations in the Board's hearing process and the jurisdiction of the Board are presented below:

- the Board is not able to effectively assess the broader impacts of the Project on Peguis First Nation in relation to the displacement of land users from areas impacted by the Project to other areas for traditional land use purposes because the scope of the Boards assessment is limited to the Project Area;
- the Board is not in a position to assess the contribution of the Project to cumulative effects on PFN rights and interests arising from past projects or policies that are not physical in nature such as loss of language and culture;
- the Board does not have the jurisdiction to order or implement measures to protect other areas utilized by PFN to compensate for the impacts of the project on the traditional land use by PFN;
- in fulfilling its obligations as the responsible authority under the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52) ("CEAA 2012") the Board is limited, pursuant to s. 5.(1)(C)(iii) of CEAA 2012, to assessing effects causing changes to PFN's current use of lands and resources for traditional purposes and is not able to assess pre-existing limitations on the use of lands and resources for traditional purposes arising from prior development within the areas that will be adversely effected by the Project and the Board lacks the jurisdiction to order measures aimed at addressing past impacts on the use of lands and resources by PFN for traditional purposes;
- the Board does not have the jurisdiction to address project effects on PFN's inherent right of self-government;

- the Board cannot order economic accommodation for impacts on PFN rights or interests;
- the Board cannot, on its own, resolve the conflict between PFN's TLE rights to additional reserve lands and the Project; and,
- the Board cannot address historic and ongoing infringement of PFN rights caused by the construction and operation of the original Line 3.

PFN submits that all of the above noted concerns have direct relevance to the application presently before the Board but acknowledges that some aspects of the issues identified above may extend beyond matters immediately relevant to the present application before the Board. The limitation of the Board's jurisdiction to the application before the Board is one of the key challenges in the Board's capacity to address the broader concerns of PFN which may be impacted by both the Project and other developments. The Crown possesses the capacity to address effects in the nature of those presented above but the Crown has not engaged with PFN to discuss those concerns and absent Crown involvement they may go unaddressed. The Supreme Court of Canada has expressed concerns about the potential for the concerns of Indigenous Peoples to be lost in the cracks of regulatory systems:

[62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.<sup>86</sup>

PFN confirmed that there has been no consultation between PFN and the federal government in relation to the Project.<sup>87</sup>

The Crown possesses knowledge of PFN's treaty rights and asserted Aboriginal rights through the *Treaty One and Aboriginal Title: A Report for Peguis First Nation* prepared

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<sup>86</sup> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

<sup>87</sup> Peguis First Nation, Mr. Lloyd Stevenson (Transcript, Volume 4, Line 1844).

by Dr. Peter Kulchyski.<sup>88</sup> The Crown also possesses knowledge of PFN's preferred methods of consultation through the filing of the PFN *Preliminary Consultation and Accommodation Policy* by PFN.<sup>89</sup> The Crown also possesses knowledge of PFN concerns that the proposed Project could adversely affect established or potential Aboriginal or treaty rights of PFN through the evidence filed by PFN and the oral traditional evidence provided by PFN to the Board.

Despite the sharing of this information by PFN during the Board's hearing process, no actions have been taken by the Crown to address PFN concerns.

## **2. The Board is required to assess whether the duty to consult and accommodate PFN has been discharged prior to granting the relief sought by Enbridge**

The Crown is required to discharge its constitutional duty to consult and accommodate PFN whenever it contemplates conduct that could adversely affect an established or potential Aboriginal or treaty right of PFN. The Crown has not delegated the duty to consult and accommodate PFN to the Board. The duty of the Crown to consult and accommodate PFN has been triggered by the Crown's knowledge of the Project's potential impacts on the rights and interests of PFN. The duty is a constitutional duty invoking the honour of the Crown and it must be discharged.

PFN submits that the *NEB Act* confers on the Board the power to consider whether the Crown has discharged its obligation to consult and accommodate PFN in relation to adverse effects of the proposed Project on PFN's rights and interests. The Board possesses the power to decide questions of law. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power.<sup>90</sup>

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<sup>88</sup> C47-02-12 – Treaty One and Aboriginal Title Report – A4T8Q0.

<sup>89</sup> C47-02-11 – PFN Preliminary Consultation and Accommodation Policy May 2013 – A4T8L9.

<sup>90</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at para 69 [Carrier Sekani].

In assessing whether to grant the relief requested by Enbridge pursuant to section 52 of the *NEB Act* the Board may have regard to any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.<sup>91</sup> The Supreme Court of Canada has concluded that the British Columbia Utilities Commission, a regulatory body with powers similar to those of the Board, possesses the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.<sup>92</sup>

PFN submits that the Board possesses not only the jurisdiction but also the obligation to assess whether the Crown has discharged the duty to consult and accommodate PFN in relation to the proposed Project prior to issuing the relief sought by Enbridge. However, PFN submits that the Board's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.<sup>93</sup>

The Board granted both Natural Resources Canada ("NRCAN") and the Fisheries and Oceans Canada status as intervenors when it released the List of Parties on 28 April 2015.<sup>94</sup> In its Application to Participate, Natural Resources Canada noted that it might provide expertise relating to "the Crown's legal duty to consult and Aboriginal groups, and the Crown's approach to Aboriginal consultation for the Project".<sup>95</sup> NRCAN submitted written evidence to the Board on 30 July 2015 in Exhibits C28-03-1, C28-03-2 and C28-03-3. NRCAN did not address any matters relating to the impacts of the Project on PFN or engagement with PFN in its written evidence. NRCAN did pose questions relating to Aboriginal Engagement and Consultation in its information request to Enbridge dated 10 June 2015.<sup>96</sup> Fisheries and Oceans Canada filed an Application to Participate<sup>97</sup> but did not file any written evidence or issue any information requests during the hearings for the proposed Project.

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<sup>91</sup> Section 52(2)(e) of the *NEB Act*, *supra* note 2.

<sup>92</sup> *Carrier Sekani*, *supra* note 90 at para. 70.

<sup>93</sup> *Carrier Sekani*, *supra* note 90 at para 74.

<sup>94</sup> A6-01 – Ruling No. 1 - Participation – A4K8V2 and A6-02 – Décision no 1 - Participation – A4K8V1.

<sup>95</sup> C28-01-01 – Application To Participate – A4K0L2, Adobe p. 3.

<sup>96</sup> C28-02-01 – NRCAN - IR 1 to Enbridge – A4Q5H7.

<sup>97</sup> C17-01-01 – Application To Participate – A4K0R5.

The Federal Court of Appeal has stated that “achieving practical solutions to project-related problems by recourse to the mainstream regulatory jurisdiction of the Board is a worthy objective that should be pursued.”<sup>98</sup> PFN submits that the regulatory jurisdiction of the Board provides valuable opportunities for First Nations to share information about project-related impacts but is insufficient to independently discharge the duty to consult and accommodate. Active participation from the Crown in both the proceedings before the Board and in direct engagement with PFN is necessary due to the limitations of the hearing process discussed above. In the present instance, the Crown has had only limited engagement in the proceedings and has not sought to address the concerns of PFN within the context of the proceedings. Further, as noted above, the Crown has not engaged with PFN outside of the hearing process in relation to the proposed Project.

PFN anticipates that the Crown may assert that it will rely on the proceedings before the Board to the extent possible to satisfy the duty to consult and accommodate PFN. However, absent meaningful participation by the Crown in the hearing process or direct engagement with PFN outside the hearing process it is not possible for the Crown to fully understand the impacts of the proposed Project on PFN or to develop solutions to PFN concerns. If the Board issues the relief sought by Enbridge without directing the Crown to consult with PFN to address the environmental, cultural and rights-based concerns of PFN prior to irreversible decisions being taken in relation to the proposed Project there is a significant risk of undermining the constitutional imperative of reconciliation between First Nations people and the Crown.

The participation of the Crown in the hearing process permits the Board to assess whether the duty to consult and accommodate PFN has been fulfilled in an adversarial context and the issues raised by PFN were properly before the Board.<sup>99</sup> PFN submits that pursuant to section 12 of the *NEB Act* the Board possess the remedial power to address the concerns of PFN relating to the failure of the Crown to discharge its duty to consult and accommodate PFN in relation to the proposed Project.

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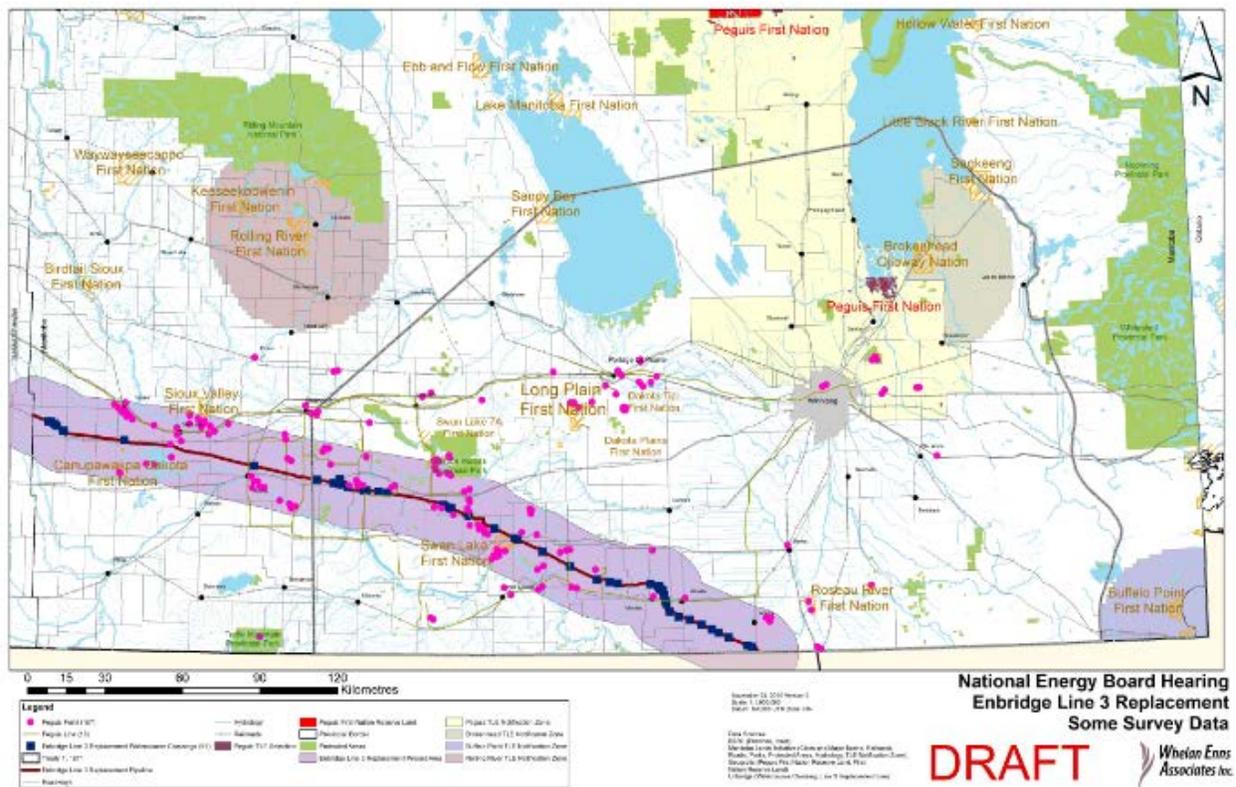
<sup>98</sup> *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222 (CanLII) at para. 78 [*Chippewas of the Thames*].

<sup>99</sup> *Ibid* at paras. 41 and 42.

PFN submits that the Crown has not discharged its obligation to consult and accommodate PFN in relation to the potential impacts of the proposed Project on the rights and interests of PFN. PFN requests that the Board exercise its authority to require the Crown to undertake meaningful consultation and accommodation of PFN in relation to the environmental, cultural and rights based concerns of PFN as a condition of Project approval. PFN has proposed a draft condition for the proposed Project in a later section of this final argument in relation to this point.

## Enbridge’s Faulty Engagement Strategy Limits the Board’s Understanding of Proposed Project Impacts and Mitigation Measures

PFN members’ extensive use of their traditional territory includes the Project Area. The graphic below, titled: “National Energy Board Hearing - Enbridge Line 3 Replacement – Some Survey Data”,<sup>100</sup> indicates numerous cultural value points that are important to PFN. These cultural value points include: hunting; fishing; trapping; gathering; occupancy; and cultural and recreation areas.<sup>101</sup> PFN submits that the amount of data generated by thirteen of the over 10,000 members of PFN suggests that many more locations of cultural value may be identified if a proper study can be completed.



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The cultural value points provided on the “National Energy Board Hearing - Enbridge Line 3 Replacement – Some Survey Data” graphic was collected in November 2015 from only thirteen community members who completed a self-directed questionnaire

<sup>100</sup> C47-08-01 Peguis NEB Line3 Hearing Draft TLUO Map 24Nov2015 - A4W0E6.

<sup>101</sup> C47-08-03 Cizek Environmental [sic] Services memo re Enbridge line 3 replacement flythrough with TLUOS – A4W0E8, Adobe p. 2.

<sup>102</sup> C47-08-01 Peguis NEB Line3 Hearing Draft TLUO Map 24Nov2015 - A4W0E6, Adobe p. 1.

and fourteen community members who completed a mapping exercise. The methodology utilized by PFN to gather information about current traditional land use is described below:

1705. Peguis First Nation held workshops in Winnipeg, Peguis and Selkirk on the 12th, 13th, and 14th of November to provide the questionnaire to community members who participated and to collect those results.

1706. Participants were asked to complete the questionnaire and a self-directed mapping exercise. "Self-directed" means they were provided with instructions and the maps and then left alone to complete it themselves. It was not guided; it was self-directed.

1707. There are four items of importance concerning the questionnaire I'd like to point out. One, participation was voluntary. Two, no honoraria was provided. Three, everyone agreed to participate signed a consent form. Four, names are confidential, participants are anonymous.

1708. So 14 people completed the consent form and questionnaire, along with 13 people who completed the self-directed mapping exercise portion by our internal deadline to get the evidence to the NEB.

1709. Some of the panel members here on the -- at the table also completed the questionnaire and the self-directed mapping exercise. But again, participants are anonymous so I'll just say that some of the panel members participated.

1710. There are, as the Chief said this morning, 10,000 Peguis members. A larger, more thorough land use and occupancy interview project would include up to 80 percent or more of the adults in the community with knowledge of this project area. We don't know how many that would be, but we only have 14 today.

1711. This is a very small sample size. And the results of the questionnaire, that map, do not reflect an official position of Peguis First Nation. I'm just reporting raw data. That's all I'm doing.

1712. A larger, more detailed land use and occupancy study would collect hundreds more data points. Peguis First Nation is planning on a larger, more detailed land use and occupancy study when the engagement agreement with Enbridge is implemented.

1713. This study would include locating archaeological sites. Peguis does not have this information now and they need to complete this more detailed study to collect that information.

1714. This project that Peguis will hopefully be undertaking under the engagement with Enbridge is very similar to a project that they did fund by a Crown corporation Manitoba called Manitoba Hydro. And they completed that just

recently and finalized the report. And it was for southeastern Manitoba, most of Treaty 1 territory.

**Peguis First Nation, Mr. Jared Whelan (Transcript, Volume 4, Lines 1705 - 1714)**

PFN has conducted similar and comprehensive studies in relation to other significant linear infrastructure projects. An example of the outcomes of those types of a similar study conducted by PFN has been shared with the Board as an aid to presentation filed as Exhibit C47-09-02. During the oral traditional evidence hearings, PFN shared information about the value of undertaking a traditional land use and occupancy study (“Traditional Land Use and Occupancy Study” or “TLUO”) for the proposed Project:

1810. We were able to convince Manitoba Hydro with the Manitoba-Minnesota Line -- the hydro line that’s going down from Winnipeg down to the U.S. to deliver hydro -- to sell hydro to them -- to give us an opportunity to do a land use study even before anything happened because I convinced hydro and I said, “If -- if we do a land use study -- an occupancy study, we will show you the activities that happen within that project area”, which is southeastern Manitoba from Winnipeg Highway 1 down 59.

1811. We did a project in that area. I’m sorry; I couldn’t get it in on time to enter it as evidence, but we’ll -- it would reaffirm our case when it comes to asking Enbridge for the funding to do a land -use and occupancy study in the south -- southwestern corner of Manitoba.

1812. We interviewed approximately 100 people. A study was done, and there are hundreds, if not thousands, of focal -- focus points of hunting, trapping and fishing. It even went, from what I understand, to the point where there was a fight within the proponent, Manitoba Hydro, and they actually moved the line because of our activities in a certain part of that area because it -- there was too much activity going on there by the First Nation people.

**Peguis First Nation, Mr. Jared Whelan (Transcript, Volume 4, Lines 1810- 1812)**

The Enbridge-Peguis First Nation Engagement Agreement was executed in November 2015. Implementation of the agreement, work plan and funding have not started as of the date of submission of this argument. PFN intends to TLUO interviews with community members who have strong knowledge of the Project Area in order to provide information to the Board about the potential impacts of the proposed Project on PFN. However, the initiation of the TLUO study has been delayed due to lack of resources.

PFN has provided a rough estimate of how long it would take to begin the work once the necessary resources become available:

1749. MS. BOYE: Thank you, Jared, for your comments.

1750. I'd like to follow-up in terms of the reference that was made to Dr. Cisek's environmental services in his report, which is filed at Exhibit C47-08-03.

1751. Jared, I'd like to ask you a question about the additional study that you described. Can you confirm when additional work you described will be completed?

1752. MR. JARED WHELAN: Peguis First Nation will start the day the resources arrive. Jesse McCormick introduced to the room the community coordinator, Cheyenne Parisian. She's the individual that coordinates the community work that I've worked with for the last four years. So as soon as those resources arrive, we've done some preliminary work and we can start booking workshops and information sessions within a couple weeks, and then we would find the best people to interview, and then we would schedule interviews, and then we would digitize the results and then we would make draft maps and update the Google Earth 3D flyover.

1753. It's December. Christmas is coming up. There's about two weeks that's gone for cultural and holiday reasons. So we don't expect to move into this full steam until January.

**Peguis First Nation, Mr. Jared Whelan (Transcript, Volume 4, Lines 1749-1753)**

For obtaining information on Traditional Land and Resource Use ("TLRU"), Enbridge states that it "engages with Aboriginal groups that may be affected by a proposed development or that may have an interest in the development based on the proximity of their community to the Project. Details of the Aboriginal engagement program for the Project are provided in Section 3."<sup>103</sup>

The TLRU LSA identified by Enbridge "encompasses and extends beyond the Footprint to include the LSA boundaries of water quality and quantity, fish and fish habitat, wetlands, vegetation, wildlife and wildlife habitat, and heritage resources, since TLU is dependent upon these resources. Accordingly, the TLRU LSA ranges from a 110m wide band to a 2 km wide band extending 55 m to 1 km from the centreline (i.e., 55m to 1 km

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<sup>103</sup> B5-08 – Appendix 06 ESA Part 08 of 10 – A4E6W8, Adobe p. 7.

on both sides) and is considered to be an area where there is a reasonable potential for Project activities to affect existing TLRU (e.g., fishing, hunting and plant gathering)”<sup>104</sup>

Enbridge submits that “[t]he aboriginal engagement program for the Project recognizes the rights of aboriginal groups and assists Enbridge in engaging in meaningful dialogue with potentially affected aboriginal groups about the Project.”<sup>105</sup> As part of its Aboriginal engagement program, Enbridge identified Aboriginal groups based on criteria, including:

- proximity of Aboriginal groups to the Project Area (First Nations whose reserve and Treaty Land Entitlement lands are within approximately 80 km to either side of the ROW and Métis regional boundaries traversed by Project);
- Aboriginal groups and organizations whose lands are not proximate to the Project Area, but have identified an interest based on traditional territory, traditional lands or traditional land uses; and,
- the proposed Project traverses traditional territory of Treaties 1, 2, 4 and 6.<sup>106</sup>

Enbridge did not include PFN in its List of Aboriginal Groups Identified for Engagement (the “Table 5-1 List”).<sup>107</sup> PFN asserts that Enbridge knew, or should have known of PFN’s interests in the proposed Project, and should identified PFN as a part of the List of Aboriginal Groups on the basis that:

- PFN’s Treaty One lands are directly affected by the proposed Project;
- PFN’s traditional territory includes land directly impacted by the proposed Project;
- PFN members have Aboriginal title to the lands and waters affected by the Project, exercise aboriginal rights on these lands; and,
- PFN is entitled to acquire lands in the proposed Project are through a Treaty Land Selection.

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<sup>104</sup> B5-08 – Appendix 06 ESA Part 08 of 10 – A4E6W8, Adobe p. 7.

<sup>105</sup> B1-21 – Chapter 5 – Aboriginal Engagement – A4E4K3, Adobe p. 2.

<sup>106</sup> *Ibid*, Adobe p. 3.

<sup>107</sup> *Ibid*, Adobe p. 4, Table 5-1.

PFN asserts that Enbridge's failure to include it as part of the Table 5-1 List precluded PFN from becoming fully informed about the proposed Project and its potential impacts on PFN early in the process, and diminished PFN's ability to compile the necessary information to participate fully in the process. By contrast, many of the groups identified on Table 5-1 were mailed a Project Information Package on 11 July 2013.<sup>108</sup> Each of the groups identified in Table 5-1 were provided with information detailing the Project's expanded scope.<sup>109</sup> Enbridge's failure to identify PFN as of the List of Aboriginal Groups inhibited it, and PFN, from collecting and compiling information that is necessary for the Board to consider in terms of the Project impacts on traditional land use and Enbridge's proposed mitigation measures.

Enbridge submits that through the course of the Aboriginal engagement program, it would work with all interested Aboriginal groups on the Table 5-1 List to obtain information on traditional land and resource use.<sup>110</sup> By electing not to identify PFN as part of the Table 5-1 List, Enbridge did not work with PFN to obtain information on traditional land and resource use, or provide PFN with the means to undertake this study at an early stage of project development. As of the date of the Oral Traditional Evidence Hearings, PFN still had not received any funding from Enbridge to comprehensively and systematically undertake TLUO study.<sup>111</sup>

Enbridge submits that it will continue to engage with all identified Aboriginal groups in open and transparent dialogue concerning the proposed Project and will continue to offer meaningful opportunities to engage with each Aboriginal group for the purposes of exchanging information respecting the proposed Project, responding to inquiries, hearing and responding to any interests and concerns that may arise.<sup>112</sup> PFN submits that Enbridge has not engaged with PFN to the extent necessary to permit PFN to share fully the concerns of PFN in relation to the proposed Project. PFN submits that further opportunities to engage and exchange information are required and should be pursued in accordance with PFN's Preliminary Consultation and Accommodation Policy.

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<sup>108</sup> B1-21 – Chapter 5 – Aboriginal Engagement – A4E4K3, Adobe p. 6.

<sup>109</sup> *Ibid.*

<sup>110</sup> B1-21 – Chapter 5 – Aboriginal Engagement – A4E4K3, Adobe p. 8.

<sup>111</sup> Peguis First Nation, Mr. Jared Whelan (Transcript, Volume 4, Line 1752).

<sup>112</sup> B1-21 – Chapter 5 – Aboriginal Engagement – A4E4K3, Adobe p. 11.

PFN's Preliminary Consultation and Accommodation Policy sets out PFN's expectation for Third Party Obligations as part of its engagement process, including:

- (d) provide adequate resourcing to Peguis First Nation so that information on the Third Party's Activity can be shared with First Nation members so that community input on potential impacts on Section 35 rights held by the First Nation can be considered.<sup>113</sup>

PFN's Preliminary Consultation and Accommodation Policy also sets out specific consultation and accommodation steps for Third Parties, and requires Third Parties to provide PFN with an information package that includes:

- (a) the name and telephone number of the appropriate Crown or Third Party contact;
- (b) clearly drawn or reproduced, referenced maps of the area in question, including in digital format;
- (c) all inventories, assessments and other background information upon which proposals are based, including any archaeological, ethnographic, traditional use, environmental or other reports, maps and map data or other information;
- (d) a copy of any assessments and inventories in the hands of Third Parties or the Crown (e.g. ecological or cultural assessments relating to streams terrain, archaeology), and the "pre-consultation assessments" recommended in any provincial policy or any First Nations or Aboriginal interest assessments required by the Crown;
- (e) a complete description of the proposed Activity including a description of the land and resources involved and a description of the current and anticipated value of the proposed Activity;
- (f) the timeframe for the commencement and completion of the Activity;

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<sup>113</sup> C47-02-11 – PFN Preliminary Consultation and Accommodation Policy May 2013 – A4T8L9, Adobe p. 12.

- (g) the details of any anticipated impacts on the land itself and an initial assessment of any anticipated impacts to Section 35 rights;
- (h) information on any anticipated economic benefits for PFN;
- (i) other information as may be requested by PFN; and,
- (j) if there are any Activities that cause potential transboundary effects that may potentially infringe and impact PFN's Section 35 rights on the Traditional Territory from lands adjacent to the Traditional Territory, Peguis First Nation reserves the right to invoke the Policy on that Activity. PFN submits that Enbridge knew or ought to have known about PFN's Preliminary Consultation and Accommodation Policy, and should have engaged with PFN in a manner consistent with this policy. PFN further submits that by choosing not to identify PFN as part of the Table 5-1 List, Enbridge did not effectively identify and address PFN's concerns relating to the proposed Project.

Enbridge posits that “[t]he current land tenure and land use would appear to preclude the possibility of traditional activities being practiced on the majority of the proposed project area.”<sup>114</sup> Enbridge also expresses that it does not believe that formal TLRU studies are necessary for most of the replacement pipeline route, since the current land tenure and land use preclude, to a large extent, the practice of traditional activities on the lands in question.<sup>115</sup> PFN disagrees with Enbridge's conclusions on the ability of First Nations, including PFN, to pursue traditional activities along the replacement pipeline route. PFN submits that Enbridge has not conducted the necessary investigations or consultations to identify with confidence the potential impacts of the Project on traditional land use.

During the Oral Traditional Evidence Hearings, PFN provided evidence to the Board about its members' traditional land use and occupancy trends in the Project LSA and adjacent areas through a flyover video<sup>116</sup> and overlay map with preliminary survey data

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<sup>114</sup> B1-21 – Chapter 5 - Aboriginal Engagement – A4E4K3, Adobe p.8.

<sup>115</sup> B5-08 – Appendix 06 - ESA Part 08 of 10 – A4E6W8, Adobe p. 11.

<sup>116</sup> C47-08-02 – Placeholder Document Google 3D Movie with TLUO Data – A4W0E7.

on Enbridge Draft TLUO Map.<sup>117</sup> This information, however, underrepresents PFN's land use activities in the LSA and surrounding area. Enbridge's faulty engagement strategy limits the Board's understanding of project impacts on PFN's traditional land use and concerns and the extent to which Enbridge's mitigation measures can address these concerns.

The lack of information about PFN's traditional land use and occupancy, and the deferral of engagement with Aboriginal groups, until after project approvals have been granted is self-serving and beneficial to Enbridge in that the absence of information about impacts prevents those potential impacts from impeding project approval or requiring specific mitigation as part of proposed Project conditions. Enbridge's failure to obtain such information from PFN is particularly concerning in light of the potential Project impacts on PFN's use of water and aquatic resources, on plant gathering and hunting activities on Crown and private lands, all which are critical to PFN's traditional, ceremonial and subsistence practices.

The absence of information about traditional land use activities presently before the Board is a direct result of Enbridge's chosen methods and timing of aboriginal engagement activities. It was possible for Enbridge to structure project development and investigations in such a manner to permit Enbridge to provide the Board with detailed information about other aspects of the proposed Project application. Enbridge has both the capacity and experience to have executed a more effective traditional land use engagement process and the present deficiencies in the information about traditional land use before the Board are a direct result of Enbridge's failure to conduct Aboriginal engagement earlier in the process using methodologies that would be more effective for the identification of potential Project impacts on traditional land use activities and plant species of concern to PFN.

The resulting uncertainties relating to potential project impacts on traditional land use generate unnecessary risk of harm to PFN cultural values. Enbridge's promises of future mitigation and engagement ring hollow in light of Enbridge's failure to take the

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<sup>120</sup> C47-08-01 – Peguis NEB Line 3 Hearing Draft TLUO Map 24 Nov 2015 – A4W0E6.<sup>121</sup> B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p. 10.

necessary measures to ensure that information was gathered and presented to the Board in a robust manner as part of the proposed Project application. The Board is now faced with a request for approvals with insufficient information to truly understand how the proposed Project will impact PFN. The message that would be sent by the Board to First Nations if this approach to project development is endorsed by the Board would be that First Nations concerns are secondary to other considerations in project development and need not be actively considered at the approvals stage.

The lack of baseline TLRU data provided by the Proponent is not justified and substantiated. The Proponent has not met the regulatory requirements of the NEB or conformed to the relevant Canadian Environmental Assessment Agency guidance:

- The Proponent should clearly communicate if and how they attempted to gather TLRU for each of the Nations, what protocols were followed, and if these are consistent with the CEEA Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*;<sup>118</sup>
- The Proponent should clarify whether the Nations qualify for the provision of detailed TLRU according to the criteria found in Section A.2.4 of the NEB Filing Manual. If the Nations do not meet any of the requirements for the provision of detailed TLRU information, the Proponent should provide clear and conclusive evidence to that effect;<sup>119</sup> and,
- If the Nations do qualify for the provision of detailed TLRU information under any of the triggers identified in Section A.2.4 of the NEB Filing Manual, the Proponent should gather baseline information on TLRU for each of the Nations in cooperation with their representatives, should the Nations choose to provide such information.<sup>120</sup>

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<sup>121</sup> B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p. 10.

B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p. 10. ocument Google 3D Movie with TLUO Data – A4W0E7.

## 1. Water

PFN has informed the Board of its stewardship obligations over the water and that it considers water as sacred and life-giving:

1478. I was asked to talk about the sacred song that we sing at every ceremony. Water to us is the blood of Mother Earth. It's very sacred, it's life-giving, and without water there will be no life. So the women, the Anishinaabe women are considered the ones that take care of the water, carry the teachings for our children and our grandchildren and our great-grandchildren so that we can continue to have a good life, clean water. It's a healing song so that our waters stay clean.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4, Line 1478)**

1561. Today my main message is the importance of water on our mother the earth. As ogichidaakwe, I carry ceremony called the Moon Lodge and it's mainly about taking care of water and the earth. And my role as an Anishinaabe kwe, my role as a First Nation woman, to make sure that water stays healthy for our grandchildren, our great-grandchildren and those that are to come.

1562. The role of Anishinaabe people is to take care of the earth, to take care of our mother the earth, who provides all our medicines, all of the water and the food, our shelter and everything that we need in our way of life.

**Peguis First Nation, Elder Faylene Sutherland (Transcript Vol. 4 Lines 1561-1562)**

PFN members rely on wetlands and the aquatic environment to harvest plants for ceremonial, medicinal and sustenance purposes. PFN members informed the Board that they are concerned about the risk of contamination:

1568. When I was preparing my information, you know, even the wetlands where we gather our medicines, like the weekays and the skutimos (ph), and the bulrush, those are three main medicines that we use on a regular basis, and it's something that we need to take care of to make sure that it continues to grow because if the water and the earth, the soil is contaminated it will not be a medicine for us; it will poison the earth and water will be contaminated, you know, where our children and our grandchildren will no longer have those medicines that we rely on.

...

1577. **ELDER FAYLENE SUTHERLAND:** There is lots of medicines that go around the water and bulrush is one of the medicines that our little ones use, and

right into adulthood. And it grows right along the shores of wetlands or along where there is water. And the other medicines that we have is weekays or weekay; I think it's called ginger root in English. That's a medicine that -- it's a natural antibiotic, so it provides medicine for many different kinds of illnesses.

...

1580. **ELDER FAYLENE SUTHERLAND:** That's my main worry when there is a pipeline close by that -- you know, the oil is not natural to our land so therefore, if it mixes in with the earth there will be a lot of contamination and destruction, not only of our medicine plants but the earth and the water and everything that has life around, should there have been catastrophe with the oil.

**Peguis First Nation, Elder Faylene Sutherland (Transcript Vol. 4 Lines 1568, 1577, 1580)**

PFN members are also concerned about contamination of fish, plants and animals and that the effects of the spill would compromise their vital food sources:

1726. Specific impacts that respondents were concerned about were impacts on hunting and trapping, specifically the wildlife and their habitat. Another concern was pollution from the construction itself. Another concern was potential impacts on waterways and fisheries during construction and operation. They raised the issue of remediation of the land after construction. They wanted to minimize the impacts on the land from the construction.

1727. They raised concerns again about the gathering plants for both food and medicine. And they were concerned about the timing of the construction and minimizing the impact on the environment and plants and animals, and waterfowl and animals.

**Peguis First Nation, Jared Whelan (Transcript Vol. 4 Lines 1726-1727)**

1653. I'm concerned about the oil spills and getting into the fish and the food that we eat from that land. It's going to be affecting everything down that way if it does break or leak. What kind of -- what kind of guarantee can you make for us that this ain't going to be breaking on us? That would be my question for you.

...

1666. **MR. VINCENT ORVIS:** Well, there's a lot of people that depend on wild meat around this area, and if there was to ever be an oil spill they would have nothing. There would be no fish left or nothing for them to eat.

**Peguis First Nation, Vincent Orvis (Transcript Vol. 4 Lines 1653 and 1666)**

PFN members are concerned about the downstream effects from a rupture or spill of the pipeline, the risk that contaminated substances will affect the resources they rely on:

1815. We heard from the panel about spills and damages that are done. All the water that flows from southeastern Manitoba flows one way, and that's to Lake Winnipeg and to Lake Manitoba. And we live on the banks of those shores of those -- those lakes. So if there's a spill, then how are we to know we are going to be protected, not only by the people that live in that immediate area, but further downstream to the lake where we use to survive?

**Peguis First Nation, Vincent Orvis (Transcript Vol. 4 Line 1815)**

PFN submits that the concerns of PFN relating to the impacts of the proposed Project on plants relied upon by PFN has not been adequately investigated by Enbridge and the extent of the proposed Project impacts cannot be assessed in a meaningful fashion based on the information that is presently before the Board. Further measures are required to ensure that the adverse effects of the proposed Project on traditional land use of plants by PFN are avoided, mitigated or off-set.

As part of the "Local and Traditional Knowledge" section of the Aquatic Technical Report, Enbridge submits that it has "has implemented and continues to conduct an open, extensive and thorough public consultation, as well as Aboriginal engagement and landowner relations programs. These programs were based on Aboriginal groups, landowner and stakeholder groups' interests and inputs, knowledge levels, time, and preferred methods of engagement."<sup>121</sup> Enbridge further submits that "[d]iscussions also occurred between Aboriginal groups and Enbridge representatives and concern for the Project's impact on fishing was brought up. Other feedback from the engagement activities have not identified any additional concerns or other new information related to fish and fish habitat at the time of writing."<sup>122</sup>

Enbridge refers the reader to Section 3.0 of the ESA for a complete overview and results of the consultation and engagement program.<sup>123</sup> Enbridge did not identify any concerns raised by PFN as part of its consultation and engagement program.<sup>124</sup>

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<sup>121</sup> B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p. 10.

<sup>122</sup> B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p. 11.

<sup>123</sup> *Ibid*, Adobe p. 10.

<sup>124</sup> B5-02 Appendix 06 – ESA Part 02 of 10 – A456W2.

Enbridge asserts that it engaged with Aboriginal groups, which expressed specific concerns, interests or special knowledge related to wetlands, however, they expressed that they have a responsibility to protect the land and have concerns about the effects of the Project on water resources and habitat for medicinal plants, birds, fish and other wildlife.<sup>125</sup>

Again, Enbridge refers the reader to Section 3.0 of the ESA for a complete overview and results of the consultation and engagement program.<sup>126</sup> Enbridge did not identify any concerns raised by PFN as part of its consultation and engagement program.<sup>127</sup>

Enbridge's lack of information about PFN members' aquatic plant use, ecological traditional knowledge about fish, fish habitat and fish presence, and medicinal plants, birds, fish and other wildlife demonstrates inadequate effort on the part of Enbridge to engage with PFN and obtain information from PFN about proposed Project impacts. The absence of information about traditional land use activities presently before the Board is a direct result of Enbridge's chosen methods and timing of aboriginal engagement activities.

The Board is now faced with a request for approvals but insufficient information to truly understand how the proposed Project will impact PFN. Without robust and reliable information about PFN's traditional ecological knowledge, and PFN's land and water-based activities, the Board has insufficient information to understand and determine how the Project may impact PFN. Further, without this information in place, the Board is not able to determine if the proposed mitigation measures are appropriate or adequate.

## **2. Medicinal plants**

PFN has expressed to the Board the importance of plants to the well-being of PFN:

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<sup>125</sup> B6-20 – Appendix 06 – ESA Appendix 8 – Wetland Technical Report Part 1 of 7 – A4E7C3.

<sup>126</sup> B6-13 – Appendix 06 – ESA Appendix 7 – Aquatics Technical Report Part 1 of 7 – A4E7A6, Adobe p.

10.

<sup>127</sup> B5-02 Appendix 06 – ESA Part 02 of 10 – A456W2.

1563. I'm also wanting to talk about some of the medicines that we take care of, that we harvest, for the healing of our people, the medicines that we hope will be there for all of our generations to come.

1564. As many people know that diabetes is one of the diseases and illnesses that came to our people and many places the plants that we look for and have relied on are no longer there.

1565. An example that we have is disruption of the earth. We use to pick the medicine for diabetes at this one certain place and then gravel pits came in; we no longer had that medicine there and we had to go to other First Nation people to go to their territories to find that medicine because we haven't been able to find that one specific medicine that was given to us to use.

1566. And also in our own community we've lost because of, again, the taking of gravel, you know, for construction. We've lost the medicine that we had for minor ailments such as headaches. It used to grow so much and now it isn't there where we used to and we had to search a lot of -- many places, travel a lot of miles to find this medicine, where it used to grow just in our backyard.

1567. So medicines is very important to the wellness of our people.

1568. When I was preparing my information, you know, even the wetlands where we gather our medicines, like the weekays and the skutimos (ph), and the bulrush, those are three main medicines that we use on a regular basis, and it's something that we need to take care of to make sure that it continues to grow because if the water and the earth, the soil is contaminated it will not be a medicine for us; it will poison the earth and water will be contaminated, you know, where our children and our grandchildren will no longer have those medicines that we rely on.

1569. As I was growing up, you know, we used to go into our backyard and know what medicines were there for us just to pick, you know, and we would like the medicines to continue to be there for our children.

1570. And for the medicines that are specialized, like the cancer medicine that grows in the swampland, needs to be taken care of.

1571. Our children and our grandchildren need to be provided with clean water, you know, and I guess with the interruption of our earth it's a very serious Peguis First Nation - Oral presentation Elder Faylene Sutherland Transcript Hearing Order OH-002-2015 concern to me as a grandmother. And I lived in the area where this pipeline goes by.

1572. My husband was in the police force and also went to University of Brandon. So in many of those areas, you know, we practice our traditional ways and did many ceremonies and attended teachings, cultural teachings. We also

harvested a lot of the medicines that grow in this area that has been disrupted, and intrusion of the land is something that I, as a grandmother, need to think about and worry about.

1573. Miigwech.

1574. MS. BOYE: Thank you for your comments, Elder Faylene.

1575. One of the issues that you spoke about, and I would like to ask you a few questions on, is medicines that are found in water.

1576. Can you describe some of the medicines that you harvest from water? You used bulrush as an example. Can you describe where you harvest bulrush from?

1577. ELDER FAYLENE SUTHERLAND: There is lots of medicines that go around the water and bulrush is one of the medicines that our little ones use, and right into adulthood. And it grows right along the shores of wetlands or along where there is water. And the other medicines that we have is weekays or weekay; I think it's called ginger root in English. That's a medicine that -- it's a natural antibiotic, so it provides medicine for many different kinds of illnesses.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4,  
Lines 1563-1577)**

1593. In my journey, I had to learn the difference between male and female. I knew in life it's the woman that give life, and a lot of times that we look for is the plants that are female. A lot of the plants that are female, especially those ones that -- a taproot, you could only find the female in late fall. During the summer, you can't tell the difference. I certainly can't. It's the only time I can find them and that's the only time the Elders share those.

1594. We worked in that whole area on the map there at Spruce Woods Park there where we did a lot of traditional teachings, with not only First Nations but other -- the Red man, the yellow man, and the Black man from the university. And we shared their -- we were in culture camps with the university and we shared all those -- the plants and stuff in that area.

1595. It's really hard to explain a lot of those plants because our Elders tell us in the past, as soon as we share something, they turn around and sell it back to us. And that's why a lot of times we don't want to share some of the stuff, but there's so much medicine in that area which is really strong medicine. Like even the poison ivy that we use, and the poison ivy is used for HIV.

1596. There's a lot of things that we wouldn't share because you have to know how to look after them and how to pick them. You just can't go out there, anybody, and pick them. There's certain ways of picking them and it takes a long time to understand from the Elders that they share them with you. A lot of them will give you -- share with a question so that you would have to figure it out.

1597. All the plants in that area, there's red willow, all which you use for the eyes. If you have trouble with your eyes we use red willow. It's a good eyewash, and we use that a lot for that. Not only that, you know, the red willow is also used for - a lot of the animals need that red willow in order to reproduce. And when you follow the moose and the deer and all those other animals as they go, you would see all where they just nibble at the trees. They don't -- you know, they don't kill it, they only take a little bit and then move on.

1598. And that's who our people learn from, because we don't pick all the medicine from this one area; we have to pick a little bit here and there. So it will be enough for our grandchildren, our great grandchildren.

**Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Lines 1593 – 1598)**

1725. Another comment was that they wanted to make sure that the pipeline construction did not interfere with wildlife or the gathering of medicines. Another comment from a respondent was that we need to respect the land.

[...]

1727. They raised concerns again about the gathering plants for both food and medicine. And they were concerned about the timing of the construction and minimizing the impact on the environment and plants and animals, and waterfowl and animals.

**Peguis First Nation, Mr. Jared Whelan (Transcript, Volume 4, Line 1725 and Line 1727)**

PFN submits that the concerns of PFN relating to the impacts of the proposed Project on plants relied upon by PFN has not been adequately investigated by Enbridge and the extent of the proposed Project impacts cannot be assessed in a meaningful fashion based on the information that is presently before the Board. Further measures are required to ensure that the adverse effects of the proposed Project on traditional land use of plants by PFN are avoided, mitigated or off-set.

Enbridge asserts that Aboriginal engagement for the proposed Project was considered in the development of the Vegetation Technical Report, and the assessment of rare plants, rare ecological communities and vegetation resources in the ESA.<sup>128</sup> However, the Vegetation Technical Report states that no local knowledge of specific rare plant

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<sup>128</sup> B3-01 - Appendix 06 - ESA Appendix 9 - Vegetation Technical Report Part 1 of 5 - A4E7D1, Adobe p. 9.

concerns or weed infestations were provided by Aboriginal groups.<sup>129</sup> Enbridge provides a summary of consultation activities related to vegetation in Table 1 of the Vegetation Technical Report.<sup>130</sup> It makes no mention of PFN or any other First Nation. Enbridge refers the reader to the Aboriginal Engagement Program.<sup>131</sup> Enbridge did not identify PFN in its List of Aboriginal Groups Identified for Engagement.<sup>132</sup>

Enbridge has identified high level First Nations' concerns about plants and Enbridge states that through ongoing engagement, Enbridge expects to obtain greater detail on asserted traditional use interests.<sup>133</sup>

Enbridge's lack of information about PFN members' plants demonstrates inadequate effort on the part of Enbridge to engage with PFN and obtain information from PFN about Project impacts. The absence of information about traditional land use activities presently before the Board is a direct result of Enbridge's chosen methods and timing of aboriginal engagement activities.

The Board is in a situation where it has a request for approvals but insufficient information to truly understand how the Project will impact PFN. Without robust and reliable information about PFN's traditional ecological knowledge, the Board has insufficient information to understand and determine how the Project may impact PFN. Further, without this information in place, the Board is not able to determine if the proposed mitigation measures are appropriate or adequate.

### **3. Private land use**

The proposed Line 3 replacement pipeline traverses 1996 tracts of land, representing 1097 landowners and 293 occupants on Crown and privately-owned lands and, as of September 30, 2014, approximately 95% of all tracts to be crossed by the proposed

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<sup>129</sup> *Ibid*, Adobe p. 12.

<sup>130</sup> *Ibid*, Adobe pp. 9-12.

<sup>131</sup> *Ibid*, Adobe p. 12.

<sup>132</sup> B1-21 - Chapter 5 - Aboriginal Engagement - A4E4K3, Adobe p. 4, Table 5-1.

<sup>133</sup> B8-02 - Enbridge Response to NEB IR No. 1 - A4G5T3, Adobe p. 6-7.

Line 3 replacement pipeline are privately held, while approximately 5% are held by the provincial Crown and less than 1% held by the federal Crown.<sup>134</sup>

PFN has shared with the Board that PFN members make active use of the private lands along the pipeline right of way:

1788. We talk about, in dealing with Enbridge and other departments, you know, reference to the Alberta Clipper. How were First Nations affected in this area within their traditional territories because it's all private land? Well, we still hunt on private land. We still exercise our Treaty and Aboriginal rights with permission to do so, whether it be hunting or gathering or fishing, harvesting plants, berries, medicines. It's still done on private lands. Just because it's owned by an individual doesn't mean we cannot practice our Treaty and Aboriginal rights on that piece of land. And we do it quite often and many people do give us permission to practice our Treaty and Aboriginal rights on private land.

**Peguis First Nation, Mr. Mike Sutherland (Transcript, Volume 4, Line 1788)**

1675. MS. BOYE: And, Vincent, when you're hunting can you describe the lands that you hunt on?

1676. MR. VINCENT ORVIS: They were nice. I like them all.

1677. MS. BOYE: And in terms of those lands, are some of those lands private lands or Crown lands?

1678. MR. VINCENT ORVIS: Yeah, there's private lands, Crown lands. And we just have to ask permission if it's on some farmer's field. You always have to ask permission. But one friend says you have a right-of-way if you need to go off Crown land onto the farmer's land if you shot it, you have the right-of way to go retrieve your animal. So you don't always have to have permission. But you just can't go jump on someone's field and start shooting every deer or moose on his property but if that moose or deer was on Crown land and wandered off onto private property you have a right to go chase it down and get it.

1679. MS. BOYE: M'hm.

1680. MR. VINCENT ORVIS: But there would be no moose or deer around that area where I've hunted there and fished before if there was a big contamination spill.

1681. MS. BOYE: M'hm. When you're following an animal, when you're hunting an animal, does it often stay only on Crown lands?

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<sup>134</sup> B2-01 - Chapter 11 Lands - A4E5E8, Adobe p. 1.

1682. MR. VINCENT ORVIS: No.

1683. MS. BOYE: Where does it wander?

1684. MR. VINCENT ORVIS: It wanders wherever the food is available.

1685. MS. BOYE: All right.

1686. MR. VINCENT ORVIS: And most times it's -- sometimes it's on the farmer's land too, because they like to go eat their harvest.

1687. MS. BOYE: Now, when you are hunting the -- if there are any developments on the lands that you're hunting on, or that are adjacent to the lands that you're hunting on, how does that affect your ability to hunt? Any developments like noise, or roads.

1688. MR. VINCENT ORVIS: They're pretty scarce when it's noisy and that. You barely ever find anything where there's construction sites or anything like that. It affects the animals lots because their ears are sensitive and they don't like the noise.

**Peguis First Nation, Mr. Vincent Orvis (Transcript, Volume 4, Lines 1675 - 1688)**

PFN has also explained to the Board that PFN may acquire private lands through the Peguis TLE agreement:

1536. For Section 302(2)(a) and (b) indicates that Peguis can acquire private land in the treaty area and also land within the Province of Manitoba. So we have a large area of selection or requisition for private lands in the province according to their right to select lands in the southern portion of the province still exists. The Peguis TLE Agreement is considered to flow from Section 35 of the Constitution Act (1982).

**Peguis First Nation, Mr. Lloyd Stevenson (Transcript, Volume 4, Line 1536)**

PFN has also expressed concerns about a potential spill from the Project and the manner in which adverse environmental effects from a spill may affect lands and waters outside of the immediate Project footprint, including lands that may not be private:

1579. MS. BOYE: You mentioned that you are worried that your medicines could be destroyed or contaminated. Are you worried that your medicines could be destroyed by oil contamination?

1580. ELDER FAYLENE SUTHERLAND: That's my main worry when there is a pipeline close by that -- you know, the oil is not natural to our land so therefore, if

it mixes in with the earth there will be a lot of contamination and destruction, not only of our medicine plants but the earth and the water and everything that has life around, should there have been catastrophe with the oil.

1581. MS. BOYE: Are you concerned that a spill from Line 3 could contaminate the plants that you rely on?

1582. ELDER FAYLENE SUTHERLAND: Yes, very much so. Like I mentioned some of the plants but there are many, many plants that we use. The strawberry plant, the raspberry bush. All of those bushes are fruits, they're food, but they're also -- their roots and barks are also our medicines. So there is many, many plants that are along this pipeline that, should there have ever been any kind of disaster that it would contaminate and even kill those plants that we need.

1583. MS. BOYE: Thank you, Elder Faylene.

1584. ELDER FAYLENE SUTHERLAND: Miigwech.

**Peguis First Nation, Elder Faylene Sutherland (Transcript, Volume 4, Lines  
1579 - 1584)**

1627. MS. BOYE: And is a part of that provincial park enclosed in the right-of-way?

1628. ELDER FLOYD SUTHERLAND: It's -- yeah, it partially -- it's there in -- there's other -- there's four other Sun Dances that are in that area, from different areas.

1629. MS. BOYE: So those areas are particularly important to you and close to that right-of-way or in that right-of-way?

1630. ELDER FLOYD SUTHERLAND: I think to all the ones that are in that area it's very important for them because -- yes it is. And there's a lot of different kind of medicines that grow along that area. And if there's ever a break in that area, like, what's going to happen; how far is it going to go? I think that's where, you know, we're -- it's nice to say that, you know, this will never happen. I don't know.

1631. MS. BOYE: You mentioned that you pass down knowledge by taking people on the land. Are you concerned if there was a spill that you wouldn't be able to pass down your knowledge because the land was changed?

1632. ELDER FLOYD SUTHERLAND: Maybe on some of the medicines that are in that area that, you know -- but most of them I imagine, you know, we'd be able to find them somewhere else. But it's hard when you -- you know, when you go to a place to pick your medicines you usually move a little farther in and not from the exact spot.

**Peguis First Nation, Elder Floyd Sutherland (Transcript, Volume 4, Lines 1627 - 1632)**

1653. I'm concerned about the oil spills and getting into the fish and the food that we eat from that land. It's going to be affecting everything down that way if it does break or leak. What kind of -- what kind of guarantee can you make for us that this ain't going to be breaking on us? That would be my question for you.

[...]

1666. MR. VINCENT ORVIS: Well, there's a lot of people that depend on wild meat around this area, and if there was to ever be an oil spill they would have nothing. There would be no fish left or nothing for them to eat.

1667. MS. BOYE: Thank you.

1668. MR. VINCENT ORVIS: You're not going to be going eating a fish that's contaminated with oil or anything like that. Like, that's like scary, like the oil.

1669. MS. BOYE: Vincent, can I ask you just to repeat that last part? I think you said that it was scary.

1670. MR. VINCENT ORVIS: It would be scary to go -- not to be sure if what you're eating -- because you don't want to be eating a fish that's so contaminated with oil in it.

1671. MS. BOYE: M'hm.

1672. MR. VINCENT ORVIS: Like if there was ever to be a break there the fish would be one of the first things to go.

[...]

1680. MR. VINCENT ORVIS: But there would be no moose or deer around that area where I've hunted there and fished before if there was a big contamination spill.

**Peguis First Nation, Mr. Vincent Orvis (Transcript, Volume 4, Lines 1653, 1666 – 1672, and 1680)**

1815. We heard from the panel about spills and damages that are done. All the water that flows from southeastern Manitoba flows one way, and that's to Lake Winnipeg and to Lake Manitoba. And we live on the banks of those shores of those -- those lakes. So if there's a spill, then how are we to know we are going to be protected, not only by the people that live in that immediate area, but further downstream to the lake where we use to survive?

1816. There's no guarantees. ...

**Peguis First Nation, Mr. Mike Sutherland (Transcript, Volume 4, Lines  
1815 - 1816)**

PFN disagrees with Enbridge's conclusions that private land tenure does not permit PFN traditional land use activities to take place. PFN has provided uncontested evidence to the Board confirming PFN traditional land use on private lands, including lands in close proximity to the pipeline and lands falling within the pipeline right of way. PFN also asserts that the impacts of the Project on private lands where PFN may not directly access the lands may still have impacts on the availability of wildlife for harvesting or other traditional land use activities in areas near to or adjacent to the private lands that will be impacted by the proposed Project.

## Conditions

The Board has released three sets of draft conditions for comment.<sup>135</sup> PFN intends to provide further submissions on the draft conditions proposed by the Board in oral final argument and invites the Board to consider those submissions in its assessment of the Project.

In addition to the draft conditions proposed by the Board in the above noted filings, PFN submits that the Board should recommend the following two conditions in its report on the section 52 relief sought by Enbridge and include the conditions as part of any section 58 order that may be issued by the Board to Enbridge.

### **PFN Condition 1 – Crown Consultation**

The Crown, represented by the Department of its choice, shall file with the Board for approval, prior to construction of the Project, a report summarizing consultation with PFN including:

- a) the goals, principles and objectives for consultation and accommodation of PFN in a manner consistent with PFN's Preliminary Consultation and Accommodation Policy;
- b) a summary of the concerns raised by PFN and whether those concerns, in the view of the Crown, can be adequately addressed by the Board;
- c) a description of how the Crown has addressed or will address the concerns raised and a description of any actions that may be required by the Board or Enbridge to address those concerns;
- d) a description of any outstanding concerns;
- e) a description of how the Crown intends to address any outstanding concerns, or an explanation as to why no further steps will be taken; and,

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<sup>135</sup> A58-01 - Letter and Draft Conditions and Regulatory Oversight - A4V7Q2 and A60-01 – Letter and Draft Decommissioning Conditions - A4V8T4.

f) a description of the resources that will be available to support the participation of PFN in the consultations.

## **PFN Condition 2 – PFN Traditional Land Use Study**

Enbridge shall file with the Board for approval, at least 60 days prior to commencing construction, a report including the following content:

a) a summary of the results of the detailed land use and occupancy study conducted by PFN pursuant to the engagement agreement between PFN and Enbridge;

b) a summary of the effects of the proposed Project on the current use of lands and resources for traditional purposes by PFN;

c) a summary of the mitigation measures proposed by Enbridge and/or by PFN to address the effects of the proposed Project;

d) a description of how Enbridge has incorporated any additional mitigation measures into its project planning;

e) a description of any outstanding concerns raised by PFN regarding potential effects of the proposed Project on the current use of lands and resources for traditional purposes by PFN, including a description of how these concerns have been or will be addressed by Enbridge; and,

f) a summary of any outstanding land use and occupancy investigations or follow-up activities that will not be completed prior to commencing construction, including an explanation as to why these will not be completed prior to commencing construction, and an estimated completion date, if applicable.

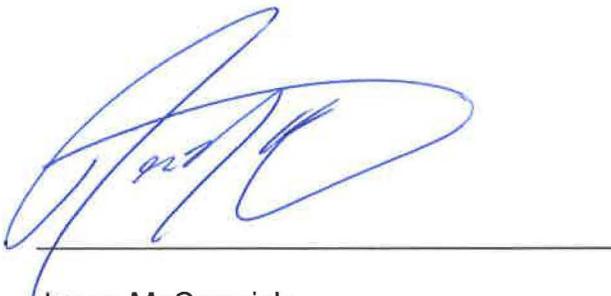
## Conclusion

PFN has participated in the hearing process for the proposed Project in good faith and to the best of PFN's ability given the constraints of time, resources and capacity. Throughout PFN's participation in the hearing process PFN has endeavoured to provide information that will be helpful to the Board in its assessment of the proposed Project. PFN respectfully submits that the project, as proposed, is not in the public interest and further measures should be ordered by the Board to ensure that the effects of the proposed Project on PFN are properly understood and addressed prior to construction of the proposed Project.

Respectfully submitted,

December 11, 2015

Vancouver, British Columbia



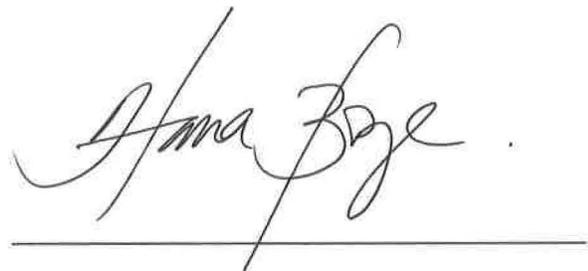
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