ENVIRONMENT ACT APPEAL

In the matter of Environment Act Licence No. 3288, dated April 4, 2019, issued to Manitoba Hydro for the construction, operation, and decommissioning of the Manitoba-Minnesota Transmission Project which includes an international power line and modifications to the existing Dorsey Converter Station, the Riel Converter Station, and the Glenboro international power line

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ENVIRONMENT ACT APPEAL
OF THE MANITOBA METIS FEDERATION

Environment Act Licence No. 3288 dated April 4, 2019

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PART I OVERVIEW

1. The Manitoba Metis Federation Inc. (the "**MMF**") seeks to quash, or in the alternative vary, the Government of Manitoba's ("**Manitoba's**") decision of April 4, 2019, to issue Licence No. 3288 (the "**Licence**" and the "**Licence Decision**") pursuant to section 12(1) of *The Environment Act*, C.C.S.M. c. E125 ("***The Environment Act***") to Manitoba Hydro ("**Hydro**") for the construction, operation, and decommissioning of the Manitoba-Minnesota Transmission Project ("**MMTP**" or "**Project**").

2. The Licence should be quashed for the following six reasons:

a) the Licence does not comply with the requirements of *The Environment Act*;

b) the Licence was issued in breach of the provincial Crown's duty to consult;

c) the Licence was issued in a manner that breached Manitoba's obligations pursuant to *The Path to Reconciliation Act* C.C.S.M. c. R30.5 ("***The Reconciliation Act***");

d) the Licence was issued in breach of the honour of the Crown;

e) the Licence was issued by a biased decision-maker and following a pre-determined result; and

f) the Licence was issued in breach of the provincial Crown's administrative and procedural fairness duties.

3. In the alternative, the Licence should be varied as set out in Part 5 below.

4. This appeal is about whether the Crown's constitutional, statutory, and procedural fairness duties to the Manitoba Métis Community will be upheld in relation to the Project.

5. The Project cuts through the heart of the Manitoba Métis Community's traditional territory. It will permanently—and measurably—impact the lands that are the birthplace of the Métis Nation—in the province that they were partners in creating—for generations to come.

6. As further outlined below, Manitoba's conduct in relation to the Project has not upheld the honour of the Crown or fulfilled its duties to the Manitoba Métis Community and has placed the goal of reconciliation in jeopardy. This appeal represents the opportunity for Manitoba to correct its course and demonstrate that reconciliation in Manitoba is not a fiction.

PART II FACTS

A. The Manitoba Métis Community

7. The Manitoba Métis Community is a distinct "indigenous" and "aboriginal" community that emerged in the Red River Valley in the early 1800s. It has its own origin story, identity, language (Michif), national symbols, art, dance, music, self-government, laws, and traditional territory. It has been acknowledged and recognized as a distinct Métis community by the Supreme Court of Canada,[1] Manitoba courts,[2] and by other governments.[3]

8. The Manitoba Métis Community is a part of a larger Métis people—the Métis Nation. The Métis Nation is one of the "aboriginal peoples of Canada" within section 35(2) of the *Constitution Act, 1982*. The Métis Nation has been acknowledged and recognized by other governments[4] and the Supreme Court of Canada[5] as an 'aboriginal' and 'indigenous' peoples.

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1 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14.

2 *R v Goodon*, 2008 MBPC 59.

3 Framework Agreement for Advancing Reconciliation between the MMF and the Government of Canada, executed on November 15, 2016.

4 Canada-Métis Nation Accord between the Government of Canada and the Métis Nation of Canada, executed on April 13, 2017.

5 *Alberta Aboriginal Affairs and Northern Development v Cunningham*, 2011 SCC 37; *Daniels v Canada Indian Affairs and Northern Development*, 2016 SCC 12; *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14.

B. Métis Rights, Interests, and Unresolved Claims

9. The Manitoba Métis Community's rights, interests, and claims fall into three broad categories:

a) established and recognized Aboriginal rights and related interests in land, which engage the Crown's fiduciary duties;

b) asserted rights, interests, and claims, including Aboriginal title and specific pre-existing interests in lands, which trigger the Crown's duty to consult and accommodate and asserted jurisdiction and law-making power as the Métis self-government; and

c) a recognized and as of yet unsatisfied claim relating to land flowing from section 31 of the *Manitoba Act, 1870*, to which the honour of the Crown attaches.

Established and recognized section 35 rights, inherent jurisdiction, and law-making power

10. Based on its emergence prior to the Crown's assertion of sovereignty or settler governments effecting political or legal control in the Red River Valley and the 'Old Northwest,' the Manitoba Métis Community holds pre-existing and communal Aboriginal rights and interests in and over lands throughout its traditional territory. It also holds the inherent right to self-government. The descendants of the historic Manitoba Métis Community, who form the modern-day community that connects to this pre-existing community, continue to collectively-hold these rights today.

11. These Métis rights and interests in specific lands are protected as "aboriginal rights" by section 35(1) of the *Constitution Act, 1982*. These section 35 Métis rights have not been modified, exchanged, or "extinguished" by way of a negotiated agreement with the Crown

(e.g., treaties) or by any other agreement or legislative means, including, but not limited to, the *Natural Resources Transfer Agreement, 1930*.[6]

12. Some aspects of the Manitoba Métis Community's harvesting rights have been judicially recognized throughout southern Manitoba.[7] As affirmed by the Supreme Court of Canada, such rights are "recognize[d] as part of the special aboriginal relationship to the land"[8] and are grounded on a "communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land."[9] Importantly, courts have also recognized that Métis harvesting rights may not be limited to unoccupied Crown lands.[10]

13. The MMF-Manitoba Points of Agreement on Métis Harvesting executed on September 29, 2012 (the "**MMF-Manitoba Harvesting Agreement**"), recognizes the Manitoba Métis Community's section 35 harvesting rights throughout 169,584.04 km^2 of southern and central Manitoba (the "**Recognized Métis Harvesting Area**"). The Project is entirely within the Recognized Métis Harvesting Area.

Strong assertions of Métis rights, interests and claims

14. In addition to the Métis harvesting rights that have been established through litigation or recognized in agreements with the Crown, the Manitoba Métis Community also asserts:

a) self-government rights, jurisdiction, and law-making power;

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6 *R v Horseman*, [1990] 1 SCR 901.

7 See, for example, *R v Goodon,* 2008 MBPC 59.

8 *R v Powley*, 2003 SCC 43 at para 50.

9 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 5.

10 *R v Kelley,* 2007 ABQB 41 at para 65.

b) commercial and trade related rights within Manitoba and beyond;

c) exclusive use and occupation of specific locations and areas of Manitoba prior to the Crown's assertion of sovereignty that gives rise to Aboriginal title; and

d) other outstanding land related claims flowing from the *Rupert's Land and North-Western Territory Order, 1870*, the *Dominion Lands Act*, and the resulting Métis land scrip system.

15. These are strong assertions, well founded in the historical records and the customs, practices, and traditions of the Manitoba Métis Community. It is incumbent on the Crown to take them seriously and consult with the Manitoba Métis Community when its actions have the potential to adversely impact them.

Recognized and unaddressed section 31 claim

16. In *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14 ("***MMF***"), the Supreme Court of Canada recognized the Manitoba Métis Community's outstanding land related collective claim against the federal Crown flowing from section 31 of the *Manitoba Act, 1870* and issued the following declaration to the MMF: "[t]hat the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown."[11] The Court also held that as this "constitutional grievance" remains outstanding, "the ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied."[12]

17. The land promised was a nation-building, constitutional compact that was meant to secure a "lasting place in the new province [of Manitoba]"[13] for future generations of the Métis

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11 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 154.

12 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 140.

13 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 5.

people. This "lasting place" was to have been achieved by providing the Manitoba Métis Community a "head start"[14] in securing lands in the heart of the new province that the Métis were partners in creating.

18. Instead, the federal Crown was not diligent in its implementation of section 31, which effectively defeated the purpose of the constitutional compact.[15] This constitutional breach is an outstanding Métis claim flowing from a judicially-recognized common law obligation[16] which burdens the federal Crown. It can only be resolved through good faith negotiations and a just settlement with the MMF.[17] Lands both within the 'old postage stamp province' as well as in other parts of Manitoba—since little Crown lands remain within the 'old postage stamp province'—may need to be considered as part of any future negotiations and settlement in fulfillment of the promise of 1.4 million acres.

19. On November 15, 2016, the MMF and the Government of Canada ("**Canada**") signed a Framework Agreement for Advancing Reconciliation [the "**Framework Agreement**"] establishing a formal negotiation process to:

> jointly develop a renewed nation-to-nation, government-to-government relationship between the Crown and the Manitoba Métis Community . . . and arrive at a shared solution that advances reconciliation between the Parties

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14 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at paras 5–6, 9.

15 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14.

16 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at paras 156, 212.

17 *R v Sparrow*, [1990] 1 SCR 1075 at paras 51–53; *R v Van der Peet*, [1996] 2 SCR 507 at paras 229, 253; *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 20; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 32.

> consistent with the purpose of section 35 . . . and the Supreme Court of Canada's decision in [*MMF*].[18]

20. The negotiations between the MMF and Canada under the Framework Agreement are active and ongoing, but the "rift" recognized by the Supreme Court of Canada remains unaddressed.

C. The Manitoba Metis Federation

21. The MMF is an "indigenous" and "aboriginal" government created by and for the Manitoba Métis Community. It is the modern-day manifestation of the Métis Nation's inherent right to self-government and self-determination as an Indigenous people within Manitoba.

22. More specifically, the MMF Inc. was incorporated in 1967 under *The Corporations Act*, C.C.S.M, C225 "as a body corporate in order to conduct financial and administrative affairs relating to the Manitoba Métis Community and to otherwise carry out its objectives" as set out in the bylaws and constitution adopted by the MMF's members.[19] The MMF is a continuation and exercise of the Manitoba Métis Community's self-government rights today.

23. The MMF maintains a centralized registry of its members who are citizens of the Métis Nation and members of the Manitoba Métis Community based on the processes set out in its bylaws and constitution. The MMF is authorized by its members "to provide responsible and accountable governance on behalf of the Manitoba Métis Community," including, *inter alia*, advancing the recognition of the community's rights protected by section 35(1) of the

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[18] Framework Agreement between the MMF and Canada, executed on November 15, 2016, at article 1.1.1.

[19] Manitoba Metis Federation Inc. Constitution, ratified September 24, 2017, Preamble ("**MMF Constitution**").

Constitution Act, 1982, and ensuring the "community is fully consulted and accommodated when a decision or project is contemplated that may affect [those] collective Métis rights."[20]

D. The Project

24. Hydro is proposing to construct and operate the MMTP, which includes the construction and operation of a 213 km-long, 500 kV, international power line and modifications to the Dorsey Converter Station, the Riel international power line and Converter Station, and the Glenboro international power line and Station.

25. This Project cuts through the heart of the Manitoba Métis Community's homeland and the birthplace of the Métis Nation. 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 there, 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.

E. History and Context

26. Crown decisions are not—or should not be—made in a vacuum. In order to understand the issues raised in this appeal, the Licence Decision must be viewed in light of the history and context that preceded and informed it, including:

a) the Crown agreements and delegated processes related to the MMTP, including the Turning the Page Agreement (2014) and the MMF-Hydro funding agreement contract (2016), bilateral negotiation process between the MMF and Hydro

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[20] MMF Constitution, Article I, section 5; Resolution No. 8.

(2017), and the Major Agreed Points (July 2017) as an accommodation agreement the MMF reached with Hydro;

b) the MMF Study that provided quantified and verified evidence—that was agreed to by Hydro—of the significant impacts and adverse effects of the Project on the Aboriginal Rights of Métis and the Manitoba Métis Community;

c) the MMF's implementation and reliance on the Major Agreed Points (2017) including as evidenced in the National Energy Board regulatory process for the Project;

d) Manitoba's March 21, 2018, decision, its aftermath, and Manitoba's pre-judgment of whether accommodation was required,;

e) the impoverished Crown consultation process related to the Project, including the inability to consult with MMF citizens and harvesters following Manitoba's March 21, 2018, decision, and refusal of the Crown to meet;

f) the MMF's reliance on the Major Agreed Points as an accommodation agreement that addresses impacts and adverse effects of the Project in the Crown consultation and licencing process;

g) Manitoba's failure to take any steps to remedy the gaps, errors, and omissions in its Crown consultation process and considerations following March 21, 2018;

h) Manitoba's April 4, 2019, Licence Decision; and

i) Manitoba's after-the-fact notification that did not address the MMF's concerns or the Project's outstanding impacts.

Crown agreements and delegated processes related to MMTP

The Turning the Page Agreement (2014)

27. On November 26, 2014, the *Kwaysh-kin-na-mihk la paazh Agreement* (the "**TPA**" or "**Turning the Page Agreement**") was signed by the MMF, Manitoba, and Hydro (the "**TPA Parties**"). Its purpose was to "build a forward-looking, productive and non-adversarial working

relationship" between the TPA Parties.[21] It also expressly addressed the "Aboriginal Rights of Métis," which are referred to 13 times in the agreement and defined as follows:

> Aboriginal Rights of Métis means the rights of the Métis recognized and affirmed under s. 35 of the *Constitution Act, 1982*[22] (the "**Aboriginal Rights of Métis**").

28. In the TPA, the Aboriginal Rights of Métis were addressed through a series of mutually agreeable payments, commitments, and carefully-crafted reconciliation processes. Specifically, in exchange for payments from Hydro[23] as well as a series of legally binding commitments and processes to address the Aboriginal Rights of Métis, the MMF agreed to:

a) withdraw two active licensing appeals filed against Manitoba's approval of the Bipole III and Keeyask projects that were grounded on the provincial Crown's breaches of duty to consult and accommodate owing to the Manitoba Métis Community in relation to those projects;[24]

b) not initiate legal proceedings respecting the violation of Aboriginal Rights of Métis in relation to specific Hydro projects for the duration of the TPA;[25] and

c) provide its "support" in relation to specific Hydro development projects that impact the Aboriginal Rights of Métis as defined by the TPA.[26]

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21 *Kwaysh-kin-na-mihk la paazh Agreement* ("Turning the Page Agreement" or "TPA"), executed on November 26, 2014, Preamble, para A.

22 TPA, Article 1.2.1: Definitions.

23 The TPA commits approximately $20 million over 20 years payable to the MMF.

24 The MMF can no longer seek to quash past licences issued to Hydro by Manitoba through judicial review. The Respondents have obtained the benefit they sought, however, they have now reneged on the corollary benefits promised to the MMF in the TPA. While potential claims for damages may be pursued, the MMF's procedural consultation rights in relation to these projects are now gone forever. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 51–54.

25 TPA, Article 3.1.1(c).

26 TPA, Preamble, para F at 2.

29. The legally binding commitments and processes to address the Aboriginal Rights of Métis in the TPA expressly provided the following:

a) **a delegation or authorization** to Hydro to **bilaterally engage** with the MMF to address any "Unaddressed Impacts" of Bipole III and Keeyask projects agreed to by Hydro and the MMF "through a variety of additional offsetting, mitigation, or, if necessary, compensation measures **through negotiated agreement(s)**";[27]

b) that Manitoba would **only** become engaged in the bilateral process established between Hydro and the MMF in relation to Bipole III and Keeyask under Articles 4.1.1 and 4.1.2 of the TPA **if** there was a "dispute" about "the existence of an impact or in relation to whether additional offsetting, mitigation, or compensation measures are required";[28]

c) **a delegation or authorization** to Hydro to **bilaterally engage** with the MMF on "Future Developments" advanced by Hydro to identify potential "impacts" from those developments, and, if Hydro and the MMF agreed that there were impacts "that have not been addressed through existing planning, design, construction, and mitigation of a Future Development, such impacts may be addressed through a variety of additional offsetting, mitigation, or, if necessary, compensation measures **through negotiated agreement(s)**";[29] and

d) a commitment by the TPA Parties to participate in a dispute resolution process that includes a meeting of the MMF President, the President and CEO of Hydro, and the provincial Minister responsible for Hydro **prior to** taking any action in relation to the "interpretation or implementation" of the TPA.[30]

30. Article 7.1.6 of the TPA states that "[t]his Agreement is legally binding and enforceable against the [TPA] Parties."[31]

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27 TPA, Articles 4.1.1 and 4.1.2.

28 TPA, Article 4.1.3.

29 TPA, Articles 4.3.1 and 4.3.2. Similar to Articles 4.1.1 and 4.1.2, the TPA provides for no involvement of Manitoba in these TPA-authorized bilateral engagements and/or "negotiated agreement(s)" to address "impacts" from "Future Developments."

30 TPA, Articles 5.1.1 and 5.1.3.

31 TPA, Article 7.1.6.

Implementing the commitments in the TPA (2015 to 2017)

31. Between 2015 and 2017, the TPA Parties proceeded to implement the TPA as they were all legally obligated to do. This implementation, *inter alia*, included:

a) Hydro making all payments under the TPA to the MMF;

b) each TPA Party appointing representatives to the Tripartite Steering Committee (the "**TSC Committee**") in order to "provide oversight of the implementation" of the TPA;[32] and

c) the MMF and Hydro engaging in the contemplated bilateral processes under the TPA to deal with Bipole III, Keeyask, and Future Developments—which included for the MMTP negotiating a workplan, funding agreement, and process for how to identify impacts on the Aboriginal Rights of Métis and address such impacts "through a variety of additional offsetting, mitigation, or, if necessary, compensation measures through negotiated agreement(s)."[33]

MMF-Hydro workplan on MMTP (January 2016)

32. Flowing from the legally-binding commitments and authorizations in the TPA, in January 2016, the MMF and Hydro negotiated and signed a mutually agreeable workplan and contribution agreement (the "**Contract**"). The Contract—consistent with the TPA—outlined how the MMF and Hydro were going to identify, and, where the MMF and Hydro agreed, address any identified, unaddressed impacts of the Project on the Aboriginal Rights of Métis. The Contract is legally binding and remains in place today.

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[32] TPA, Article 5.1.1(a).

[33] TPA, Articles 4.3.1 and 4.3.2. Similar to Articles 4.1.1 and 4.1.2, the TPA provides for no involvement of Manitoba in these TPA-authorized bilateral engagements and/or "negotiated agreement(s)" to address "impacts" from "Future Developments."

The MMF Study identified significant, quantifiable, and verified impacts and adverse effects of the MMTP on Métis rights (July 2016)

33. Central to this MMF-Hydro bilateral process—and as set out in the Contract—was a Métis Traditional Knowledge and Land Use Study (the "**MMF Study**") to be prepared by an independent consultant.[34] The MMF Study was undertaken—and funded by Hydro—to address acknowledged deficiencies in its Environmental Impact Statement ("**EIS**") for the Project in relation to understanding and identifying the unaddressed impacts of the MMTP on the Aboriginal Rights of Métis. For example, while Hydro's EIS identifies the MMTP's effects on wildlife, plants, and other things, the MMF Study identifies the Project's adverse effects on the Aboriginal Rights of Métis and Manitoba Métis Community.

34. Notably, while the MMF Study addressed the commitments in the TPA, it was also consistent with the Supreme Court of Canada's direction that Crown consultation and accommodation must focus on understanding impacts to Aboriginal rights "as *rights*, rather than as an afterthought to the assessment of environmental concerns."[35] As further outlined below, this is what the MMF Study does: it captures the distinct Métis perspective as well as the impacts of the Project on section 35 Métis rights, including a mutually agreeable process developed with Hydro to **measure, quantify, and address those impacts**.

35. The MMF Study was completed in July 2016. It documented significant, outstanding impacts of the Project on the Aboriginal Rights of Métis that required further actions to address

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[34] Calliou Group, *Métis Specific Interests Report: Assessment of Potential Effects Prior to Mitigation for the Manitoba-Minnesota Transmission Project*, prepared for Manitoba Hydro, and Manitoba Conservation and Water Stewardship on behalf of the MMF, dated July 2016, at 5–9 (the "**MMF Study**").

[35] *Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 51.

even *after* the mitigation measures already proposed in its EIS were implemented (e.g., it assumed all environmental mitigation measures were already in place and implemented, and measured impacts and adverse effects from that baseline).

36. With respect to section 35 Métis harvesting rights, the MMF Study provided evidence that, among other matters:

a) the Manitoba Métis Community uses the Project area for hunting, trapping, fishing, berry picking, plant, mushroom and medicine gathering, tree and tree product gathering, and rock and mineral gathering;[36]

b) 98% of Métis harvesters surveyed indicated specific sites of use within the Regional Assessment Area ("**RAA**"), Local Assessment Area ("**LSA**") and Project Development Area and ("**PDA**");

c) 73% of Métis hunters and 60–72% of Métis gatherers (depending on the materials being gathered) will avoid a transmission line when exercising their harvesting rights to hunt and gather;[37] and

d) 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 Study, "Unoccupied Crown Land."[38]

37. In addition, as further outlined below, the MMF Study—unlike Hydro's EIS—also specifically focused on and identified the adverse effects of the Project on the Métis *as people* using the impacted land.

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36 MMF Study at 5–9.

37 MMF Study at 4.

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

CEC hearing (May to June 2017)

38. The MMF participated extensively in the CEC Hearing for the Project. It submitted opening statements, information requests, written evidence, cross-examined Hydro's experts, put up an expert panel and a traditional knowledge panel, and gave final oral and written submissions.[39]

39. The MMF's evidence and submissions focused on the fact that Hydro's EIS did not adequately characterize or address the effects of the MMTP on the Manitoba Métis Community, specifically the effects on the exercise of Métis rights, considered from the perspective of the rights-holders themselves. This is a common issue in environmental assessments, which are often scoped too narrowly—using purely biophysical markers (e.g., impacts on moose populations)—to properly assess impacts to Aboriginal rights (e.g., Métis harvesting of moose). In order to understand the impact on Métis rights, *as rights*, the person exercising that right—their experiences, preferences, where they say they will and will not harvest and under what circumstances—is a critical consideration.

40. Both the MMF Study and the evidence given by the MMF during the CEC Hearing demonstrated that there will be significant effects to the exercise Métis rights that were not—and

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[39] MMF Opening Comments, CEC MMTP, dated May 8, 2017 [MMF-001]; Written Submissions of the MMF, CEC MMTP, dated May 23, 2017 [MMF-003]; Métis Land Use Occupancy Study Presentation, CEC MMTP, dated May 30, 2017 [MMF-004]; Written Responses to Questions Submitted to the MMF, CEC MMTP [MMF-005]; MMF Final Written Submissions, CEC MMTP, dated June 16, 2017 [MMF-006]; Manitoba Hydro Responses to MMF Information Requests, CEC MMTP IR Round 1 Part 2 [A91072-9], CEC MMTP Transcript of Proceedings, Volume 1, May 8, 2017 at 188; CEC MMTP Transcript of Proceedings, Volume 2, May 9, 2017 at 357; CEC MMTP Transcript of Proceedings, Volume 3, May 10, 2017 at 655; CEC MMTP Transcript of Proceedings, Volume 6, May 16, 2017 at 1360; CEC MMTP Transcript of Proceedings, Volume 7, May 1, 2017 at 1625; CEC MMTP Transcript of Proceedings, Volume 8, May 18, 2017 at 1839; CEC MMTP Transcript of Proceedings, Volume 14, May 30, 2017 at 3102.

cannot—be addressed through Project design and environmental mitigation measures as found in the EIS and related documents (e.g., the Environmental Protection Plan). These effects flow from the fact that the Project will be routed, in part, on unoccupied Crown lands, in an area where undisturbed Crown lands are growing scarcer and scarcer. The alteration of any of these lands has significant impacts to the exercise of Métis rights in the Project area.

41. In the CEC Hearing, the MMF argued that Hydro's conclusion in its EIS—that there would be no significant effects to Traditional Land and Resource Use ("**TLRU**") [40]—was based on false premises. Hydro acknowledges in its EIS that "the scope of [its] measurable parameters does not reflect the importance of these potential changes to First Nations and Métis."[41] Hydro knew that the approach taken in the EIS to assess the effects of the MMTP on the Manitoba Métis Community would not reflect the Métis perspective.[42] Hydro explained its decision to proceed in this manner as follows:

> First Nations and Métis 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**

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40 Supplemental Report—Manitoba Hydro Articles How MMF Report Influenced MMTP [A91072-26].

41 Manitoba Hydro—Environmental Impact Statement at 11–13 [A81181-20].

42 In the MMF's cross-examination of Mr. Butch Amundson, Hydro's expert on TLRU during the CEC hearing, Mr. Amundson acknowledged that the measurable parameters chosen by Hydro (availability of resources and access to land) were not sufficient to present a complete picture of effects of the Project to Métis TLRU. MMTP CEC Transcript of Proceedings, Volume 8, May 18, 2017, at 1841:13–1842:5. Note that additional information on other places in the EIS that failed to take this into account are set out in the Written Submissions of the Manitoba Metis Federation to the CEC [A84535-9 MMF Part 1 Presentation – Exhibits].

> **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[43] [emphasis added].

42. The MMF Study demonstrates that it is possible to quantitatively capture qualitative information about the exercise of Métis rights and Métis perspectives and experiences of adverse effects. The MMF Study did, in fact, "put numbers" to it.[44] It created the evidentiary basis upon which the MMF and Hydro could negotiate "a variety of additional offsetting, mitigation, or, if necessary, compensation measures" to accommodate and address outstanding impacts of the Project on the Aboriginal Rights of Métis as committed to in the TPA.[45]

The MMF-Hydro negotiation process under the TPA on MMTP (March 1, 2017 to June 29, 2017)

43. Based on the evidence in the MMF Study regarding the impacts of the Project on the Aboriginal Rights of Métis, the MMF and Hydro met to discuss how to address those impacts. Consistent with the TPA provisions, where the MMF and Hydro agreed that there were impacts "that have not been addressed through existing planning, design, construction, and mitigation of a Future Development, such impacts may be addressed through a variety of additional offsetting, mitigation, or, if necessary, compensation measures through negotiated agreement(s)."[46]

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[43] Manitoba Hydro—Environmental Impact Statement at 11–14 [A81181-20] [emphasis added].

[44] This is in contradiction to Mr. Amundson's contention under cross-examination that "it's difficult to put numbers around that kind of thing." CEC MMTP Hearing Transcripts, Volume 8, May 18, 2017, at 1847: 3–7.

[45] *Clyde River* (*Hamlet*) *v Petroleum Geo Services Inc*, 2017 SCC 40 at paras 50–51.

[46] TPA, Articles 4.3.1 and 4.3.2. Similar to Articles 4.1.1 and 4.1.2, the TPA provides for no involvement of Manitoba in these TPA-authorized bilateral engagements and/or "negotiated agreement(s)" to address "impacts" from "Future Developments."

44. On March 1, 2017, the MMF and Hydro signed a Memorandum of Understanding (the "**MOU**") in furtherance of—and consistent with—the bilateral processes contemplated under the TPA. The MOU established "a confidential and without prejudice Negotiation Process for a six (6) month period starting March 1, 2017" (the "**Negotiation Process**").[47]

45. The MOU expressly describes the Negotiation Process as having the goal of "achieving a mutual agreement to address issues, including issues associated with the Manitoba-Minnesota Transmission Project, St. Vital Transmission Complex, and Bipole III, through a comprehensive agreement or agreements."[48]

The Major Agreed Points (June 29, 2017)

46. The Major Agreed Points is an accommodation agreement in fulfillment of the commitments made to the MMF in the TPA and the Contract and is based on the evidence in the MMF Study.

47. The Major Agreed Points addresses the Aboriginal Rights of Métis in relation to the identified Hydro projects through payments from Hydro to the MMF and further reconciliation processes that provide that:

a) the Major Agreed Points "fully and finally address and satisfy all concerns of the Métis with respect to Existing Transmission Projects as well as Identified Projects, which include: Bipole III, MMTP, St. Vital, LWESI and Birtle Projects; and any Future Transmission Projects . . . undertaken by Hydro during the initial 20 years of the agreement";[49]

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47 Memorandum of Understanding ("**MOU**") between the MMF and Manitoba Hydro, dated March 1, 2017, Article 1.1.1.

48 MOU, Preamble, para B.

49 Major Agreed Points, article 3.

b) the MMF will provide to Hydro "full and final releases with respect to any impacts, including impacts on the exercise of Aboriginal Rights of Métis arising from the development and operation of the Identified Projects; Existing Transmission Projects; and Future Transmission Projects that are undertaken by Hydro during the initial 20 years of the agreement;"[50] and

c) it extended the claims free period under the TPA from 20 to 30 years with no additional compensation being paid under the TPA.[51]

48. In addition, the Major Agreed Points required that the MMF:

a) "support the development and ongoing operations of" the MMTP;[52]

b) support the MMTP, including "in any regulatory or licensing processes" for the Project, such as the National Energy Board ("**NEB**") hearing process and Crown licencing process;[53] and

c) "agree not to appeal or contest any approvals or licences issued with respect to any of the Identified Projects" including MMTP.[54]

49. On July 5, 2017, Hydro's board of directors resolved: "[t]hat the corporation be authorized to negotiate and sign a Relationship Agreement with the MMF [e.g., the Major Agreed Points]."[55]

50. On September 20, 2017, the MMF board of directors correspondingly formally ratified the Major Agreed Points.

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50 Major Agreed Points, article 8(d).

51 Major Agreed Points, article 8(g).

52 Major Agreed Points, article 8(a).

53 Major Agreed Points, articles 8(a)–(c): "The MMF will . . . support the development and ongoing operations of . . . the Identified Projects [which includes the MMTP] . . . Support MH [Manitoba Hydro] in any regulatory or licensing processes for the Identified Projects [and] Advise the National Energy Board that the MMF withdraws its submissions related to the MMTP."

54 Major Agreed Points, article 8(f).

55 Hydro Board Minute.

Implementation and reliance on the Major Agreed Points (July 2017 to March 2018)

51. From July 2017 onwards the MMF implemented its part of the "deal" set out in the Major Agreed Points. This included by limiting the scope of its participation in the NEB hearings related to the MMTP, as well as in the Crown consultation processes for the Project.[56] Throughout all of this period and at none of the TSC meetings did Manitoba make the MMF—in any way—aware that it had any concerns with the Major Agreed Points or TPA processes.

52. The NEB expressly acknowledged that—as a result of relying on the Major Agreed Points—the MMF did not exercise its procedural rights or introduce certain evidence and information before it:

> The Board . . . accepts the MMF's submission that the question [the legality of the Major Agreed Points] does not need to be answered in order for this document to be relevant. The Board does note that, as a result of the terms of the July 2017 document [the Major Agreed Points], the MMF refrained from taking certain actions within the hearing, including not filing any IR's regarding MH's evidence, as expressed in their letter of 28 March 2018 (A90869). The Board also notes that the MMF filed no written evidence in the proceeding, nor did they present Oral Traditional Evidence. Further, the Board is of the view that the IR Response contains information relevant to the Board's IR No. 1 to Intervenors [where the Board sought information on mitigation measures that addressed the MMF's concerns about impacts and adverse effects of the Project]."[57]

53. Notably, the MMF had no reason to outline the identified and agreed-upon impacts of the Project on the Aboriginal Rights of Métis because: (i) the Major Agreed Points "fully and

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[56] As further discussed below, Manitoba's silence as well as the MMF's reliance is relevant to the application of the honour of the Crown.

[57] NEB Ruling No. 14, Hearing Order EH-001-2017 Hydro Motion to Strike the Manitoba Metis Federation Response to Board Information Request No. 1 [A92734-3].

finally" addressed these impacts on the Aboriginal Rights of Métis, and, (ii) the MMF was legally-bound to support the Project in regulatory review and licencing processes.

Triggering the dispute resolution process under the TPA (January 2018)

54. On January 4, 2018, the MMF wrote to the other TPA Parties in relation to the implementation issues related to the Major Agreed Points as a "negotiated agreement" under the TPA.[58]

55. A series of TSC meetings were held between February 5, 2018, to March 8, 2018, but the dispute resolution process was not completed.

56. During the same period, the Crown consultation and the NEB process marched on. At no point did Manitoba raise any concerns with the MMF's reliance on the Major Agreed Points during this time.

Manitoba's March 21 Decision and aftermath

57. On March 21, 2018, without any notice to the MMF (advanced or otherwise), Manitoba—including, specifically Minister Squires who was subsequently involved in the Licence Decision—under the purported authority of section 13(1)(a)(i) of *The Crown Corporations Governance and Accountability Act*, issued Order-in-Council 82/2018 (the "**OIC**") that attached "*A Directive to Manitoba Hydro Electrical Board Respecting Agreements with Indigenous Groups and Communities*" (the "**Directive**").[59]

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[58] Letter from MMF to Hydro and Manitoba dated January 4, 2018.

[59] Manitoba OIC No. 82/2018 and Directive.

58. Part of the Directive includes the following Cabinet decision as an operational directive to Hydro:

> Manitoba Hydro is directed to not proceed with the agreement [e.g., the Major Agreed Points] with the Manitoba Metis Federation at this time[60] (the "**March 21 Decision**").

59. On March 21, 2018, the Premier of Manitoba, Brian Pallister, communicated the March 21 Decision to the public at a press conference with no warning or notice to the MMF. He stated that the Major Agreed Points was "the reason" for the resignation of nine Hydro board members who submitted their joint letter of resignation to Manitoba prior to the Premier's statements.[61] He referred to the Major Agreed Points as "persuasion money."[62] Later, he also referred to the MMF as nothing more than a "special interest group."[63]

60. On April 19, 2018—nearly a month after the decision was made—Manitoba provided the Directive and OIC to the MMF for the first time.[64] Manitoba has never provided reasons to the MMF for this decision.

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60 Manitoba OIC No. 82/2018 and Directive.

61 Letter from Hydro Board of Directors to the Minister of Crown Services dated March 21, 2018.

62 *Winnipeg Free Press*, "'Desperate' Pallister not telling truth, mismanaging issues: 'disappointed' former Hydro chair Riley says," March 22, 2018; *CBC*, "Former Hydro board chair says Pallister wrong about what led to mass exit of board members," March 22, 2018; *Globe and Mail*, "Former Manitoba Hydro chair takes aim at Premier Brian Pallister's account of board exodus," March 22, 2018; *Winnipeg Free Press* article, "Nine of 10 Pallister-picked Hydro board members quit, say premier won't discuss 'critical' issues, dated March 21, 2018.

63 *Winnipeg Free Press* article, "Nine of 10 Pallister-picked Hydro board members quit, say premier won't discuss 'critical' issues, dated March 21, 2018.

64 Letter from Manitoba Deputy Minister of Crown Services to MMF Chief of Staff, dated April 19, 2018.

61. At the MMF's insistence, on May 15, 2018, the MMF President, the President and CEO of Hydro, and the Minister responsible for Hydro finally met pursuant to the TPA's dispute resolution process. At that time, the Minister responsible for Hydro advised the other TPA Parties that the Decision was final. To date, Manitoba has not changed its position.

Impoverished provincial Crown consultation for MMTP

Lack of a meaningful—or reasonable—Crown consultation process (2015 to 2017)

62. On March 6, 2015, the MMF first wrote to Manitoba regarding the MMTP and to express concerns regarding the lack of any meaningful consultation and engagement about the Project. The MMF clearly communicated to Manitoba that it expected the TPA processes to apply to the MMTP. The MMF referenced the "recently signed Kwaysh-kin-na-mihk la paazh Agreement, which seeks to build a "forward-looking, productive and non-adversarial working relationship" between the MMF, Manitoba Hydro and the Manitoba Government" and outlined that the MMF viewed the Project "in the heart of the Métis Nation's Homeland—as an ideal opportunity to begin to 'turn the page' and truly advance reconciliation."[65]

63. On January 19, 2016, Manitoba wrote to the MMF to begin its Crown consultation process for the Project.

64. Over the following 28 months the MMF attempted to establish a meaningful Crown consultation process with Manitoba that took into account the unique nature of the Manitoba Métis Community and distinct Métis rights, interests, and claims impacted by the Project. After

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[65] Letter from MMF Minister Jack Park to Minister Eric Robinson, Minister of Aboriginal and Northern Affairs and Minister responsible for Manitoba Hydro, dated March 6, 2015.

over two years of protracted discussions—where Manitoba questioned everything from how many meetings the MMF required to which consultants the MMF proposed to hire—the MMF reluctantly agreed to a workplan and budget that provided for only one community meeting and the preparation of a summary report. The MMF never agreed that this could, or did, constitute meaningful consultation sufficient to fulfill the Crown's duty to consult and accommodate.

65. On July 5, 2017—the same month the MMF and Hydro concluded the Major Agreed Points—the MMF signed a Crown-Aboriginal Consultation Participation Fund Agreement on the MMTP with Manitoba based on this impoverished workplan and budget (the "**MMF-Hydro Funding Agreement**").

MMF's reliance on the Major Agreed Points in Crown consultation and licencing process (July 2017 onward)

66. On March 19, 2018—two days before the March 21 Decision—the MMF held the one and only community meeting provided for under Manitoba's Crown consultation process. At that meeting the MMF discussed with community members how the Major Agreed Points addressed outstanding community concerns, including unaddressed impacts on Métis rights, interests, and claims of the Manitoba Métis Community.

67. Based on the Major Agreed Point being in place—and consistent with its requirement that the MMF support the project in its licencing processes—the community meeting demonstrated support of the proposed way forward for the MMTP.

68. At no point before March 21, 2018, did Manitoba or Hydro indicate any concerns about the MMF relying on the Major Agreed Points in the licencing processes—including in Crown

consultation—as an accommodation agreement that on its face addressed "impacts on the exercise of Aboriginal Rights of Métis."

Manitoba's disingenuous and flawed Crown consultation process (March 21, 2018 to April 2019)

69. Following the March 21 Decision, the MMF attempted to initiate discussions with Manitoba regarding the need to address these issues and fill the gap in the Crown's consultation and accommodation duties with respect to the Project:

a) on September 12, 2018, MMF President David Chartrand raised these concerns directly in a meeting with Minister Mayer and Minister Clark, however, they indicated they had no ability to discuss these issues with the MMF;

b) on September 22, 2018, the MMF wrote to Manitoba regarding its concerns about "the significant and outstanding impacts on the rights, claims and interests of the Manitoba Métis Community that have not been addressed";[66] and

c) on October 1, 2018, the MMF wrote to Manitoba requesting a meeting on an urgent basis to discuss the MMF's outstanding concerns about unaddressed impacts of the Project on the Aboriginal Rights of Métis. The MMF stated that:

> there is an urgency to this request because Manitoba has not met with the MMF in over two years in relation to the Project and [Minister Squires] Cabinet colleagues (Minister Mayer and Clarke) as well as other Manitoba officials have refused to engage in any meaningful discussion or dialogue with the MMF about these outstanding issues.[67]

70. Notably, prior to March 21, 2018, the MMF and Manitoba had not had any meetings for two years and no substantive communication for over a year—specifically, Manitoba's

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[66] Letter from Jason Madden, legal counsel for MMF to Ms. Lori Stevenson, Chair, Manitoba Crown Consultation Steering Committee for MMTP, dated September 22, 2018.

[67] Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires Re: Manitoba-Minnesota Transmission Line Project, dated October 1, 2018.

communication record illustrated how exchanges with the MMF about the Project dropped off following July 2017 when the Major Agreed Points were reached.

71. The MMF's October 1, 2018, letter also outlined how Manitoba was failing to fulfill its duties owing to the Manitoba Métis Community in relation to the Project as follows:

a) Manitoba failed to properly understand, assess, and determine the nature and scope of the duty owed to the MMF in relation to the Project and is proceeding on an incorrect legal basis; and

b) Manitoba's approach to consultation with the MMF in relation to the Project is unreasonable because:

i) Manitoba is relying on a flawed consultation process;

ii) Manitoba's consultation record ignores relevant information and has substantial gaps in information about unaddressed impacts of the Project on Métis rights;

iii) Manitoba is refusing to talk to the MMF and shows no willingness to address MMF's concerns; and

iv) Manitoba has created a situation where there is no possibility of accommodation in the consultation process.

72. The MMF provided information, evidence, and submissions related to each of these points. Manitoba failed to correct these blatant and identified gaps, errors, and omissions in its final consultation record.

73. On November 19, 2018, the MMF had its one and only meeting with Manitoba. In that meeting Manitoba's representatives stated that they had no decision-making authority to discuss or agree—even in principle—to measures that could address the MMF's concerns. They stated that their role was to collect concerns and prepare the record for the decision-makers.

74. The MMF's one and only face-to-face meeting with the Crown was cut short by Manitoba and the agenda was not completed. By letter that same day the MMF raised concerns about Manitoba's approach to consultation as well as the bias of Minister Squires as the decision-maker:

> The MMF has significant, outstanding and ever-increasing concerns about Manitoba's approach to Crown consultation in relation to MMTP. The current Crown consultation process, as outlined by Manitoba officials today, provides no meaningful opportunity to dialogue or address these outstanding issues and concerns. In fact, Manitoba officials indicated today that they had no mandate or ability to deal with the substantive issues and concerns the MMF raised. Instead, they were simply collecting information and creating an inventory of concerns. This is not meaningful consultation. Moreover, it precludes any accommodation whatsoever. The MMF will be following up with Manitoba officials to outline these concerns in greater detail, since the Crown consultation chart and inventory of concerns prepared by Manitoba misunderstands, mischaracterizes and completely misses the mark in relation to the MMTP's impacts on Métis section 35 rights.[68]

75. On November 26, 2018, the MMF wrote to Manitoba to outline—for a third time—how Manitoba had:

a) mischaracterized the MMF's concerns;

b) failed to consider the adverse impacts that had been identified as being directly attributable to the MMTP;

c) dismissed, denied, and demonstrated a bias towards the adverse impacts identified by the MMF Study; and

d) substantial gaps and omissions in its Crown consultation record.[69]

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[68] Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires, dated November 19, 2018.

[69] Letter from Ms. Marci Riel, MMF Director of Energy and Infrastructure to Ms. Lori Stevenson, Chair, Manitoba Crown Consultation Steering Committee for MMTP, dated November 26, 2018.

76. The MMF offered to engage in a collaborative process with Manitoba to identify impacts, concerns, and to address the deficiencies in Manitoba's consultation record. The MMF stated that "in our view this was necessary to ensure that Manitoba understood the MMF's significant concerns and correctly identified unaddressed impacts, given the problems illustrated through Manitoba's unilateral approach that resulted in Appendix C [of its consultation record] and inaccurate and mischaracterized identification and assessment of the MMF's concerns and impacts." Manitoba rejected this collaborative approach.

77. The MMF's November 26, 2018, letter attached a chart of Adverse Effects, Outstanding Concerns, and Unaddressed Impacts (the "**Unaddressed Impacts Chart**"). The Unaddressed Impacts Chart was based on the MMF Study and outlined the real, quantifiable, and significant impacts on section 35 Métis rights and the Manitoba Métis Community that are directly attributable to the Project and will adversely impact the Manitoba Métis Community for generations to come. The MMF requested a meeting with Manitoba to further discuss these identified impacts and to meet with someone who could discuss and agree in principle with mutually-agreeable ways to address them.

78. The MMF's November 26, 2018, letter also referenced Manitoba's draft *Provincial Framework for Consultation with First Nations, Métis Communities and Local Aboriginal Communities* (the "**Provincial Consultation Framework**") that acknowledged the role that proponents—such as Hydro—and financial accommodation or mitigation agreements—such as the Major Agreed Points—have in the Crown consultation process in hopes that this would 'connect-the-dots' for Manitoba regarding the need to consider the Major Agreed Points in its

consultation process.[70] Specifically, the Provincial Consultation Framework defines "Accommodation" and "Mitigation" as:

> a) "Accommodation"—the obligation on a government to reasonably address concerns raised during the consultation by taking steps to avoid irreparable harm or to minimize the effects of the infringement on aboriginal and treaty rights or the adverse effects on the exercise of aboriginal and treaty rights. It may include activities by proponents to mitigate concerns raised through project design or other measures. Economic or financial accommodations may be considered where mitigative measures are insufficient and there is reasonable probability of permanent or ongoing infringement on aboriginal and treaty rights;
>
> b) "Mitigation"—efforts by proponents to reasonably address concerns raised by communities by taking steps to avoid irreparable harm or to minimize effects on Crown land and natural resources. Proponents may be able to mitigate concerns raised through project design or other measures. Economic or financial accommodations may be considered where mitigative measures are insufficient and there is reasonable probability of permanent or ongoing infringement on aboriginal and treaty rights.

79. Following its only meeting with Manitoba, the MMF wrote to Manitoba five times requesting meetings to discuss outstanding concerns related to unaddressed impacts of the Project on section 35 Métis rights and concerns with deficiencies in the Crown consultation process.[71]

80. Specifically, on February 4, 2019, the MMF outlined how it was being kept entirely in the dark and was "completely unaware of how—or if—Manitoba is considering our concerns

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[70] Manitoba's *Provincial Framework for Consultation with First Nations, Métis Communities and Local Aboriginal Communities* shared with the MMF by email dated March 5, 2018.

[71] The MMF sent letters to Manitoba on: November 26, 2018; November 30, 2018; December 17, 2018; February 4, 2019; and March 20, 2019.

[and how] it has been radio silence from Manitoba following our only meeting with your officials almost two months ago."[72] The MMF stated that:

> We are increasingly concerned that reconciliation is becoming a fiction in this province that we were founders in creating. Under these circumstances—where the Crown ignores our clearly communicated concerns, repeatedly turns a blind eye to Métis rights, and denies any possibility of accommodation for impacts to the Manitoba Métis Community—how can the MMF believe that consultation will be meaningful or that the honour of the Crown will be met?[73]

81. The MMF received no response to this letter.

Manitoba's Licence Decision (April 4, 2019)

82. On April 4, 2019, the Minister of Sustainable Development issued the Licence to Hydro pursuant to section 12(1) of *The Environment Act* for the construction, operation and decommissioning of the MMTP.

83. Manitoba did not respond to the multiple meeting requests to discuss the outstanding impacts of the Project on the Aboriginal Rights of Métis prior to the Licence Decision. Manitoba's April 4, 2019, letter stated that:

> Manitoba acknowledges [the MMF's] requests to meet with Manitoba representatives at a higher level than the Steering Committee, who are able to discuss outstanding concerns including [the MMF's] positions in relation to the Turning the Page Agreement and the Major Agreed Points of July 2017 with Manitoba Hydro. We also acknowledge that this request was reiterated in the

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[72] Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires, dated February 4, 2019.

[73] Letter from Ms. Marci Riel, MMF Director of Energy and Infrastructure to Ms. Lori Stevenson, Chair, Crown Consultation Steering Committee for MMTP, dated March 20, 2019.

> letter from Marci Riel, Director of Energy and Infrastructure. We can assure that this request has been clearly articulated in the Crown Consultation Final Report.[74]

Manitoba's after-the-fact notification did not fulfill the duty or address the MMF's concerns

84. On April 4, 2019, Manitoba wrote to inform the MMF of its Licence Decision and provide a copy of the Licence. This letter attached a "copy of the Record of Communication [with the MMF] and the Summary of Concerns as [Manitoba had] recorded and understood them, including Manitoba's responses to those concerns."[75]

85. The letter also stated that "The Final [Crown Consultation] Report put forward 30 recommendations to include new licence conditions or to strengthen existing conditions. Seventeen (17) of these recommendations respond specifically to concerns Manitoba heard from your community and are attached."[76]

86. None of the recommendations—or the conditions for the Licence—address the outstanding impacts of the Project on the Aboriginal Rights of Métis or the MMF's concerns about the adverse effects of the Project on the Manitoba Métis Community.

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[74] Letter from Lori Stevenson, Chair, Crown Consultation Steering Committee for MMTP to MMF President Chartrand, dated April 4, 2019.

[75] Letter from Lori Stevenson, Chair, Crown Consultation Steering Committee for MMTP to MMF President Chartrand, dated April 4, 2019.

[76] Letter from Lori Stevenson, Chair, Crown Consultation Steering Committee for MMTP to MMF President Chartrand, dated April 4, 2019.

The ongoing judicial review application does not challenge the Licence

87. On June 4, 2018, the MMF filed an application for judicial review of Manitoba's March 21 Decision. That application is currently proceeding through the courts.

88. Importantly, that judicial review does not challenge or seek to quash, vary, or overturn in any way the Licence that is the subject of this appeal. While some of the same facts, history, and context set out above are also relevant in that application, the judicial review and this appeal are separate and distinct.[77]

PART III APPEAL ISSUES

89. The Licence should be quashed for six reasons:

a) The Licence does not comply with the requirements of *The Environment Act*;

b) The Licence was issued in breach of the provincial Crown's duty to consult;

c) The Licence was issued in a manner that breached Manitoba's obligations pursuant to *The Reconciliation Act*;

d) The Licence was issued in breach of the honour of the Crown;

e) The Licence was issued by a biased decision-maker and following a pre-determine result; and

f) The Licence was issued in breach of the provincial Crown's administrative and procedural fairness duties.

90. In the alternative, the Licence should be varied, as set out in Part 5 below.

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[77] Among other things, the MMF notes that: the March 21 Decision is a different Crown decision than the Licence; the judicial review application was initiated prior to the Licence being issued (therefore it cannot address the Licence without amendment, which has not occurred); and this appeal seeks separate and distinct relief than is sought in the judicial review.

PART IV ARGUMENT

A. The Licence Does Not Comply With The Requirements of *The Environment Act*

91. The Minister—as the decision-maker under *The Environment Act*—must exercise their authority in accordance with the requirements, purpose, and intent of the Act.[78] The Supreme Court of Canada has stated that:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; **no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute**. . . . "Discretion" necessarily implies good faith in discharging public duty; **there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption**.[79]

92. As a matter of statutory interpretation "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."[80]

93. The purpose and intent of *The Environment Act* is:

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78 *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (HL): "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."

79 *Roncarelli v Duplessis*, [1959] SCR 121 (emphasis added).

80 *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 (internal citations omitted).

> to develop and maintain an environmental protection and management system in Manitoba which will ensure that the environment is protected and maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations, and in this regard, this Act: . . .
>
> b) provides for the environmental assessment of projects which are likely to have significant effects on the environment; . . .
>
> d) provides for public consultation in environmental decision making while recognizing the responsibility of elected government including municipal governments as decision-makers.[81]

95. *The Environment Act* defines "environment" and "adverse effect" as:

> i) "environment" means a) air, land, and water, or b) plant and animal life, **including humans**;
>
> ii) "adverse effect" means impairment of or damage to the environment, **including a negative effect on human health or safety**.[82]

96. In addition, the Licence was issued pursuant to section 12 of *The Environment Act*.

Section 12(7) states that:

> Upon receipt of proposal under this section **the minister shall deal with the proposal** in accordance with subsections (4) and (5) and consider the proposal, and shall
>
> a) issue a licence to the proponent, with such specifications, limits, terms and conditions or with a requirement for such modifications as the minister deems necessary **to ensure effective environmental management**; or
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> b) on the approval of the Lieutenant Governor in Council, refuse to issue a licence.[83]

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81 *The Environment Act*, CCSM, c E125, section 1(1), emphasis added.

82 *The Environment Act*, CCSM, c E125, section 1(2), emphasis added.

83 *The Environment Act*, CCSM, c E125, section 12(7), emphasis added.

97. A purposive reading of the above provisions results in the following conclusions:

a) the Minister must specifically consider the adverse effects of the Project on people—including the Manitoba Métis Community, Métis Citizens and harvesters—that, under the Act, are defined as a part of the environment; and

b) the Minister must only issue a licence where they have imposed "such specifications, limits, terms and conditions . . . to ensure effective environmental management"—which would necessarily include minimizing, mitigating, and offsetting adverse effects on the Manitoba Métis Community so that the Métis can "sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations."

98. For the reasons set out below, Manitoba failed to do this.

Hydro's EIS failed to consider the adverse effects of the Project on the Manitoba Métis Community

99. Manitoba Hydro's choice of measurable parameters in its EIS undermined the usefulness of the EIS in evaluating the impact of the MMTP on the Manitoba Métis Community. As outlined above, Hydro chose to use biophysical measurable parameters (e.g., moose populations) as a proxy for impacts on Métis harvesters exercising Métis rights. This is inconsistent with an approach that reflects the relationship between the Manitoba Métis Community and the land and its resources. It fails to capture adverse effects on the Manitoba Métis Community *as people*.

100. In her presentation to the CEC, Calliou Group principal Tracey Campbell (the authors of the MMF Study) summarized the problems of this approach in an environmental assessment:

> **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**.[84]

101. Hydro purported to address this interrelationship between Métis land users and the land and its resources "narratively." This was entirely insufficient. Such an approach cannot identify or address impacts to the exercise of Métis rights or adverse effects on the Manitoba Métis Community in a meaningful or considered way.

Manitoba failed to consider the identified and quantified evidence of adverse effects in the MMF Study

102. As noted above, the MMF Study filled this gap: it provided the distinct Métis perspective on the impacts of the Project and measured and quantified the evidence that Hydro incorrectly stated was "difficult to quantify and not easily amenable to assessment." As summarized by Ms. Campbell, "rather than study biophysical things, **[the MMF Study] studied the Métis people themselves**. [It] studied Métis beliefs and perceptions. [It] studied what Métis prefer and what Métis people avoid when they harvest."[85]

103. While the MMF Study filled this gap with respect to the Manitoba Métis Community, Manitoba took no steps to address these identified and quantified adverse effects on the Métis in response to this evidence:

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84 CEC MMTP Hearing Transcripts, Volume 14, May 30, 2017, at 3135: 14–24 and 3136:20–25 (emphasis added).

85 CEC MMTP Hearing Transcripts, Volume 14, May 30, 2017, at 3137: 3–7 (30 May 2017) (emphasis added).

a) the Licence conditions in no way address these identified adverse effects on the Métis—as people—as required by *The Environment Act;*

b) Manitoba's "Summary of Concerns" document contains no indication that it considered the significant concerns raised by the MMF or the evidence in the MMF Study about the quantified and verified evidence of adverse effects on the Métis; and

c) Manitoba's responses illustrate how it incorrectly relied on Hydro's EIS—that was acknowledged as deficient in this respect—devalued traditional Métis knowledge, and ignores clear evidence of adverse effects on the Manitoba Métis Community.

104. For example, the MMF Study provided evidence from an MMF harvester of health concerns related to transmission line projects and that he "tr[ies] not to hunt near too many powerlines cause I've noticed in the past that the deer I've harvested had deformed forms and lumps [and he] couldn't eat them." Manitoba's "response" was that "[t]here is no evidence to support the claim that deer have deformed antlers or lumps as a result of transmission lines." The evidence was clearly before Manitoba in the traditional knowledge and experience of the Métis harvester.

105. Manitoba clearly failed to consider the evidence of impacts on the Métis as people. Given this foundational failing there is no way to confidently conclude that Manitoba fulfilled its obligation to ensure effective environmental management that would allow the Métis to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations of the Manitoba Métis Community.

106. The Licence was issued in breach of Manitoba's obligations pursuant to *The Environment Act*. According to the terms of the Act, the Licence must be quashed.

B. The Licence was issued in breach of the provincial Crown's duty to consult

107. In *Haida Nation v. British Columbia*, the Supreme Court of Canada explained the purpose of the duty to consult and accommodate as follows:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. . . . Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. . . .
>
> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[86]

Manitoba's March 21 Decision was a breach of the duty to consult: it predetermined that no consultation would be possible for impacts of the Project on the Métis

108. Manitoba's March 21 Decision was, in effect, a breach of the TPA, the honour of the Crown, and—as further illustrated below—the duty to consult for the Project.

109. The courts have been clear that "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[87] On March 21, 2018, Manitoba effectively

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86 *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at paras 20, 25.

87 *Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*), 2005 SCC 69 at para 54.

pre-determined there would be no meaningful accommodation for the impacts of the Project on the Aboriginal Rights of Métis.

110. This conclusion tainted Manitoba's consultation process from that point onwards. Because of the March 21 Decision neither Manitoba, nor Hydro, would talk to the MMF about how to address the outstanding impacts of the Project. It turned consultation into a shell-game that left the Métis with no where to go to resolve these impacts and concerns.

111. By virtue of its March 21 Decision, Manitoba rendered its consultation with the MMF about the Project meaningless.

Manitoba did not correctly determine the scope of its duty

112. The Supreme Court of Canada has held that in order to properly discharge the duty to consult a Crown decision-maker must first determine whether the duty is triggered and the nature and scope of the duty owed in relation to the contemplated government conduct. These determinations are questions of law on which the Crown must be correct.[88]

113. In this appeal, there is no dispute that the duty is triggered.[89] As further set out below, however, Manitoba incorrectly determined the nature and scope of its duty to the Manitoba Métis

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88 *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at paras 61–62; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 64.

89 Letter from Lori Stevenson, Manitoba Conservation and Water Stewardship to President David Chartrand, MMF President dated January 19, 2016. This letter acknowledges that Manitoba "is starting its Crown consultation process with [the Manitoba Métis Community as] . . . Manitoba's decisions, to issue a Class 3 development licence and any permits or easements related to Crown land, might adversely affect the exercise of your community's rights."

Community regarding the Project, and the resulting consultation process was not effective, meaningful, or reasonable.

114. Courts have determined that the Crown is required to provide a strength of claim analysis so that an Aboriginal group can review, fill gaps, and respond to the Crown's assessment.[90] An annex to Manitoba's July 9, 2018, letter included the ambiguous reference to "Moderate level – Community Sessions" for the MMF.[91] Manitoba provided no clarification when asked about this statement and whether it reflected Manitoba's assessment of the scope of its duty,[92] nor did Manitoba respond to the MMF's multiple requests for the Crown's assessment and analysis.[93] Manitoba erred in determining only "moderate" consultation was required.

115. Based on Manitoba's actual knowledge and recognition of section 35 Métis rights, significant interests, and unresolved claims in relation to the Project,[94] the MMF concluded—and shared with Manitoba the information on which this conclusion was grounded—that the Crown's duty was significant and required deep consultation in relation to the Project.[95]

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90 See for example: *Adams Lake Indian Band v British Columbia*, 2011 BCSC 266 at para 131; *Enge v Manderville*, 2013 NWTSC 33 at para 145; *Wii'litswx v British Columbia* (*Minister of Forests*), 2008 BCSC 1139 at para 147; *Klahoose First Nation v Sunshine Coast Forest District* (*District Manager*), 2008 BCSC 1642 at para 18; *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at paras 638, 647.

91 Appendix A, Letter from Lori Stevenson, Chair, Manitoba Crown Consultation Steering Committee for MMTP to President David, dated July 9, 2018.

92 Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires, dated October 1, 2018.

93 Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires, dated October 1, 2018.

94 The rights, interests, and claims of the Manitoba Métis Community in relation to the Project have been set out in letters, submissions, meetings and presentations to Manitoba since 2016.

95 Letter from Jack Park, MMF Minister responsible for Energy and Infrastructure to Minister Rochelle Squires, dated October 1, 2018.

116. Manitoba's determination that deep consultation was not required is wrong in law. Moreover, as further outlined below, its approach to consultation would not even have fulfilled a 'moderate' assessment of the duty.[96]

Manitoba did not design or implement a reasonable consultation process

117. Whether the duty was fulfilled is a question of mixed fact and law that will be judged on a standard of reasonableness. While the Crown has discretion as to how the consultation process is structured, it must design and implement a reasonable consultation process.[97] "There must be more than an available process; **the process itself must be meaningful**."[98]

118. Manitoba's consultation process was neither meaningful nor reasonable and as such was insufficient to fulfill the duty because:

a) Manitoba unilaterally orchestrated a flawed consultation process, then refused to take steps to correct gaps in its process, pre-determined that there would be no potential accommodation for the Métis, and refused MMF's requests to meet face to face;

b) Manitoba implemented its consultation process in an unreasonable manner, including by failing to establish a meaningful two-way dialogue, by approaching the duty as mere note-takers and having no one who could commit to measures to address the MMF's concerns, and by precluding all possibility of accommodation for impact on Métis rights; and

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96 What is required to discharge the duty to consult varies in the circumstances: "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" but at a minimum, the Crown must ensure that its actions are consistent with the honour of the Crown. *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at paras 37–38.

97 *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at para 516.

98 *Chartrand v British Columbia* (*Forests, Lands and Natural Resource Operations*), 2015 BCCA 345 at para 77 (emphasis added).

c) Manitoba issued the Licence on the basis of a consultation record that has serious gaps, flaws, and omissions that were identified by the MMF and were never corrected by Manitoba.

Manitoba orchestrated a flawed consultation process, pre-determined the outcome, and repeatedly refused to meet with the MMF

119. Manitoba's consultation process with the Manitoba Métis Community consisted almost exclusively of the process outlined in the MMF-Hydro Funding Agreement and MMTP workplan: a single meeting with MMF Citizens and harvesters and the preparation of a consultation report outlining the concerns and comments from community members regarding potential impacts of the Project. The MMF reluctantly signed the MMF-Hydro Funding Agreement in July 2017 because it had reached the Major Agreed Points with Hydro that same month.

120. Meaningful consultation must take into account the current state of affairs. Similar to how the removal of a proponent can have sweeping effects on a consultation process, so too can the directed removal of an accommodation agreement require adjustments to the process.[99]

121. The MMF's one and only community consultation meeting was held two days before Manitoba unilaterally changed the entire premise on which the meeting was held and dramatically impacted one of the key questions that the duty to consult seeks to answer: have the impacts of the Project been addressed and accommodated?

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[99] See *Gitxsan v British Columbia* (*Minister of Forests*), 2002 BCSC 1701 at para 82: "the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly."

122. This one and only community meeting with MMF Citizens and harvesters was premised on the Major Agreed Points being implemented, honoured, and upheld. The community meeting—and the accuracy of Métis concerns and outcomes flowing from it—were rendered meaningless following Manitoba's March 21 Decision.

123. Manitoba made no corresponding changes to its consultation process with the MMF to take into account these changed circumstances. Rather than work with the MMF to implement a revised consultation process, Manitoba added insult to injury by attempting to hold the MMF to the original—and now defunct—workplan and process.

124. In Manitoba's view, form trumped substance; so long as the meeting was held and Manitoba could check off the box, it did not matter if the concerns expressed by the Manitoba Métis Community about impacts on their rights was accurate, updated, or fulsome. Manitoba's refusal to adapt or modify the consultation process was a breach of the duty to consult.

Manitoba's consultation process was unreasonable and meaningless

125. The Courts have been clear that "meaningful dialogue is the prerequisite for reasonable consultation."[100] Manitoba's consultation process is characterized by the almost total absence of any dialogue between the MMF and the Crown:[101]

a) Before November 2018, Manitoba had not met with the MMF in over two years regarding the Project;

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100 *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at para 564.

101 During this same period the MMF was in active negotiations and discussions with Hydro related to identifying the adverse effects on the Aboriginal Rights of Métis and addressing those effects through the Negotiation Process. The absence of any dialogue between the MMF and Manitoba during this time makes sense when viewed in light of Hydro having expressly been delegated this responsibility in the TPA.

b) before the MMF's letter of October 1, 2018 there had been no substantive communication between the MMF and Manitoba for over a year;

c) Manitoba only met with the MMF once in its entire consultation process despite over 7 written requests to meet; and

d) Manitoba replied on average to the MMF every third or fourth letter and even then, did not substantively address the issues or concerns raised.

126. Manitoba—to fulfill the duty—was "required to do more than to receive and document concerns and complaints."[102] Yet Manitoba admitted that its representatives were not empowered to address the MMF's concerns,[103] and repeatedly confirmed that their view of consultation amounted to nothing more than receiving information and "reporting on the decisions."[104] The similarities between Manitoba's consultation with the MMF for MMTP is strikingly similar to Canada's failed consultation regarding the Trans Mountain Pipeline:

> Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes—someone able to respond meaningfully to the applicants' concerns at some point in time.
>
> The exchanges with the applicants demonstrate that this was missing from the consultation process [and how] consultation fell short of the mark."[105]

127. In addition, the courts have been clear that "meaningful consultation is not simply a process of exchanging information . . . a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make

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102 *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at para 559.

103 November 19, 2018 meeting between MMF and Manitoba.

104 Letter from Lori Stevenson, Chair, Manitoba Crown Consultation Steering Committee for MMTP to President David Chartrand, dated July 9, 2018.

105 *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at paras 599–600.

changes to its proposed actions based on information and insight obtained through consultation."[106]

128. Following Manitoba's March 21 Decision, Manitoba refused to acknowledge the outstanding impacts of the Project on the Aboriginal Rights of Métis or to discuss with the MMF any alterative way for how to resolve and address these impacts and concerns. Manitoba orchestrated and implemented a consultation process that precluded any potential form of accommodation for the Métis.

Manitoba issued the Licence on the basis of a consultation record with serious gaps, flaws, and omissions

129. Manitoba's record of communication put before the decision-maker did not correct the gaps identified by the MMF. To the contrary, it repeated Manitoba's tunnel-vision approach to consultation regarding the Project that failed to consider the context or history relevant to the Project, and Crown consultation.

130. For example, Manitoba's April 4, 2019, letter attached Appendix A—Record of Communication between the MMF and Manitoba regarding the MMTP.[107] On its face this record does not correct the gaps that the MMF expressly drew to Manitoba's attention regarding concerns that it raised through the TSC regarding the Project and that were previously identified as gaps in Manitoba's record related to the Project. These concerns directly related to the implementation of accommodation measures (e.g., the Major Agreed Points) for the impacts of

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106 *Tsleil-Waututh Nation v Canada* (*Attorney General*), 2018 FCA 153 at para 564.

107 Letter from Lori Stevenson, Chair, Crown Consultation Steering Committee for MMTP to President Chartrand, dated April 4, 2019.

the Project on the Aboriginal Rights of Métis and were raised with representatives of the provincial Crown responsible for Hydro projects and appointed pursuant to the TPA provisions.

131. The duty to consult extends to constructive knowledge held by the Crown.[108] For example, the Crown is always presumed to have certain common, public knowledge (e.g., rights contained in treaties), or knowledge of processes that it is engaged in (e.g., litigation or negotiations). While Manitoba may disagree with nature of the Major Agreed Points as an accommodation measure, it is not open to the Crown to cherry-pick its consultation record to avoid mentioning significant concerns raised by Indigenous communities with representatives of the Crown.[109]

Decisions made on the basis of inadequate consultation should be quashed

132. The duty must be fulfilled prior to the decision.[110] The Supreme Court of Canada has been clear: "Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review."[111]

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108 *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 35.

109 The gap of these concerns in the Record also—as further discussed below—goes to administrative and procedural fairness as the decision-maker was not presented with all the information necessary to make an informed decision about the sufficiency of consultation and accommodation about the Project.

110 *Chippewas of the Thames First Nation v Pipelines Enbridge Inc*, 2017 SCC 41 at para 32.

111 *Clyde River* (*Hamlet*) *v Petroleum Geo Services Inc*, 2017 SCC 40 at para 24.

133. For the reasons outlined above, the Licence was issued on the basis of inadequate consultation and did not fulfill Manitoba's duty to consult and accommodate the Manitoba Métis Community. It must be quashed.

C. The Licence Was Issued In A Manner That Breached Manitoba's Obligations Pursuant To *The Reconciliation Act*;

134. On March 15, 2016, *The Reconciliation Act* received royal assent. It defines "Reconciliation" as "**the ongoing process of establishing and maintaining mutually respectful relationships** between Indigenous and non-Indigenous peoples in order **to build trust, affirm historical agreements**, address healing and **create a more equitable and inclusive society**."[112] "Indigenous peoples" is defined to include the "First Nation, Inuit **and Métis peoples** of Manitoba."[113]

135. *The Reconciliation Act* lists four foundational principles that "the government **must** have regard to" for advancing reconciliation:

> a) Respect: Reconciliation is founded on respect for Indigenous nations and Indigenous peoples . . .;
>
> b) Engagement: Reconciliation is founded on engagement with Indigenous nations and Indigenous peoples;
>
> c) Understanding: Reconciliation is fostered by striving for a deeper understanding of the historical and current relationships between Indigenous and non-Indigenous peoples and the hopes and aspirations of Indigenous nations and Indigenous peoples; and

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112 *The Path to Reconciliation Act*, CCSM, c R30.5, section 1(1), emphasis added.

113 *The Path to Reconciliation Act*, CCSM, c R30.5, section 1(2), emphasis added.

d) Action: Reconciliation is furthered by concrete and constructive action that improves the present and future relationships between Indigenous and non-Indigenous peoples.

136. Through *The Reconciliation Act*, Manitoba created—and bound itself to uphold—legislative parameters and standards for its conduct in dealing with Indigenous peoples. Manitoba's actions uphold none of these principles that by its own definition are mandatory for the government to advance reconciliation with the Métis. Specifically:

a) Manitoba leaders did **not demonstrate respect** when they made statements in the context of the Project that the MMF, the democratically-elected self-government of the Manitoba Métis Community was a "special interest group";

b) Manitoba's Ministers and staff consistently **refused to engage** with the MMF and repeatedly did not reply to the MMF's multiple requests to meet and discuss its concerns about the Project;

c) Manitoba's Ministers and staff made **no effort to understand** the MMF's concerns, perspective, or in any way consider the evidence of how the Project had direct and significant impacts on the aspirations, rights and Citizens of the Manitoba Métis Community; and

d) **Manitoba took no "concrete and construction action"** to improve its relationship with the Métis or address the MMF's concerns about the Project.

137. While the Minister of Indigenous and Northern Relations is specifically identified as "responsible for reconciliation," the Act states that "each member of the Executive Council is to promote measures to advance reconciliation."[114] By individually and collectively participating in the Licence Decision in light of the above conduct and history—and the MMF having repeatedly raised the significance that this Project has for advancing reconciliation between the Métis and

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114 *The Path to Reconciliation Act*, CCSM, c R30.5, section 3(1)–(2).

the Crown—Manitoba proceeded to issue to the Licence in breach of its obligations to respect, engage, understand, and take action to advance reconciliation, pursuant to the Act.

138. Manitoba's actions with respect to the Project and issuing the Licence set reconciliation back for generations to come. The Licence must be quashed.

D. The Licence Was Issued In Breach Of The Honour Of The Crown

139. The honour of the Crown is a constitutional principle.[115] It "refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[116] The Crown and Indigenous communities—even those that have signed historic or modern day treaties—cannot "contract" out of it.[117]

140. In a case bearing the MMF's name, the Supreme Court of Canada confirmed that the honour of the Crown "gives rise to different duties in different circumstances" and set out four such circumstances.[118] Subsequent cases have identified additional duties and confirmed that the door is not closed for others to be identified by the courts in the future.[119]

141. One well-recognized duty flowing from the honour of the Crown is that "the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty

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115 *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at para 24; *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 69; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

116 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 65.

117 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 61.

118 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 73.

119 *Daniels v Canada* (*Indian Affairs and Northern Development*), 2016 SCC 12 at para 43; *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at paras 45, 47.

and statutory grants to aboriginal peoples."[120] Put another way: the Crown must fulfill its promises.

142. *The Reconciliation Act* and the mandatory standard of Crown conduct towards Indigenous peoples pursuant to it is one such promise. The constitutionally mandated purpose and process of reconciliation at the heart of section 35 and the duty to consult and accommodate is another such promise. The legally-binding agreements and contracts made between Indigenous people and the Crown are a third such promise. All are engaged in this case.

143. While perfection is not guaranteed "a persistent pattern of errors and indifference that substantially frustrates the purpose of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. . . . The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?"[121]

144. The answer for the Manitoba Métis Community regarding the MMTP is no.The following Crown conduct demonstrates that the honour of the Crown has not been upheld in this case:

a) Manitoba had evidence of the Major Agreed Points that on their face "fully and finally addressed" impacts of the Project on the Aboriginal Rights of Métis for 8 months during the licencing and regulatory processes and Crown consultation process and said nothing to the MMF about Manitoba having any concerns with the agreement;

b) Manitoba ignored the consequences of its unilateral March 21 Decision and how it undermined its Crown consultation process;

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120 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at para 73(4).

121 *Manitoba Metis Federation Inc v Canada* (*Attorney General*), 2013 SCC 14 at paras 82–83.

c) Manitoba repeatedly turned a blind eye to the concerns raised by the MMF about outstanding impacts of the Project on the Aboriginal Rights of Métis;

d) Manitoba did not respond to the MMF's five requests to meet and engage in a meaningful consultation process prior to making the Licence Decision;

e) Manitoba representatives made disparaging and disrespectful statements about the MMF and its leadership in the press related to the Project; and

f) Manitoba is now trying to shift the tables and place the blame on the MMF for relying on the processes that Manitoba agreed to in the TPA and is alleging—for the first time in its post-decision letter—that the MMF did not participate or bring forward its concerns or evidence.[122]

145. The Crown's conduct did not demonstrate that it was acting with honour or in any way intended to fulfill the promises that it made to the MMF through *The Reconciliation Act*, the Crown consultation process, or its agreements (e.g., TPA and MMF-Hydro Funding Agreement). Manitoba made the Licence Decision in breach of the honour of the Crown. The Licence must be quashed.

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[122] Letter from Manitoba to MMF dated April 4, 2019, Appendix 2—"Summary of Concerns" table includes allegations by Manitoba that the MMF did not participate in the consultation process or did not raise concerns or put evidence of impacts before the Crown. This is false. The evidence of impacts of the Project on Métis section 35 rights was clearly before Manitoba in the MMF Study. If Manitoba chooses to turn a blind eye to this evidence, and erroneously view traditional knowledge with less value or weight than western science, or not follow the clear guidance of the courts that the Indigenous perspective on the impacts to rights must be given equal consideration (see *Tsilhqot'in*) **this does not mean that the evidence is not there**.

E. The Licence Was Issued By A Biased Decision-Maker

An impartial decision-maker is a constitutional and common-law requirement

146. The impartiality of an adjudicator—which connotes the absence of bias[123]—is a constitutional and common-law requirement of paramount and fundamental importance.[124] It is "designed to preclude conduct [that would] undermine public confidence in the integrity of the decision-making process."[125]

147. The rule against bias requires decision-makers to both "be and appear to be unbiased."[126] It is not necessary to show actual bias to disqualify a decision-maker.[127] All that is required is that a reasonable apprehension of bias be demonstrated.

The test for reasonable apprehension of bias

148. The test for reasonable apprehension of bias is: **"what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude**."[128]

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123 *Valente v The Queen*, [1985] 2 SCR 673 at para 15 (SCC); *R. v. Généreux*, [1992] 1 SCR 259 at para 36.

124 *R v Curragh Inc.*, [1997] 1 SCR 537 at para 7; *R v S (RD)*, [1997] 3 SCR 484 at para 93, *per* Cory J. dissenting; *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at para 57.

125 Donald Brown and Hon. John Evans, "Judicial Review of Administrative Action in Canada," (updated December 2018) at 11-4

126 *R v S* (*RD*), [1997] 3 SCR 484 at para 92; See also Hewart, CJ's comments in *R v Sussex Justices, Ex p McCarthy,* [1924] 1 KB 256 at 259 (QBD): "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

127 *R v S* (*RD*), [1997] 3 SCR 484 at para 109, *per* Cory J. dissenting.

128 *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369 at 394–395, *per* de Grandpré J., dissenting but not on this point (emphasis added). See also *R v S (RD)*, [1997] 3 SCR 484 at para 31; *Agrium Vanscoy Potash Operations v USW, Local 7552*, [2014] SKCA 79 at paras 39–41.

149. The application of this test depends on the context and nature of the decision-maker.[129] Where the decision-making process is adjudicative or quasi-judicial in nature, the requirement of impartiality is similar to that imposed on judges.[130] On the other hand, where the functions of the decision-maker are more administrative, policy driven, preliminary, or investigatory in nature, the requirement may be less.[131]

The Minister was a biased decision-maker

150. The Minister was performing an adjudicative function in deciding whether or not to issue the Licence. That is, the Licence Decision occurred after and was informed by the CEC process, which involved the quintessential elements of an adjudicative process (i.e., the opportunity to make written submissions, provide evidence, cross-examine witnesses, and participate in the hearing, etc.).

151. In performing an adjudicative function, the law requires that the Minister's Licence Decision be free from any actual or apparent bias. An informed person, viewing the matter realistically and practically, would conclude that the Minister's involvement in the March 21 Decision rendered her a biased decision-maker with respect to the Licence Decision. That is, the March 21 Decision —in which Manitoba unilaterally directed Hydro to "not proceed" with the

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[129] *R v S* (*RD*), [1997] 3 SCR 484 at paras 32, 92; *Newfoundland Telephone Co v Newfoundland* (*Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at paras 25 and 27; *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 47.

[130] *Newfoundland Telephone Co v Newfoundland* (*Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at paras 27–29.

[131] *Newfoundland Telephone Co v Newfoundland* (*Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at para 27; *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 47–48; *Old St Boniface Residents Assn Inc v Winnipeg* (*City*), [1990] 3 SCR 1170 at para 44; *Save Richmond Farmland Society v Richmond* (*Township*), [1990] 3 SCR 1213 at para 24.

accommodation agreement reached with the MMF (i.e., Major Agreed Points)—should be reasonably seen as a pre-determination of the Métis accommodation issues to be made under the subsequent Licence Decision.

152. Even if judged against the more lenient threshold, the Minister's Licence Decision was biased. The low end of the bias spectrum requires that there not be a "pre-judgment of the matter to such an extent that any representations to the contrary would be futile."[132]

153. An informed person would reasonably interpret the Minister's March 21 Decision as a pre-judgment of the eventual Licence Decision: it was a pre-determination that accommodation was not owed to the Manitoba Métis Community with respect to the MMTP. Furthermore, the Minister's failure to respond to or even acknowledge the concerns raised and request for clarification made by the MMF in three separate letters concerning her involvement in the March 21 Decision [133] is evidence that any "representation [by the MMF] to the contrary [would be] futile." [134] The Minister's mind was not open to transparent dialogue—let alone capable of persuasion—as required by law.

154. In light of the above, there exists a reasonable apprehension of bias concerning the Minister's Licence Decision as it relates to accommodation of the adverse impacts of the MMTP to Métis rights, interests, and claims. The Licence should be quashed accordingly.

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132 *Newfoundland Telephone Co v Newfoundland* (*Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at para 27 (emphasis added).

133 Letter from MMF to Manitoba, dated October 1, 2018.

134 *Newfoundland Telephone Co v Newfoundland* (*Board of Commissioners of Public Utilities*), [1992] 1 SCR 623 at para 27 (emphasis added).

F. The Licence Was Issued In Breach Of The Provincial Crown's Administrative And Procedural Fairness Duties

155. A duty of fairness applies to Manitoba's decision to issue a Licence under *The Environment Act*. "The fact that a decision is administrative and affects "the rights, privileges or interests of an individual is sufficient to trigger the application of the duty.""[135]

156. Procedural fairness ultimately aims to "ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[136]

157. What is required to fulfill the duty of procedural fairness varies. Manitoba owed the MMF a higher level of procedural fairness due to:

a) the judicial nature of the licencing process (including the collection of information, consideration and analysis of concerns, weighting of evidence and determination that statutory, common law and other requirements were met, etc.);[137]

b) the importance of the Licence Decision to the Manitoba Métis Community in light of the high to moderate magnitude, continuous, irreversible and permanent adverse effects that would result from the Project (as evidenced in the MMF Study);[138]

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135 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 20.

136 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 22.

137 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 23: "The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble a judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

138 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 25: "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."

c) the legitimate expectations of the MMF as to what was required as part of a reasonable Crown consultation process, that a reasonable process would be undertaken (as required by law), and that the concerns it shared with the Crown would be put before the decision-maker;[139] and

d) the implications for the honour of the Crown, reconciliation, and fair dealing required whenever the Crown engages with Indigenous people.[140]

158. Manitoba's breached its administrative and procedural fairness duties by, among other things:

a) failing to satisfy the requirements of *The Environment Act* and *The Reconciliation Act* (as outlined above);

b) denying the MMF a fair hearing and a meaningful opportunity to be heard by designing and implementing an unreasonable, meaningless consultation process (as outlined above);

c) failing to ensure the decision-maker was not biased in her determination of the Licence Decision and whether the duty to consult and accommodate had been fulfilled (as outlined above); and

d) failing to put an accurate record of the MMF's information and concerns before the decision-maker so the Minister fully and fairly consider it (as discussed below).

159. These are procedural errors, which are errors of law.[141]

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139 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 26: "If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness."

140 *Long Plain First Nation v Canada* (*Attorney General*), 2015 FCA 177 at para 108: "A higher level of procedures is often accorded where the legal and practical interests are higher. . . . Where the decision-maker has undertaken that certain procedures will be followed, for example in an agreement, the decision-maker will be held to them. And where Aboriginal peoples are concerned, the concepts of honour, reconciliation and fair dealing—matters of constitutional import—may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded.

141 *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817.

160. The MMF had a legitimate expectation that materials it put before Manitoba related to the Project would form part of the analysis, recommendations, and final decision of the Minister. The expectation was that these materials would be considered in order to reach reasoned conclusions and recommendations about whether to issue the Licence in light of all the information provided.[142]

161. It is apparent from Manitoba's April 4, 2019 letter and appendices that this did not occur. Information that the MMF shared with Manitoba through the TSC Committee related to the Project was not included in Manitoba's consultation record—despite the MMF noting its absence and requesting this gap be fixed. Other incorrect statements are also not corrected.[143] It is paradoxical that Manitoba seeks to rely on the TSC Committee when it wants to prove it responded to the MMF yet remains willfully blind to the MMF's information put to Manitoba's representatives via the same committee.[144] If the TSC is a forum for sharing this information—which Manitoba seems to accept that it is[145]—then surely it cannot be a one-way exchange?

162. In failing to put this information before the decision-maker, the Minister failed to consider relevant materials and information that was required in order to fulfill the MMF's

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142 *Old St Boniface Residence Assn Inc v Winnipeg* (*City*), [1990] 3 SCR 1170 at 1204; *Gaw v Commissioner of Corrections* (1986), 2 FTR 122; *Re Multi-Malls Inc and Minister of Transportation and Communication* (1979), 14 OR (2d) 49 at 34–35.

143 Such as related to the MMF's positions, understanding of certain events, and the significance of certain points (e.g., the relevance of raising the MMF's negotiations with Canada and SCC declaration in *MMF v Canada*) are misstated and have not been corrected based on discussions with Manitoba where the MMF has explicitly noted these legal and factual inaccuracies.

144 Letter from Manitoba to MMF, dated April 4, 2019, Appendix 2 – "Summary of Concerns" contains multiple references to information Manitoba asserts it shared with the MMF via the TSC.

145 And which was, in part, the purpose of the TSC as established pursuant to the TPA.

legitimate expectations and discharge her administrative and procedural fairness duties to the MMF.

163. The Licence Decision was made in breach of Manitoba's duties of administrative and procedural fairness and must be quashed.

PART V RELIEF REQUESTED

164. The Appellants respectfully request the following relief:

a) That the operation of Environment Act Licence No. 3288 be suspended pursuant to section 30 of *The Environment Act* until this appeal is disposed of;

b) That Environment Act Licence No. 3288 be quashed pursuant to s. 28(2)(d) of *The Environment Act*.

c) In the alternative, that Environment Act Licence No. 3288 be varied pursuant to s. 28(2)(d) of *The Environment Act* to ensure that the outstanding adverse effects on the environment—including the Manitoba Métis Community and Métis Citizens—are addressed and the section 35 rights, interests, and claims of the Manitoba Métis Community are meaningfully accommodated and that the following additional condition be added to the Licence:

   i) The Licencee shall implement the components of the Major Agreed Points that relate to the Development.

   or

   ii) The Licencee shall address the impacts of the Development on the Aboriginal Rights of Métis that are identified in the Métis Specific Interests Report: Assessment of Potential Effects Prior to Mitigation (July 2016) in an alternative, equivalent way.

d) In the further alternative, that Environment Act Licence No. 3288 be referred back to a Minister that did not participate in the March 21 Decision and Order-in-

Council 2018/82 for reconsideration with direction to address the issues and concerns set out in this appeal.

All of which is submitted this 3rd day of May 2019.

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