

MANITOBA CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF section 6(5)(b) of the *Environment Act*,
C.C.S.M. c. E125;

AND IN THE MATTER OF a review by the Clean Environment Commission (“CEC”) of the Environmental Impact Statement for the Manitoba Hydro Manitoba-Minnesota Transmission Project (the “Project”) pursuant to the Terms of Reference of the Minister of Sustainable Development dated December 31, 2016, and updated on February 15, 2017.

MANITOBA METIS FEDERATION

FINAL WRITTEN SUBMISSION

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A: INTRODUCTION: UNDERSTANDING THE SIGNIFICANCE OF THIS PROJECT TO THE MANITOBA METIS COMMUNITY

1. Manitoba Hydro is proposing to construct and operate the Manitoba-Minnesota Transmission Project (the “MMTP” or the “Project”), a 213 km-long, 500 kV, international power line. Originating at the Dorsey Converter Station located near Rosser, northwest of Winnipeg, the MMTP would travel south around the city and then east towards Anola, from where it would continue south-southeast to the Manitoba-Minnesota border, near Piney. The Project would enable electricity to be exported from Manitoba to Minnesota. Its estimated cost is \$350 million.
2. For the Manitoba Metis Federation, as the democratic self-government representative of the Manitoba Metis Community, this is no ordinary transmission line. The Project dissects the heart and soul of the Manitoba Metis Community’s traditional territory, which the Métis call their Homeland. The valleys of the Red and Assiniboine Rivers and the lands stretching from Winnipeg to the American border is where the Métis—as a distinct Indigenous people—were born. It is their *place*. This *place*, which is now known as southern Manitoba, is home to the Manitoba Metis Community’s origins story, traditional lands, unique language, culture, and way of life, and it is where they originally forged their nation-to-nation relationship with Canada. This *place* is irreplaceable for the Métis.
3. In this *place*, the Métis should presently own over 1.4 million acres of land. They should be seen and treated as key partners with respect to development and decision-making taking place in relation to this territory. This was the intent of the constitutional compact reached between Canada and the Métis in 1870, which is embedded in parts of the *Manitoba Act, 1870*. They were supposed to have a “lasting place”¹ in their *place*. Instead, the Métis have been systemically dispossessed from their *place*. Piece by piece, project by project, their *place* is now largely owned and controlled by others. Moreover, precious little land remains in their *place* where they can continue to exercise their rights and sustain their unique culture and way of life.
4. In assessing this Project and crafting its recommendations, the Clean Environment Commission (“CEC”) must keep the Manitoba Metis Community’s Aboriginal rights and the broken promise of the *Manitoba Act, 1870*, front of mind. If the MMTP is built, another slice will be cut away from the limited lands currently available to the Métis for the exercise of their rights. Another slice will be cut away from the lands available to the Crown to be used in the long overdue fulfillment of its promise. To some, this may seem like a small matter. To some, it may seem like only a small amount of available lands will be taken up by the MMTP. Not so. For the Manitoba Metis Community, this Project—in their *place*—is of significant concern. The CEC must take these concerns seriously and make recommendations that ensure the Minister appreciates what is at stake, as well as the Project’s potential effects on the Manitoba Metis Community.

¹ *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] SCJ No 14 at para 5 [MMF cited to QL] [Written Submissions of the Manitoba Metis Federation, dated May 23, 2017 (hereafter the “MMF Submissions”), Tab 2 at 48].

5. Moreover, at this unique time in Canada’s history as a country, the ongoing national project of reconciliation between the Crown, Canadians and Indigenous peoples must also be considered. This Project should advance reconciliation. It should not repeat the indifference and mistakes of the past, which often ignored and minimized the perspectives of Indigenous peoples. In order to avoid a repeat of this sorry history, the CEC must understand what this Project and its effects mean to the Manitoba Metis Community. The Supreme Court of Canada has articulated well what is at stake in situations such as this one:

The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.²

B: THE REGULATORY FRAMEWORK: MANITOBA HYDRO IS REQUIRED TO ASSESS IMPACTS OF THE MMTP ON THE MANITOBA METIS COMMUNITY

6. Among other things, the CEC must determine whether the Environmental Impact Statement (“EIS”) prepared by Manitoba Hydro for the MMTP appropriately and sufficiently assesses the impacts of the Project on the Manitoba Metis Community. This follows from the Minister’s decision, pursuant to s. 6 (5.1) of the *Environment Act*, to direct the CEC to review the EIS.³ The applicable regulations require the EIS to include “a description of the potential impacts of the development on the environment,” including the “socio-economic implications resulting from the environmental impacts.”⁴ For the purposes of the EIS, the “environment” includes “humans.”⁵ Under cross-examination, Manitoba Hydro admitted that the EIS needed to include an assessment of the impacts of the Project on the Manitoba Metis Community.⁶

7. The requirement that the EIS assess the effects of the MMTP on the Manitoba Metis Community was spelled out in detail in the MMTP Scoping Document, which directed that the EIS include assessments of the following, among other things:

- traditional and local knowledge;
- potential effects on socio-economic elements;

² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] SCJ No 71 at para 1 (QL).

³ *Revised Terms of Reference: Clean Environment Commission: Manitoba Minnesota Transmissions Project* (15 February 2017).

⁴ *The Environment Act—Licensing Procedures Regulation*, Man Reg 163/88, s. 1(j).

⁵ *The Environment Act*, CCSM c E125, s. 1(2).

⁶ Manitoba Clean Environment Commission, *Manitoba-Minnesota Transmission Project: Transcript of Proceedings* (Tr Pr), Volume 2 at 358:7 (May 9, 2017).

- potential effects on land and resource use;
- potential effects of the Project on First Nation and Métis and their traditional land uses;
- mitigation measures and risk mitigation practices that are technically and economically feasible that would mitigate any significant adverse environmental effects of the Project;
- identification and quantification (where possible) of residual environmental effects; and
- any change to the Project that may be caused by the environment.⁷

8. In keeping with the requirement that the EIS contain an assessment of the impacts of the Project on the Manitoba Metis Community, the Minister mandated the CEC to include in its review of the EIS consideration of the effect on the Métis of any changes to the environment, including those related to:

- health and socio-economic conditions;
- physical and cultural heritage;
- the current use of lands and resources for traditional purposes; and
- any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.⁸

C: MÉTIS RIGHTS, CLAIMS, AND INTERESTS IN THE PROJECT AREA

a. Origins of the Manitoba Metis Community

9. To understand the potential impact of the MMTP on the Manitoba Metis Community, one must keep in mind the origins of the Métis Nation, which includes the Manitoba Metis Community; how the Métis became a distinct Indigenous people; and the indispensable role that southern Manitoba plays in this story. The true significance of the Project's potential impacts can only be assessed in the light of this Métis perspective.

10. The Métis Nation—as a distinct Indigenous people—emerged in what was historically known as the “Old Northwest” prior to Canada’s acquisition and assertion of sovereignty in the territory:

⁷ Manitoba-Minnesota Transmission Project Scoping Document at 4.2 (11 June 2015).

⁸ *Revised Terms of Reference: Clean Environment Commission: Manitoba Minnesota Transmissions Project* (15 February 2017).

The Métis were originally the descendants of eighteenth-century unions between European men—explorers, fur traders and pioneers—and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta. Within a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears. In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture. The descendants of Francophone families developed their own Métis language derived from French. The descendants of Anglophone families spoke English. In modern times the two groups are known collectively as Métis.⁹

11. More specifically, the Red River Valley generally, and the Red River Settlement more specifically, was the geographic origin of the Métis Nation. Here, beginning in the early 1800s, the Manitoba Metis Community, as a part of the larger Métis Nation, developed its own economic, social, and political institutions:

A large—by the standards of the time—settlement developed the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson’s Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson’s Bay Company.

In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centered on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population [approximately 10,000 Métis], and held leadership positions in business, church and government.¹⁰

12. The Red River Settlement was the Manitoba Metis Community’s heart and soul, a focal point of community life from which the Métis stretched out across what is now southern Manitoba, including the entirety of the Project area:

The Metis community of Western Canada has its own distinctive identity. As the Metis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Metis “community” was more extensive than, for instance, the Metis community described at Sault Ste. Marie in *Powley*. The Metis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

...

Within the Province of Manitoba this historic rights-bearing community includes all of the area within the present boundaries of southern Manitoba from the present day City of

⁹ *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2011 SCC 37, [2011] SCJ No 37 at para 5 [Cunningham cited to QL] [MMF Submissions, Tab 1 at 20].

¹⁰ *MMF*, *supra* note 1 paras 21–23 [MMF cited to QL] [MMF Submissions, Tab 2 at 48].

Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba.¹¹

13. In acknowledgement of this history, the Supreme Court of Canada, in *Manitoba Métis Federation v. Canada* (“MMF”), recognized that the Manitoba Métis were one of the “indigenous peoples” who were living in the “western territories” as the new country of Canada began its westward expansion following confederation in 1867.¹²

b. *The Aboriginal Rights of the Manitoba Metis Community*

14. The Aboriginal rights of the Manitoba Metis Community are rooted in its existence as an Indigenous people in the “western territories” prior to the Crown’s assertion of sovereignty and effective European control of the area. Flowing from this Indigenous pre-existence, the rights of the Manitoba Metis Community are inherent to it—as is recognized by the *United Nation Declaration on the Rights of Indigenous Peoples* (“UNDRIP”). It is worth noting that, in setting out its commitment to reconciliation in legislation, the government of Manitoba has declared itself to be guided by the principles set out in *UNDRIP*.¹³

15. Section 35 of the *Constitution Act, 1982* recognizes and affirms Métis rights. Métis rights are not derivative of or subordinate to the rights of First Nations; they are of equal standing to those of other Aboriginal peoples.¹⁴ Despite this, governments have often ignored and denied the Métis’ collective rights. Section 35 was designed to reverse that trend:¹⁵

The landscape shifted dramatically in 1982, with the passage of the *Constitution Act, 1982*. In the period leading up to the amendment of the Constitution, Indian, Inuit and Métis groups fought for constitutional recognition of their status and rights. Section 35 of the *Constitution Act, 1982* entrenched existing Aboriginal and treaty rights and recognized three Aboriginal groups - Indians, Inuit, and Métis. For the first time, the Métis were acknowledged as a distinct rights-holding group.¹⁶

16. Unfortunately, even after the inclusion of Métis in s. 35, governments continued to deny the existence of Métis rights because of their post-contact emergence. In 2003, the Supreme Court of Canada, in *R. v. Powley*, affirmed the constitutional protection of Métis right protected by s. 35:

¹¹ *R v Goodon*, 2008 MBPC 59 at paras 46 and 48 [*Goodon*] [MMF Submissions, Tab 5 at 248].

¹² *MMF*, *supra* note 1 at para 2 [MMF Submissions, Tab 2 at 45].

¹³ *Path to Reconciliation Act*, SM 2016, c 5, Preamble and s. 4(a) [MMF Submissions, Tab 42 at 684–685, 686–687].

¹⁴ Thomas Isaac, *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision* (August 21, 2016) at p. 12, Written Submissions of the Manitoba Metis Federation, Tab 15.

¹⁵ Thomas Isaac, *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision* (August 21, 2016) (the “Isaac Report”) at 12 [MMF Submissions, Tab 15 at 361].

¹⁶ *Cunningham*, *supra* note 9 at para 13 [MMF Submissions, Tab 2 at 47].

The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

...

The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other Aboriginal communities.¹⁷

17. Based on *Powley*, governments were supposed to negotiate with Métis for the recognition of their rights, similar to what has been done with First Nations and Inuit peoples. At first, in Manitoba, this did not happen. The Métis turned to the courts for justice. In 2009, in *R. v. Goodon*, the Manitoba courts affirmed what the Métis have always known: that the Manitoba Metis Community has constitutionally-protected harvesting rights (i.e., hunting, fishing, gathering of plants, medicines, berries, etc.), including the use of timber for domestic purposes.¹⁸

18. Following *Goodon*, the Crown, as represented by the Manitoba government, recognized some aspects of the Manitoba Metis Community's rights through a negotiated agreement, the MMF-Manitoba Government Points of Agreement on Métis Harvesting.¹⁹ In particular, this Agreement—recognizes Métis rights to “hunting, trapping, fishing and gathering for food and domestic use, including for social and ceremonial purposes and for greater certainty, the ability to harvest timber for domestic purposes” throughout the area as shown on the Map of Recognized Métis Natural Resource Harvesting Areas.²⁰ The MMTP falls entirely inside the Métis Recognized Harvesting Area.

19. Just as the Métis have done since the 19th century, when they first developed and implemented laws in relation to Métis hunting, the Manitoba Metis Community continues to govern and regulate its own hunting activity. Today, this is done using the Métis Laws of the Harvest, which the MMF developed and passed grounded on Métis traditional laws and self-government.²¹

20. Beyond those rights already established through litigation and recognized by agreements with the Crown, the Manitoba Metis Community claims commercial and trade related rights in the area of Manitoba through which the Project passes. These are strong, well-founded assertions, and it is incumbent on the Crown to take them seriously.

¹⁷ *R v Powley*, 2003 SCC 43, [2003] SCJ No 43 at paras 13 and 17 [*Powley* cited to QL].

¹⁸ *R v Goodon*, *supra* note 11 at paras 46 and 48[*Goodon* cited to QL] [MMF Submissions, Tab 5 at 248].

¹⁹ Points of Agreement on Metis Harvesting in Manitoba (29 September 2012) [MMF Submissions, Tab 17 at 413].

²⁰ Map of Recognized Métis Natural Resource Harvesting Areas (September 29, 2012) [MMF Submissions, Tab 18 at 419].

²¹ Metis Laws of the Harvest, Revised 3rd Edition [MMF Submissions, Tab 8 at 260].

21. Section 35 protects as Métis rights those activities that were elements of a practice, custom, or tradition integral to the distinctive culture of a Métis community prior to the assertion of effective European control of the territory at issue.²² As noted above, the Manitoba Metis Community has its roots in trade.²³ As a distinct Métis culture developed, the Métis developed commerce and trade as distinctive aspects of their way of life.²⁴ Many Métis became independent traders, acting as middlemen between First Nations and Europeans.²⁵ Others ensured their subsistence and prosperity by trading resources they themselves hunted and gathered.²⁶ By the mid-19th century, the Métis in Manitoba had developed the collective feeling that “the soil, the trade and the Government of the country [were] their birth rights.”²⁷

22. Commerce and trade is and always has been integral to the distinctive culture of the Manitoba Metis Community since their emergence as a people prior to the Crown’s control of their territory. As such, the Manitoba Metis Community has an Aboriginal, constitutionally protected right to continue this trading tradition in modern ways to ensure that their distinct community will not only survive but also flourish.

23. Unlike the rights of First Nations in Manitoba, which were converted and modified by treaties and the *Natural Resource Transfer Agreement* (“*NRTA*”),²⁸ the Métis’ pre-existing customs, practices, and traditions—including as they relate to commerce and trade—were not affected by the *NRTA*²⁹ and continue to exist and be protected as Aboriginal rights.

24. Métis Aboriginal rights are also not tempered by the “taking up” clauses found in historic treaties with First Nations. Accordingly, the Aboriginal rights of the Métis must be respected as they are, unmodified by legislation or agreements.

c. The Manitoba Metis Community’s Interests and Use of the Project Area

25. The Métis rights described above are not abstract or academic. They continue to be exercised by many Métis in southern Manitoba, as evidenced by the extensive use shown in the Metis Land Use and Occupancy Study (the “MMF Report”).³⁰

26. The baseline data collected for the MMF Report shows that the Manitoba Metis Community uses the MMTP area for hunting, trapping, fishing, berry picking, plant, mushroom

²² *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77 at para 46 [*Van der Peet* cited to QL]; *R v Powley*, *supra* note 17 at para 14.

²³ *R v Blais*, 2003 SCC 44, [2003] SCJ No 44 at para 9 [*Blais* cited to QL]; *Goodon*, *supra* note 11 at para 25 [MMF Submissions, Tab 5 at 245].

²⁴ *Powley*, *supra* note 17 at para 10.

²⁵ *Goodon*, *supra* note 11 at para 30 [MMF Submissions, Tab 5 at 246].

²⁶ *Goodon*, *supra* note 11 at paras 31, 33, and 71 [MMF Submissions, Tab 5 at 246, 252].

²⁷ *Goodon*, *supra* note 11 at para 69(f) [MMF Submissions, Tab 5 at 250–251].

²⁸ *R v Horseman*, [1990] 1 SCR 901, [1990] SCJ No 39 [*Horseman* cited to QL].

²⁹ *Blais*, *supra* note 23.

³⁰ The MMF Report was filed with the CEC on April 19, 2017.

and medicine gathering, tree and tree product gathering, and rock and mineral gathering. Of the 47 Métis harvesters surveyed, 98% indicated specific sites of use within the Regional Assessment Area (“RAA”), Local Assessment Area (“LSA”) and Project Development Area (“PDA”). In fact, 281 specific-use sites were identified as intersecting the PDA. The data gathered indicates that the majority of this Métis use was located on undeveloped Crown land, or, as it is referred to in the MMF Report, “Unoccupied Crown Land.”³¹

d. *The Manitoba Métis Land Claim: The Broken Promise of Section 31 of the Manitoba Act*

27. As mentioned above, the MMF has an outstanding legal claim against the federal Crown relating to its failure to diligently implement the promise of 1.4 million acres of land promised to the children of the Métis living in the Red River Valley enshrined in s. 31 of the *Manitoba Act, 1870*.³²

28. Thomas Isaac, in his report as the Minister’s Special Representative on Métis Section 35 Rights, summarizes succinctly the events which led to this constitutional promise:

A key and central event in Métis and Canadian history was the Red River Resistance of 1869-70 resulting from Métis resistance to the fur trade policies of the Hudson’s Bay Company and the land settlement policies of Canada. Together, these policies were seen as a threat to the Métis and their way of life. Following the Red River Resistance, the Métis, led by Louis Riel, participated in the negotiation of the *Manitoba Act, 1870*, which brought Manitoba into Confederation as a province of Canada.³³

29. Section 31 of the *Manitoba Act, 1870* was a constitutional compact negotiated between the Manitoba Métis and the Dominion government in an act of nation building. It was critical to Manitoba’s entrance into Confederation. The Supreme Court of Canada recognized that the land promised in s. 31 was meant to secure a “lasting place in the new province [of Manitoba]”³⁴ for future generations of the Métis people. This promise goes to the heart of this country’s constitutional morality.

30. The Métis’ “lasting place” in Manitoba was to have been achieved by providing them a “head start” in securing lands in the heart of the “old postage stamp province.” Instead, the federal Crown failed to act diligently in its implementation of s. 31, which effectively defeated the purpose of the constitutional compact. This was strongly articulated by the Supreme Court of Canada in *MMF*, where the Court found that the federal Crown failed to implement diligently and purposefully the Métis land grant provision set out in s. 31 of the *Manitoba Act, 1870*, amounting to a breach of the honour of the Crown. The Court described the consequences of this breach as follows:

³¹ For maps that illustrate the data collected through the 47 surveys, please see section 5.2 of the MMF Report, beginning at 88.

³² *Manitoba Act, 1870*, 33 Victoria, c 3, s. 31 [MMF Submissions, Tab 20 at 423].

³³ *Isaac Report*, *supra* note 14 at 8 [MMF Submissions, Tab 15 at 357].

³⁴ *MMF*, *supra* note 1 at para 5 [MMF Submissions, Tab 2 at 46].

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.³⁵

31. This breach results in an outstanding Métis claim flowing from a judicially-recognized constitutional obligation that burdens the federal Crown. It can only be resolved through good faith negotiations and a just settlement with the MMF.³⁶ Lands in the Project area in Manitoba may need to be considered as a part of any future negotiations and settlement in fulfillment of the promise of 1.4 million acres.

32. Canada has now commenced negotiations with the Manitoba Metis Community, through the MMF, to resolve this constitutional grievance and other issues. As is discussed in greater detail below, on November 15, 2016, the MMF and Canada concluded a Framework Agreement for Advancing Reconciliation (“Framework Agreement”). The Framework Agreement serves as the basis for ongoing negotiation aimed at implementing the Supreme Court of Canada’s decision in *MMF* and advancing the process of reconciliation between the Crown and the MMF. The Framework Agreement represents a momentous breakthrough in the nation-to-nation relationship between the Manitoba Metis Community and the Crown. The promise of reconciliation that the Framework Agreement represents is an essential part of the backdrop against which the CEC must evaluate the effects of the MMTP on the Manitoba Metis Community.

D: MANITOBA HYDRO’S FAILURES IN ASSESSING THE EFFECTS OF THE MMTP ON THE MANITOBA METIS COMMUNITY

33. This section provides an overview of some of the errors made by Manitoba Hydro in the EIS regarding its assessment of impacts on the Manitoba Metis Community. It is not an exhaustive discussion, but is intended to highlight for the Commission several of the most critical errors made by Manitoba Hydro that prevented the EIS from capturing impacts of the MMTP on the Manitoba Metis Community. These errors were largely caused by Manitoba Hydro’s failure to take into account the Métis perspective, leading to a failure to appreciate the complex interrelationship between the Métis people and the environment.

34. Manitoba Hydro admits in the EIS that its approach to assessing the impacts of the Project on Traditional Land and Resource Use (“TRLU”), as set out in Chapter 11 of the EIS, was insufficient to provide a holistic picture of impacts to the Métis. In undertaking to evaluate the potential effects on the Project TRLU, including that of the Métis, Manitoba Hydro chose two measurable parameters: availability of resources; and, access to land. Manitoba Hydro

³⁵ *MMF*, *supra* note 1 at para 40 [MMF Submissions, Tab 2 at 51].

³⁶ *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49, paras 51–53 [*Sparrow* cited to QL]; *R v Van der Peet*, *supra* note 22 at paras 229, 253 [*Van der Peet* cited to QL]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] SCJ No 70 at para 20 [*Haida* cited to QL]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] SCJ No 43 at para 32 [*Carrier Sekani* cite to QL].

contends that by measuring potential changes to these parameters the potential impact of the MMTP on Métis TLRU can be determined.

35. The shortcomings of Manitoba Hydro’s approach were apparent immediately, both to Manitoba Hydro and to the MMF. The EIS states that “the scope of these measurable parameters does not reflect the importance of these potential changes to First Nations and Metis.”³⁷ In the MMF’s cross-examination of Mr. Butch Amundson, Manitoba Hydro’s expert on TLRU, Mr. Amundson further acknowledged that these measurable parameters were not sufficient to present a complete picture of effects of the Project to Métis TLRU.³⁸

36. Chapter 11, the chapter of the EIS devoted to TLRU, is not the only place in the EIS where Manitoba Hydro recognizes that it has incomplete information regarding effects on Métis people. Rather than finding an approach that would allow this information to be obtained, Manitoba Hydro moved on and simply did not complete its assessments, or alternatively made assessments of no significant effects. Below are just three examples:

- *Routing*: in the development of the Alternate Corridor Model, hunting and trapping were identified as criteria of concern, but “when [Manitoba Hydro] didn’t have data, [Manitoba Hydro] was unable to implement that in the corridor model.”³⁹
- *Aboriginal Health*: Manitoba Hydro concluded that low effects on Aboriginal health were predicted to occur. The prediction of low effects was in spite of the observation in the EIS that “it is likely that the project will to some degree alter, interfere with access to, and participation in traditional and cultural activities and may contribute to decreased consumption of subsistence foods and traditional medicines for some community members.”⁴⁰ Manitoba Hydro’s expert on this subject, Mr. Frank Bohlken, confirmed under cross-examination that the EIS’s conclusion of low effects on Aboriginal health was based on incomplete information.⁴¹
- *Visual Quality*: despite recognizing the link between visual quality and TLRU, not a single priority viewpoint that was carried through to assessment was identified by a Métis land user. In the words of Mr. Bohlken, “from the results of the engagement, we didn’t have identified viewpoints I believe from First Nations or Metis”, and further that “related to say issues of importance to visual quality from First Nations and Metis, we didn’t have that specific information to inform the assessment.”⁴² Both in the design of a methodology that relied on static

³⁷ Environmental Impact Statement at 11–13.

³⁸ Tr Pr, Volume 8, 1841:13–1842:5 (18 May 2017).

³⁹ Tr Pr, Volume 3, 658:21–22 (10 May 2017).

⁴⁰ Tr Pr, Volume 7, 1639:7–21 (17 May 2017).

⁴¹ Tr Pr, Volume 7, 1639:16–21 (17 May 2017).

⁴² Tr Pr, Volume 7, 1627:10–13, and 1629:2–6 (17 May 2017).

viewpoints, and from its application as one that did not include any viewpoints identified by Métis, Manitoba Hydro failed, in this instance in a literal way, to incorporate the Métis perspective. It is therefore not surprising that Manitoba Hydro did not attempt to examine the intersection between visual quality, Métis health, and Métis land and resource use.⁴³ Proponents can, and must, do better at incorporating Aboriginal perspectives, including the intersectionality between TLRU and other aspects of the EIS such as visual quality.

37. The remainder of this section will be dedicated to examining Manitoba Hydro’s approach to TRLU in particular, as set out in Chapter 11 of the EIS. It will first explain how the Métis perspective, which requires an ecosystem approach, is absent from Manitoba Hydro’s approach to TLRU. Manitoba Hydro made four main errors in this respect:

- i) Manitoba Hydro approached Métis harvester behaviour and beliefs as too subjective to be quantified, despite carrying out subjective assessments in other parts of the EIS;
- ii) Manitoba Hydro considered Métis harvester behaviour and beliefs “narratively,” but not in a meaningful or transparent way;
- iii) Manitoba Hydro believed that information about Métis harvester behaviour and beliefs needed to be site-specific to be incorporated into the EIS; and
- iv) Manitoba Hydro used biophysical measurable parameters as a proxy for impacts on Métis land users.

38. Manitoba Hydro’s errors were all avoidable. As will be explained, the MMF Report provides an illustration of how to assess impacts to Métis traditional land users without relying on biophysical proxies. The MMF contends that the approach taken in the MMF Report provides a model that better reflects the Métis perspective and an ecosystem approach.

39. This section will finish with a discussion of Manitoba Hydro’s deficient approach to assessing significant and cumulative effects, which was again one that discounts the Métis perspective and the lived experience of Métis harvesters.

a. Manitoba Hydro’s Approach to Evaluating TRLU did not Include the Métis Perspective

40. Manitoba Hydro’s choice of measurable parameters in Chapter 11 undermined the usefulness of the EIS in evaluating the impact of the MMTP on the Manitoba Metis Community in relation to TLRU, as it ignores the experiences and behaviours of Métis harvesters. As the Supreme Court of Canada has made clear, when evaluating the effect of potential interferences with existing aboriginal rights, it is crucial “to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”⁴⁴ In contrast, from the outset Manitoba Hydro knew that the

⁴³ Tr Pr, Volume 7, 1630:3–12 (17 May 2017).

⁴⁴ *Sparrow*, *supra* note 36 at 1112.

approach they took in the EIS to assessing the effects of the MMTP on the Manitoba Metis Community would not reflect the Métis perspective. Manitoba Hydro explained its decision to proceed in this manner as follows:

First Nations and Metis may choose not to practice traditional activities or use traditional sites and areas near the Project for spiritual, aesthetic or other reasons. There are beliefs held by some First Nations members that EMF and herbicides will have an overall negative effect that will preclude use of the land. These views and concerns about the Project (which informed this assessment and was considered as an effect pathway) may influence their use of traditional lands and resources. **Beliefs, or perceptions, around adverse effects are difficult to quantify and not easily amenable to assessment in the same way as other Project effects. Given the subjective nature of this effect pathway and the limited site-specific information provided by First Nations regarding beliefs and concerns regarding the Project, a full effects characterization was not carried forward.** The topic was considered narratively in the assessment of Project effects on plant gathering, hunting and trapping, trails and travelways, and cultural sites.⁴⁵

41. This decision was further explained by Mr. Amundson under cross-examination: “simply because it is so subjective and not measurable, and almost entirely qualitative ... it would be professing to speak for people.” Instead, Manitoba Hydro “[chose] to look at intangible parts of traditional land and resource use more narratively and try to explain it ... because of its nuances.”⁴⁶

42. Subjectivity was not removed, however, by using a “narrative” approach. The narrative presented in the EIS was Manitoba Hydro’s experts’ views on general preferences and concerns of the Métis. As will be discussed further below, this lip service fell far short of any identifiable, meaningful, or methodologically rigorous consideration of the Métis perspective when it came time to evaluate effects. The MMF contends that Manitoba Hydro’s approach was precisely what Mr. Amundson claimed Manitoba Hydro was trying to avoid. The “narrative” that was presented in Chapter 11 was not that of the Métis. How could it have been? Manitoba Hydro’s narrative had no basis in reliable quantitative or qualitative data gathered from Métis people about their preferences, beliefs, and behaviours.

b. Subjectivity Did Not Prevent Manitoba Hydro from Assessing Effects in Contexts Other than TRLU

43. From a reading of the EIS, it is clear that subjectivity did not always pose an insurmountable challenge to Manitoba Hydro. For instance, in Chapter 19, “stress and annoyance” was addressed as one potential Project effect. It was acknowledged that stress and annoyance could be due to perceptions, including perceptions of human health risks associated with electro-magnetic fields.⁴⁷ This perception was addressed for land owners and land users,

⁴⁵ Environmental Impact Statement at 11–14.

⁴⁶ Tr Pr, Volume 8, 1843:8–20 (18 May 2017).

⁴⁷ Tr Pr, Volume 7, 1636:6–16; Environmental Impact Statement, Chapter 19 at 19-48, and 19-50 to 19-51.

such as recreational land users, but was not addressed for Métis traditional land users, either in Chapter 19 or in Chapter 11 of the EIS.

c. Manitoba Hydro Did Not Take an Ecosystem Approach

44. In the Bipole III Report of this Commission, the CEC made a critical non-licensing recommendation to Manitoba Hydro:

7.3 Manitoba Hydro undertake route selection and environmental assessment based on an ecosystem approach, rather than just on individual Valued Environmental Components (VECs). This would make the process more in keeping with Aboriginal worldviews of the interrelationship between people and the environment.⁴⁸

45. Manitoba Hydro's insistence that "site-specific" information was required about Métis harvester behaviour and beliefs, in order to be able to carry them through to a full effects assessment,⁴⁹ is inconsistent with an ecosystem approach. By insisting that such information was necessary, Manitoba Hydro failed to respond to the CEC's recommendation.

d. Manitoba Hydro's Use of Biophysical Measurable Parameters does not Capture Impacts to Métis People

46. Manitoba Hydro chose to use biophysical measurable parameters to characterize effects to TLRU; in other words, biophysical markers were used as a proxy for Métis traditional land use. This is inconsistent with an approach that reflects the relationship between the Métis and the land and its resources. In her presentation to the CEC, Calliou Group principal Tracey Campbell summarizes the problems of this approach:

The measurable parameters used for traditional land and resource use by Manitoba Hydro were availability of resources, or access to plant gathering, hunting and trapping areas, disturbance to trails or travel ways, and reduced ability to access or use those travel ways, disturbance to cultural sites and access to cultural sites. Notice that these measurable parameters do not relate to the activity – are not related to the activities of people, but mostly to plants, animals, sites or things.

...

So what these biophysical measurable parameters don't reflect is the preferences of the people using those resources. If you don't study the people using those resources, you won't understand the behaviour of the people using those resources.⁵⁰

47. As discussed above, Manitoba Hydro purported to address this interrelationship between Métis land users and the land and its resources "narratively." This was insufficient. Any adverse impact, limitation, or infringement of the exercise of constitutionally held rights deserves far more than throwaway lines in the EIS. This narrative incorporation left the MMF in the dark as

⁴⁸ Clean Environment Commission, Bipole III Transmission Project Report on Public Hearing (June 2013) at 40.

⁴⁹ As set out at 11-14 of the Environmental Impact Statement.

⁵⁰ Tr Pr, Volume 14, 3135: 14-24 and 3136: 20-25 (30 May 2017).

to how these broad statements about general Métis “preferences” weighed in Manitoba Hydro’s assessment of effects and of the significance of those effects. Narrative incorporation is inconsistent with the methodological approach of the rest of the EIS, rendering it impossible for the MMF, or the CEC for that matter, to discern whether and to what degree these effects were taken seriously. This is unacceptable.

e. The MMF Report Provides the Missing Métis Perspective

48. The MMF Report provides an example of how the effects of a project on the people that use the environment can be done in a methodological and quantitative way. As summarized by Ms. Campbell, “rather than study biophysical things, [Calliou Group] studied the Metis people themselves. [Calliou Group] studied Metis beliefs and perceptions. [Calliou Group] studied what Metis prefer and what Metis people avoid when they harvest.”⁵¹

49. The MMF Study demonstrates that it is possible to quantitatively capture qualitative information about Métis harvesting; Calliou Group did, in fact, “put numbers” to it.⁵² In the MMF Study, Metis Specific Interests (“MSIs”), which are equivalent to VECs in the EIS, were chosen through close collaboration with Métis harvesters during workshops. Eventually, Calliou Group scoped two MSIs to study: lands available for Métis use, and Métis harvesting.⁵³

50. “Lands available for Métis use” was important because the exercise of Métis rights and Métis traditional land use requires a location—a *place*. “Métis harvesting” relates to the behaviour of harvesters. If a location is technically available for harvesting, but Métis will not use it because its harvesting conditions are unacceptable, then that location may as well be on the moon. The MMF Report therefore captures two fundamental components not captured by the EIS: both where the Métis **can** harvest, and where the Métis **will** harvest, after the MMTP is built. This allowed Calliou Group to quantify what Manitoba Hydro said was too subjective, namely, what is the impact that the MMTP will have on Métis harvesters? This provides the Métis perspective that was lacking in the EIS.

f. Manitoba Hydro Missed Opportunities to Gather Information about the Métis Perspective and to Incorporate it into the EIS

51. It seems clear that Manitoba Hydro made little effort to systematically gather the kind of information that Calliou Group gathered for the MMF Report. For example, Manitoba Hydro, in an Appendix to Chapter 4 of the EIS, provides a template with questions to ask Aboriginal land users in conducting Aboriginal Traditional Knowledge studies. These questions focus exclusively on historic and current use. They are silent on harvester preferences and likely reactions to the Project. Ms. Sarah Coughlin, under cross examination, confirmed that these templates were designed by Manitoba Hydro for the MMTP to provide the information that Manitoba Hydro deemed important. It seems to follow then, that information regarding what

⁵¹ Tr Pr, Volume 14 3137: 3-7 (30 May 2017).

⁵² This is in contradiction to Mr. Amundson’s contention under cross-examination that “it’s difficult to put numbers around that kind of thing.” Tr Pr, Volume 8, 1847: 3-7 (18 May 2017).

⁵³ For the effects, measurable parameters, and rationale for selection please see Table 2-3-2-1, at 35–36 of the MMF Report.

Métis harvesters do, and prefer, and their view on the MMTP and its impacts on their activities, was not deemed by Manitoba Hydro to be important.⁵⁴

52. Ms. Coughlin stated in her cross-examination that this kind of information, related to Métis harvester behaviour before and after the MMTP was built, would have been helpful. And yet Manitoba Hydro made no apparent effort to gather it from the MMF prior to the drafting of the EIS, or to meaningfully use it after the MMF gathered it through the MMF Study.⁵⁵

53. Manitoba Hydro filed a “Supplementary Report where Manitoba Hydro Articles How the MMF Report Information has Influenced MMTP.” This Supplemental Report concludes that:

After review, it is the view of the assessment team that the information contained in the MMF report does not change the conclusions reached in the MMTP Environmental Impact Statement: that the project will not result in significant effects to the biophysical or socioeconomic environment nor would the report change routing of the transmission line.⁵⁶

54. The paragraph quoted above is illustrative of the reluctance of Manitoba Hydro to correct the errors in its approach, even after being presented with the kind of information that was missing when it drafted its EIS. In short, in failing to incorporate the information contained in the MMF Report, Manitoba Hydro once again failed to apply an ecosystem approach, and failed to take into account the perspectives of the Métis. Manitoba Hydro continued to rely on its biophysical proxies for the Métis perspective, which as explained above, was entirely inappropriate and acknowledged by Manitoba Hydro to be insufficient.

g. Effects of the MMTP on the Manitoba Metis Community will be Significant

55. The MMF Report provides a characterization of effects on the two MSIs prior to mitigation. At this time, no Métis-specific mitigation measures have been committed to by Manitoba Hydro.

56. Calliou Group’s characterization of residual effects for the studied MSIs were:

- i) Lands Available for Métis Use: the residual effects on this MSI were concluded to be adverse, high in magnitude within the PDA, continuous, permanent and irreversible.⁵⁷

⁵⁴ Tr Pr, Volume 8, 1850:13–18, 1851:17–24 (18 May 2017).

⁵⁵ Tr Pr, Volume 8, 1852:8–14 (18 May 2017).

⁵⁶ Manitoba Hydro, “Supplementary Report where Manitoba Hydro Articles How the MMF Report Information has Influenced MMTP,” filed with the CEC on April 19, 2017 at 1.

⁵⁷ For a summary table of residual effects characterization for Lands Available for Metis use please see Table 4-7-1 at 84–85 of the MMF Report.

- ii) Métis Harvesting: the residual effects on this MSI were concluded to be adverse, of high to moderate magnitude, continuous, irreversible and permanent.⁵⁸

57. These effects are significant. This is contrary to Manitoba Hydro’s conclusion that, in part, as the area of land disturbed by the MMTP will be “relatively small,” effects are not significant. As explained by Ms. Campbell, “significant does not mean big or little; it means acceptable or unacceptable.” The amount of Crown land that is impacted by the MMTP may be small in size, but it does not follow, as Manitoba Hydro believes, that the effect on Metis harvesting will be small in scale.

58. Helpful background on the challenges that Métis harvesters in southern Manitoba already face was given by Métis harvester and MMF citizen Ms. Brielle Reimer. Pertinent aspects of her testimony are summarized below.

59. Ms. Reimer grew up in St. Eustache, a town within the RAA, in the “heart of [the Manitoba Metis Community] Homeland.”⁵⁹ She explained that, growing up, her family found ways to harvest, despite the fact that St. Eustache is located within largely agricultural lands. She testified that her family fished, hunted waterfowl, beaver and deer, trapped, and went berry picking. These traditional activities were “central to [her] family life,” and formed part of “most of [her] childhood memories.”⁶⁰

60. Ms. Reimer provided an explanation of the importance of harvesting for Métis people and Métis culture:

Maintaining a tradition of harvesting is really important to myself, its important to my family, it’s important to the way we live, the way that we understand our life. It’s not only about the skills that we gain, but also about the knowledge and the importance that it gives us in understanding other people and the humility of those relationships. It’s a tradition I want to carry for my daughter, or my unborn daughter, and I’d like it to stay in my family, and I wish that for our whole community.⁶¹

61. Ms. Reimer expressed a strong preference to harvest in the area where she grew up—southern Manitoba:

My preferred harvesting area is in and around the region where I grew up. It seemed that you could just, you know, there’s something special about harvesting in your area, it’s a building of the knowledge of years and generations.⁶²

⁵⁸ For a summary table of residual effects characterization for Metis Harvesting please see Table 4-7-1 at 120–121 of the MMF Report.

⁵⁹ Tr Pr, Volume 14, at 3124:9–3125:11—3129:11–17 (30 May 2017).

⁶⁰ Tr Pr, Volume 14, 3124:9–3125:11 (30 May 2017).

⁶¹ Tr Pr, Volume 14, 3130:7–17 (30 May 2017).

⁶² Tr Pr, Volume 14, 3125:15–3126:6 (30 May 2017).

62. As well, Ms. Reimer echoed the preference that came through strongly in the MMF Report against conducting certain traditional land use activities near industrial development or infrastructure. She stated that:

...even considering the region that we do traditionally harvest in, there are preferred areas within that region. I mentioned that is a region we prefer to harvest, but we don't prefer to harvest around the developed areas, or like along the road or things like that. So non-preferred areas are not my traditional territory, and areas that are largely developed.⁶³

63. And further, she provided her perspective on impact of the MMTP specifically:

...overall, the project and the physical presence of the transmission line, I think reflects, it does not have a physical environmental impact, but it also is a constant reminder, its physical presence is a constant reminder of the diminished available lands that are left intact as natural lands, which is really important for Metis harvesters... And having those lands be intact is something that is really important to that connection, to maintaining the tradition of harvesting... And these lands are so important to the Metis Nation, to the Manitoba Metis community, because it's the heart of our homeland.⁶⁴

64. Ms. Reimer stated that diminishing bush and the effects from development make it "very difficult" to harvest in southern Manitoba, and very hard to maintain the multi-generational tradition of harvesting that Ms. Reimer described was so central to her family.⁶⁵ When asked if, in her opinion, she could sustain her family through harvesting in southern Manitoba, Ms. Reimer's answer was no.⁶⁶

h. Manitoba Hydro's Cumulative Effects Assessment Ignores the Métis Perspective

65. Manitoba Hydro's conclusions on cumulative effects displays a lack of understanding of the current state of Métis harvesting in southern Manitoba. The heart of the Métis Homeland can no longer sustain its people, and yet Manitoba Hydro concludes that there are no significant effects on TLRU from the MMTP, specifically or as part of a cumulative effects assessment.

66. Manitoba Hydro recognizes in the EIS that the MMTP has "potential cumulative effects on resources relied upon to exercise TLRU," as well as potentially contributing to "perceived effects on the landscape," and that "these cumulative effects can deter First Nations and Metis land users ... Some users may choose not to conduct TLRU activities based on beliefs and concerns about the site having reduced value."⁶⁷ Despite this "narrative" acknowledgment, Manitoba Hydro concludes that "the area disturbed by the Project will be relatively small with respect to the large amount of available undistributed native habitat available...in addition, MH

⁶³ Tr Pr, Volume 14, 3126:20–3127:5 (30 May 2017).

⁶⁴ Tr Pr, Volume 14, 3128:19–3129:21 (30 May 2017).

⁶⁵ Tr Pr, Volume 14, 3127:9–23 (30 May 2017).

⁶⁶ Tr Pr, Volume 14, 3128:2 (30 May 2017).

⁶⁷ Environmental Impact Statement at 11-62.

will not place restrictions on use of the ROW for TLR after construction, if anyone chooses to do so.”⁶⁸ Manitoba Hydro concludes that the cumulative effects of the MMTP are not significant.

67. Manitoba Hydro’s characterization of cumulative effects, and its conclusion as outlined above demonstrates a fundamental misunderstanding and discounting of the Métis perspective and the ecosystem approach for several reasons:

- i) It mischaracterizes that a large amount of native habitat is still available. Ms. Reimer and the MMF Report clearly express that Métis harvesters in southern Manitoba already face large challenges finding areas to harvest. Manitoba Hydro equates the size of disturbed land with significance, rather than looking at how any further disturbance will impact the Métis. Any further disturbance is significant given how difficult it is already for Métis harvesters to exercise their Métis rights and practice their traditional way of life.
- ii) It assumes that, because Manitoba Hydro will not restrict access to the ROW after construction, that land becomes available for all TLRU again. The MMF Report and Ms. Reimer’s testimony demonstrates that this is misleading. Métis harvesting behavior will be impacted by the presence of the MMTP, because Métis harvesters will alter their behaviour, whether Manitoba Hydro workers are present or not. This reflects the general preference of Métis harvesters to exercise their rights and practice their traditional activities in undeveloped areas.
- iii) It reduces Métis harvesting behaviour to “individual choice,” rather than recognizing the widespread alteration of Métis harvesters’ behaviour that will be caused by the MMTP.⁶⁹ This idea of “individual choice” ignores the preferred harvesting conditions of constitutional rights holders that form part of those rights, demonstrating a “go else where” mentality. This attitude absolves Manitoba Hydro of any accountability for their alteration of the landscape and of Métis harvesters’ experiences on the land—experiences which, as the CEC heard from Ms. Reimer, are fundamental to families and communities.

68. It is clear that these effects, understood from the Métis perspective, as they ought to be according to caselaw and previous CEC recommendations, are significant. Assuming that Métis harvesters can “go else where” denies that Métis harvesting has already been irrevocably and adversely altered through thousands of small interferences. The situation is now so extreme that any loss of what little land remains available for preferred Métis use amounts not only to a significant impact on Métis harvesting, but to an infringement of constitutionally protected Métis rights.

69. The jurisprudence is clear that requiring Aboriginal rights-holders to travel unreasonable distances to exercise their rights constitute an infringement. In the case of *Mikisew Cree*, the Supreme Court of Canada stated that the proposition that Mikisew Cree First Nation hunters could simply move their hunting activities to another area of Treaty 8, where hunting was still

⁶⁸ Environmental Impact Statement at 11–62.

⁶⁹ Tr Pr, Volume 8, 1844:9–14 (18 May 2017); see also Tr Pr, Volume 7, 1638:2–3 (17 May 2017).

available, “cannot be correct.”⁷⁰ The Court made an apt analogy, writing that “[o]ne might as plausibly invite the truffle diggers of southern France to try their luck in Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfillment of the promises of Treaty 8.”⁷¹ Similarly, the Quebec Court of Appeal, in *R. v. Young*, held that expecting that Algonquin fishers to “travel more than 80 kilometers to reach geographically accessible lakes suited to the exercise of their Aboriginal rights” “deprived [the Algonquins] of both a right of priority access to a resource and a right of ready and privileged access.”⁷² The Court found that an infringement had been proven. Expecting the Métis of southern Manitoba to go elsewhere to exercise their rights is no different from the *Mikisew Cree* and *Young* cases—this expectation “cannot be correct.”

E: THE CEC’S ROLE IN CONSULTATION AND RECONCILIATION

70. The imperative of reconciliation must inform all engagements and consultations by proponents, regulators, and the Crown regarding proposed industrial development in the traditional territories of Aboriginal peoples. On this, the Supreme Court of Canada has been clear:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.⁷³

71. The history of the Manitoba Metis Community’s grievances is long indeed. The misunderstandings that have so often troubled relations between the Métis and other Manitobans are persistent. “The unfinished business of reconciliation of the Métis people with Canadian sovereignty,” as the Supreme of Canada noted, “is a matter of national and constitutional import.”⁷⁴

72. Progress, however, is being made. On November 15, 2016, the MMF and Canada concluded a Framework Agreement, as described above.⁷⁵ The Framework Agreement puts the MMF and Canada firmly on the path of reconciliation by providing the basis for negotiating a modern-day treaty or land claims agreement. It provides Canada with a formal mandate to negotiate with the MMF on a variety of subject matters, including self-government, settlement lands, water and subsurface rights, forestry, environmental assessment, and land management.⁷⁶

⁷⁰ *Mikisew Cree*, *supra* note 2 at para 45.

⁷¹ *Mikisew Cree*, *supra* note 2 at para 45.

⁷² *R v Young*, [2003] 2 CNLR 317 at para 24 [*Young* cited to QL].

⁷³ *Mikisew Cree*, *supra* note 2 at para 1.

⁷⁴ *MMF*, *supra* note 1 para 140 [MMF Submissions, Tab 2 at 66].

⁷⁵ *MMF-Canada Framework Agreement for Advancing Reconciliation* [MMF Submissions, Tab 12 at 328].

⁷⁶ Written Submissions of the Manitoba Metis Federation at para 60.

It promises a new era of nation-to-nation, government-to-government, Crown-Métis relations in Manitoba.

73. Consultation with the Manitoba Metis Community and accommodation of its rights, claims, and interests in relation to the MMTP must be informed by the ongoing negotiations between the MMF and the Crown pursuant to the Framework Agreement. The scope and content of the Crown's duty to consult Aboriginal people is assessed on a spectrum on which strong *prima facie* claims by Aboriginal groups regarding rights and interests of high importance attract deep consultative duties.⁷⁷ Indeed, the Supreme Court of Canada has made clear that “as the claim strength increases, the required level of consultation and accommodation correspondingly increases.”⁷⁸

74. Courts acknowledge that, in determining the scope and content of the duty to consult owed to an Aboriginal group, “[w]hile not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' asserted claim.”⁷⁹ Indeed, Courts have found that as the assertion of an Aboriginal right or interest advances through the stages of claim, proof, and negotiation the Crown's duty to consult and accommodate the Aboriginal group in question with respect to their assertion increases.⁸⁰

75. The MMF's claim flowing from s. 31 of the *Manitoba Act, 1870* has been made out. It has been accepted by the Supreme Court of Canada.⁸¹ What the ongoing negotiations between the MMF and Canada are about, to use the words of Thomas Isaac from his report as Minister's Special Representative on Reconciliation with Métis, is “the implementation of declaratory relief from the highest court in Canada, and more broadly about implementing in practical terms the honour of the Crown and achieving reconciliation with the Métis of Manitoba.”⁸² The MMTP runs through the heart of the territory that will be central to these talks. In the circumstances, the Crown owes the MMF deep consultative and accommodative duties.

76. Even though Manitoba will undertake Crown-Aboriginal consultation in a process separate from the CEC's, the same considerations that require the Crown to consult deeply with the MMF regarding the MMTP require Manitoba Hydro to engage deeply with the MMF and require the CEC to make meaningful efforts to address the MMF's concerns. For the MMF, engaging with Hydro and participating in the CEC hearing is a part of the consultation process. Courts in Manitoba have been clear that Aboriginal groups must “consult in good faith by

⁷⁷ *Haida*, *supra* note 36 at para 44.

⁷⁸ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] SCJ No 44 at para 91 [*Tsilhqot'in* cited to QL].

⁷⁹ *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, [2007] FCJ No 1006 at para 104 [*Ka'a'Gee Tu* cited to QL].

⁸⁰ *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204, [2012] FCJ No 216 at paras 133, 137, and 139 [*Sambaa K'e* cited to QL]; *Ross River Dena Council v Government of Yukon*, 2011 YKSC 84, [2011] YJ No 130 at para 46 [*Ross River* cited to QL].

⁸¹ *MMF*, *supra* note 1 at para 154 [MMF Submissions, Tab 2 at 69].

⁸² *Isaac Report*, *supra* note 14 at 39 [MMF Submissions, Tab 15 at 388].

whatever means available to them.”⁸³ In fulfillment of its duty to participate in consultations in good faith, the MMF must participate in available regulatory processes.⁸⁴ In evaluating the sufficiency of consultation regarding projects proposed by Manitoba Hydro, courts in Manitoba will consider the degree to which Aboriginal groups engaged with Manitoba Hydro and participated in the CEC process in good faith.⁸⁵ In deciding whether to approve such projects, the Minister will review information received from Manitoba Hydro, the CEC, and the Crown consultation process together.⁸⁶ The duty to consult underlies the MMF’s participation in the CEC process, and it must inform the CEC’s responses to the MMF’s concerns.

77. The underlying purpose of Crown consultation and engagement with Aboriginal groups—whether by Crown corporations acting as proponents or regulatory tribunals—is the same: reconciliation. It is uncontroversial that reconciliation is the underlying goal of consultations between the Crown and Aboriginal groups.⁸⁷ In the *Path to Reconciliation Act*, Manitoba acknowledges that the same is true of engagements more broadly: “[r]econciliation is founded on engagement with Indigenous nations and Indigenous peoples.”⁸⁸ Moreover, the Act recognizes the importance of advancing reconciliation, “across all sectors of society, including interdepartmental, intergovernmental, corporate and community initiatives.”⁸⁹ Reconciliation is the common north star that orients Crown consultation, the CEC, and Manitoba Hydro’s engagement with the MMF. The interrelations between these processes must be acknowledged; the processes must inform each other.

78. As a tool of reconciliation, the duty to consult, “derives from the need to protect Aboriginal interests while land and resource claims are ongoing.”⁹⁰ As such, the Crown is obliged to consult and accommodate to protect those rights and interests to which Aboriginal groups have a credible claim and can reasonably expect to have recognized through the modern treaty process. It is important, therefore, for the CEC to bear in mind the potential outcome of the land claims negotiations between Canada and the MMF when crafting its recommendations to the Minister regarding the MMTP. These recommendations are an extremely important part of the Crown consultation process, as the Minister will look to them for guidance regarding concrete measures to be taken to protect the MMF’s interests.

⁸³ *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, [1999] BCJ No 1880 at para 161 [*Halfway River* cited to QL], cited in *Pimicikamak Cree Nation v Manitoba*, 2014 MBQB 143, [2014] MJ No 200 at para 76 [*Pimicikamak* cited to QL], and *Sapotaweyak Cree Nation v Manitoba*, 2015 MBQB 35, [2015] MJ No 67 at para 205 [*Sapotaweyak* cited to QL].

⁸⁴ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] SCJ No 53 at para 79 [*Beckman* cited to QL].

⁸⁵ *Sapotaweyak*, *supra* note 83 at paras 201, 220.

⁸⁶ *Sapotaweyak*, *supra* note 83 at para 118.

⁸⁷ *Haida*, *supra* note 36 at para 49; *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2006] FCJ No 1677 at para 82 [*Dene Tha’* cited to QL].

⁸⁸ *The Path to Reconciliation Act*, SM 2016, c 5, s. 2 [MMF Submissions, Tab 42 at 685–686].

⁸⁹ *The Path to Reconciliation Act*, SM 2016, c 5, s. 3(1)(b) [MMF Submissions, Tab 42 at 686].

⁹⁰ *Carrier Sekani*, *supra* note 36 at para 33.

79. Constitutionally protected modern treaties and land claims agreements, such as the one the MMF and Canada are negotiating, invariably include provisions to ensure that the Aboriginal party benefits appropriately from economic development in their territory. This is achieved through a number of different mechanisms: requirements that proponents negotiate impact benefit agreements with Aboriginal parties;⁹¹ guarantees of resource revenue sharing through royalty payments to Aboriginal parties;⁹² detailed provisions regarding economic measures designed to benefit Aboriginal parties.⁹³ There is a common thread running through these agreements, and it will run through any eventual land claim agreement with the MMF: the right of the Aboriginal party—the Manitoba Metis Community—to share in the wealth generated by its territory so that it may survive and flourish.

80. Viewed in the context of the strength of the MMF’s rights, claims, and interests in southern Manitoba, the pressure that the Métis in southern Manitoba must bear in exercising their rights and asserting their traditions, and the ongoing land claims negotiations, it is incumbent on the CEC to make recommendations that will ensure that the MMF will reap an equitable share of the economic benefits that the MMTP is expected to produce. Reconciliation depends on it.

F: A NEW PATH IN MANITOBA IS REQUIRED

81. For reconciliation to mean anything, it must be more than just a word. Reconciliation requires action. Manitoba’s *Path to Reconciliation Act* acknowledges this, listing “action” as one of reconciliation’s animating principles: “[r]econciliation is furthered by concrete and constructive action that improves the present and future relationships between Indigenous and non-Indigenous peoples.”⁹⁴

82. Among the required “concrete and constructive action,” the *Path to Reconciliation Act* lists “measures to advance reconciliation” and “initiatives to advance reconciliation across all sectors of society, including interdepartmental, intergovernmental, corporate and community initiatives.”⁹⁵ The MMF agrees that it is imperative that Manitoba adopt such measures and initiatives. The province has fallen well behind other jurisdictions, which have already implemented meaningful mechanisms to ensure that Aboriginal communities derive economic benefits from projects in their traditional territories.

⁹¹ *Inuit of Nunavut Land Claim Agreement*, Article 26.2.1 [MMF Submissions, Tab 22 at 427]; *Labrador Inuit Land Claim Agreement*, Articles 6.7.1 and 7.7.2 [MMF Submissions, Tab 23 at 439, 450]; *Tlicho Land Claims and Self-Government Agreement*, Article 23.4.1 [MMF Submissions, Tab 24 at 464].

⁹² *Gwich’in Land Claim Agreement*, Ch. 9 [MMF Submissions, Tab 25 at 468]; *Maa-Nulth First Nations Final Agreement*, Ch. 17 [MMF Submissions, Tab 26 at 470–471]; *Sahtu Dene and Metis Land Claim Agreement*, Ch. 10 [MMF Submissions, Tab 27 at 474].

⁹³ *Tlicho Land Claims and Self-Government Agreement*, Ch. 26 [MMF Submissions, Tab 28 at 476–479]; *Sahtu Dene and Metis Land Claim Agreement*, Ch. 12 [MMF Submissions, Tab 29 at 482–483]; *Gwich’in Land Claim Agreement*, Ch. 10, [MMF Submissions, Tab 30 at 486–487].

⁹⁴ *The Path to Reconciliation Act*, SM 2016, c 5, s. 2 [MMF Submissions, Tab 42 at 685–686].

⁹⁵ *The Path to Reconciliation Act*, SM 2016, c 5, s. 3(1)(a) & (b) [MMF Submissions, Tab 42 at 686].

83. British Columbia, for example, has a number of initiatives that encourage the negotiation of revenue sharing or economic benefit agreements with First Nations on whose territory development is proposed. The situation of many of these First Nations is similar to that of the MMF, in that they never signed historic treaties and are currently engaged in the modern treaty process. The following initiatives could serve as examples for Manitoba to follow:

- i) First Nations Clean Energy Business Fund Revenue Sharing Agreements between British Columbia and First Nations (treaty and non-treaty) provide revenue sharing opportunities in relation to clean energy projects.⁹⁶
- ii) Forest Consultation and Revenue Sharing Agreements with both treaty and non-treaty communities in British Columbia with direct economic benefits based on harvesting activities taking place in their traditional territories.⁹⁷
- iii) Natural Gas Pipeline Benefits Agreements provide economic benefits to treaty and non-treaty First Nations in British Columbia potentially affected by liquid natural gas pipeline development—linear corridor infrastructure similar to transmission lines.⁹⁸

84. Ontario's Long-Term Energy Plan serves as another example to follow, containing strong language directing that Aboriginal groups be involved in and benefit from new transmission projects:

The government [of Ontario] expects to see Aboriginal involvement become the standard for the future of major, planning transmission lines in Ontario. First Nation and Métis communities are interested in a wide range of opportunities—from procurement to skills training to commercial partnerships. When new, major transmission line needs are identified, the companies looking to develop the proposed lines will, in addition to fulfilling consultation obligations, work to involve potentially affected First Nations and Métis communities, where commercial feasible and where there is an interest.⁹⁹

85. To encourage Aboriginal participation in energy development, Ontario has adopted a suite of tools, including the following:

⁹⁶ See MMF Submissions, Tab 31, for a list of current First Nations Clean Energy Business Fund Revenue Sharing Agreements; see MMF Submissions, Tab 32 for an example of one of these agreements, made with the Kwantlen First Nation (a non-treaty First Nation).

⁹⁷ See MMF Submissions, Tab 33, for a list of current Forest Consultation and Revenue Sharing Agreements; see MMF Submissions, Tab 34, for an example of one of these agreements, made with the Adams Lake Indian Band (a non-treaty First Nation).

⁹⁸ See MMF Submissions, Tab 35, for a list of current Natural Gas Pipeline Benefits Agreements; see MMF Submissions, Tab 36, for an example agreement, made with Gitanyow First Nation (a non-treaty First Nation; currently negotiating an Agreement in Principle).

⁹⁹ Ontario, Long-Term Energy Plan at 69–70 [MMF Submissions, Tab 37 at 620–621].

- i) price adders and contract set-asides for Aboriginal-led or partnered renewable energy projects;¹⁰⁰
- ii) the *Aboriginal Loan Guarantee Program*, which helps Aboriginal communities secure financing for their equity participation in clean energy and transmission projects;¹⁰¹
- iii) the *Aboriginal Energy Partnership Program*, which provides financial support to eligible Aboriginal communities to help them develop economically viable projects and make clean energy choices;¹⁰²
- iv) the *Independent Electricity System Operator's Energy Partnerships Program*, which supports First Nations and Métis Communities in assessing and developing renewable energy projects;¹⁰³ and
- v) a ministerial direction to the effect that capacity funding be provided to Aboriginal communities that are exploring equity positions in major transmission projects in Ontario.¹⁰⁴

86. Manitoba can and ought to adopt similar measures and initiatives to advance reconciliation, and the CEC has an important part to play in encouraging that to happen. The CEC's purpose includes "providing advice and recommendations to the minister [of sustainable development]."¹⁰⁵ The Minister, for her part, is, as a member of Manitoba's Executive Council, responsible "to promote measures to advance reconciliation through the work of the member's department and across government."¹⁰⁶ The MMF urges that the CEC play its part in advancing reconciliation by recommending that the Minister adopt measures and initiatives, such as those set out above, to ensure that Aboriginal groups have access to an equitable share of the economic benefits resulting from the development of their territories. It is an essential step towards the creation of a more equitable and inclusive society. It is an essential step towards reconciliation.

G: CONDITIONS AND RECOMMENDATIONS SOUGHT

87. The MMF respectfully requests that the CEC make the following Project-specific licensing conditions to the Minister in its report regarding the MMTP:

¹⁰⁰ Ontario, Long-Term Energy Plan, at 69 [MMF Submissions, Tab 37 at 620].

¹⁰¹ Ontario, Long-Term Energy Plan, at 69 [MMF Submissions, Tab 37 at 620].

¹⁰² Ontario, Energy Partnerships Program [MMF Submissions, Tab 38 at 642–645].

¹⁰³ Independent Electricity System Operator, Energy Partnerships Program Partnership Rules [MMF Submissions, Tab 39 at 646].

¹⁰⁴ Direction from Minister of Energy (25 August 2011) [MMF Submissions, Tab 40 at 681–682].

¹⁰⁵ *The Environment Act*, CCSM c E125, s. 6(1)(a).

¹⁰⁶ *The Path to Reconciliation Act*, SM 2016, c 5, s. 3(2) [MMF Submissions, Tab 42 at 686].

- i) That Manitoba Hydro be directed to come to a mutually agreeable arrangement with the MMF to address the outstanding issues identified in the MMF Report in relation to minimizing impacts of the MMTP on the Manitoba Metis Community; and
- ii) That Manitoba Hydro be directed to come to a mutually agreeable arrangement with the MMF so as to ensure that the Manitoba Metis Community will benefit from an equitable share of the economic benefits created by the MMTP;

88. The MMF respectfully requests that the CEC make the following non-licensing recommendations to the Minister in its report regarding the MMTP:

- i) That the Minister adopt future measures and initiatives to ensure that Aboriginal groups have access to an equitable share of the economic benefits resulting from the development of their territories;
- ii) That Manitoba Hydro strive to better reflect the complex interrelationship between Aboriginal people and the environment, through obtaining information about Project impacts and cumulative effects directly from Aboriginal communities and harvesters rather than by relying on current use and biophysical markers; and
- iii) That an Aboriginal perspective be meaningfully, not narratively, incorporated into effects and cumulative effects assessments by Manitoba Hydro.

All of which is respectfully submitted on this 16th day of June 2017.



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