



Supplementary Information

Oral Presentation

Submission from Manitoba Metis Federation

In the Matter of the

Whiteshell Laboratories

Application to renew the Nuclear Research and Test Establishment Decommissioning Licence for the Whiteshell Laboratories site for a period of ten years

Commission Public Hearing

October 2-3, 2019

Renseignements supplémentaires

Exposé oral

Mémoire de la Fédération des Métis du Manitoba

À l'égard de

Laboratoires de Whiteshell

Demande pour le renouvellement, pour une période de dix ans, du permis de déclassement d'un établissement de recherche et d'essais nucléaires pour les Laboratoires de Whiteshell

Audience publique de la Commission

Les 2 et 3 octobre 2019

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September 25, 2019

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Attention: Louise Levert, Senior Tribunal Officer

BY EMAIL

Dear Ms. Levert:

**Re: Manitoba Métis Federation Presentation and Speaking Notes
Commission Public Hearing CMD 19-H4, October 2-3, 2019**

**Canadian Nuclear Laboratories Ltd.
Licence Renewal Request for Whiteshell Laboratories**

On behalf of the Manitoba Metis Federation (the “MMF”), which is the democratically elected, self-government representative of the Manitoba Métis Community, I am writing to provide the MMF’s presentation and speaking notes to the Canadian Nuclear Safety Commission (the “**Commission**”) hearing regarding Canadian Nuclear Laboratories Ltd. (“**CNL**”) licence renewal application for the Whiteshell Laboratories WL-1 Nuclear Reactor and Whiteshell site (the “**Hearing**”).

These speaking notes are attached as Appendix A and provide further detail and elaborate on the points made in the MMF Presentation.

In addition, the MMF would like to draw the Commission’s attention to the four reports that it has submitted to CNL regarding the proposed in-situ decommissioning of the Whiteshell Laboratories site and WL-1 Nuclear Reactor:

- Whiteshell Reactor Decommissioning Project Technical Review: Technical Review of the Draft Environmental Impact Statement;
- Whiteshell Reactor Decommissioning Community Feedback Report;
- Whiteshell Reactor #1 Decommissioning: Manitoba Métis Traditional Knowledge, Land Use, and Occupancy Study;
- CNL Whiteshell WR-1 Decommissioning: Review of Draft Valued Components (VCs) and Related Measurement Endpoints and Indicators for the Project Environmental Impact Statement (EIS) (collectively, the “**MMF Reports**”).

In addition, the MMF anticipates submitting a further report specifically on the CNL Whiteshell Relicensing Application Review once finalized by MMF’s consultant.

The MMF understands that the MMF Reports have been provide to the Commission by CNL.¹ While the MMF understands that the Hearing is focused specifically on the renewal of the existing CNL licence and that a future hearing will consider CNL’s in-situ decommissioning proposal, the MMF’s Reports provide further evidence regarding the history of the Manitoba Métis Community, the exercise of Métis rights on an around the Whiteshell Laboratories site, the relationship between the MMF and CNL, and outstanding concerns of the MMF and Manitoba Métis Community regarding impacts of the WL-1 Nuclear Reactor and activities at the Whiteshell Laboratories site. This information is equally applicable to this Hearing. Some of this evidence and information has been summarized in the MMF’s Presentation and attached speaking notes however the Commission is directed to the full reports for complete details.

Should the Commission have any questions regarding the MMF’s Presentation or speaking notes, please feel free to contact me directly at 204 586 8474 ext 263 or via email to marci.riel@mmf.mb.ca.

Sincerely,



Marci Riel,
Director of MMF Energy & Infrastructure Department

Encl. (2)

¹ If this is not the case, the MMF requests that the Commission inform the MMF so that these reports can be provided to the Commission for their consideration as part of the Hearing.

Speaking Notes for MMF’s Oral Submissions

Introduction and Overview

1. The Manitoba Métis Community is a distinct Indigenous and Aboriginal community that emerged in the Red River Valley in the early 1800’s. 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 throughout its traditional territory, including but not limited to, the Whiteshell site and surrounding area.
2. The Manitoba Metis Federation (the “**MMF**”) is the democratically elected self-government representative of 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. It is authorized by the members of the Manitoba Métis Community (also known as MMF Citizens) to represent their collectively held rights and interests and engage in consultation with the Crown regarding the same. The MMF has been repeatedly recognized as representing the Manitoba Métis Community in legislation, by the courts, as well as by other governments.
3. The MMF was never consulted regarding the original Licence for the WR-1 Nuclear Reactor, the decision to locate it on the Manitoba Métis Community’s traditional territory, or the proposed decommissioning plan for the WR-1 Nuclear Reactor and Whiteshell site. Canadian Nuclear Laboratories (“**CNL**”) is now applying to the Canadian Nuclear Safety Commission (the “**Commission**”) for a renewal of this licence so that it can continue to complete the decommissioning activities and prepare an alternative in-situ decommissioning plan (which the MMF understands will be reviewed by the Commission in a separate hearing process). The Commission is charged with determining whether this renewal request should be granted, and, if so, what conditions may be required in order to, among other things, ensure that the health and safety of people and of the environment are maintained, Canada’s international commitments are honoured, and the constitutional duties owing to the Manitoba Métis Community are fulfilled.
4. As further outlined below, the proposed activities associated with CNL’s licence renewal application have the potential to adversely impact the Manitoba Métis Community’s constitutionally protected rights, claims, and interests. MMF Citizens have raised significant concerns regarding the potential for ongoing contamination of the lands and waters associated with the decommissioning activities—both related to the existing licence and CNL’s proposed in-situ decommissioning plan that is still in development. As the health of the land, waters, and resources are impacted, so too is the health of the

Manitoba Métis Community that relies on those resources for sustenance and to maintain and pass on their distinct Métis practices, customs and traditions.

5. The duty to consult was designed to address such potential impacts. Consultation is required whenever the Crown has knowledge of an established or asserted Aboriginal right and contemplates conduct that may adversely affect it. The overall purpose of consultation is to advance reconciliation and provide opportunities to prevent impacts to constitutionally protected rights before they occur.
6. The Manitoba Métis Community's rights, claims, and interests are further outlined below. These Métis rights are distinct from the rights and interests of First Nations and must be specifically considered, through meaningful consultation and engagement with the MMF. Mitigation, minimization, and accommodation measures for any impacts must be identified, considered, and implemented in coordination with the MMF. The honour of the Crown demands nothing less.
7. The honour of the Crown and the constitutional duties owing to the Manitoba Métis Community cannot be forgotten in this process simply because a renewal, rather than new licence, is being requested by CNL. The activities that the renewed licence will permit are extensive and include: demolition, transportation of radioactive materials which could result in the spill of hazardous materials into the natural environment; storage/disposal of radioactive materials; access restrictions to the Whiteshell site; additional noise and dust contamination in the area; and more. These activities would not occur but for a renewal of the licence. The Manitoba Métis Community has provided overwhelming evidence of the significance of this area to the exercise of its section 35 Métis rights, and has provided extensive information on its specific outstanding questions and concerns.
8. The Commission is required to ensure that its decision on CNL's licence renewal application complies with the Constitution. This requires a meaningful consultation process to consider and address the MMF's outstanding concerns and potential impacts of CNL's activities. While the MMF has established a positive working relationship with CNL to date, this cannot be left to chance or merely corporate goodwill. Contrary to the conclusions of the Commissions' staff: the duty to consult is clearly triggered and requires that additional measures be imposed in order to ensure that it is fulfilled.
9. The MMF therefore respectfully requests that the Commission include a licencing condition that requires ongoing consultation with the MMF to ensure that its outstanding questions and concerns continue to be addressed; the rights, interests, and claims of the Manitoba Métis Community are respected; and any impacts to these rights are mitigated and accommodated, as required by the honour of the Crown. The MMF has proposed two options of draft conditions below.
10. The MMF's Presentation and speaking notes will proceed as follows:

The Métis Nation and the Manitoba Métis Community	3
<i>The Birth of a Nation</i>	4
<i>The Promise of Confederation</i>	7
<i>Terror and Dishonor</i>	9
<i>Aftermath and Resurgence</i>	15
The Manitoba Metis Federation.....	16
Métis Rights, Interests, and Claims	18
The MMF and the Crown’s Duty to Consult (MMF’s Resolution No. 8 Framework)	21
The Duty to Consult and Accommodate.....	22
The Duty to Consult is Triggered by the Licence Renewal Decision.....	24
The Manitoba Métis Community is Owed Deep Consultation.....	25
a) <i>The Manitoba Métis Community has Established and Crown-Recognized s. 35 Métis Rights</i>	26
b) <i>The MMF has a Judicially Recognized Outstanding Claim for Land and Ongoing MMF-Canada Negotiations</i>	27
c) <i>Significant Evidence of Métis Land Use in and around the Whiteshell Site</i>	28
d) <i>Limited Amount of Crown Land and History of Metis Disposition</i>	29
The Honour of the Crown Requires Consultation to Address Outstanding Métis Concerns	30
Canada’s International Obligations and Commitments Require a Nation-to-Nation, Reconciliation Approach	33
Summary: MMF’s Recommendations Regarding CNL’s Licence Renewal Application.....	36
MMF’s Proposed Draft Licencing Conditions	39
Closing Comments.....	40

The Métis Nation and the Manitoba Métis Community

11. The Métis Nation in general, and in southern Manitoba, finds its earliest roots in the fur trade.¹ In the eighteenth century, both the Hudson Bay Company and the Northwest Company created a series of trading posts that stretched across the upper Great Lakes, through the western plains, and into the northern boreal forest. Inevitably, unions between European men—explorers, fur traders, and pioneers—and Indigenous women

¹ *R. v. Goodon*, 2008 MBPC 59 at para. 25; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 at para. 5; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 2.

were consummated. More remarkably, however, was that “[w]ithin a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears”² and the Métis Nation was born—a new people, indigenous to the western territories.³

12. The Métis led a mixed way of life. “In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture.”⁴ The Métis were employed by both of the fur trades major players, the Hudson’s Bay and Northwest companies. By the early 19th century, they had become a major component of both firms’ workforces. At the same time, however, the Métis became extensively involved in the buffalo hunt. As a people, their economy was diverse; combining as it did, living off the land in the Aboriginal fashion with wage labour.⁵
13. Some of the earliest Métis settlements were found on the Red River, beginning perhaps in 1810 with the establishment of Fort Gibraltar, a Northwest Company Post.⁶ In these years, the Métis developed both a sense of pride in their origins and proprietorship in the lands that would become southern Manitoba. William McGillvray, a Northwest Company Partner, described the Métis it in 1815:

...the Half Breed Indians, a daring and now numerous race sprung from the intercourse of the Canadian Voyageurs who consider themselves the Possessors or the Country and Lords of the soil.⁷

The Birth of a Nation

14. It was on the Red River, in reaction to a new wave of European immigration, that the Métis Nation first came into its own. In 1811, hoping to establish a Scottish settlement, Lord Selkirk purchased 116,000 acres of territory from Hudson Bay Company in the Red and Assiniboine River basins. They arrived at the Forks—the junction of the Red and Assiniboine Rivers — in 1813. River lots were surveyed, and a fort was constructed.⁸

² *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 at para. 5; *R. v. Goodon*, 2008 MBPC 59 at para. 25.

³ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 2.

⁴ *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 at para. 5.

⁵ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 29.

⁶ *R. v. Goodon*, 2008 MBPC 59 at para. 68.

⁷ As cited in *R. v. Goodon*, 2008 MBPC 59 at para. 25.

⁸ *R. v. Goodon*, 2008 MBPC 59 at para. 69 a).

15. To wrest control of land and resources from the Métis, the new settlement tried to restrict the hunting of buffalo on horseback. But, with the support of the North West Company and under the leadership of Cuthbert Grant, the Métis resisted the imposition of any control by the new settlement. In 1816, the Métis captured Fort Brandon, a Hudson Bay Company post, and then in what became known as the Battle of Seven Oaks drove the settlers from the Forks.⁹

16. The Battle of Seven Oaks victory had a catalyzing effect and was a pivotal event in the history of the Métis Nation:

It was the largest and most significant military encounter in which they had ever participated and their overwhelming victory sent a clear message to outsiders that they were a force to be reckoned with. In addition to boosting their confidence and assertiveness, the battle also provided mixed European-Indian ancestry people with some of the trappings or symbols of nationalism. The flag presented to them by the North West Company was apparently unfurled during the encounter. Moreover, the exploits of mixed European-Indian ancestry warriors at Seven Oaks were later immortalized in song composed in 1817 by Pierre Falcon, Cuthbert Grant's brother-in-law and comrade in arms.¹⁰

17. Lord Selkirk and his settlers returned to the Forks in 1817, peace was made with the Métis, and no further evacuations were necessary. The Métis, for their part, appeared to be glad for the market the settlement provided for their goods—so long as their practices and customs were not interfered with.¹¹

18. In 1821, The Hudson Bay and North West Companies merged. This had a significant effect on the Métis of the Northwest. A number of trading posts were closed, and many Métis lost their jobs. There was a flood of Métis settlers to lands around the confluence of the Red and Assiniboine Rivers. Cuthbert Grant himself settled at St. Francois Xavier, just west of the Forks on the Assiniboine River.¹² Indeed, in the years that followed, generations of Métis employed in the fur trade would follow this example and settle in region.¹³

19. In this burgeoning settlement, the Métis Nation took root and flourished.

⁹ *R. v. Goodon*, 2008 MBPC 59 at para. 69 b).

¹⁰ Donna Cona, *Historical Profile of the Cumberland Lake Area Mixed European-Indian or Mixed European-Inuit Ancestry Community* (29 March 2005), prepared for Justice Canada, at pp. 27-28.

¹¹ *R. v. Goodon*, 2008 MBPC 59 at para. 69 c).

¹² *R. v. Goodon*, 2008 MBPC 59 at para. 69 d).

¹³ Letter from Archibald to Secretary of State (27 December 1870), as cited in *Manitoba Métis Federation et. al. v. Canada* (No. C. 81-01-01010), Plaintiffs' Written Argument, para. 329, Document 122.

20. The Métis abided by their own rules and continued to resist the imposition of European control through the mid-19th century. In 1834, for example, when Antoine Laroque—a Métis tripman—was assaulted by Thomas Simpson—an English born Hudson’s Bay Company clerk—the Métis community demanded justice on their own terms. “[T]he entire Métis community in the settlement took up arms in Laroque’s defence [sic]” and surrounded the seat of the Council of Assiniboia at Upper Fort Garry.¹⁴ An agreement was brokered between the Company and the Métis community in which restitution was paid not only to Mr. Laroque, but also to the Métis assembled in his defense. From this incident was born the collective realization of the Métis that “if they stood united, the company would have to gain at least their tacit assent to govern the colony.”¹⁵
21. Never was the Métis Nation’s independence more apparent than during the trial of William Sayer, a Métis man who, in 1849, was charged with illegally trading furs in Rupert’s Land. As the proceedings were held, a large group of Métis surrounded the courthouse. Though Sayer was convicted, he was not punished. The assembled crowd celebrated, chanting as a rallying cry, “le commerce est libre!” The Hudson Bay Company could no longer use the courts to enforce its supposed trade monopoly. “The Métis treated this as a victory and continued to trade freely, ignoring any law prohibiting such action.”¹⁶
22. In the mid-1800s, Hudson Bay Company employee Alexander Ross articulated the Métis’ commitment to freedom, which was put on such public display as a result of events such as the Sayer trial:
- “[The Métis believed] all men were born to be free ... they [were] marvelously tenacious of their own original habits. They cherished freedom as they cherish life.”¹⁷
23. It was perhaps during the waning days of the Hudson Bay Company’s administration in Rupert’s Land that the Métis Nation was most powerful and influential. George Simpson, governor of the Hudson Bay Company, stated in 1846 that “the half-breeds ... believe ...

¹⁴ Gerhard J. Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996) at p. 54; see also Adam James Patrick Gaudry, *Kaa-tipeyimishoyaahk – ‘We are those who own ourselves’: A Political History of Métis Self-Determination in the North-West, 1830-1870* (PhD Thesis, University of Victoria Department of Indigenous Governance, 2014) [unpublished] at 176.

¹⁵ Gerhard J. Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996) at p. 55; see also Adam James Patrick Gaudry, *Kaa-tipeyimishoyaahk – ‘We are those who own ourselves’: A Political History of Métis Self-Determination in the North-West, 1830-1870* (PhD Thesis, University of Victoria Department of Indigenous Governance, 2014) [unpublished] at 180.

¹⁶ *R. v. Goodon*, 2008 MBPC 59 at para. 69 f).

¹⁷ Report of Gwynneth C.D. Jones, *The Métis of Southern Manitoba in the Nineteenth Century: A Historical Report*, (1 Sept 2005) prepared for *R. v. Goodon* at p. 47.

that the fact of their being natives of the soil gives them the unquestionable right of trading [and] hunting within the H.B. Territory which cannot be affected by the Company's Charter."¹⁸

24. A decade later, in 1856, the situation was much the same. Simpson observed that:

To a man the rising generation of Half-breeds may be set down as opposed to the Company's rule, which they consider adverse to their best interests...feeling that the soil, the trade and the Government of the country are their birth rights.¹⁹

25. This proud independent Métis population constituted a historic rights-bearing community in present day Manitoba and beyond, which encompassed "all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States."²⁰

26. The heart of the historic rights-bearing Métis community in southern Manitoba was the Red River Settlement, which the Supreme Court of Canada described in *Manitoba Métis Federation*:

In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government.²¹

The Promise of Confederation

27. In 1867, Canada was created. "The historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation."²² Indeed, one of the first priorities of Canada's first Prime Minister—Sir John A. Macdonald—was to secure the transfer of Rupert's Land from the Hudson's Bay Company to the new Dominion.

¹⁸ Report of Gwynneth C.D. Jones, *The Métis of Southern Manitoba in the Nineteenth Century: A Historical Report*, (1 Sept 2005) prepared for *R. v. Goodon* at p. 50.

¹⁹ Simpson to Committee of Hudson's Bay Company (1856) as cited in *R. v. Goodon*, 2008 MBPC 59 at para. 69 f).

²⁰ *R. v. Goodon*, 2008 MBPC 59 at para. 48.

²¹ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 23.

²² *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 4.

28. In the Red River Settlement, the rumor that Canada would annex Rupert’s Land was confirmed by the arrival of a surveying party in 1869. The surveyors were met with armed resistance and, at a location now part of the City of Winnipeg, were enjoined not to survey land that was “the property of French half-breeds.”²³ Shortly thereafter, on November 2, 1869, William McDougall—Canada’s proposed Lieutenant Governor of the new territory—was turned back at the border by a mounted Métis patrol. The same day, a group of Métis led by Louis Riel seized Upper Fort Garry, now downtown Winnipeg. In the weeks that followed, the Métis formed a provisional government and drew up a list of demands for Canada to satisfy before the Red River Métis would accept Canadian control.²⁴ Riel issued a Declaration of the People of Rupert’s Land, which proclaimed the provisional government and stated that:

... a people which has no government is free to adopt one form of government rather than another ... the sole legitimate authority today in Rupert’s Land and the North-West is the authority accorded provisionally by the people to us their representatives ... we refuse to recognize the authority of Canada which comes to impose on us a form of government still more contrary to our rights and our interests...²⁵

29. Canada had little choice but to negotiate. It had neither the legal authority nor the military capacity to send in troops to quell the uprising.²⁶ Macdonald, however, found some of the demands of “the insurgent Half-breeds” to be “altogether inadmissible.”²⁷ To settle the dispute, he invited a delegation to visit Ottawa for the purpose of representing the claims and interests of Rupert’s Land, and he offered his assurances that the Métis’ claims would “be equitably settled.”²⁸

30. Riel nominated a delegation of three—a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott—which arrived in Ottawa on April 11, 1870.²⁹ They met with Prime Minister Macdonald and the Minister of Militia and Defence,

²³ *R. v. Goodon*, 2008 MBPC 59 at para. 69 g); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 26.

²⁴ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at paras. 26-27; *Caron v. Alberta* 2015 SCC 56 at para. 19; *R. v. Goodon*, 2008 MBPC 59 at para. 69 g).

²⁵ Report of Gwynneth C.D. Jones, *The Métis of Southern Manitoba in the Nineteenth Century: A Historical Report*, (1 Sept 2005) prepared for *R. v. Goodon* at p. 54.

²⁶ *Manitoba Métis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293 at para. 78, cited in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623.

²⁷ Letter from John A. Macdonald to Donald A. Smith (3 January 1870), as cited in *Manitoba Métis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293 at para. 87.

²⁸ Letter from John A. Macdonald to Donald A. Smith (3 January 1870), as cited in *Manitoba Métis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293 at para. 87.

²⁹ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at paras. 28, 30.

George-Étienne Cartier. These men negotiated what would become the key provisions of *Manitoba Act, 1870*, including a grant to Métis children of 1.4 million acres of land (s. 31),³⁰ a guarantee of legislative and judicial bilingualism (s. 23),³¹ and protection for catholic schools (s. 22).

31. The delegation returned home and, on June 24, 1870, proposed the arrangement to the Legislative Assembly of Assiniboia—the legislature for the provisional government:

The Assembly was read a letter from Minister Cartier which promised that any existing land interest contemplated in s. 32 of the *Manitoba Act* could be converted to title without payment. Minister Cartier guaranteed that the s. 31 children’s grants would “be of a nature to meet the wishes of the half-breed residents” and the division of grant land would be done “*in the most effectual and equitable manner.*”³²

32. The agreement was accepted on the basis of these promises. Finally, Métis land tenure appeared to be secure. Given the importance that the Métis placed on their lands, it is hard to overestimate what this must have meant to the Métis. As Louis Riel would explain later in his life:

The lands that they owned...belonged to them once by the Indian title, twice for having defended them with their blood, and thrice for having built and lived on them...³³

33. On July 15, 1870, Manitoba became a province, with the name “Manitoba” having been suggested by Riel himself.³⁴

Terror and Dishonor

34. It is worth asking whether Canada’s promises were ever meant to be kept. Historian Douglas Sprague explains:

In the midst of the negotiations with Ritchot, Macdonald made plain to Sir Clinton Murdoch and the Governor General that local control of land was as “inadmissible” as the amnesty [for Riel and his followers]. At the same

³⁰ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 30.

³¹ *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para. 7.

³² *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 31.

³³ Louis Riel, “Last Memoir” in A-H de Trémaudan, *Hold High Your Heads: History of the Métis Nation in Western Canada*, translated by Elizabeth Maguet (Winnipeg: Pemmican Publications, 1982) at pp. 207-208.

³⁴ Report of Gwynneth C.D. Jones, *The Métis of Southern Manitoba in the Nineteenth Century: A Historical Report*, (1 Sept 2005) prepared for R. v. Goodon at p. 56.

time, “for the sake of peace,” the delegates were led to believe that their accord with Canada included a pattern of self-government extending to the administration of the Métis homeland in the District of Assiniboia.³⁵

35. Indeed, Macdonald made little secret of his disdain for the Métis and of his prescription for dealing with them. In February, 1870 he had written that “these impulsive half breeds have got spoilt by their emeute [riot], and must be kept down by a strong hand until they are swamped by the influx of settlers.”³⁶ That, in so many words, is more or less what happened.

36. Canada’s efforts to set aside the 1.4 million acres and divide the land among eligible recipients were plagued errors and delays,³⁷ which the Supreme Court of Canada summarized in *Manitoba Métis Federation*:

The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of Rupert’s Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

In 1873, the federal government changed its position, and decided that only Métis children would be entitled to s. 31 grants. The government also decided that lands traditionally used for haying by the Red River settlers could not be used to satisfy the children’s land grant, as was originally planned, requiring additional land to be set aside to constitute the 1.4 million acres. The 1873 decision was clearly the correct decision. The problem is that it took the government over three years to arrive at that position. This gave rise to the second allotment.

In November 1873, the government of Sir John A. Macdonald was defeated and a new Liberal government formed in early 1874. The new

³⁵ Douglas N. Sprague, *Canada and the Métis, 1869-1885*, (Waterloo: Wilfred Laurier University Press, 1988) at p. 89.

³⁶ PAC, Macdonald Papers, Letter Books, vol. 14, pp. 24-28, Macdonald to Rose, 23 February 1870, as cited in Douglas N. Sprague, *Canada and the Métis, 1869-1885*, (Waterloo: Wilfred Laurier University Press, 1988) at p. 89.

³⁷ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 32.

government, without explanation, did not move forward on the allotments until early 1875. The Liberal government finally, after questions in Parliament about the delay and petitions from several parishes, appointed John Machar and Matthew Ryan to verify claimants entitled to the s. 31 grants. The process of verifying those entitled to grants commenced five years after the *Manitoba Act* was passed.

The next set of problems concerned the Machar/Ryan Commission's estimate of the number of eligible Métis children. Though a census taken in 1870 estimated 7,000 Métis children, Machar and Ryan concluded the number was lower, at 5,088, which was eventually rounded up to 5,833 to allow for even 240-acre plots. This necessitated a third and final allotment, which began in 1876, but was not completed until 1880.

...

Eventually, it became apparent that the Acting Agent of Dominion Lands, Donald Codd had underestimated the number of eligible Métis children — 993 more Métis children were entitled to land than Codd had counted on. In 1885, rather than start the allotment yet a fourth time, the Canadian government provided by Order in Council that the children for whom there was no land would be issued with \$240 worth of scrip redeemable for land. Fifteen years after the passage of the *Manitoba Act*, the process was finally complete.³⁸

37. Had circumstances allowed the Métis to benefit from the grants made to them, they would have enjoyed a privileged place in the heart of the new province. While waiting for the land grants to be executed in an “equitable manner,” however, the Métis had the control and governance of their homeland torn from their grasp.
38. As soon possible after Manitoba joined confederation, 1,200 soldiers—the Red River Expeditionary Force—were sent from Ontario to assert Ottawa's control over the fledgling province. When the soldiers entered Fort Gary on August 24, 1870, Riel watched on anxiously from the steps of Bishop Taché's cathedral on the river's far bank:

He stood there with the Bishop watching the troops race into the empty fort, whooping for blood and finding no one to hang or to shoot. Feeling disappointment and anger of his own, Riel turned to Taché and said, “It appears that we have been deceived.”³⁹

³⁸ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at paras. 33-36, 38.

³⁹ Douglas N. Sprague, *Canada and the Métis, 1869-1885*, (Waterloo: Wilfred Laurier University Press, 1988) at p. 69.

39. This was the beginning of what the New York Times would later label Manitoba’s “reign of terror.”⁴⁰ Historian Fred Shore elaborates:

Since the militia was stationed in Fort Garry along with the Dominion Lands Office, the first Provincial Legislature and other government offices, Métis attempts at being part of the new power system were fraught with danger. Assaults, ‘outrages,’ [rapes] murder, arson and assorted acts of mayhem were practiced on the Métis anytime they came near Fort Garry, while the situation in the rest of the Settlement Belt was not much better.⁴¹

40. There is no room here for a full account of the violence that the Métis of southern Manitoba were made to suffer. Some of the most outrageous examples, however, cannot be ignored.

- On September 6, 1870, John Christian Shultz—who would go on to become Manitoba’s fifth Lieutenant Governor—and a number of other men invaded the home of Thomas Spence, editor of the *New Nation*.⁴² At gunpoint, they horsewhipped him. They then moved on to his office, disabled his printing press, and trashed his supplies.⁴³
- On September 13, 1870, Elzéar Goulet—a Métis leader and supporter of Riel and the provisional government—was murdered. Soldiers with the Red River Expeditionary Force chased Mr. Goulet out of a saloon and into the river. While Mr. Goulet tried to swim to the opposite shore, the soldiers stoned him. He drowned.⁴⁴ No charges are laid against the soldiers.
- On October 6, 1870, the St. Paul *Daily Pioneer* reported on the reign of terror:

Its purpose was to drive out by threats or actual violence all the French Half-Breed population, all American citizens, the Hudson’s Bay Company, and [Lt.] Governor Archibald.⁴⁵

⁴⁰ “A Military Reign of Terror in Manitoba – Assault on the American Consul” *The New York Times* (12 June 1871).

⁴¹ Fred J. Shore, *The Métis: Losing the Land*—Aboriginal Information Series, Office of University Accessibility (University of Manitoba, August 2006).

⁴² The *New Nation* was published weekly from January 7, 1870 to September 3, 1870. Formed by the merger of the Red River Pioneer with the Nor’Wester, it was friendly to the provisional government headed by Louis Riel, the debates and discussions of which it reported in great detail.

⁴³ Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 4.

⁴⁴ Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 4.

⁴⁵ As cited in Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 5.

- On December 16, 1870, a Métis man—David Tait—and two of his companions were beaten and left for dead. A soldier’s kepi with a regimental number was recovered at the scene of the assault.⁴⁶
- In February 1871, André Nault—a prominent Métis leader—was attacked by volunteers for the Red River Expeditionary Force while visiting a hotel in Pembina. He fled across the border, but was caught, bayoneted, and left for dead. He carried a scar from the assault until his death.⁴⁷
- On April 19, 1871, Fredrick Bird, a Métis man and the MLA for Portage la Prairie, was kicked and thrown into the mud by John Christian Shultz’s supporters, who did not like the way he voted in the legislature.⁴⁸
- On December 8, 1871, soldiers attacked Louis Riel’s home. Pierre Parenteau described the incident in a letter written the following day:

December 8, 1871, when a party of armed men, led by William Buchanan, raided Riel’s house in St. Vital, claiming to hold warrants for his arrest. Riel was away, and the raiders could only threaten the women of the household to vow bitterly that the Métis leader would be killed before the night had ended.⁴⁹

41. The violence was stifling, as Lieutenant Governor Archibald explained in a letter to John A. Macdonald:

Many of them [the French half-breeds] actually have been so beaten and outraged that they feel as if they were living in a state of slavery.⁵⁰

42. In the decades that followed, the animosity suffered by the Métis in southern Manitoba remained intense. There is little doubt that it eroded their foothold in the province:

The future of the Métis in the new province was, to a large extent, decided in the two decades following the creation of Manitoba. These were hard years for the Red River Métis. Not only were the hunting and trading economies in rapid decline, but commercial grain farming was not viable

⁴⁶ Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 6.

⁴⁷ Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 7; Ruth Swan and Janelle Reynolds, *Dictionary Canadian Biography, s.v.*, André Nault.

⁴⁸ Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 7.

⁴⁹ Public Archives of Manitoba *Lieutenant Governor’s Papers*, Letter Parenteau et al., December 9, 1871, as cited in Lawrence Barkwell, *The Reign of Terror Against the Métis of Red River* (Louis Riel Institute) at p. 5.

⁵⁰ Letter from Archibald to Macdonald (9 October 1871) as cited in as cited in *Manitoba Métis Federation et. al. v. Canada* (No. C. 81-01-01010), Plaintiffs’ Written Argument, para. 362, Document 122.

before the 1880s. This produced subsistence crises that led to significantly higher Métis mortality rates in the province. Delays in gaining possession of the land grants promised in the Manitoba Act led to further insecurity as immigrants from Ontario sometimes squatted on land the Métis claimed as their own. Adaptation to the new political and social climate of Manitoba was further complicated by the introduction of a representative government unfamiliar to the Métis. Given these factors, it should not be surprising that many Métis ceased to see Red River as a Métis homeland, sold their lands, and left the province for lands further west, south, and north.⁵¹

43. Faced with unrelenting social pressures, on the one hand, and the glacial pace of the land grant process, on the other, many Métis felt that their only choice was to sell their claims—often at unconscionably low prices—and leave:

While the allotment process lagged, speculators began acquiring the Métis children’s yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children’s interests to speculators, but, in 1877, it passed legislation authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child’s parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale.⁵²

44. The central purpose of the land promised in s. 31 of the *Manitoba Act* was to give “families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants.”⁵³ Through its inaction and delay, the government failed to give effect to this purpose:

The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in “the most effectual and equitable manner”. Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of

⁵¹ Gerhard J. Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996) at p. 139.

⁵² *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 37 (internal citations omitted).

⁵³ *Manitoba Métis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293 at para. 655 as cited in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 102.

repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.⁵⁴

Aftermath and Resurgence

45. Some Métis stayed in, or returned to, southern Manitoba but their survival demanded that they remain all but invisible. In the years following confederation the dangers of publicly identifying as Métis were made obvious. This established a pattern of behavior that would last almost a century:

Another element that contributes to the invisibility of the Métis is that following the Métis uprisings at Red River in 1870 and in Saskatchewan in 1885 it became impolitic and sometimes dangerous for Métis to self-identify publicly. In 1872, the Ontario legislature passed a \$5,000 bounty on the head of Louis Riel [and others involved in the execution of Thomas Scott]. The atmosphere in Winnipeg after 1870 has been called a “reign of terror” which was designed to discourage public identification as Métis. This disinclination to publicly identify as Métis only increased following the events of 1885. Many Métis grew ashamed to identify in public. In this way, the Métis survived [...] by being invisible. This survival mechanism served the Métis until the 1960s, when the Métis, along with other aboriginal peoples in North America began to reclaim their identity and rights in an increasingly public manner.⁵⁵

46. In the past decades, however, the Métis have been resurgent. In 1967, the Manitoba Metis Federation was founded to promote and advocate for the rights and interests of Métis in the province. The constitutional amendments of 1982—which recognized the Métis as one of the “aboriginal people of Canada”—signaled that the time had “finally come for recognition of the Métis as a unique and distinct people.”⁵⁶
47. More recently, the Métis cause has been buoyed by a series of major legal victories.⁵⁷ In 2008, in *R. v. Goodon*, the Provincial Court of Manitoba affirmed the existence of constitutionally protected Métis harvesting rights in the province. In 2013, in *Manitoba Métis Federation Inc. v. Canada*, the Supreme Court of Canada held that the federal government had “failed to implement the land grant provision set out in s. 31 of the

⁵⁴ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 128.

⁵⁵ Jean Teillet, *Métis Law in Canada*, looseleaf (Vancouver: Pape Salter Teillet LLP, 2015) at p. 1-9.

⁵⁶ *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 at para. 70.

⁵⁷ *R. v. Powley*, [2003] 2 SCR 207; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

Manitoba Act, 1870 in accordance with the honour of the Crown.”⁵⁸ In that decision, the Court took pains to highlight that “[t]he unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.” The Manitoba Métis are ready to do their part in resolving this unfinished business. They are prepared to reclaim their rightful place in the heart of the province and their fair share of the wealth generated by their homeland. Just as the Manitoba Métis were willing partners in confederation, they will be willing partners in reconciliation.

The Manitoba Metis Federation

48. While the MMF was initially formed in 1967, its origins lie in the 18th century with the birth of the Manitoba Métis Community and in the legal and political structures that developed with it.
49. The MMF is the official democratic and self-governing representative for the Métis Nation’s Manitoba Métis Community. The MMF promotes the political, social, cultural and economic interests and rights of the Métis in Manitoba.
50. The Supreme Court of Canada, in *Manitoba Métis Federation Inc. v. Canada*, recognized that the MMF as the only body in the litigation to have standing to represent the collective interests of the Manitoba Métis in relation to the outstanding claim against the Crown flowing from s. 31 of the *Manitoba Act, 1870*.⁵⁹ Further, the Provincial Court of Manitoba, in *R. v. Goodon*, recognized that the MMF is the governing body of Métis people in Manitoba.⁶⁰
51. The MMF is also recognized by other levels of government as the representative body of the Manitoba Métis Community. It receives limited annual funding from the federal government and the Manitoba government to represent Manitoba Métis Community. It has also negotiated many agreements and arrangements on behalf of the Manitoba Métis Community with other levels of government.
52. The objectives of the MMF, as set out in the MMF Constitution, are as follows:
 - i. To promote and instill pride in the history and culture of the Métis people.
 - ii. To educate members with respect to their legal, political, social and other rights.
 - iii. To promote the participation and representation of the Métis people in key political and economic bodies and organizations.

⁵⁸ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 154.

⁵⁹ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para 44.

⁶⁰ *R. v. Goodon*, 2008 MBPC 59 at para 52.

- iv. To promote the political, legal, social and economic interests and rights of its members.
 - v. To provide responsible and accountable governance on behalf of the Manitoba Métis community using the constitutional authorities delegated by its members.
53. In fulfillment of these objectives, the MMF delivers programs and services to the Manitoba Métis Community, including services relating to children and families, justice, housing, youth, education, human resources, economic development, natural resources, and healthcare.
54. Importantly, and based on the mandate derived from the MMF citizenship registry, the MMF's province-wide ballot box election, the MMF Constitution and the collective will of the Manitoba Métis, the MMF is authorized to deal with the collective rights, interests and claims of the Manitoba Métis Community.
55. In order to discharge its representative role on behalf of the Manitoba Métis Community, the MMF is organized and operated based on democratic principles. The MMF President is its Chief Executive Officer, leader and spokesperson. The President is elected in a province-wide election every four years and is responsible for overseeing the MMF's day-to-day operations. In addition, the MMF has a Board of Directors that leads, manages and guides the policies, objectives and strategic direction of the MMF and its subsidiaries. All 23 members of the Board of Directors are democratically elected by the membership.
56. The MMF is also organized into seven Regions throughout the province. Each Region is administered by a vice-president and two executive officers, all of whom sit on the MMF's Board of Directors. These Regions deliver programs and services to their specific geographic area.
57. Within each Region are various settlements, villages or area-specific "Locals," which are administered by a chairperson, a vice-chairperson and a secretary-treasurer. There are approximately 140 MMF Locals in the province. A Local must have a minimum of nine members and meet at least four times a year. Every member of the MMF belongs to a Local. The purpose of a Local is for members to have local-based representation through local governance and communication channels and to exchange information upward to higher levels of MMF governance concerning local issues, values and interests. This structure allows the MMF to centralize and use resources efficiently, while at the same time remaining in tune with and responsive to regional and local needs and concerns while representing the Manitoba Métis Community as a whole.

The Manitoba Métis Community’s Rights, Interests, and Claims

58. The Manitoba Métis Community possesses Aboriginal rights, including pre-existing Aboriginal collective interests in lands protected by section 35 of the *Constitution Act, 1982*, throughout their homeland and traditional territory. This includes, but is not limited to, the area of and surrounding the Whiteshell site. Indeed, Manitoba courts recognized these pre-existing, collectively held rights of the Manitoba Métis Community in *R. v. Goodon*:

I conclude that there remains a contemporary community in southwest Manitoba that continues many of the traditional practices and customs of the Métis people. [...] I have determined that the rights-bearing community is an area of southwestern Manitoba that includes the City of Winnipeg south to the U.S. border and west to the Saskatchewan border.⁶¹

59. As affirmed by the Supreme Court of Canada, such rights 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.”⁶² Importantly, courts have also recognized that Métis harvesting rights may not be limited to Unoccupied Crown Lands.⁶³

60. The Crown, as represented by the Manitoba government, has recognized some aspects of the Manitoba Métis Community’s rights through a negotiated agreement. In 2012, the MMF and Manitoba government concluded the MMF-Manitoba Harvesting Agreement which recognizes Métis rights to “hunting, trapping, fishing and gathering for food and domestic use, including for social and ceremonial purposes and for greater certainty, the ability to harvest timber for domestic purposes” throughout an area spanning approximately 800,000 km² (the “Métis Recognized Harvesting Area”). MMF asserts rights beyond this Métis Recognized Harvesting Area as well.

61. As further discussed below, MMF citizens continue to exercise their Métis harvesting rights in and around the vicinity of the Whiteshell site.⁶⁴

62. Beyond those rights already established through litigation and recognized by agreements, the Manitoba Métis Community claims commercial and trade related rights. Courts have noted that Métis claims to commercial rights remain outstanding.⁶⁵ These claims are

⁶¹ *R. v. Goodon*, 2008 MBPC 58, at paras. 58; 75.

⁶² *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para. 5.

⁶³ *R. v. Kelley*, 2007 ABQB 41, at para. 65.

⁶⁴ See MMF Reports and specifically the MMF Whiteshell Reactor #1 Decommissioning: Manitoba Métis Traditional Knowledge, Land Use, and Occupancy Study for further details.

⁶⁵ *R. v. Kelley*, 2007 ABQB 41.

strong and well-founded, and it is incumbent on the Crown and others to take them seriously.

63. The Manitoba Métis Community has its roots in the western fur trade.⁶⁶ The Métis in Manitoba are descendants of early unions between Aboriginal women and European traders.⁶⁷ As a distinct Métis culture developed, the Métis took up trade as a key aspect of their way of life.⁶⁸ Many Métis became independent traders, acting as middlemen between First Nations and Europeans.⁶⁹ Others ensured their subsistence and prosperity by trading resources they themselves hunted and gathered.⁷⁰ By the mid-19th century, the Métis in Manitoba had developed the collective feeling that “the soil, the trade and the Government of the country [were] their birth rights.”⁷¹
64. Commerce and trade is, and always has been, integral to the distinctive culture of the Manitoba Métis Community. Today, the Manitoba Métis have an Aboriginal, constitutionally protected right to continue this trading tradition in modern ways to ensure that their distinct rights will not only survive but also flourish.
65. Unlike First Nations in Manitoba, whose commercial rights were converted and modified by treaties and the *Natural Resources Transfer Agreement* (“NRTA”),⁷² the Manitoba Métis Community’s pre-existing customs, practices, and traditions—including as they relate to commerce and trade—were not affected by the NRTA⁷³ and continue to exist and be protected as Aboriginal rights.
66. The MMF also has outstanding claims related to Métis-specific land interests. The MMF’s first unresolved claim related to land flows from the 1.4 million acres of land promised to the children of the Métis living in the Red River Valley, a promise enshrined in s. 31 of the *Manitoba Act, 1870*.⁷⁴ This promise was a key element of a nation-building, constitutional compact that was meant to secure a “lasting place in the new province [of Manitoba]”⁷⁵ for future generations of the Métis people. This “lasting place”

⁶⁶ *R. v. Blais*, 2003 SCC 44 at para. 9; *R. v. Goodon*, 2008 MBPC 58, at para. 25.

⁶⁷ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para. 21.

⁶⁸ *Powley*, supra at para. 10.

⁶⁹ *R. v. Goodon*, 2008 MBPC 58, at para. 30.

⁷⁰ *R. v. Goodon*, 2008 MBPC 58, at para. 31, 33, & 71.

⁷¹ *R. v. Goodon*, 2008 MBPC 58, at para. 69(f).

⁷² *R. v. Horseman*, [1990] 1 SCR 901.

⁷³ *R. v. Blais*, 2003 SCC 44.

⁷⁴ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para 154.

⁷⁵ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para 5.

was to have been achieved by providing the Manitoba Métis Community a “head start”⁷⁶ in securing lands in the heart of the new province. Instead, the federal Crown was not diligent in its implementation of s. 31, which effectively defeated the purpose of the constitutional compact.

67. In March 2013, the Supreme Court of Canada found that the federal Crown failed to implement diligently and purposefully the Métis land grant provision set out in s. 31 of the *Manitoba Act, 1870*.⁷⁷ This constituted a breach of the honour of the Crown. In arriving at this legal conclusion, the Court wrote:

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.⁷⁸

68. The Supreme Court of Canada granted the MMF the following declaratory relief (the “**MMF Declaration**”):

That 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.⁷⁹

69. This constitutional breach—this unfinished business of nation building and reconciliation—constitutes an unresolved Métis claim flowing from a judicially recognized constitutional obligation, which burdens the federal Crown.⁸⁰ It can only be resolved through good faith negotiations and a just settlement with the MMF.⁸¹ Lands, including those areas where the Manitoba Métis Community has a historic and ongoing connection to, may need to be considered as a part of any future negotiations and settlement in fulfillment of the promise of 1.4 million acres.

⁷⁶ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at paras 5-6.

⁷⁷ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para 154.

⁷⁸ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para 140.

⁷⁹ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at para. 154.

⁸⁰ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, at paras 156, 212.

⁸¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, pp. 1105-6; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 253; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 para. 20; *Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 256, para 17.

70. On May 27, 2016, the Government of Canada, represented by the Minister of Indian Affairs and Northern Development (“**Canada**”), and the MMF executed a Memorandum of Understanding (“**MOU**”) on Advancing Reconciliation. The MOU established an exploratory discussion process aimed at developing a framework agreement based on which negotiations for the resolution of the MMF’s claim could proceed.
71. On November 15, 2016, Canada and the MMF executed a Framework Agreement for Advancing Reconciliation (the “**MMF Framework Agreement**”) that formalized a negotiation process to “jointly develop a renewed nation-to-nation, government-to-government relationship” and aims “to arrive at a shared solution that advances reconciliation between the Parties consistent with the purpose of section 35 of the *Constitution Act, 1982* and the Supreme Court of Canada’s decision in *Manitoba Métis Federation Inc. v. Canada (AG)*.”⁸² These negotiations are ongoing.

The MMF and the Crown’s Duty to Consult (MMF’s Resolution No. 8 Framework)

72. Resolution No. 8 is the framework for engagement, consultation, and accommodation with the Manitoba Métis Community. Designed by Métis—for Métis—Resolution No. 8 sets out the process that is to be followed by federal and provincial governments, industry, and others when making decisions and developing plans or projects that have the potential to impact the rights, claims, and interests of the Manitoba Métis Community.

73. Resolution No. 8 that states that:

In keeping with prior MMF AGA resolutions, this assembly continues to give the direction to the Provincial Home Office to take the lead and be the main contact on all consultations affecting the Métis community and to work closely with the Regions and Locals to ensure governments and industry abide by environmental and constitutional obligations to the Métis and [...]

That direction and mandate be given to the MMF Board to pursue legal and other actions as the Board may determine are appropriate against governments and industry in the consultation and accommodation areas to ensure that the Manitoba Métis community is fully consulted and accommodated when a decision or project is contemplated that may affect our collective Métis Rights.

⁸² Framework Agreement for Advancing Reconciliation between the MMF and Canada, 2016, sections 1.1.1 and 1.1.2. Online: <https://www.aadnc-aandc.gc.ca/eng/1502395273330/1502395339312>.

74. Resolution No. 8 was unanimously passed at the MMF AGA in 2007 and mandates a “one-window” approach to consultation with the Manitoba Métis Community through the MMF Home Office. Based on Resolution No. 8, the MMF Home Office, Regions, and Locals have a responsibility to work together to ensure that all MMF Citizens’ rights and interests are effectively represented in matters related to consultation and accommodation.

The Duty to Consult and Accommodate

75. The Crown’s duty to consult is grounded in the honour of the Crown and the reconciliation of Indigenous peoples’ prior occupation and use of the land with the assertion of Crown sovereignty. This includes the Manitoba Métis Community, who have used and occupied their traditional territory in what is now Manitoba prior to Manitoba entering confederation—and before any assertion of Canadian sovereignty—and as such have Aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.

76. The Crown’s duty to consult is triggered when a decision or action by the Crown may impact an Aboriginal right:

The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.⁸³

77. The Aboriginal right does not need to be proven or established in order for consultation to be required—a credible asserted right is sufficient to trigger the Crown’s duty to consult:

There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate . . . A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.⁸⁴

⁸³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 35.

⁸⁴ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 37 (emphasis added).

78. Likewise, the impact does not need to be certain—a potential impact is sufficient to trigger the Crown’s duty to consult:

Haida Nation and *Taku River* set a low threshold. The flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered.⁸⁵

79. Consultation is a forward-looking duty, meaning that the Crown must undertake consultation with potentially impacted Indigenous groups **before** any action or decision is taken.⁸⁶ This includes strategic, or high-level policy decisions that set the stage or create a momentum for later events that have the **potential** to impact an existing or asserted Aboriginal right.⁸⁷

80. The amount, or “scope” of consultation owed varies depending on the circumstances. It is generally proportionate to an assessment of the strength of the Aboriginal right and the severity of the potential impact. The courts have used the concept of a “spectrum” to discuss how much consultation is required, spanning from notice and an exchange of information to, in certain cases, consent of the Indigenous community:

The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.⁸⁸

⁸⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2015 SCC 69, at para 34.

⁸⁶ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2015 SCC 69, at para 35.

⁸⁷ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

⁸⁸ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, at para 91.

81. In all cases consultation must be undertaken in a manner that upholds the honour of the Crown.⁸⁹ The Supreme Court of Canada has said that the overall question in “all situations” is:

what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake?⁹⁰

82. This is the question that the Commission must ask with respect to the CNL licence renewal.

The Duty to Consult is Triggered by the Licence Renewal Decision

83. The Commission’s decision to renew the CNL licence for the current proposed Whiteshell decommissioning activities will impact the Manitoba Métis Community’s rights, interests, and claims. As set out above, the duty is triggered at a low threshold,⁹¹ and it is met—and exceeded—by CNL’s licence renewal application in relation to the Manitoba Métis Community’s rights and claims.

84. The law is clear that there must be a “contemplated action” (the renewal of the licence); “the potential existence of an Aboriginal right” (the Manitoba Métis Community’s recognized and established as well as credibly asserted Aboriginal rights and claims are set out above); and the possibility that the contemplated conduct could adversely affect the Aboriginal rights or claims.⁹² The nature of the activities contemplated by the CNL licence renewal on its face has the potential to adversely impact the Manitoba Métis Community’s rights, interests, and claims.

85. CNL’s licence renewal application identifies decommissioning activities such as demolition, increased traffic to the area, access restrictions, activities that could result in contamination of water or other resources such as the relocation or storage of radioactive waste, as well as various remediation activities which will alter the natural environment.⁹³ Given the nature of the Manitoba Métis Community’s rights, claims, and interests in the Whiteshell area, including land-related claims and extensive harvesting activities and consumption of harvested foods, the kinds of activities identified in the licence *prima facie* have the potential for adverse impacts.

⁸⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 41.

⁹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 45.

⁹¹ See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, para 40: “The threshold, informed by the need to maintain the honour of the Crown, is not high.”

⁹² *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 35

⁹³ See CMD 19-H4.1 – Submission from CNL on their application for renewal of licence for Whiteshell Laboratories.

The Manitoba Métis Community is Owed Deep Consultation

86. As set out above, once the duty to consult is triggered, the scope of that duty must be determined. The Courts have used the concept of a spectrum to outline what is required in order to fulfill the content of the duty to consult. Specifically, the scope of the duty depends on two things: the strength of the Aboriginal rights or claims, and the seriousness of the potential impacts.

As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.⁹⁴

87. The courts have held that deep consultation is required “where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.”⁹⁵ Given the established rights and claims of the Manitoba Métis Community in the Whiteshell area, their significance to the Manitoba Métis Community, and credible risk of adverse impacts that would have serious and potentially permanent consequences for contamination of the lands, waters, and resource on which the Métis rely, the Manitoba Métis Community is owed deep consultation.

88. The following factors related to the Manitoba Métis Community’s rights, claims, and interests support a determination that not only is the duty to consult triggered, but that a deep duty is owed to the MMF:

- a) established section 35 Métis rights that are recognized by the Crown;
- b) a land-related claim that has been accepted for negotiation by the federal Crown;
- c) and extensive and detailed evidence of ongoing Métis land use for the purposes of exercising section 35 rights.

This is explained in further detail below.

⁹⁴ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 41.

⁹⁵ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 44.

a) *The Manitoba Métis Community has Established and Crown-Recognized s. 35 Métis Rights*

89. The Manitoba Métis Community has constitutionally protected Aboriginal rights, judicially recognized outstanding claims, and significant and distinct Métis interests in the lands and resources on and surrounding the Whiteshell site. The rights and claims of the Manitoba Métis Community in relation to the Whiteshell site should, at this stage, be well known. They have been elaborated on in meetings and discussions with CNL, and in the MMF's Reports. This section provides only a summary, and the MMF's Reports should be consulted for a more fulsome picture.
90. It is important to emphasize that the Manitoba Métis Community's section 35 Aboriginal rights and claims in relation to the Whiteshell site and surrounding area flow from pre-existing and collectively held Métis interests in relation to those specific lands. These section 35 rights continue to exist today as "rights" to use and rely on those lands in order to sustain the unique Métis identity, culture, and way of life.⁹⁶ These include Métis harvesting, gathering, and water rights as well as Métis commercial and trade interests that were never impacted by the *Manitoba Natural Resources Transfer Agreement, 1930*.
91. As recognized in *R. v. Goodon*⁹⁷ and the MMF's harvesting agreement with Manitoba,⁹⁸ these collectively-held Métis interests in land—that are protected as section 35 rights—were not extinguished or modified by the *Manitoba Act, 1870* in the old postage stamp province of Manitoba or throughout the rest of what is present day Manitoba.⁹⁹
92. These rights are recognized and established rights, not merely assertions. The courts have been clear that while "dubious claims" may attract only notice and an opportunity to discuss concerns or provide information, "established claims" attract "more stringent duties" and in some cases require the full consent of the Indigenous community before the project or activity can proceed.¹⁰⁰ Similar to other cases involving established rights,

⁹⁶ As the SCC recognized in *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 [MMF] at para 53: these "interest[s] (title or some other interest) must be distinctly Aboriginal; it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 37."

⁹⁷ *R v Goodon*, 2008 MBPC 59.

⁹⁸ MMF-Manitoba Points of Agreement on Metis Harvesting in Manitoba, September 29, 2012.

⁹⁹ In *R v Goodon*, 2008 MBPC 59, Manitoba argued "that Métis hunting rights have been extinguished within the "postage stamp" Province of Manitoba by the *Manitoba Act* of 1870. The Crown further submits that if part of the rights-bearing community rests within the "postage stamp" province, the rights of the entire community are extinguished." The court succinctly concluded: "I disagree" (at para 76). In addition, the Harvesting Agreement states that "Manitoba recognizes that collectively-held Métis Harvesting Rights, within the meaning of s. 35 of the *Constitution Act, 1982*, exist within the Game Hunting Areas identified on the map attached as Schedule "A" [the "Recognized Métis Harvesting Area"]" (Article 1).

¹⁰⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 37.

“deep consultation is required” regarding impacts on established and recognized Métis rights exercised at the Whiteshell site.¹⁰¹

b) *The MMF has a Judicially Recognized Outstanding Claim for Land and Ongoing MMF-Canada Negotiations*

93. The MMF Declaration and ongoing negotiations with Canada also support that deep consultation is required regarding CNL’s licence renewal. As noted above, the MMF Declaration results in an outstanding land related claim against the federal Crown. It has been accepted by Canada for negotiations that include, amongst other things, addressing “the role of land in any agreement and the quantum, selection and management of potential settlement lands.”¹⁰²

94. The ongoing negotiations between the MMF and Canada also must inform Manitoba’s conduct as well as the level of consultation required. The Supreme Court of Canada has made clear that the Crown accepting a claim for negotiations increases the required level of consultation regarding that claim and decisions that have the potential to impact it.¹⁰³ Tom Isaac, in his capacity as the Minister’s Special Representative on Reconciliation with Métis, emphasized in his report just how far advanced the MMF is in this process:

The MMF Declaration is not a claim. The MMF Declaration is also not a settlement of litigation. The litigation is complete. The MMF Declaration is about the implementation of declaratory relief from the highest court in Canada, and more broadly about implementing in practical terms the honour of the Crown and achieving reconciliation with the Métis of Manitoba. ***This is an important step in the overall objective of reconciliation and one upon which Canada should act immediately without any further delay.***¹⁰⁴

95. Given this context, there is no doubt that Crown decisions that might adversely affect the ongoing negotiation process being undertaken by Canada and the MMF with respect to the MMF Declaration would attract a deep duty to consult and require meaningful, appropriate accommodation.

¹⁰¹ For instance, see *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, at para 43 which had “established treaty rights” in the Project area.

¹⁰² MMF-Canada Framework Agreement for Advancing Reconciliation, November 15, 2016, online: <https://www.aadnc-aandc.gc.ca/eng/1502395273330/1502395339312>.

¹⁰³ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74.

¹⁰⁴ Thomas Isaac, *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision* (August 21, 2016) at p. 39 (emphasis added).

c) Significant Evidence of Métis Land Use in and Around the Whiteshell Site

96. The MMF Reports provide significant evidence that the Whiteshell site falls within lands where the Manitoba Métis Community asserts and exercises their Aboriginal rights. Specifically, the MMK TKLUS outlines evidence of, among other practices:

- 424 locations of traditional land use information, 75 of which were within 100m of the Whiteshell site;
- 90% of study participants consume deer harvested within 25km of the Whiteshell site;
- 80% of study participants consume fish from within 25km of the Whiteshell site;
- 60% of study participants consume berries or fruit from within 25km of the Whiteshell site; and
- 50% of study participants consume birds from within 25km of the Whiteshell site.

97. In addition, the MMF Citizens who participated in the TKLUS for the Whiteshell Nuclear Reactor decommissioning demonstrated a deep familiarity with the land and waters of the area and expressed significant concerns regarding impacts to human health, the environment, and the exercise of their Métis rights. This data—while only a limited snapshot of Métis land use and the exercise of Métis rights in this area—demonstrates the high importance of this area to the Manitoba Métis Community.

98. The evidence in the MMF Reports clearly outlines that the Manitoba Métis Community continues to extensively rely on the lands and waters surrounding the Whiteshell site to exercise their Métis rights, maintain their distinct Métis traditions and connections to the land, and harvest to feed themselves and their families.

99. In particular, CNL was surprised by the evidence of the high level of reported consumption by the Manitoba Metis Community of wild game, fish, plants, and other products near the Whiteshell site. The MMF undertook a consumption survey to gather additional information about the consumption patterns of the Manitoba Métis Community for consideration by CNL. The Métis consumption survey results demonstrated that:

- 71% of Métis harvesters interviewed had used the Winnipeg River for fishing;
- 76% of Métis harvesters interviewed had used the land around Lac du Bonnet, while 45-52% had used the area around Seven Sisters and the Pinawa area;

- 71% of Métis harvesters use the area for fishing and gathering, and 38% for hunting.

100. In addition, the consumption survey indicated higher than average reliance by Métis harvester on harvested food as part of their diet. In light of this evidence, the MMF has raised the need for additional monitoring or investigation into health risks specifically faced by the Manitoba Métis Community.

101. The Manitoba Métis Community has an interest in, rights and traditional stewardship responsibilities associated with, their traditional territory and maintaining a sustainable environment for future generations of their community. Potential risks (such as leaks of radioactive contaminants or accidents during the transports of such materials) associated with the licence and decommissioning activities would occur within the Manitoba Métis Community’s traditional territory, and have the potential to affect the exercise of their constitutionally protected Aboriginal rights and impact their ongoing stewardship rights and obligations. There must be a process for the MMF and CNL to discuss and plan measures to avoid or mitigate these concerns.

d) Limited Amount of Crown Land and History of Metis Disposition

102. The limited amount of “Crown” land for the Métis to exercise their rights on is also a factor that supports a deeper duty to consult. Denied the “head start” in the province that they were Canada’s negotiating partner in creating, the Manitoba Métis Community primarily relies on “Crown” lands to exercise their rights, maintain their distinct Métis traditions, and maintain their connection to their traditional territory today. Crown land—and particularly federal Crown land—is in short supply in Manitoba.

103. Southern Manitoba generally has already been extensively impacted by development,¹⁰⁵ and the Manitoba Métis Community already finds it increasingly difficult to exercise their constitutionally protected rights.¹⁰⁶ Further disturbance to these already constrained lands used for the exercise of Métis rights—which the Whiteshell decommissioning and WR-1 Nuclear Reactor may do for countless generations—will result in significant impacts in an area where the Manitoba Métis Community already cannot meaningfully exercise their harvesting rights.

104. In addition, the limited amount of federal Crown lands in Manitoba engages the MMF-Canada Framework Agreement negotiations, which as noted above, include “potential settlement lands” as one of the matters for negotiation. Whether these lands

¹⁰⁵ This was recognized by the National Energy Board in its review of the Manitoba Minnesota Transmission Line Project also in southern Manitoba.

¹⁰⁶ *Mikisew Cree First Nation v Canada*, 2005 SCC 59, at para 48.

have the potential to be remediated to a state where the MMF may be interested in considering them as part of any settlement reached regarding the MMF Declaration is directly impacted by the Licence Renewal and how the decommissioning activities are undertaken

The Honour of the Crown Requires Consultation to Address Outstanding Métis Concerns

105. As outlined in greater detail in the MMF Reports, the Manitoba Métis Community continues to have significant concerns about the environmental and safety impacts of the proposed decommissioning activities and what impacts these activities will have on their constitutionally protected rights, claims, and interests. These concerns must be resolved before the licence is renewed. At minimum, a meaningful process that can address and resolve these concerns needs to be required and implemented as a part of the licence renewal. The honour of the Crown demands nothing less.
106. MMF Citizens have asked questions regarding remediation plans for any existing contamination and raised concerns about health risks associated with asbestos for workers on site and other risks with asbestos in general. Questions were also posed about restrictions on access to the site, how the disposal would occur and what safety measures would be put in place both in the short and long-term. These concerns relate directly to the health and safety of the individuals of the Manitoba Métis Community living near and using the lands in the Whiteshell area and require answers from CNL prior to decommissioning activities taking place.
107. MMF Citizens also voiced concerns about the potential for contamination of wildlife and movement of those contaminated wildlife causing contamination further afield (e.g. to fisheries in Lake Winnipeg, and about impacts to their groundwater including local drinking water in particular). These concerns were particularly prevalent given the Manitoba Métis Community's reliance on harvesting, including hunting, fishing, gathering and use of the lands and rivers to sustain themselves and their families. MMF Citizens also voiced concerns about the likelihood of any contamination to the rivers/waterways, if so what the extent would be (i.e., how far downstream contamination would spread), what the plans for preventing any leakage would be, and how often monitoring and testing would be done.
108. A number of questions were asked regarding the ongoing monitoring and testing as well, including what species would be tested, how often, for what distance from the site, etc. These concerns overlap with the Manitoba Métis Community's ongoing stewardship rights and responsibilities for their traditional territory. Ensuring a healthy

and sustainable environment for future generations of the Manitoba Métis Community is a vital concern. MMF Citizens raised the question of whether species other than proposed by CNL would be sampled, or if other factors/information could be collected as part of the monitoring to reflect a more holistic perspective of the health of the species found in the Whiteshell area. One MMF Citizen specifically asked whether annual Métis monitoring tours could be arranged, as an exercise of the Manitoba Métis Community's stewardship.

109. The above concerns and potential unaddressed impacts illustrate that Metis-specific mitigations need to be put in place to avoid any risks and impacts of the licence renewal and decommissioning activities on Métis rights, claims, and interests. This must be done in consultation with the MMF and consistent with the Resolution No. 8 process so that the Manitoba Métis Community can have confidence that they can continue to harvest and consume wild foods from the area without fear of contamination.
106. The MMF has provided specific recommendations to help address its concerns and mitigate impacts to Métis rights, interests, and claims.¹⁰⁷ Not all of these have been adopted, or fully embraced by CNL.
107. It is critical that CNL continue to engage with the MMF on these issues—as part of their licensing conditions—and not only as a “recommended” or optional “best practice.” The stakes are high for the Manitoba Métis Community. They rely on this area extensively to harvest and exercise their s. 35 Métis rights. These rights are not tenuous or mere assertions. They are established/recognized and highly credible rights supported by extensively documented land use. The Manitoba Métis Community's concerns are related to a nuclear facility that is proposing to transport and deal with highly hazardous materials within their traditional territory. These concerns are not trivial.
108. The MMF Reports included, among other things, recommendations for:¹⁰⁸
- Ongoing monitoring and increased water and sediment sampling, as well as fish sampling, at sites and with a frequency to be determination in consultation with the MMF;
 - The creation of a Métis Technical Working Group to assist with the design and oversight of the monitoring plan, which should include Métis monitors who are

¹⁰⁷ See MMF Reports and specifically the tracking tables in those reports regarding how and if CNL is addressing the MMF's concerns and implementing the MMF's recommendations.

¹⁰⁸ Note that these recommendations are a summary of the full recommendations outlined in the MMF Reports. The summary is not intended to be exhaustive or to reflect all details (e.g. specific contaminate levels or frequency of monitoring) that is included in the MMF Reports.

on the ground with CNL during all stages of monitoring (and the necessary capacity funding for monitoring training and skills development or education);

- Adoption of adaptive management and contingency plan for responding to degrading water and sediment quality or indication of contamination, developed in consultation with the MMF;
- An updated environmental protection plan, to be developed in consultation with the MMF;
- An updated Human Health and Ecological Risk Assessment to evaluate the potential impacts of the proposed activities in light of the greater than average reliance of the Manitoba Métis Community on the waters, lands, and resources potentially impacted by the Whiteshell project for subsistence, the unique circumstances of the Manitoba Métis Community, and Métis traditional knowledge;
- Consultation with the MMF and inclusion of Métis traditional knowledge regarding reclamation activities as well as the development of mitigation and avoidance measures;
- The development of a Communications Protocol with the MMF so Métis Citizens are provided with information regarding the status of decommissioning activities and the MMF can provide input in timing windows that may avoid impacts on Métis harvesting seasons or practices;
- An Emergency Response Plan must be developed in consultation with the MMF, to notify its members in the event of radioactive leaks and airborne monitoring exceedances; and
- Limitations on the Manitoba Métis Community use of the lands and resources resulting from the anticipated “end use” state of the Whiteshell site should be clearly identified and mitigated, in consultation with the MMF, among others.

109. CNL has yet to fully respond to and implement these recommendations.

110. In order to ensure that consultation continues with the Manitoba Métis Community to address these outstanding impacts and concerns, an ongoing consultation requirement must be included as a licencing condition. This is the only way—other than denying the approval altogether—that the Crown can ensure that Métis rights will be adequately considered and addressed moving forward. Without such a licencing condition, consultation may be viewed as merely “optional”—or, as the Commission

staff have incorrectly stated “recommended”—rather than required as the constitutional obligation that it is. As further outlined below, such licencing conditions are not novel and are supported by Canada’s international obligations and commitments to reconciliation with the Métis.

Canada’s International Obligations and Commitments Require a Nation-to-Nation, Reconciliation Approach

111. The Commission’s review and licensing decision must be made and implemented in accordance with Canada’s commitments to the Manitoba Métis Community specifically, as well as its commitments and international obligations to Indigenous peoples generally. This includes, among other things:
- a. the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”);
 - b. Canada’s 10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples (“**Principles**”); and
 - c. the MMF-Canada Framework Agreement.
112. First, the Commission must exercise its discretion regarding CNL’s licence renewal application in light of Canada’s commitment to implement UNDRIP.¹⁰⁹ On May 10, 2016, Canada unequivocally stated that it was committed to implementing UNDRIP and removed its previous objections related to it and its requirements of free, prior and informed consent.
113. UNDRIP sets out the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” It contains obligations to Indigenous Peoples, including the Manitoba Métis Community, that are directly relevant to CNL’s licence renewal. These include the following articles that confirm the significance of Indigenous community’s such as the Manitoba Métis Community being able to continue to rely on and access their traditional territory, participate in decision making and specifically not have hazardous materials stored on their traditional territory without their free, prior and informed consent:
- Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

¹⁰⁹ Speaking notes for Minister Carolyn Bennett, Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues, New York City, May 10, 2016, online: <https://www.metisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf>

- Article 26(1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- Article 29: (i) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.
(ii) States shall take effective measures to ensure that no storage of disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent.
(iii) States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of Indigenous peoples, as developed and implemented by the peoples affected by such materials are duly implemented.

114. CNL’s Licence Renewal Application contemplates not only the continued alteration of the traditional lands of the Manitoba Métis Community, it also contemplates the continued and long-term movement (and potential future plan for storage) of hazardous materials on the traditional lands of the Manitoba Métis Community. The above UNDRIP articles are clearly engaged and the Commission must make its decisions—as the vehicle through which the Crown acts to make certain decisions¹¹⁰—in a way that respects and is aligned with Canada’s international commitments, including UNDRIP.

115. Secondly, Canada adopted a set of core Principles that are to guide all of its relationships with Indigenous peoples. This is noted “as a necessary starting point. . .to support efforts to end the denial of Indigenous rights.”¹¹¹ Similar to UNDRIP, the Commission must respect these principles in its decision-making process.

¹¹⁰ The Supreme Court of Canada has clearly stated that independent tribunals or regulators are the “Crown” for the purposes of the duty to consult. See *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, at para 29: “...the NEB is not, strictly speaking, “the Crown”. Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown’s ministers — no relationship of control exists between them. As a statutory body holding responsibility under s. 5(1) (b) of COGOA, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts.”

¹¹¹ Canada’s 10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples, online: <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

116. The Commission—as a vehicle for legislatively mandated Crown action—must play a role in furthering reconciliation between the Crown and Indigenous peoples, including with the Manitoba Métis Community. The following Principles provide guidance about how Canada envisions its relationship with Indigenous communities evolving, a vision that the Commission must align its actions with:

- Principle 1 sets out that “The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.” It calls for “all governments to shift their relationships and arrangements with Indigenous peoples so that they are based on recognition and respect for the right to self-determination.” A necessary aspect of self-determination is meaningful involvement in decisions that impact the Manitoba Métis Community. This requires ongoing engagement about projects that are taking place that impact the rights and way of life of the Manitoba Métis Community.
- Principle 4 “recognizes that Indigenous self-government is part of Canada’s evolving systems of cooperative federalism and distinct orders of government.” This Principle recognizes that “Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.” This Principle is clearly meant to apply to any and all developments or projects that take place on Indigenous lands.
- Principle 6 provides that “meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.” The Whiteshell facility, and the activities contemplated under the CNL licence renewal application, are wholly located on the traditional territory of the Manitoba Métis Community, lands that the evidence demonstrates are significant and are extensively used by the Community for the exercise of their constitutionally protected rights. Not only has the Manitoba Métis Community’s “free, prior and informed consent” not been sought, but no ongoing consultation obligation has been recognized with respect to the activities contemplated in CNL’s licencing renewal application.
- Principle 10 “recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.” As a distinct Indigenous people, the rights, claims and interests of the Manitoba Métis Community are distinct from those of interested or affected First Nations. Consultation and engagement with the Manitoba Métis Community must take into account the unique history, rights, interests, claims, and concerns of the Manitoba Métis Community.

117. In addition, Canada has made a number of commitments about proceeding on a nation-to-nation, government-to-government basis with the MMF in the MMF-Canada Framework Agreement. Fundamentally, these commitments reflect the goal of increasing Métis decision making over actions or activities that affect MMF Citizens, their rights, claims, and interests or traditional territory. For instance, Canada and the MMF have agreed that their negotiations under the Framework Agreement may address quantum, land selection and management of potential settlement lands; water and subsurface rights; wildlife, fishing, and fisheries; forestry; and land management.¹¹²
118. The Commission’s decision on CNL’s licence renewal—and any conditions imposed as a part of a licence—needs to align with Canada’s commitments in UNDRIP, Canada’s renewed relationship with the Manitoba Métis Community as set out in the Principles and the MMF-Canada Framework Agreement, and must respect and contribute to the overall process of reconciliation with Indigenous peoples.

Summary: MMF’s Recommendations Regarding CNL’s Licence Renewal Application

119. MMF Citizens have clearly expressed their desire to continue to be involved in the decision-making process, monitoring, and decommissioning activities for the Whiteshell site. One MMF Citizen said that they envisioned:

*Something sustainable that we could pass onto our grandchildren and they can pass that on, keep it. Make sure we all remember where we came from, spend time with family on the land. It’s all about preserving something for the future.*¹¹³

120. Another Citizen offered this comment:

*Well I’d like to see the government sit down, and I’d like to see the Metis have more control, sit down with the board, have First Nations, Metis, government, and the provincial and federal government. Sit down equally, not just say well we just invite the Metis because we have to, you know. We got to be equal partners if we’re going to fix this.*¹¹⁴

121. As set out above, consultation regarding CNL’s licence renewal is not a “best practice,” nor is it “optional.” It is required by the duty to consult, the spirit of the agreements that Canada has made with the MMF, and Canada’s international legal

¹¹² MMF-Canada Framework Agreement, Appendix A: Subject Matters of the Negotiations.

¹¹³ MMF TKLUS for the Whiteshell Decommissioning Project.

¹¹⁴ MMF TKLUS for the Whiteshell Decommissioning Project

obligations. The Commission cannot ignore these in its licensing conditions, nor abdicate its responsibilities as a vehicle for Crown action to further reconciliation and uphold Canada’s commitments to Indigenous peoples.

122. The MMF therefore makes the following overall recommendations to the Commission, in addition to repeating the specific recommendations already made in the MMF Reports:
- i) In order to ensure that the duty to consult and accommodate is fulfilled the Commission must include a licencing condition for ongoing consultation with the MMF;
 - ii) In order to ensure that the duty to consult and accommodate is fulfilled a process for addressing the outstanding impacts and concerns of the MMF should be included as a licencing condition; and
 - iii) The Commissions licencing conditions and review of CNL’s Licence Renewal Application must align with Canada’s commitments to implement UNDRIP and advance reconciliation and a Nation-to-Nation, government-to-government relationship with the Métis.
123. The MMF notes that the imposition of a licencing condition requiring ongoing consultation is not novel. There are precedents for such conditions. For instance:
- a. The Sisson Mine Project’s approval included the following condition:
In order to ensure First Nations are meaningfully engaged in ongoing project planning, development and delivery of monitoring programs should the project proceed, the proponent must provide for review and approval an overall First Nations engagement strategy.¹¹⁵
 - b. The Joint Review Panel for the Site C Clean Energy Project recommended that:
the Province set aside the hunting, fishing and trapping rights in the Peace Moberly Tract for people holding Section 35 rights under the *Constitution Act, 1982*. The Panel also recommends that the Province and affected First Nations enter into discussions on the Area of Critical Community Interest with a view to the harmonious accommodation of all interests in this land.¹¹⁶

¹¹⁵ Condition 29(k)

¹¹⁶ Recommendation 20

- c. The Kitsault Mine Project required the proponent to:

prepare and implement the following management plans referenced in the Comprehensive Study Report, in consultation with the Nisga'a Nation and to satisfy Government of British Columbia requirements:

Economic, Social and Cultural Management Plans, including measures to accommodate the inability of Nisga'a citizens to carry out activities specified in the Nisga'a Final Agreement in those portions of the Nass Area and Nass Wildlife Area restricted for active mining during the life of the Project, support for Nisga'a business opportunities and strategies, and the development of a Nisga'a Nation-focused recruitment, training and employment plan.¹¹⁷

- d. The National Energy Board, with respect to the Manitoba Minnesota Transmission Project, imposed condition 22 which requires Manitoba Hydro to submit a Crown Land Offset Measures Plan that outlines how permanent loss of Crown lands available for traditional use by Indigenous Peoples resulting from the Project will be offset or compensated for. Condition 22 states:

Manitoba Hydro must file with the Board, for approval, 30 days prior to commencing operations, a Crown Land Offset Measures Plan (the Plan) that outlines how permanent loss of crown lands available for traditional use by Indigenous Peoples resulting from the Project will be offset or compensated for. The Plan must include:

- a) a description of site-specific details and maps showing the locations where Crown land is no longer available for traditional use as a result of Project activities at Dorsey Converter Station and the transmission tower locations, as well as any other locations;
- b) a list of the offset or compensation measures that will be implemented to address the permanent loss of crown lands identified in a) above;
- c) an explanation of the expected effectiveness of each offset measure described in b) for each Indigenous community;
- d) the decision-making criteria for selecting specific offset measures that would be used and under what circumstances;
- e) a schedule indicating when measures will be implemented and the estimated completion date(s);
- f) summary of consultation by Manitoba Hydro with any impacted Indigenous communities and with relevant provincial and federal authorities regarding the Plan; and,

¹¹⁷ Section 10

- g) this summary must include a description of any issues or concerns raised regarding the plan by Indigenous communities and how Manitoba Hydro has addressed or responded to them.

MMF’s Proposed Draft Licencing Conditions

124. The MMF is proposing the following two options for draft licencing conditions which it believes will further reconciliation, ensure that the ongoing duty to consult the Manitoba Métis Community can be meaningfully fulfilled, and implement Canada’s many commitments to the Manitoba Métis Community with respect to inclusion in decision-making on their traditional territory.

<p>Option 1</p>	<p>The licensee shall prepare and implement a First Nation and Manitoba Metis Community Consultation and Engagement Strategy for approval by the Commission in order to ensure Indigenous communities are meaningfully consulted in ongoing project planning, development and undertaking of Licence activities. The Strategy shall include:</p> <ul style="list-style-type: none"> a) Economic, Social and Cultural Management Plans, including measures to accommodate the inability of Indigenous peoples to carry out harvesting activities in and around the Whiteshell site due to decommissioning and Licence activities; b) Communications Plans, including community-specific communication protocols where requested by an Indigenous community, to provide for ongoing information sharing regarding matters such as timing of activities, potential access restrictions, and plain language information regarding the decommissioning activities and unaddressed questions and concerns; c) Updated Environmental Protection Plan and Human Health and Ecological Risk Assessment in light of the distinct factors for each Indigenous community (e.g. increased reliance on harvesting, traditional knowledge, etc.); and d) Consultation Plans to establish an ongoing, two-way dialogue between each Indigenous community and the licensee regarding outstanding impacts and concerns and measures that can be taken to address those concerns, including joint decision making, opportunities for ongoing Indigenous monitoring and stewardship, and involvement of Indigenous communities in decommissioning activities with the aim of securing their free, prior and informed consent for the Licence activities and plans.
<p>Option 2</p>	<p>The licensee shall prepare and implement the following management plans, developed in consultation with First Nations and the Manitoba Metis Community, in order to ensure Canada’s commitments to establishing a renewed relationship with Indigenous communities based on a recognition of</p>

	<p>rights, the United Nations Declaration on the Rights of Indigenous Peoples, and the duty to consult are upheld and fulfilled:</p> <ul style="list-style-type: none">a) Economic, Social and Cultural Management Plans, including measures to accommodate the inability of Indigenous peoples to carry out harvesting activities in and around the Whiteshell site due to decommissioning activities;b) Communications Plans, including community-specific communication protocols where requested by an Indigenous community, to provide for ongoing information sharing regarding matters such as timing of activities, potential access restrictions, and plain language information regarding the decommissioning activities and unaddressed questions and concerns;c) Updated Environmental Protection Plan and Human Health and Ecological Risk Assessment in light of the distinct factors for each Indigenous community (e.g. increased reliance on harvesting, traditional knowledge, etc.); andd) Consultation Plans to establish an ongoing, two-way dialogue between each Indigenous community and the licensee regarding outstanding impacts and concerns and measure that can be taken to address those concerns.
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Closing Comments

125. The MMF has, over the last two years, developed a productive working relationship with CNL. The MMF is hopeful that many of its outstanding concerns regarding the potential impacts of the Whiteshell decommissioning activities can be addressed through further work with CNL. However, this cannot be left to “corporate goodwill” or chance.

126. Consultation in this case is not optional. As set out above, the Crown’s duty to consult the Manitoba Métis Community is clearly triggered, the scope of the duty is deep, and there remain significant unaddressed impacts on Métis rights, claims and interests that require an ongoing consultation process to resolve.

127. While the courts have been clear that Crown decisions or project authorizations that are made without discharging the duty to consult should be quashed as unconstitutional,¹¹⁸ the MMF understands that part of the motivation for CNL’s licence renewal request is to allow for further time to plan for a proposed in-situ decommissioning. The MMF has significant concerns with such a plan. Requiring

¹¹⁸ See for example, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

ongoing consultation as a licence condition of the renewal would provide a process for the MMF and CNL to discuss both the MMF’s concerns about impacts of the current proposed decommissioning plan and activities, and also establish a process where concerns about any future in-situ plan could be collaboratively discussed leading up to any proposed application by CNL on that approach.¹¹⁹

128. Licencing conditions that mandate this continued consultation—which aligns with UNDRIP and Canada’s commitments to advance reconciliation and work in partnership with Indigenous communities—are required. Nothing less can uphold the honour of the Crown and fulfill the duty to consult, both of which fall squarely before the Commission related to this decision.

¹¹⁹ The MMF understands that the potential in-situ decommissioning plan is outside the scope of this Hearing. MMF comments here should not be taken in any way as support for that plan or a preference for it in any way.