



# *The Power of Water: Indigenous Assessments and the Crown's Duty*

Panel: Processes and perspectives on water and impact assessment in remote and urban settings

***Ontario Association of Impact Assessment Conference***

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October 18, 2018 (Toronto)

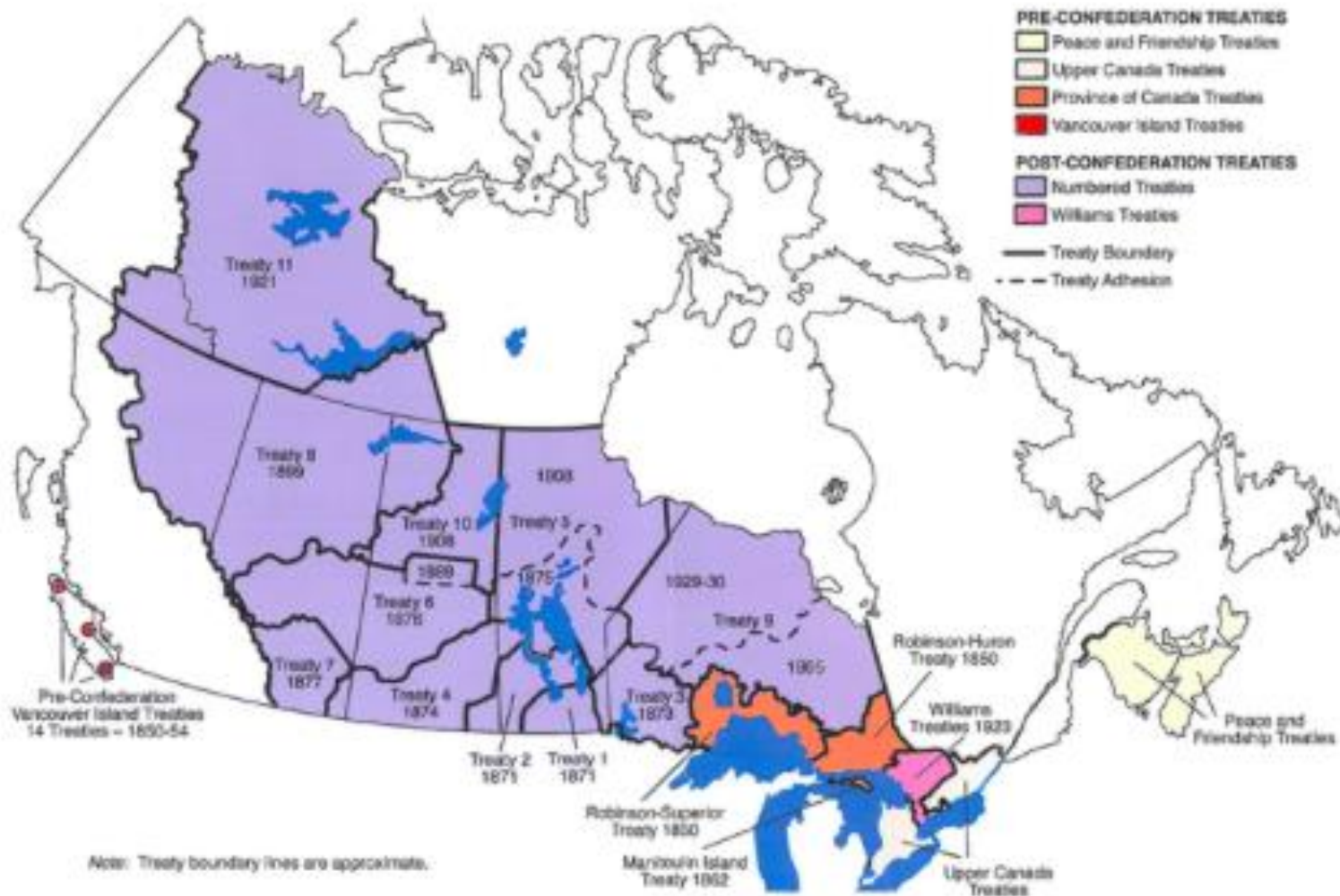
Prof. Aimée Craft, *University of Ottawa, Faculty of Law*



uOttawa



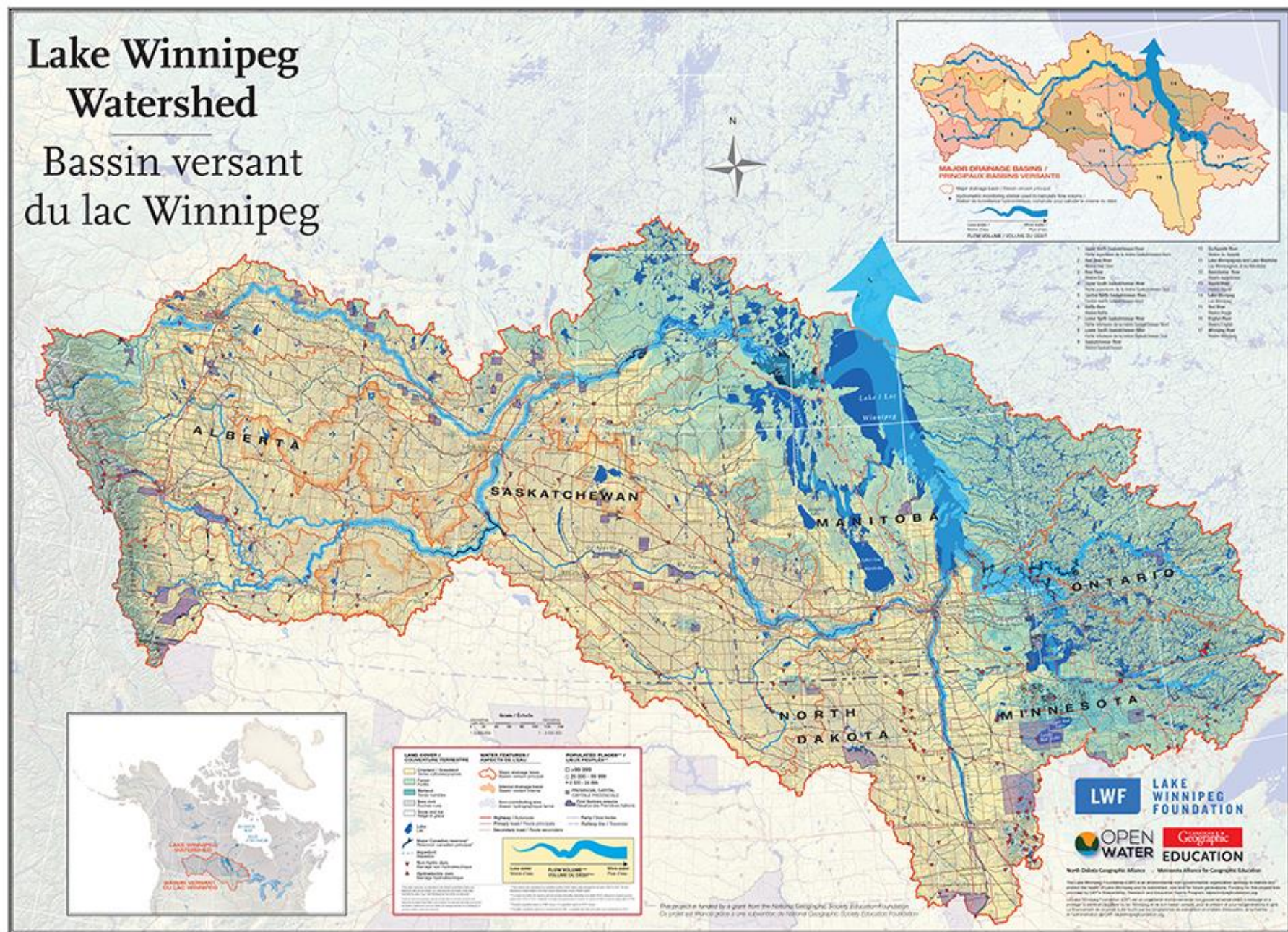
## Location of Historical Treaty Boundaries in Canada



*This map is based on information taken from the Geo Access Division maps.  
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# Bassin versant du lac Winnipeg





NEARLY  
**1 000 000 000**

SQUARE  
KILOMETRES

**10TH**

LARGEST FRESHWATER  
LAKE IN THE WORLD

**3RD**

LARGEST HYDROELECTRIC  
RESERVOIR IN THE WORLD

**2ND**

LARGEST WATERSHED  
IN CANADA

ALBERTA

SASKATCHEWAN

MANITOBA

ONTARIO

EDMONTON  
1,159,889

RED DEER  
90,564

VANIER  
7,584

CALGARY  
1,214,839

MEDICINE HAT  
72,807

LETHBRIDGE  
105,999

SWIFT CURRENT  
14,946

MOOSEJAW  
33,274

REGINA  
193,100

FLIN FLON  
5,692

THE PAS  
5,618

SWAN RIVER  
3,907

DAUPHIN  
8,252

BRANDON  
46,061

WINNIPEG  
663,617

KENORA  
15,348

STEINBACH  
13,524

MINOT  
43,746

GRAND FORKS  
53,456

FARGO  
109,779

NORTH DAKOTA

MINNESOTA

SOUTH DAKOTA

MONTANA

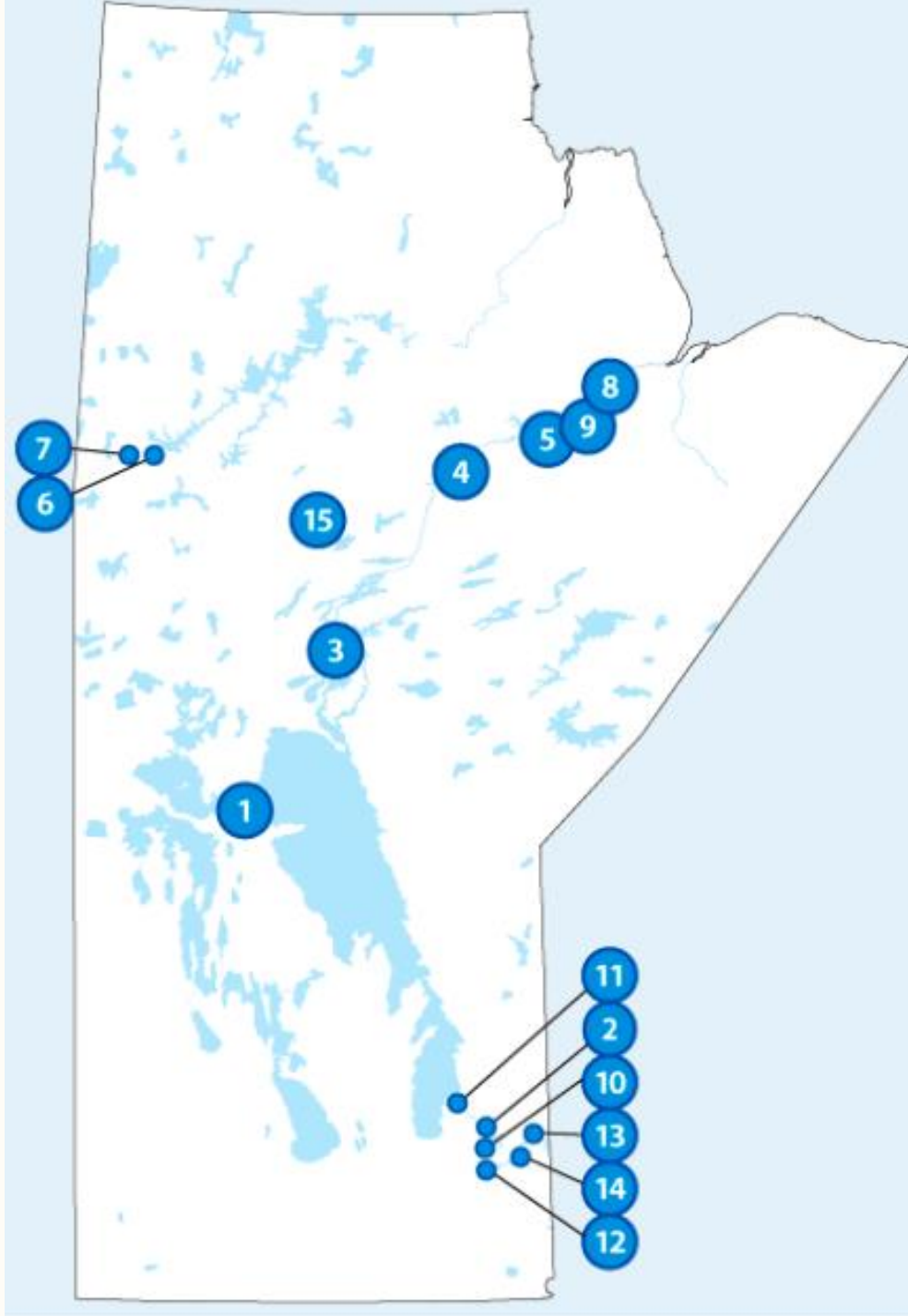
**4 + 4**

CANADIAN  
PROVINCES

AMERICAN  
STATES

*(Map adapted by  
Shawn Standen  
from Lake Winnipeg  
Foundation, and  
Province of Manitoba)*

Lake Winnipeg Watershed





# Manitoba Hydro

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- provincial Crown Corporation (owned by the Province of Manitoba) with \$2.3 billion in annual revenue and \$22 billion in assets.
- 15 hydroelectric stations.





- 1 Burntwood River -**  
Wuskwatim - 200 MW  
First Rapids - 210 MW  
Manasan - 270 MW  
Early Morning - 80 MW

- 2 Laurie River -**  
Laurie River 1 - 5 MW  
Laurie River 2 - 5 MW

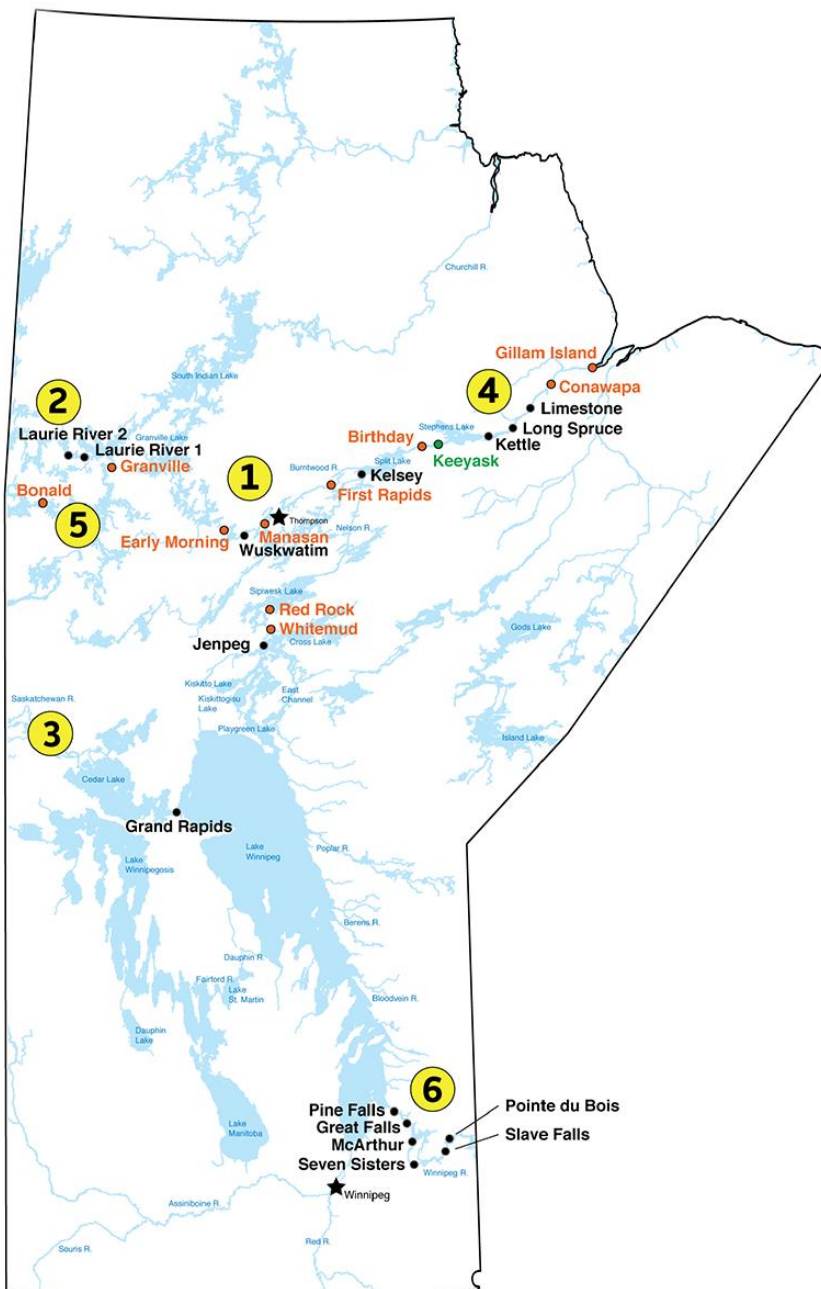
- 3 Saskatchewan River -**  
Grand Rapids - 480 MW

- 4 Nelson River -**  
Jenpeg - 129 MW  
Kelsey - 250 MW  
Kettle - 1,220 MW  
Long Spruce - 1,010 MW  
Limestone - 1,340 MW  
Keeyask - 695 MW  
Conawapa - 1,485 MW  
Gillam Island - 1,080 MW  
Birthday - 380 MW  
Redrock - 250 MW  
Whitemud - 310 MW

- 5 Upper Churchill River -**  
Granville - 120 MW  
Bonald - 110 MW

- 6 Winnipeg River -**  
Pine Falls - 89 MW  
Great Falls - 136 MW  
McArthur - 55 MW  
Seven Sisters - 165 MW  
Pointe du Bois - 77 MW  
Slave Falls - 67 MW

- Current sites- 5,228 MW  
• Under development- 695 MW  
• Potential sites- 4,295 MW





# Keeyask



## Content of the Environmental Impact Statement



- 1 OnColonyport, Our Story
- 2 Executive Summary
- 3 Response to the EIS Guidelines
- 4 BC's Environmental Evaluation Reports
- 5 Supporting volumes
- 6 Maps/Info

### In the Executive Summary, the Partnership summarizes:

- Studies of 38 valued environmental components including 16 biophysical components and 20 socio-economic components; and
- The environmental effects assessment contained in the Response to EIS Guidelines.



# Two track approach





## Keeyask - A watershed decision

Closing Arguments

Consumers' Association of Canada (Manitoba Branch)  
 Prepared by : Byron Williams, Aimée Craft & Joëlle Pastora Sala  
 Submitted to the CEC  
 January 14, 2014



Stephens Lake, Nelson River • Photo by R. Halim







# CEC report

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



## Aboriginal Perspective

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“a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law”  
such that “[t]rue reconciliation will, equally, place weight on each”

*(R v Van der Peet, [1996] 2 SCR 507, 137 DLR (4th) 289  
at paras. 49 and 50)*





## Aboriginal Perspective (evidence)

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Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui, supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies “did not keep written records”, the failure to do so would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge’s findings of fact.




## Aboriginal Perspective (Indigenous laws)

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- running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement” (*R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289. para 263).
- “The Aboriginal perspective focuses on **laws, practices, customs and traditions** of the group. In considering this perspective for the purpose of Aboriginal title, ‘one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed” (*Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 para 35 – citations omitted).







# CEC report: a reconciliation process

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The Commission is of the view that there is a need for a more formal process of reconciliation. We hasten to add that we are not suggesting a long and complex process similar to the residential schools process.

The Commission recommends a process to rebuild trust and respect, for what was lost, what remains and what may be in the future. The process must be designed in collaboration with all of the First Nations impacted by all hydro development in northern Manitoba. The governments of Canada and Manitoba should be parties to this process.



# Business and Reconciliation

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92. We call upon the corporate sector in Canada to **adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.** is would include, but not be limited to, the following:

- Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
- Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
- Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. is will require skills based training in intercultural competency, con ict resolution, human rights, and anti-racism.



# Reconciliation and Indigenous laws

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



# Legal traditions

Inaakonigewin

Relationships

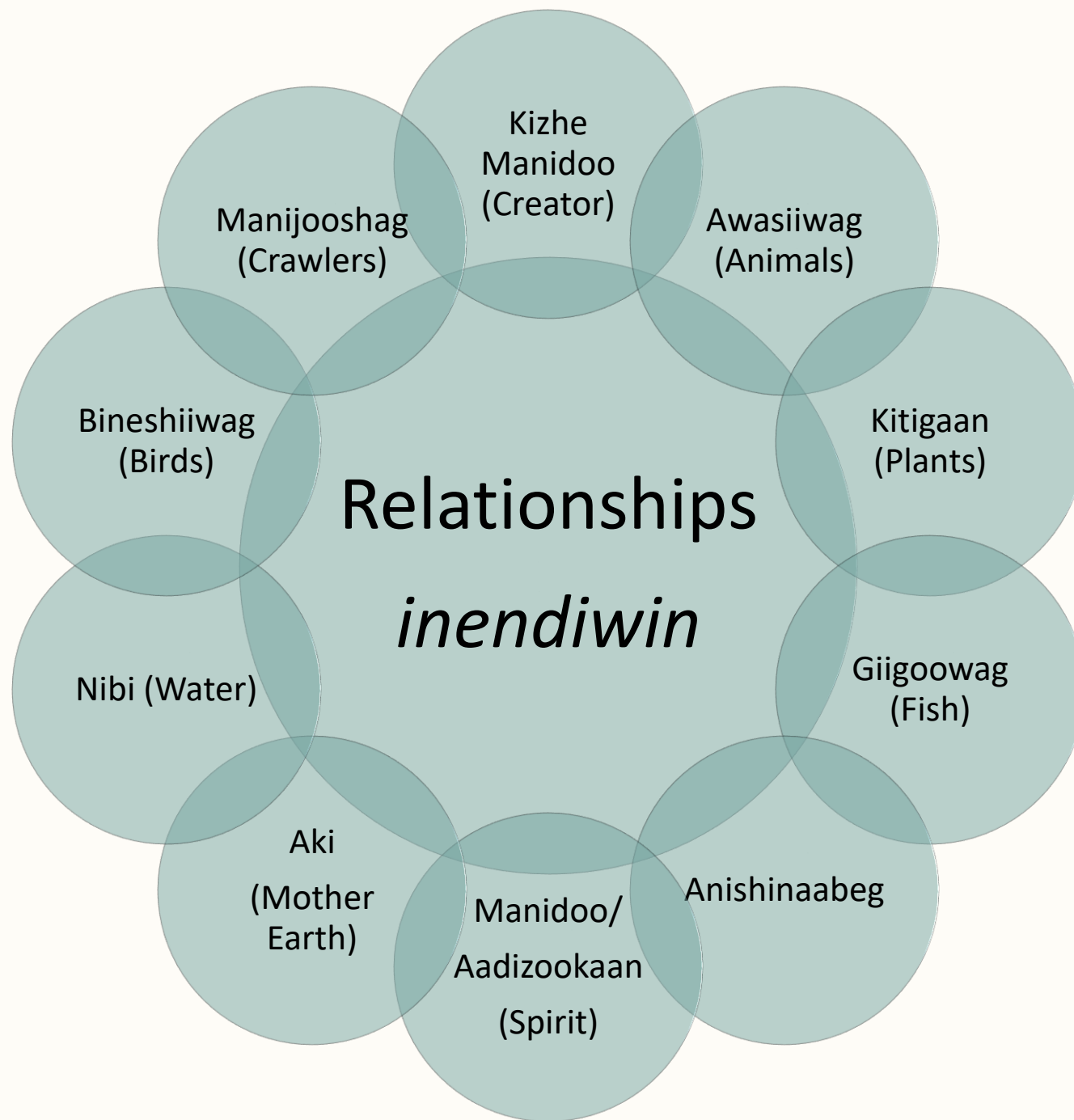
Mino-bimaadiiziiwin

Western Law

Individualism

Property









# Anishinaabe inaakonigewin





# ANI principles

- **Spiritual law** : water is life.
- **Natural law** : water must flow.
- **Customary law** : we must not stop water from flowing without reason and without reparation for the breach of spiritual and natural law.
- What is the **human law**? (Deliberative process)





# Legal Personhood & Agency

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- Whanganui River, Aotearoa (New Zealand) – Act of Parliament (2017)
- Ganges and Yamuna Rivers (India) – High Court ruling (2017)
- Rights of Nature in Constitution (Ecuador) (2008)
- Rights of Mother Earth Law (Bolivia) (2010)
- Atrato River (Colombia) - Constitutional Court (2016)
- Colorado River – claim in Colorado District Court (USA) (Fall 2017)
- Colombian Amazon – Colombia Supreme Court (January 2018)



## ***UNDRIP Article 25***

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**Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.**







uOttawa



GRAND COUNCIL  
**TREATY #3**

THE GOVERNMENT OF THE ANISHINAABE NATION IN TREATY #3





*Miigwech*

*Elders*

*SSHRC*

*CHRR*

*UOttawa*

*LRI*