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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**APPEARANCES:**
MANITOBA METIS FEDERATION INC.,	Jason T. Madden, Thomas Isaac and Marc E. Gibson
Applicant,	for the Applicant
- and -	
BRIAN PALLISTER, PREMIER OF MANITOBA, CLIFF CULLEN, MINISTER OF CROWN SERVICES, THE EXECUTIVE COUNCIL FOR THE GOVERNMENT OF MANITOBA, THE GOVERNMENT OF MANITOBA, THE MANITOBA HYDRO ELECTRIC BOARD,	Maureen Killoran, Q.C. and Sean Sutherland for the Respondent Government of Manitoba
Respondents.	Robert J. Adkins for the Respondent Manitoba Hydro Electric Board
	Judgment delivered: March 16, 2020

JOYAL C.J.Q.B.

I. INTRODUCTION

[1] Manitoba Métis Federation Inc. (the "MMF") seeks judicial review of the Lieutenant Governor in Council's ("Cabinet") decision to issue Order in Council 82/2018 (the "OIC")

dated March 21, 2018. The OIC authorized the Minister of Crown Services (the "Minister") to issue "A Directive to Manitoba Hydro Electric Board Respecting Agreements with Indigenous Groups and Communities" (the "Directive").

[2] The Directive purports to seek to align the Government of Manitoba's ("Manitoba") policies with the Manitoba Hydro Electric Board's ("Hydro") practices regarding all relationship and benefit agreements with Indigenous communities. It requires that any such agreements (including those being developed) either obtain ministerial approval or provide legally required mitigation or compensation measures that address thoroughly defined impacts.

[3] The OIC and the Directive arose in the context of concerns about the document entitled "June 29 FINAL DRAFT—For Discussion Purposes Only The Major Agreed Points" (the "Major Agreed Points").

[4] The Major Agreed Points is said to be inconsistent with Manitoba policy, as expressed in the Directive. Therefore, the Minister directed Hydro "not to proceed" with the Major Agreed Points "at this time".

[5] The MMF describes its application for judicial review as engaging fundamental legal and constitutional issues and principles, including the rule of law, the honour of the Crown, procedural fairness and whether reconciliation is real or "just a mirage" in Manitoba. The MMF contends that this is a case of first instance that is of significant importance to the MMF, Manitoba's Crown corporations, as well as all Indigenous Peoples in Manitoba. Amongst other things, it is, according to the MMF, a first judicial consideration of Manitoba's new and untested "Directive" power under s. 13(1) of ***The***

Crown Corporations Governance and Accountability Act, C.C.S.M. c. C336 ("***CCGAA***").

II. ISSUES

[6] Based upon the Amended Notice of Application, submissions of counsel and the applicable governing law, the issues in the present case can be reduced to the following questions:

I. **Is the Directive a lawful and reasonable exercise of Cabinet's statutory power to enforce its stewardship role over Hydro?**

II. **Does Cabinet's authorization of the Directive and the consequent involvement in or effect on the MMF's negotiations with Hydro, engage the honour of the Crown?**

III. **Does either the honour of the Crown or the common law entitle the MMF to special procedural rights in relation to a Cabinet policy decision?**

[7] As I will explain in respect of the above issues, I have answered question one in the affirmative and questions two and three in the negative.

[8] For the reasons that follow, despite the able submissions of MMF counsel, the application for judicial review is dismissed.

III. HYDRO'S ROLE AND POSITION AS A PARTY ON THIS JUDICIAL REVIEW

[9] Hydro's role and position as a party on this judicial review is best understood in connection to what had been and what remains as the live issues that need be addressed.

As will be more fully explained, the MMF asserts that the honour of the Crown arose in this case by virtue of the Kwaysh-kin-na-mihk la paazh Agreement (also known as the "Turning the Page Agreement" – hereinafter referred to as the "TPA"). That Agreement was executed by the MMF, Manitoba and Hydro on November 24, 2014. The MMF also alleges that Manitoba improperly used s. 13 of the ***CCGAA*** and that it usurped an "operational decision" of Hydro and acted in a procedurally unfair manner against the MMF.

[10] In the context of those issues, no relief is sought in the judicial review by the MMF against Hydro. Neither is Hydro seeking judicial review or relief in relation to the Directive.

[11] As a preliminary matter, Hydro identified that it had a major concern that the MMF's Notice of Application for judicial review included an assertion by the MMF that the Major Agreed Points was a legally binding agreement between the MMF and Hydro. Further, the materials filed by the MMF included assertions in an affidavit that supported the MMF's position with respect to the Major Agreed Points issue. Hydro denied the assertions by the MMF with respect to the Major Agreed Points issue and submitted that the Major Agreed Points issue was not justiciable in an application for judicial review and that any materials filed that purported to support that position by the MMF should be struck.

[12] As a consequence of a consent order and this court's written reasons in relation to a preliminary motion leading up to the merits hearing on this judicial review (discussed *intra* at paras. 14-20 of this judgment) the materials supporting the MMF's assertion with

respect to the Major Agreed Points issue were struck. As a result, the Major Agreed Points issue is not a matter for determination on this judicial review. Accordingly, Hydro did not make any further submissions on the Major Agreed Points issue.

[13] Hydro's submissions in the context of this judicial review were largely confined to its stated position that nothing in this case validly gave rise to an issue involving an Indigenous claim or right, nor the honour of the Crown, nor a breach of procedural fairness.

IV. MANITOBA'S OBJECTIONS TO THE MMF'S RELIANCE ON STRUCK EVIDENCE

[14] In a preliminary and earlier argued motion raised in the context of my case management of this unique judicial review, I was asked by Manitoba to deal with a foundational admissibility matter in connection to which I was required to address amongst other things, its objections to some of the MMF's affidavit evidence. I was also asked on that motion to provide to the parties what Manitoba insisted was the needed clarity in respect of what grounds the MMF could be seen to have actually pled and what arguments it advanced in its application for judicial review.

[15] As it relates to the admissibility question respecting significant portions of the MMF affidavit evidence of President David Chartrand and as reported in the connected written reasons for judgment cited as ***Manitoba Metis Federation Inc. v. Brian Pallister et al.***, 2019 MBQB 118 (***MMF 2019***), I had determined that some of the affidavit of President Chartrand was either inadmissible extrinsic evidence and/or otherwise inadmissible evidence for reasons relating to non-compliance with certain identified ***Court of Queen's Bench Rules***, Man. Reg. 553/88.

[16] On the question relating to the scope of the MMF's arguments concerning what it is the MMF pled in the Amended Notice of Application, I concluded at para. 55 of my reasons (***MMF 2019***, *supra*) that with or without a re-amended notice of application, the parties should see the existing Amended Notice of Application for judicial review as including, amongst other things, allegations of breaches of the TPA and the honour of the Crown (including the specific duties flowing therefrom). Notwithstanding the alleged breach of the TPA, as I explain in para. 52 of this judgment, the lawfulness of the purported termination of the TPA is not an issue before the court on this judicial review.

[17] Now, in respect of the MMF's submissions in connection to the present hearing on the merits, Manitoba again raises concerns about the MMF's seeming reliance on certain evidence. In that regard, Manitoba asks that I strike out certain paragraphs of the MMF brief which Manitoba submits, offends the earlier identified evidentiary determinations that I made prior to the merits hearing.

[18] At the hearing on the merits, Manitoba contends that the MMF is now "attempting to use two backdoors to get the same or similar evidence before the court."

[19] Manitoba first points to the MMF's reliance on unrelated judicial decisions for the purposes of summarizing the Manitoba Métis Community's asserted and established rights, interests and claims and, for providing alleged "background and context" through which the MMF asserts the TPA must be interpreted.

[20] Manitoba is correct to note that I had indeed already decided that for the purposes of this judicial review, this information is inadmissible and manifestly unrelated to any issues in dispute. See ***MMF 2019***, at para. 160.

[21] Second, Manitoba also objects to what it says is the MMF's reliance on letters authored by persons other than President Chartrand (the MMF's affiant) for the truth of their contents. Manitoba invokes by way of example, the MMF's reliance on letters from Al Benoit (MMF's Chief of Staff) to establish the following: the purported inter-relationship between the TPA and the Major Agreed Points; the MMF's purported reliance on the Major Agreed Points; and, the content of Tripartite Steering Committee ("TSC") meetings (see MMF motion brief, paras. 30 – 32, 35 – 37 and 39 – 41). As Manitoba noted in their submission, this represents the same sort of material that was struck from the Chartrand affidavit sworn November 14, 2018 (see affidavit paras. 125, 139 – 40 and 148). I had indeed earlier determined that the MMF evidence on these issues was irrelevant and inadmissible argument, opinion and hearsay.

[22] As it relates then to Manitoba's expressed objections, it will suffice to note at this point in the judgment, that insofar as any portions of the MMF submissions attempt to invoke or use previously struck inadmissible evidence or other materials for any purposes including those already determined to be irrelevant or unrelated to any issues in dispute, such evidence and any related submissions will be given little or no weight.

V. THE FOCUSED PARAMETERS OF THIS JUDICIAL REVIEW

[23] As the earlier set out and identified issues should suggest, this judicial review gives rise to important questions surrounding the lawful exercise of Cabinet's stewardship role over Hydro. As well, it raises significant questions respecting the honour of the Crown and whether, in the particular circumstances of this case, the MMF was entitled to special procedural rights in relation to a Cabinet policy decision.

[24] While this judicial review takes place in relation to the issuance of a Cabinet Directive whose timing has been (rightly or wrongly) linked to certain resignations on the part of otherwise talented and dedicated Board members of an important Manitoba Crown corporation (Hydro), it is well to underscore that the identified and specific legal questions and issues in this case (and their adjudication), are in no way determinative of any serious policy issues or disagreements that may have existed or developed as between Manitoba and the former Board members of Hydro.

[25] Accordingly, the adjudication of any of the specific legal issues on this judicial review should not be seen as nor are they meant to constitute a commentary or determination of any issue touching upon the public dispute that arose between senior members of the Manitoba government and the previous members of the Hydro Board of Directors. Put simply, this case requires the court to address very particular and focused questions respecting the lawful exercise of Cabinet's statutory powers to enforce its stewardship role over Hydro and whether the honour of the Crown or procedural fairness, vis-à-vis the MMF, were engaged in the exercise of that power. This case is not about the degree to which Manitoba in its exercise of those statutory powers, wisely or honourably interacted with Hydro's former Board of Directors.

VI. BACKGROUND FACTS AND CONTEXT

(i) The Turning the Page Agreement

[26] On November 26, 2014, the MMF, Manitoba and Hydro, the "TPA Parties" executed the TPA.

[27] The TPA is drafted so as to be "as clear as possible". Articles 1 to 7 are the entire agreement; there are no additional undertakings, representations or promises (express or implied).

[28] The TPA is a relationship agreement. It provides non-adversarial processes through which the TPA Parties can discuss their concerns and address issues in relation to Hydro projects. However, the TPA Parties explicitly agreed that the TPA does not affect: (i) Métis rights recognized and affirmed under s. 35 of the ***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11***, (the "***Constitution Act, 1982***"); or (ii) with one exception, Manitoba's duty to consult and, if necessary, accommodate. (See TPA, Articles 1.2.1.(a) and 7.1.9.) The common law continues to apply, unmodified.

[29] The non-adversarial process described in the TPA includes:

a) optional "without prejudice" discussions or agreements regarding existing Hydro projects;

b) optional negotiations and agreements to offset, mitigate or compensate "identified" project impacts that have "not been addressed" through "existing planning, design, construction and mitigation" measures;

c) the appointment of an MMF employee or contractor as a Hydro Liaison Officer to serve as a contact point between the MMF and Hydro;

d) optional Hydro funding to the MMF for engagement on future projects;

e) engagement on business, employment and training opportunities;

f) $1 million annual funding from Hydro to the MMF (for the term of the TPA), to be used in part to fund the MMF's participation in TPA processes; and

g) a dispute resolution process whereby a Tripartite Steering Committee (TSC) comprised of TPA Party representatives (and later, their principals) may attempt to resolve disputes relating to the interpretation and implementation of the TPA before turning to the courts.

[30] To immediately "turn the page", the TPA required on closing that:

a) Hydro pay $2 million to the MMF; and,

b) the MMF withdraw its appeals of Keeyask and Bipole III Licences.

[31] Aside from these closing obligations, the TPA guaranteed very little. Indeed, the TPA includes broad termination provisions that entitle each TPA Party to unilaterally terminate the TPA without cause.

[32] Read as a whole, the TPA was a good faith attempt by the TPA Parties to facilitate a non-adversarial working relationship. However, it could end at any time, without effect to the parties' constitutional rights and obligations.

(ii) The Major Agreed Points ("For Discussion Purposes Only")

[33] As part of a "confidential and without prejudice" negotiation process, the MMF and Hydro finalized a document titled "June 29 FINAL DRAFT - For Discussion Purposes Only The Major Agreed Points" (the "Major Agreed Points").

[34] The Major Agreed Points is a term sheet. It contemplates the future drafting of a "binding legal agreement", if approved by the MMF and Hydro.

[35] At its core, the Major Agreed Points would exchange significant upfront and annual payments from Hydro to the MMF in return for the MMF providing legal releases in respect of existing, proposed and future (not yet proposed) projects.

[36] Specifically, the Major Agreed Points contemplates Hydro paying to the MMF:

a) a one-time lump sum payment of $37.5 million;

b) $1.5 million per annum for 20 years (adjusted for inflation); and,

c) additional annualized payments based on a percentage of the estimated capital costs of future transmission projects (not yet proposed).

[37] In return, the Major Agreed Points contemplates the MMF:

a) acknowledging that the payments "fully and finally address and satisfy all concerns of the Métis" with respect to Hydro projects;

b) supporting the development and ongoing operation of Hydro projects;

c) withdrawing an existing submission regarding a specific Hydro project;

d) providing Hydro with full and final releases with respect to any impacts on the exercise of Aboriginal rights of Métis arising from Hydro projects;

e) agreeing not to appeal or contest Hydro project approvals or licences; and,

f) extending the claims free period under the TPA from 20 to 30 years.

(iii) Government Review of the Major Agreed Points

[38] The Hydro Board authorized management to negotiate and execute an agreement with the MMF substantially in accordance with the Major Agreed Points, subject to: (i) briefing government; (ii) "fully flesh(ing)" out an agreement; (iii) review by legal counsel; and, (iv) further Board approval for any substantive changes.

[39] As instructed, Hydro management sought government's views on the Major Agreed Points.

(iv) The MMF, Hydro and Manitoba Met to Discuss the Major Agreed Points

[40] While government was considering the Major Agreed Points, the MMF confidentially requested a TSC meeting to "ensure the prompt and diligent further implementation" of the Major Agreed Points.

[41] Hydro and Manitoba agreed to meet. Indeed, the TSC met three times to discuss the Major Agreed Points.

[42] The TSC process did not resolve the MMF's concerns. As a result, the MMF requested a meeting of the principals and threatened to bring a lawsuit for "substantial monetary damages against Manitoba".

(v) Cabinet Approved the Directive

[43] On March 21, 2018, Cabinet issued the OIC authorizing the Minister to issue the Directive.

[44] The Directive applies to "all" relationship agreements, community benefit agreements and other similar agreements - including those being developed, future agreements, renewals or amendments - between Hydro and "any" Indigenous communities or groups.

[45] However, it goes on to exclude three categories of agreements:

a) agreements for the provision of goods and services;

b) agreements that provide for mitigation or compensation measures to address adverse effects of Hydro activities where: (i) the agreement has

"thoroughly defined the adverse effects"; and, (ii) Hydro obtains a legal opinion that mitigation or compensation is reasonably required to address a legal obligation or potential liability; and,

c) agreements necessary to carry out the day-to-day business of Hydro, such as easements, expropriations or agreements for electric service.

[46] The stated purpose of the Directive is "to ensure the alignment of government policies and priorities with the policies and practices of Manitoba Hydro relating to relationship agreements, community benefit agreements or other similar agreements with Indigenous communities and groups".

[47] The Directive purports to further this purpose by:

a) directing Hydro not to proceed with the Major Agreed Points "at this time";

b) requiring ministerial approval of agreements to which the Directive applies; and,

c) directing Hydro to work with government on a reconciliation on strategy.

(vi) The Principals Met to Discuss the Directive

[48] Following the Directive, Manitoba and Hydro continued to engage in discussions and meetings with the MMF regarding the Major Agreed Points. A dispute resolution meeting among principals was convened in accordance with the TPA. However, the MMF ended those discussions in favour of proceeding with this judicial review after the meeting did not result in a resolution of the matters in dispute.

(vii) Manitoba Terminated the TPA

[49] Manitoba terminated the TPA on November 29, 2018.

[50] This Court denied the MMF's application to enjoin that termination in these proceedings.

[51] Accordingly, the TPA is without further force and effect.

[52] It should be noted that based on its stated position, Manitoba terminated the TPA in what it maintains was a lawful manner permitted under the Agreement. For its part, the MMF is on the record as noting that while the issue is not directly before the court on this judicial review, the MMF intends to address in separate proceedings, the purported termination of the TPA.

VII. THE APPLICABLE STANDARDS OF REVIEW

[53] Before proceeding with my analysis of the issues in the present case, I will at this stage confirm what I have determined are the applicable standards of review in respect of the three questions underlying this judicial review.

[54] It should be noted that following the oral arguments at the merits hearing and subsequent to the recent release by the Supreme Court of Canada of certain of its much anticipated decisions relating to the standard of review in judicial review proceedings, the parties were invited by this court to make whatever supplementary submissions they might wish to make. Those submissions if they were to be made, would address what, if any impact there might be on the present case as a result of the new framework and methodology explained and discussed in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, and in any related concurrent and subsequent decisions. See ***Bell Canada v. Canada (Attorney General)***, 2019 SCC 66; ***Canada Post Corp. v. Canadian Union of Postal Workers***, 2019 SCC 67.

[55] In declining to make any further submissions, the parties confirmed by letter that as it relates to the recent identified Supreme Court of Canada cases and insofar as aspects of the analytical frameworks and methodology may be new, those cases should nonetheless have no impact respecting the applicable standards of review in the present case. Accordingly, the parties advised that no further submissions would be forthcoming. As a result, I have addressed the matter of standard of review on the basis of the submissions raised by the parties in their submitted materials. In that regard, I note that in respect of the first issue (or question one), neither of the parties identified (as I do in the discussion below) any aspect of question one requiring a review on a correctness standard. Given the ultimate result on the merits of this judicial review, the application of the less deferential standard of correctness concerning one aspect of question one, will not in any way be determinative of this judicial review. Nonetheless, I did wish to note that the parties were either silent or took a position different from this court as it relates to the standard of review applicable to determining whether, on an interpretation and reading of the relevant enabling instruments, Cabinet's decision and Directive power in the present case was *intra vires* its statutory power. So as I set out below, notwithstanding the silence or perhaps the disagreement (with the court) of the parties, whether one views what I describe as the first dimension of question one as a jurisdictional issue and/or one to be resolved on the basis of statutory interpretation, it is my view that the applicable standard is correctness.

[56] Before addressing the applicable standards of review attaching to the particular questions and issues in the present case, for ease of reference, I will note once again the three questions that I must address on this judicial review:

I. **Is the Directive a lawful and reasonable exercise of Cabinet's statutory power to enforce its stewardship role over Hydro?**

II. **Does Cabinet's authorization of the Directive and the consequent involvement in or effect on the MMF's negotiations with Hydro, engage the honour of the Crown?**

III. **Does either the honour of the Crown or the common law entitle the MMF to special procedural rights in relation to a Cabinet policy decision?**

[57] Respecting the first question, given the position advanced by the MMF, this court's task is twofold. First, I must determine whether in issuing the Directive, Manitoba and Cabinet were acting lawfully within and under statutory powers that entitle them to do that which the Directive purportedly gives them the power to do. The second dimension of the first question requires the court to determine – assuming the Directive was issued lawfully within the scope of Manitoba's statutory powers – whether the Directive represents a decision connected to Cabinet's and Manitoba's function as a steward of provincial Crown corporations concerning which it has the power to take reasonable policy decisions that fall within a range of possible acceptable outcomes defensible in respect of fact and law.

[58] As it relates to the first dimension of this first question (was the decision or Directive in question *intra vires* Manitoba's and Cabinet's statutory power?), my determination will involve identifying the statutory scope of Manitoba's power. It thus involves by Manitoba's own admission, a question of statutory interpretation. As I earlier noted, the first dimension or aspect of this first question might even be characterized as jurisdictional. However it is characterized, I am of the view that this determination must be made on a standard of correctness.

[59] Assuming the Directive (i.e. the decision) in question was *intra vires* of Cabinet's statutory power, there appears to be no disagreement in the MMF's and Manitoba's positions respecting the applicable standard of review for the second dimension of the first question. The parties agree that the appropriate standard of review is reasonableness. In that regard, it is agreed that the Directive is a discretionary decision based on the widest considerations of policy and public interest. See ***Gitxaala Nation v. Canada***, 2016 FCA 187, [2016] 4 FCR 418 (***Gitxaala***), at para. 145. If the Directive was issued under a statute that is in fact connected with Cabinet's function as steward of provincial Crown corporations, it enjoys the well-established presumption of reasonableness. See ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 (***Dunsmuir***), at para. 54; ***Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.***, 2016 SCC 47, [2016] 2 S.C.R. 293, at paras. 22 – 23. A considerable part of a judicial review for reasonableness will be concerned with the existence of justification, transparency and intelligibility within the decision making process. The standard of reasonableness also requires that a court determine whether a decision (or

in this case, the Directive) falls within "a range of possible acceptable outcomes which are defensible in respect of facts and law". See ***Dunsmuir***, *supra*, at para. 47. Where the decision-maker is Cabinet, the range of possible outcomes is broad given that Cabinet decisions are oftentimes informed by and dependent upon policy considerations that fall within Cabinet's unique institutional role, experience and expertise. See ***Gitxaala***, *supra*, at paras. 142 – 55; and ***Globalive Wireless Management Corp. v. Public Mobile Inc.***, 2011 FCA 194 (***Globalive Wireless***), at para. 33, leave to appeal to Supreme Court of Canada refused. For these reasons, the jurisprudence suggests that courts only set aside Cabinet policy decisions in the most "egregious" cases. See ***Thorne's Hardware Limited v. The Queen***, [1983] 1 S.C.R. 106 (***Thorne's Hardware***), at pp. 111 – 13. As long as the process and outcome are justifiable, transparent and intelligible, this Court will not and should not substitute its own views. See ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12, [2009] 1 S.C.R. 339 (***Khosa***), at para. 59. In reviewing the decision in question, a court must consider both the reasons provided and those that "could be" provided. See ***McLean v. British Columbia (Securities Commission)***, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 71 – 72; and ***Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 12 – 18.

[60] As it relates to the second question touching upon the honour of the Crown, despite the disagreement between the parties as to whether the honour of the Crown is actually engaged, I am of the view that the applicable standard of review which attaches to duty to consult cases applies by analogy in this case. In other words, I have

determined as Manitoba has suggested, that the legal assessment of whether the honour of the Crown is triggered is a question that need be assessed on a correctness standard. That said, the question as to whether the honour of the Crown is fulfilled, is a question that need be assessed on a reasonableness standard. See ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 (***Haida***), at paras. 60 – 63. Infused into that standard of review in this context is the particular recognition that where on a review of a Crown decision potentially involving the honour of the Crown, a review takes place pursuant to the reasonableness standard, not every Crown mistake or omission brings dishonour. Nonetheless, a pattern of errors or indifference that substantially frustrate the purposes of a solemn promise may breach the honour of the Crown. See ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, [2013] 1 S.C.R 623, at para. 82 (***MMF SCC 2013***).

[61] Finally, as it relates to the standard of review that attaches to the third question relating to procedural fairness, both the MMF and Manitoba are in agreement that if common law procedural fairness is engaged, there is no standard of review analysis required. However, it is acknowledged that where relief is available for breaches of procedural fairness based on non-specified common law principles, the review respecting the procedural issues is to be conducted for all intents and purposes, on the basis of the correctness standard. See ***Khosa***, *supra*, at para. 43.

VIII. ANALYSIS

[62] In seeking to have the Directive quashed or set aside, the MMF argues that the Directive is *ultra vires* Cabinet's Directive and statutory power. Specifically, the MMF insists that in issuing the Directive it did, Manitoba improperly used s. 13 of the ***CCGAA*** in usurping an operational decision of Hydro. The MMF insists that given the nature of the TPA and given the effects of the Directive, the honour of the Crown was engaged such that it should have precluded Cabinet from interfering with Hydro's negotiations. According to the MMF, Manitoba's process was dishonourable and Manitoba acted in a procedurally unfair manner against the MMF.

[63] In my discussion (below) of each of the earlier identified three questions representing the primary issues for my consideration on this judicial review, I will address in more detail the position of the MMF.

I. IS THE DIRECTIVE A LAWFUL AND REASONABLE EXERCISE OF CABINET'S STATUTORY POWER TO ENFORCE ITS STEWARDSHIP ROLE OVER HYDRO?

[64] In advancing the argument it has, the MMF acknowledges Hydro is a Crown corporation owned by government but which, by law, operates at arm's length. The MMF emphasizes that it is Hydro's Board of Directors that has authority to administer Hydro and that in that regard, Manitoba has only limited and specific statutory authority. It is the MMF's position that Cabinet's only directional operational control over Hydro is through the power to approve the specific actions enumerated in provisions such as subsections 15(1.3) and 16(1) of ***The Manitoba Hydro Act***, C.C.S.M. c. H190. Those specific approval powers apply, says the MMF, in those cases, for example, where Hydro

seeks to develop or acquire power plants and supplies, expropriate or otherwise take land without consent, regulate provincial power transmission, acquire real property outside of Manitoba, enter agreements with other jurisdictions, and make investments in subsidiaries or carry on joint ventures with values of over $5 million. The MMF concedes that Cabinet also has approval authority over the adoption by the Hydro Board of "standards, rules, terms, conditions, guidelines or schedules" respecting energy generation and transmission, as well as over Board regulations on similar matters. It is the MMF's position however, that read in context, these detailed provisions of ***The Manitoba Hydro Act*** highlight that Manitoba does not have any operational powers under ***The Manitoba Hydro Act*** except for those specifically and expressly carved out of the Hydro Board's authority.

[65] The MMF acknowledges that the ***CCGAA*** governs Manitoba's relationship with certain Crown corporations, including Hydro. The MMF submits however, that ***The Manitoba Hydro Act*** and the ***CCGAA*** must be read consistently where possible. In this regard, consistent with ***The Manitoba Hydro Act***, s. 16(1)(b) of the ***CCGAA*** states that a Board shall "direct the management and business affairs of the corporation" subject to any requirements or restrictions in its enabling statute or the ***CCGAA***. It is the MMF's contention that the overarching intent of the ***CCGAA*** should be seen as providing additional and publicly transparent oversight mechanisms for Crown corporations while at the same time, respecting the operational role of the Board and limiting political "interference".

[66] In response to Manitoba's argument that the Directive is substantially about matters of policy (as contemplated in s. 13(1)(a)(i) of the ***CCGAA***), the MMF offered three reasons why in its view the "policy" authority in s. 13 cannot reasonably be interpreted to authorize the Directive. First, the MMF says that the Directive does not reference or apply any policy. Second, the MMF states that the Directive's actual purpose is to impose operational directions. Third, the MMF argues that the Directive operates so as to fetter discretion granted exclusively to the Hydro Board.

[67] As part of its argument on this question, comes the reminder from the MMF that "to enforce the rule of law, courts must strike down ministerial decisions or directives that attempt to usurp statutory authority conferred on somebody else." In that spirit, the MMF echoed the Federal Court of Appeal in submitting that it "should be unnecessary to point out that the statute and regulations are law. The statements or directions of the Minister are not." See ***Hui v. Canada (Minister of Employment & Immigration)***, [1986] 2 F.C. 96, para. 11 (C.A.).

[68] It is the position of the MMF that if Manitoba seeks to exercise approval authority over Hydro's agreements with Indigenous Peoples or otherwise dictate operational actions, it must proceed through the legislature and amend the ***CCGAA*** and/or ***The Manitoba Hydro Act***. Members of the Executive Branch cannot as the MMF suggest was done in this case, simply issue *de facto* laws disguised as guidelines. See ***Ainsley Financial Corp. v. Ontario (Securities Commission)***, 1994 CanLII 2621 (ON CA) at para. 14.

[69] Having considered carefully the submissions of the MMF on this first issue, I am not persuaded by the MMF's contention that "there is no reasonable interpretation of s. 13 of the ***CCGAA*** that could provide Manitoba with the authority to issue the Directive in question." Indeed, I am of the view that using a standard of correctness, the Directive falls squarely within Cabinet's authority to issue binding legal Directives (in this case to Hydro) respecting important matters of policy. Such matters may involve as they did in this case, fiscal prudence, consistency between the Crown and its corporations, and what Manitoba identifies as "Crown oversight of its agents' measures in furtherance of the Crown's legal obligation to Indigenous communities and groups".

[70] As noted, the Directive from the Minister was issued pursuant to s. 13 of the ***CCGAA***. Section 13 of the ***CCGAA*** reads as follows:

> **Directives**
> 13(1) The minister may — with the approval of the Lieutenant Governor in Council — issue a directive to a corporation
>
> (a) respecting
> (i) matters of policy and the accounting policies and practices for the corporation,
> (ii) standards to be complied with in respect of advertising done by the corporation, and
> (iii) the conduct of special organizational reviews to be conducted by the corporation;
> (b) to ensure that practices of two or more corporations are consistent; and
>
> (c) to ensure that two or more corporations act in concert with each other or with government departments or agencies when doing so will further efficiency and effectiveness.
>
> **Accounting standards apply**
> 13(2) A directive in respect of accounting policies and practices must be consistent with generally accepted accounting principles that reflect the public interest.

Compliance

13(3) A corporation must comply with a directive given under this section.

Directives to be made public

13(4) The minister must make a directive public, in a manner he or she determines reasonable, within 30 days of the directive being given to the corporation.

[71] The Directive itself reads as follows:

PURPOSE

The purpose of this directive is to ensure the alignment of government policies and priorities with the policies and practices of Manitoba Hydro relating to relationship agreements, community benefit agreements or other similar agreements with Indigenous communities and groups.

APPLICATION AND SCOPE

This directive applies to all relationship agreements, community benefit agreements and other similar agreements, including those being developed, future agreements and renewals, or amendments to existing agreements, between Manitoba Hydro and any Indigenous communities or groups.

This directive does not apply to agreements for the provision of goods and services. This directive does not apply to agreements that provide for mitigation or compensation measures to address the adverse effects of activities of Manitoba Hydro where Manitoba Hydro has thoroughly defined the adverse effects, and where Manitoba Hydro legal counsel has provided a legal opinion that the mitigation or compensation measures are reasonably required to address a legal obligation or potential liability of Manitoba Hydro.

This directive does not apply to agreements necessary to carry out the day-to-day business of Manitoba Hydro, such as easements, expropriations or agreements for electric service.

Manitoba Hydro is directed to not proceed with the agreement with the Manitoba Metis Federation at this time.

Going forward, all relationship agreements, community benefit agreements or other similar agreements to which this directive applies between Manitoba Hydro and Indigenous communities and groups requires review by the Minister of Crown Services before being executed.

Further, to ensure alignment between the policies and procedures of Manitoba Hydro and the priorities of the government, Manitoba Hydro is directed to collaborate with Manitoba Crown Services to develop a strategy to advance reconciliation with Indigenous communities and groups.

[72] In determining as I have that the Directive issued under s. 13 of the ***CCGAA*** is a lawful exercise of Cabinet's stewardship role over Hydro, I have also concluded that the Directive lawfully binds Hydro regarding "matters of policy". In coming to that conclusion, I am by extension, rejecting the MMF's arguments that the Directive was unlawful because of what the MMF says is the absence of a reference to or an application of a policy. I am also similarly rejecting the MMF's position that the Directive represents the imposition of operational directions and the fettering of Hydro's discretion.

The scope of Section 13 of the CCGAA and Cabinet's authority to define parameters within which the Crown Corporations operate

[73] In arguing as it does, that the ***CCGAA*** grants Cabinet the statutory authority to define the parameters within which Crown corporations operate, Manitoba acknowledges that the scope of s. 13 is an issue of statutory interpretation. Accordingly, the object is to determine the legislature's intent by reading the words of s. 13 in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the ***CCGAA***, and with regard to legislative intent. See ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 32-33, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and as quoted in ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, at para. 21. In addition to the above interpretive approach, it must also be remembered that s. 13 need be interpreted as being remedial and as such be given as Manitoba suggests, the fair, large and liberal interpretation that best ensures the attainment of its objects. See ***The Interpretation Act***, C.C.S.M. c. I80, s. 6.

[74] In discussing both its purpose and focus, Manitoba explained in its submissions that the ***CCGAA***, which came into force on June 2, 2017, attempts, as its name suggests, to set the rules for governance and accountability of Crown corporations, including Hydro. Manitoba's submissions suggest that the ***CCGAA*** introduced significant changes to the previous statutory framework for the governance and accountability of Crown corporations. The purpose of the ***CCGAA*** according to Manitoba, is to "establish a clear governance model to ensure Boards are accountable for governing and overseeing management of the corporation within the parameters provided by government".[1] Its purpose and the ***Act*** itself, represent an attempt to balance the reality that Crown corporations are designed to operate at arm's length but, as Crown agents, they are nonetheless instruments of public policy for which the executive is responsible to the legislature.

[75] It is not unreasonable to suggest, as Manitoba does, that the ***CCGAA*** is meant to represent to some extent, a commitment on the part of government to ensure prudent fiscal management and a connected oversight and accountability in the way that Crown corporations do business. The ***CCGAA*** can be seen to do so by providing specific powers and procedures that aim at increasing the openness, transparency and accountability of Crown corporations. These aims seem to find support in the references to Hansard provided by Manitoba in its submissions.

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[1] Bill 20, ***The Crown Corporations Governance and Accountability Act***". 2nd Reading, Legislative Assembly of Manitoba Debates and Proceedings ("Hansard"), 41-2, Vol. 70, No. 36 (April 10, 2017), pp. 1209-10; Hansard, 1st Reading, 41-2, Vol. 70, No. 23D (March 9, 2017), p. 583

[76] In the context of the above purpose and aims of the ***CCGAA***, Manitoba again reasonably argues that the ***Act*** addresses the need for tools which facilitate openings and transparency by which government can hold Crown corporations accountable. Those tools include a "Rules and Responsibilities Record" (jointly developed by the corporation and its responsible Minister), "a Mandate Letter" (approved by Cabinet that sets out government goals, specific outcomes and performance measures), an "Annual Business Plan" (acceptable to the Minister), and the provision of the "Directive Power" (which grants Cabinet the authority to approve legally binding ministerial directives to Crown corporations).

[77] Given the object and the legislative intent of the ***CCGAA***, I have no difficulty concluding that the presence of the Directive power in the ***Act*** was meant to ensure that Crown corporations listen to what government is saying and that where a Directive is issued, the Directive is to be considered legally binding and requiring compliance.

[78] The connected Hansard Record suggests a clear belief that the Directives increase "the transparency of government's stewardship role" to ensure amongst other things, that "standards and compliance are met". Whether these objectives are met in all or most cases and whether this represents as purported, an improvement from a previous form of accountability and oversight, is a question for a different forum. What is clear is that as contemplated under the ***CCGAA***, Directives which are authorized by Order in Council and which need be made public within 30 days, represent as Manitoba suggests, "authority to intervene in the management of a Crown corporation by directing the Board

of Directors to follow a particular course of action when government believes it is in the public interest."

The Directive and its Reference to and Application of Policy

[79] The MMF has insisted that the Directive does not address policy as contemplated under the ***Act***. I disagree.

[80] "Matters of policy" as Manitoba has argued, is a phrase which represents an expansive category that by necessity, covers "a vast range of issues." This court is well to remember that the Supreme Court of Canada has accepted the plain and ordinary meaning of the term "policy". Policy is to be understood as "a course or principle of action adopted or proposed by a government." It includes "a general rule or approach, applied to a particular situation." See ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3. S.C.R. 45 (***Imperial Tobacco***), at para. 87. In this connection, Manitoba makes the important point that by vesting the Directive power in Cabinet, the legislature assigned "policy" its broadest possible meaning. As Manitoba has emphasized, "Cabinet represents all constituencies within government and considers the widest range of polycentric and diffuse factors. Its policy decisions are far outside the ken of courts and entitled to deference."

[81] In my view the Directive in question, clearly addresses different "matters" or categories of policy. Those categories or matters of policy include fiscal prudence and the consistency of policies and practices between government and Hydro. The "matters of policy" also include the Crown role and its stewardship over its agents. Put simply, the object and effect of the Directive is exactly that which Manitoba has stipulated: it refers

and applies to several interrelated and complimentary policies in respect of matters about which no government is indifferent and in respect of which s. 13 of the ***CCGAA*** has provided an authority to act.

[82] It is instructive to examine the focus of what is aptly identified as the interconnected and complimentary policies addressed in the Directive. The policies can be read and understood reasonably as attempting to ensure as Manitoba in its submission has maintained, that government effectively oversees the distribution of public capital entrusted to Hydro and that the Crown can determine the adverse impacts on Indigenous groups that had been mitigated or compensated. I note that the Crown's ability to determine adverse impacts on Indigenous groups is a means by which the government can ensure that its duties to consult and where necessary, accommodate, are met.

[83] As it relates to any additional criticisms of the Directive and what it includes or does not include, I am persuaded by and accept the submissions of Manitoba. In the present case, it is acknowledged that neither the OIC nor the Directive contained an exposition of government policy. That fact must be understood in a consideration of the nature of the OIC, the Directive and as well, in a consideration of the jurisprudence that supports the proposition that governments are not required to provide reasons for their policy decisions. See ***Thorne's Hardware***, *supra*, at pp. 112-13; ***Haig v. Canada; Haig v. Canada (Chief Electoral Officer)***, [1993] 2 S.C.R. 995, at p. 1046 (***Haig***). Even if governments are not required to provide reasons for their policy decisions, the earlier mentioned "matters of policy" are nonetheless apparent throughout the Directive.

[84] It is well to note that the stated purpose of the Directive is to align government and Hydro in respect of agreements with Indigenous groups. This is important not only in connection to the Major Agreed Points but also when considering the MMF's argument that the policies which Manitoba says are infused into the Directive, are tautologies. I am not in agreement with the MMF's characterization. In fact, it is reasonable to argue, as Manitoba did, that the Major Agreed Points do not align with government policy. In that regard, Manitoba makes reference to the facts that the Major Agreed Points contemplate at least $67.5 million to be paid to the MMF without defining or identifying the adverse effects to which those funds are directed. The Major Agreed Points further promise additional payments for the future although in not yet proposed projects that might not have any adverse effects on MMF members. When one considers the scope of what is contemplated by the Major Agreed Points, it is easy to see how Cabinet's asserted control over the Major Agreed Points is a control that does fall within its authority.

The Directive did not usurp an Operational Decision, but rather, lawfully directed Hydro to implement Policy

[85] In arguing that the Directive usurped an operational decision of Hydro, the MMF emphasizes what it asserts as a still relevant distinction between "policy" and "operational decisions". In raising as it has this supposedly clear distinction, the MMF implicitly puts forth a false dichotomy. I am of the view that in the present case, Manitoba is right to challenge the extent to which that dichotomy has application.

[86] The discussion of policy and operational decisions and the distinction between them, is a discussion that has often been rooted in relation to the law on justiciability and tort. The distinction that emerged often involved a difference that saw "core" policy

decisions identified as not justiciable. Conversely, as Manitoba has argued, conduct "operationalizing" those policy decisions was indeed subject to judicial scrutiny and review. As a matter of practicality and in noting that "decisions in real life may not fall neatly into one category or the other", the Supreme Court of Canada has questioned just how useful the dichotomy between policy and operational decisions remains (***Imperial Tobacco***, *supra*, at para. 86).

[87] Irrespective of whether the conceptual question surrounding the distinction still has utility in law, for the purposes of my analysis in the present case, the distinction certainly has diminished relevance. I am in agreement with Manitoba that the Directive in the present case does precisely what the Supreme Court confirmed it could do as a matter of policy: it offers a "general rule or approach, applied to a particular situation" (***Imperial Tobacco***, at para. 87). In the particular circumstances of this case, the general rule or approach applies to the Major Agreed Points.

[88] To understand how the distinction that the MMF invokes has diminished practical relevance, it is necessary to understand that in order for the Directive power to achieve its legislative purpose (to "ensure that standards and compliance are met") operational direction is required. In this regard, Hydro's authority to "direct its management and business affairs" cannot trump Cabinet's power to issue Directives on "matters of policy".

[89] While the MMF suggests that the Directive power be read down to exclude Hydro's "management and business affairs", such a reading down would effectively neuter the substantive content of the Directive power in the present case. Practically speaking, Manitoba is on solid ground to suggest that the government could not "ensure the

standards and compliance are met" without an incursion into Hydro's management and business. The Directive in question represents not a usurpation of an operational decision, but rather, a lawful direction to Hydro to implement government policy. Further, insofar as Manitoba did indeed in the present case direct Hydro to not proceed with the Major Agreed Points "at this time", that was a lawful decision and a lawful exercise of Cabinet's statutory power in respect of a policy that can be seen to have fallen within the range of reasonable outcomes.

The Directive did not fetter Hydro's discretion, it lawfully removed it by statute

[90] As part of the MMF's position challenging the scope of Cabinet's Directive power, the MMF has alleged that the Directive "fetters" Hydro's discretion. This characterization fails to appreciate what the ***CCGAA*** does.

[91] Where legislation provides for a statutory power with binding legal effect, the exercise of that power does not merely fetter a discretion, the exercise of that power lawfully removes or constrains discretion. That removal is triggered pursuant to a statutory power. See ***Phillips v. British Columbia (Workers' Compensation Appeal Tribunal)***, 2012 BCCA 304, at para. 37; ***Thamotharem v. Canada (Minister of Citizenship and Immigration)***, 2007 FCA 198, at para. 65, [2008] 1 F.C.R. 385; and ***Bell Canada v. Canadian Telephone Employees Association***, 2003 SCC 36, [2003] 1 S.C.R. 884, at para. 35.

[92] In the present case, the ***CCGAA*** grants Cabinet the authority to direct Hydro in respect of "matters of policy". In this context, Hydro's compliance is expected. Those authorities that are invoked by the MMF to support its argument identifying an unlawful

fettering of discretion, are distinguishable insofar as they do not clearly involve the exercise of a lawful statutory power in respect of "matters of policy". See ***Alkali Lake Indian Band v. West Coast Transmission Co.***, 1984 CanLII 760 (BC CA), [1984] 4 W.W.R. 263, at paras. 4 and 11 (the case involved a letter from a Minister); and ***Hui v. Canada***, *supra*, paras. 6-9 (the case involved a ministerial statement).

[93] Insofar as the MMF relies upon s. 16 of ***The Manitoba Hydro Act***, its argument on this point, is not strengthened. Manitoba persuasively argues that that section predates the ***CCGAA*** and it lists specific matters for which Hydro requires Cabinet approval. If the MMF argument was correct, that s. 16 for example defines the scope for Cabinet authority, then one could ask as does Manitoba, if Cabinet already has authority over these matters, what is the purpose for the Directive power?

[94] In summary, the Directive is not *ultra vires* Cabinet's Directive power and it is in fact, a lawful exercise of Cabinet's statutory authority to enforce its stewardship role over Hydro. I accept Manitoba's argument that in binding Hydro, it has the same effect as if it were written in the legislation. The Directive in question is a lawful exercise of Cabinet's statutory discretion. The decision by Cabinet in the present case as represented by the Directive, is one of a number of possible reasonable outcomes (within a broad range of possible acceptable outcomes) that can be seen as informed by and dependent upon policy considerations that fall within Cabinet's unique institutional role and which are defensible in fact and law. This decision by Cabinet cannot be set aside as one of those most "egregious cases" requiring court intervention (***Thorne's Hardware***, at paras. 111). See also page 113.

II. DOES CABINET'S AUTHORIZATION OF THE DIRECTIVE AND THE CONSEQUENT INVOLVEMENT IN OR EFFECT ON THE MMF'S NEGOTIATIONS WITH HYDRO, ENGAGE THE HONOUR OF THE CROWN?

[95] In addition to seeking that the Directive be quashed or set aside, the MMF also seeks a declaration that the Manitoba government and Cabinet, the Premier of Manitoba and Minister did not act in accordance with the honour of the Crown in making the Directive. The MMF advances the position that the honour of the Crown arose by virtue of the TPA and in light of the Directive's alleged adverse effects on Indigenous rights. The MMF argues that if the honour of the Crown can be seen (as it should be) to underlie the TPA, then Manitoba ought to have been preempted from interfering with bilateral negotiations between Hydro and the MMF. Further, the MMF asserts that Manitoba ought to have been preempted from using the Directive without first completing dispute resolution as provided for under the TPA.

[96] In making the argument it does, it is clear that the MMF does not accept the position of Manitoba and Hydro that the TPA is a normal legal agreement which does not involve an Indigenous claim or a right, nor the honour of the Crown. Despite that differing view, the MMF does however concede that a breach of a normal legal agreement is not a stand-alone ground of judicial review. Accordingly, separate from the question as to whether the Directive affects Indigenous rights, if I am not persuaded by the MMF's argument and if I conclude that the TPA was not a reconciliation or accommodation agreement and that it does not engage the honour of the Crown, I am in agreement with Manitoba and Hydro that such a conclusion would end the matter.

[97] The MMF takes the position that while the TPA was a binding legal agreement that was in full force at the time the Directive was issued, it was not an "everyday commercial contract" (***Beckman v. Little Salmon/Carmacks First Nation***, 2010 SCC 53, at para. 10 (***Beckman***)). See also ***Canada v. Long Plain First Nation***, 2015 FCA 177 (CanLII) , at paras. 118-19; and ***Bear v. Saskatchewan (Government of)***, 2016 SKQB 73 (CanLII), at paras. 29 and 36 (***Bear***). The MMF contends that the TPA is a reconciliation and accommodation agreement to which the honour of the Crown applies. According to the MMF, the TPA also entitles the MMF to legitimately expect that Manitoba will follow certain agreed procedures "in certain circumstances". The MMF contends that the TPA sets out the parties' agreement as to how Manitoba's constitutional and legal obligations respecting the Aboriginal rights of Métis would be discharged in the context of specific Hydro developments.

[98] The MMF maintains that the question of adherence to the honour of the Crown and the principles of natural justice is subject to judicial review. If Manitoba does not comply with any procedures required by the related principles, the courts must enforce them. In this connection, the MMF underscores that the honour of the Crown and principles of natural justice reinforce each other. In other words, where the honour of the Crown is triggered, "the concepts of honour, reconciliation and fair dealing – matters of constitutional import – may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded" (***Canada v. Long Plain First Nation***, *supra*, at para. 108).

[99] The MMF contends that the binding procedural commitments in the TPA, which it says was a reconciliation and accommodation agreement, engage the honour of the Crown and created legitimate expectations that those commitments would be followed. The MMF argues forcefully that the TPA expressly contemplated the bilateral negotiation process between the MMF and Hydro that led to the Major Agreed Points. It also provided for mandatory dispute resolution processes and insofar as the Directive and decision can be seen to unilaterally override what was the bilateral negotiation processes, the Directive and decision breached the TPA's dispute resolution provisions.

[100] Put simply, it is the MMF's position that the honour of the Crown (which it says was engaged by the TPA and the adverse effects of the Directive on its rights) and the principles of natural justice required more of Manitoba than what it did and provided for in this case. Specifically, Manitoba was required to fulfill its end of the bargain or provide a reasonable and honourable procedural alternative. Given its argument that Manitoba did not do so, the MMF submits that the governing law now requires that the Directive, including the decision, be quashed.

[101] After careful consideration, I have determined that the honour of the Crown has no application to the TPA. I have come to that conclusion based on my determination that the TPA is not a reconciliation and accommodation agreement. Neither does it affect or limit the "Aboriginal rights of Métis". Accordingly, it does not trigger the honour of the Crown.

[102] Even if the honour of the Crown applied to some or all of the TPA, I have nevertheless determined that it does not apply to the Directive. In this regard, I am not

persuaded that the Directive, in the circumstances of this case, adversely affects Indigenous rights.

[103] Even if I am incorrect in my determination as to whether the TPA and/or the Directive engage or affect Indigenous rights, it is my view that the Directive remains a lawful and reasonable exercise of Cabinet's powers. Notwithstanding the questions and allegations raised, Manitoba's actions, considered in the context of what are the identified policy objectives (protective of the public interests), cannot in the particular circumstances of this case, be properly characterized as dishonourable as it relates to the MMF.

The Honour of the Crown

[104] There can be no question that modern Indigenous law in Canada has been built on what the MMF characterizes as two interlinked precepts: the honour of the Crown and section 35's (of the ***Constitutional Act, 1982***) dual purpose of rights recognition and reconciliation.

[105] The MMF is well to remind the court that although the honour of the Crown is often intertwined with s. 35, it has been part of the common law for centuries and it flows from "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" (***Haida***, *supra*, at para. 32). Against this backdrop, the MMF argues that the honour of the Crown is not simply the result of the establishment of a specific s. 35 right or interest. In that sense, the MMF invokes the honour of the Crown as a "core precept that finds it application in

concrete practices" and also, in what is now a constitutional principle in its own right (***Haida***, at para. 16). See also ***Beckman***, *supra*, at paras. 41 and 105.

[106] For the purposes of giving meaning to and upholding the honour of the Crown in the context of rights recognition and reconciliation, there is now an established series of what the MMF characterizes as a series of "interrelated and adjunct duties" which include: the duty to consult and accommodate; the duty to negotiate; the duty to negotiate honourably; the duty of honourable implementation of negotiated agreements; and the duty of honourable implementation of constitutional provisions and Treaties.

[107] The Supreme Court of Canada has noted that the honour of the Crown "is always at stake in its dealings with Aboriginal peoples" (***Haida***, at para. 16) and the Crown is obligated "to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (***Haida***, at para. 32). The Supreme Court has also noted that the Crown must respect and act honourably in relation to unproven rights as the process of reconciliation advances. See ***Haida***, at para. 27. Accordingly, I have throughout my analysis with respect to this second question, remained mindful that the duty to act honourably may also be engaged in respect of what the Supreme Court identified as yet unproven rights. That said, I do not wish to be understood as saying that in every situation where the Crown may be accurately asserting that no proven Indigenous rights are engaged or affected, that the honour of the Crown can nonetheless, be validly or determinatively invoked on the basis of conjectural, speculative or purported violations of a still unproven but asserted Indigenous right. Such an approach would lead to an inevitable and constant uncertainty and unpredictability which in turn would envelope any

government in an immobilizing lack of clarity. That constant unpredictability and lack of clarity could also work to potentially trivialize or confuse the important but still narrow and circumscribed doctrine respecting the honour of the Crown.

[108] While great care must be taken to ensure that the Crown act honourably and with respect in the context of its interactions or agreements with Indigenous groups, it is important to also acknowledge that the honour of the Crown is not engaged by all interactions or agreements between the Crown and Indigenous groups. See ***MMF SCC 2013***, *supra*, at para. 68. The honour of the Crown as mentioned is a "narrow and circumscribed" (at para. 81) doctrine that clearly attaches to the Crown's solemn constitutional obligations. (See also paras. 67 and 69.) When it does apply or is triggered, the concept of the honour of the Crown gives rise to requirements that may vary in each case. The concept and what is now a cumulative body of jurisprudence, speaks to how certain obligations must be fulfilled.

[109] The Supreme Court of Canada has identified four situations that engage the honour of the Crown: (i) discretionary Crown control over a specific Aboriginal interest; (ii) contemplated Crown conduct that will adversely impact Aboriginal or Treaty Rights (i.e. the Crown's duty to consult); (iii) Treaty making and implementation; and, (iv) actions to accomplish the purposes of Treaty and statutory grants. See ***MMF SCC 2013***, at para. 73. It need be remembered that an Indigenous group must adduce evidence of a right or a solemn constitutional obligation (for example, a Treaty) that may be affected by impugned Crown conduct. See ***MMF SCC 2013***, at para. 70.; and ***Manitoba Metis Federation Inc. v. The Government of Manitoba et al.***, 2018 MBQB 131 (***MMF***

2018, at paras. 71, 76-78. In the present case, the MMF needs to establish that Indigenous rights are engaged by the TPA and that they have been adversely affected by the Directive. As I have already indicated, the MMF has failed to do so.

The TPA is not a Reconciliation or Accommodation Agreement and it does not engage the honour of the Crown

[110] I have already noted that I am not in agreement with the MMF's characterization of the TPA as an "accommodation" and "reconciliation" agreement that engages the honour of the Crown. It is also my view that on a careful reading of the TPA, it does not alter common law positions on the duty to consult or the honour of the Crown. The parties to the TPA did not in any way contract out of existing obligations. Indeed, I had previously noted in my written reasons on the motion, that the TPA and obligations thereunder did not impact Aboriginal rights of the Métis. In fact, the TPA Parties expressed their own unequivocal intention and understanding (at Article 7.1.9) that:

> Nothing in this Agreement affects any Aboriginal Rights of the Métis in the Province of Manitoba and, subject to subsection 3.1.4 nothing in this Agreement affects or limits the duty of the Crown to consult with Métis about decisions or actions that may affect the exercise of the Aboriginal rights of Métis, and to accommodate concerns about those effects.

[111] In their submissions, the MMF describes that Article in the TPA as a "standard form non-derogation clause" similar to the one noted by the Supreme Court in ***First Nation of Nacho Nyak Dun v. Yukon***, 2017 SCC 58, [2017] 2 SCR 576, at para. 9. I disagree. In fact, Article 7.1.9 need be seen as a very unique, specific and clear provision which allows for but a narrow exception as contained in subsection 3.1.4. It is clear that the TPA Parties did not intend the TPA to impact their respective constitutional rights and duties.

[112] The TPA cannot be properly characterized as an accommodation and reconciliation agreement or even a negotiated accommodation agreement as those terms have been used by the Supreme Court of Canada in such cases as ***Beckman*** and ***First Nation of Nacho Nyak Dun v. Yukon***, *supra*. Both those cases are clearly distinguishable from the present case on the basis of the evidence and the issues which required determination by the court. The two identified Supreme Court of Canada cases were required to address the interpretation and implementation of modern comprehensive land claim Treaties between the Crown and the First Nations which as Hydro pointed out, were modern day Treaties that had been negotiated between the parties under the Umbrella Final Agreements (the "UFA"), a document described as a monumental agreement that set the stage for concluding modern Treaties in the Yukon. Conversely, the TPA, was not a modern day Treaty nor was it an accommodation and reconciliation agreement within the meaning ascribed to those terms by the Supreme Court. As is explicitly stated in the TPA, it was meant to be an agreement between the parties and there were no additional undertakings, representations or promises, expressed or implied.

[113] When one examines the TPA, one notes that unlike a Treaty or an accommodation and reconciliation agreement, it was not intended to be a lasting or enduring agreement. Rather, the TPA was expressly time limited. It was also subject to an immediate termination for cause and to early termination, without cause, on 30 days' notice given by any of the parties to the TPA. (See Article 2.3.2.) Indeed, Manitoba contends (although the MMF disagrees) that the TPA was lawfully terminated on November 29,

2018, by Notice of Termination given by Manitoba by letter dated October 30, 2018, to the respective parties.

[114] I am persuaded by Manitoba's position that given the TPA Parties' broad and unconstrained right to terminate the TPA, there is no link between the processes and annual payments under the TPA and the MMF's discontinuance of statutory appeals. Instead, the ongoing processes and annual payments under the TPA can be seen to serve as consideration for the MMF's promises that are subject to the terms of the TPA. These include as Manitoba suggests, the MMF's promise not to sue or proceed with litigation against Manitoba or Hydro with respect to any impacts of existing developments and operations on the exercise of the Aboriginal rights of the Métis while the TPA remains in force. (See TPA, Article 2.3.)

[115] Despite my analysis as expressed in the foregoing paragraphs, this court can well appreciate the genuine disappointment of the MMF concerning the termination of the TPA. There is after all, no question but that on a fair reading of the TPA, it can be acknowledged to be, in spirit and letter, an attempt to usher in a perhaps heretofore unseen level of collaboration on matters of significance in connection to Hydro projects. Nonetheless, that hoped for "collaboration" need be understood mindful of the fact that the TPA is not a modern day Treaty. Further, that hoped for collaboration must also be seen through the prism of all of the purposefully drafted provisions of the agreement signed onto by the parties, including those that specifically render the agreement potentially time limited and those that stipulate that Indigenous and Métis rights will not be impacted or limited by the TPA.

[116] In the end, the TPA was not an accommodation and reconciliation agreement that engages the honour of the Crown, but rather, it was, as argued by Manitoba and Hydro, a good faith attempt by the TPA Parties to engage collaboratively on matters of significance in relation to Hydro projects without affecting rights and obligations under s. 35 of the ***Constitution Act, 1982***.

The Directive does not adversely affect Indigenous Rights

[117] Even if I am in error in respect of my determination that the honour of the Crown does not apply to some or all of the TPA, I remain of a view that the honour of the Crown does not apply to the Directive.

[118] As Manitoba has accurately observed, the Directive requires that relationship and benefit agreements with Indigenous groups provide legally required mitigation or compensation that will address thoroughly defined adverse impacts. If such is not provided, ministerial approval is needed. In this connection, I have already determined in my Motion Decision (***MMF 2019***), as follows (at para. 146):

> ...This does not affect any of the Métis rights referenced in the Chartrand Affidavit. It affects only whether those rights must be thoroughly defined and mitigation or compensation must be legally required, if Hydro and the MMF are to conclude an agreement without ministerial approval.

[119] I go on to conclude at para. 147 that: "Accordingly, I have determined that s. 35 rights have not been engaged by the OIC, the Directive and/or the Decision."

[120] At this stage, I will once more reaffirm my view that as with the TPA, the Directive does not affect the Aboriginal rights of the Métis. As a result, the honour of the Crown is not engaged.

[121] In the event that I am incorrect in the above determination I consider below an alternative analysis for the purposes of thoroughly considering the MMF's position.

Manitoba's actions were taken in the broader public interest and they were not dishonourable towards the MMF

[122] For the reasons already explained, I have determined that neither the TPA nor the Directive engage Indigenous rights. Accordingly, the honour of the Crown is not engaged. If I am in error in respect of that determination, I remain of the view that in its decision and actions surrounding the issuance of the Directive, Manitoba was attempting to act in the public interest and was not acting dishonourably against the MMF or Manitoba Métis.

[123] Although the MMF maintains that Manitoba acted dishonourably, Manitoba rejects that allegation. It is Manitoba's position that it met any and all obligations it had under the honour of the Crown. In fact, Manitoba contends that the Directive and procedures leading up to the Directive, were consistent with the TPA.

[124] When I examine the TPA, I note that it permits the MMF and Hydro to address any and all project impacts not previously mitigated through offsetting, mitigation or "If necessary", compensation measures through negotiated agreements. (See TPA, Articles 4.1.1, 4.1.2, and 4.3.2.) As a result, it can be said that the TPA stipulates two mandatory prerequisites to compensation through a negotiated agreement: (i) Hydro and the MMF must agree that there are project impacts that have not yet been addressed; and, (ii) compensation must be necessary, which is to say that the potential adverse effects cannot be offset or mitigated. In the present case, Manitoba is correct in stating that the Major Agreed Points address neither prerequisite. As Manitoba notes, had the Major Agreed Points so addressed them, and had there been a supporting legal opinion, the Major

Agreed Points would have fallen outside the scope of agreements that require ministerial review.

[125] It is noteworthy that the Directive in question instructs Hydro not to proceed with the Major Agreed Points "at this time". Manitoba suggests that this signifies that Cabinet is in essence telling Hydro not to proceed with the Major Agreed Points until it was able to meet the two requirements of the Directive, which as noted, is consistent with the permitted form of negotiated agreement in the TPA. In this sense, I am persuaded by Manitoba's position that the Directive does not foreclose Hydro and the MMF from concluding a binding legal agreement that incorporates some of the terms contemplated in the Major Agreed Points.

[126] In considering Manitoba's actions in the issuing of the Directive, it cannot be overlooked that Manitoba does indeed have statutory and constitutional obligations to ensure that Hydro projects in provincial jurisdiction mitigate adverse effects on the Manitoba Métis Community. As Manitoba emphasized in its submissions, Manitoba cannot contract out of or delegate the fulfillment of those obligations. See ***Beckman***, at para. 61; ***Haida***, at paras. 10 and 53. The fact that there is nothing mentioned in the TPA subsections regarding future, negotiated agreements, should not be seen as an abdication or a ceding of Manitoba's stewardship role over Hydro. It cannot be the case that the TPA Parties intended that Manitoba would cede its role or have no role in concluding the types of agreements that could be contemplated. Put simply, Manitoba has no authority to effectively fetter the future exercise of legislative executive discretion by way of an agreement or contract. See ***Donald Frederick Angevine v. Her Majesty***

the Queen, in Right of Ontario, 2011 ONSC 4523 (CanLII), at paras. 14-15; ***The King v. Dominion of Canada Postage Stamp Vending Company Limited***, [1930] SCR 500, at p. 506.

[127] As it relates to some of the other alleged dishonourable deficiencies identified by the MMF, I accept the explanation and contextualization offered by Manitoba. Manitoba points out that procedurally, it did substantially comply with the dispute resolution provisions in the TPA in that it participated in TSC correspondence and meetings and it participated in at least one meeting of the principals. Insofar as the Steering Committee members did not reveal the content of Cabinet's deliberations, that non-revelation is less a sign of bad faith than a sign of the emphasis that is properly placed upon the highly confidential nature of ongoing Cabinet deliberations.

[128] Concerning the failure to refer this matter to mediation, I am not persuaded in this context that there was a requirement for the principals to refer a matter to mediation or arbitration. In this connection, Manitoba is accurate when it notes that the only requirement in s. 5.1.3(b) is that the principals either meet to endeavour to resolve the dispute or, they establish a process to do so. Irrespective of whatever contractual language is used, the public interest must always remain paramount. It is for this reason that even in instances where there are "best efforts" clauses (which Manitoba underscores was not the case in the present situation) they cannot take precedence over the requisite decisions taken in the public interest. In the end, respect for the honour of the Crown does not impose a duty to agree. It is for that reason that I am persuaded by Manitoba's position that an obligation to act honourably did not compel Manitoba in the present case,

to accept the Major Agreed Points. Manitoba persuasively argues in this regard that "the Crown wears multiple hats, and the honour of the Crown does not displace Manitoba's obligations to other constituencies, including a broader public interest. The public interest should always be front of mind when a government addresses questions of moment". See also ***Bear***, *supra*, paras. 53-55, 67 and 71.

[129] For the above reasons I have determined that irrespective of whether the TPA and/or the Directive engage Indigenous rights, the Directive remains a lawful and reasonable exercise of Cabinet's powers in respect of which Manitoba did not act dishonourably towards the MMF.

III. DOES EITHER THE HONOUR OF THE CROWN OR THE COMMON LAW ENTITLE THE MMF TO SPECIAL PROCEDURAL RIGHTS IN RELATION TO A CABINET POLICY DECISION?

[130] For the reasons advanced, I have already determined the Directive in question is a lawful exercise of Cabinet's power to enforce its stewardship role over Hydro. I have also determined that neither the Cabinet's authorization of the Directive nor its involvement in (or effect on) the MMF's negotiations with Hydro engage or trigger the honour of the Crown and by extension, any of the duties that flow therefrom.

[131] With those determinations having been made, I must now turn to the MMF's contention that notwithstanding any earlier determinations, common law procedural fairness nonetheless entitles the MMF to certain things the MMF identified in its various submissions.

[132] Given the determinations I have made in respect of the first and second questions, and given that the Directive represents a decision made in relation to Cabinet's policy

making process, it is not unreasonable to say (as Manitoba does) that the procedural rights that the MMF now seek in the present case are not those normally available or provided when the decision-maker is Cabinet. In that sense, the type of procedural rights being invoked by the MMF are indeed "special". The question which then arises is whether the MMF in the circumstances of the present case, is entitled to such procedural rights, special or otherwise.

[133] The MMF argues that procedural fairness entitled it to, amongst other things, the following:

- Advance notice of the Directive;
- Dialogue with Manitoba respecting the Major Agreed Points;
- The opportunity to "present its case";
- Good faith efforts to resolve its concerns;
- Reasons for the Directive;
- The opportunity to change Manitoba's mind post-Directive; and
- Completion of the dispute resolution process under the TPA.

[134] For the reasons that follow, I have determined that given the nature of the decision (coming as it does via a Directive and the related Cabinet policy-making process), Manitoba did not owe a duty of procedural fairness (special or otherwise) to the MMF. If I am in error with respect to that conclusion and if the MMF was in fact owed a duty of fairness, any procedural rights of the MMF, in the circumstances of the present case, are not special and would in fact be – based on the governing law – at the lower end of the spectrum. In other words, pursuant to the required analysis set out in ***Baker v. Canada***

(Minister of Citizenship and Immigration), [1999] 2. S.C.R. 817, at paras. 21 – 28 (***Baker v. Canada***), if any procedural rights were owed, they were minimal and in this case, satisfied by Manitoba.

Procedural rights in relation to Cabinet's policy-making process

[135] Put simply, although the Directive may be justiciable, this court's review is limited to determining whether statutory and constitutional requirements were met. Manitoba is correct when it points out that in the present case, the only statutory procedural requirement is that the Directive be made public within 30 days. (See ***CCGAA***, s. 13.) In this instance, that requirement was met. Beyond that, common law procedural fairness has no role to play in my review of the Directive.

[136] In Canada, courts have repeatedly held that interested persons hold no procedural rights in relation to Cabinet policy decisions apart from statutorily or constitutionally prescribed procedural requirements. This consistent approach has been taken irrespective of the fact that it is obvious that Cabinet policy decisions can have a sometimes profound impact on the rights, privileges and interests of individuals and communities. See ***Martineau v. Matsqui Disciplinary Bd.***, [1980] 1 S.C.R. 602 (***Martineau***) at p. 628; ***Att. Gen. of Can. v. Inuit Tapirsat et al.***, [1980] 2 S.C.R. 735 (***Inuit Tapirsat***) at pp. 748-60; ***Thorne's Hardware***, at pp. 111-13; ***MMF 2019***, at para. 76; ***MMF 2018***, *supra*, at paras. 48-69; ***Amalgamated Transit Union Local 1374 v. Saskatchewan (Finance)***, 2017 SKQB 152 (CanLII), at paras. 45, 56-57, 61, 63-64, 87, and 134-36 (***Almalgamated Transit***); ***Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation) (Div. Ct.)***, 1991 CanLII 7099

(ON SC), 1991 CarswellOnt. 45 (Div. Ct.) at paras. 39, 42-43, and 46; ***National Anti-Poverty Organization v. Canada (Attorney General) (C.A.)***, 1989 CanLII 5274 (FCA), [1989] 3 F.C. 684, at paras. 30-31, leave to appeal to Supreme Court of Canada refused; ***Gigliotti c. College des Grands Lacs (Conseil d'administration)***, 2005 CarswellOnt. 2883 (Divisional Court), at paras. 54 and 62.

[137] Absent statutory or constitutional requirements, neither the MMF nor anyone else is entitled to early notice or the opportunity to make submissions respecting a Cabinet decision. This proposition is obviously distinct from any political imperatives which may suggest an increasing need for contemporary governments to legitimate some of their more controversial decisions with advance discussion and explanation in relation to various stakeholders and members of the public. Such imperatives however, will seldom interest or attract the attention of courts on review. It is important to remain mindful that in the present case, I have determined that the honour of the Crown was not engaged. Accordingly, any imperatives that would have required engagement with the MMF in relation to Manitoba's decision, are imperatives that should not be mistaken for legal obligations or requirements.

[138] While advance notice and discussion of a Cabinet decision might in many instances make sense and represent a fair and transparent approach to potentially affected and interested persons, the consequences for the absence of such advance notice and discussion will in most cases be political, not legal. In that same vein, although it may be intuitive to assume that for political reasons, a public explanation would normally be given as to why a perhaps controversial Cabinet decision may have been taken, the

advisability and legitimating potential of such an explanation should not be confused for an obligation to provide reasons in the same way such a requirement attaches to courts and tribunals. Indeed, it is well established that Cabinet decisions need not contain reasons for a policy. See ***Thorne's Hardware***, pp. 112-13; ***Haig***, *supra*, at p. 1046 (per L'Heureux-Dubé J, writing for the majority); ***Inuit Tapirsat***, *supra*, at p. 757.

[139] The nature of the Cabinet decision making process does not and cannot give rise to an expectation or a right on the part of an interested person to make formal advance submissions. I accept the proposition advanced by Manitoba that Cabinet must preserve the capacity to act and react quickly. It functions best when its members are free to express themselves unreservedly, without concern of "ill-informed or captious public or political criticism" or being trammelled by considerations of consistency with the past or self-justification in the future. See ***Babcock v. Canada (Attorney General)***, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 18. Having acknowledged what might be the political imperatives for ensuring in some instances, a minimal and commonsensical amount of advance public engagement, a validated, formalized or endorsed expectation by the courts of a right on the part of interested parties to make advance submissions (as with advance public notice) could frustrate Cabinet's ability to respond swiftly and effectively to political, economic and social concerns as they arise. In this connection, it must be remembered that Cabinet policy decisions do not follow an adjudication process. Instead, they are decisions as Manitoba suggests, based on polycentric, diffuse and subjective considerations that consider all constituencies. See ***Inuit Tapirsat***, at pp. 753, 755-57; ***Martineau***, *supra*, at p. 628; ***Globalive Wireless***, *supra*, at para. 45; and

Amalgamated Transit, *supra*, at para. 135. The Directive in the present case, can be seen to address issues of interest to all Indigenous groups within Manitoba and as well, the general public.

[140] For reasons similar to those noted above, there is also no common law requirement that Cabinet provide interested persons with dispute resolution or for that matter, the opportunity to change Cabinet's collective mind (post-decision) based on what in many cases would likely be good faith efforts to present and resolve the particular concerns of a specific constituency. As stark as the proposition may be, except for those Cabinet decisions where statutory or constitutional requirements have not been met, it is the ballot box which represents the proper forum at which to hold Cabinet accountable for its policy decisions. See ***Canada (Wheat Board) v. Canada (Attorney General)***, 2009 FCA 214 (CanLII), [2010] 3 FCR 374, at para. 50 (***Canada (Wheat Board)***).

If procedural fairness had application in this case, Manitoba satisfied what were the minimal requirements.

[141] If in the present case, the MMF had procedural rights owed to it by Cabinet, then those rights were at the low end of the spectrum and those requirements in the circumstances of this case, were satisfied.

[142] In ***Baker v. Canada***, *supra*, at paras. 21-28, the Supreme Court acknowledged that the content of procedural rights may vary from case to case based on context. The reference points to be considered when determining the thickness or extent of the procedural rights in a given case have been identified as follows:

i) the nature of the decision and the process followed;

ii) the nature and terms of the Statute;

iii) the importance of the decision to individuals affected; and

iv) legitimate expectations.

[143] I have considered all of the above reference points in determining the extent of the requirements for procedural fairness in the context of the decision by Cabinet.

[144] When I examine the nature of the decision and the process followed, I conclude that both the nature of the decision and the decision-maker imply minimal to no procedural rights. I note that the Directive is as Manitoba argues, a generally applicable Cabinet policy decision concerning the use of corporate funds. In that regard and as permitted, Cabinet's process is confidential.

[145] Concerning the nature and terms of the Statute, one can note that the ***CCGAA*** provides to Cabinet broad stewardship powers to issue Directives on "matters of policy". In that respect, the sole requirement relating to procedure is that the Directive must be publicly available within 30 days of issuance. Manitoba submits that such a requirement ensures that the decision of Cabinet is transparent and that interested persons are able to hold Cabinet to account through either public opinion, the electoral process, and/or both. See ***Canada (Wheat Board)***, *supra*, at para. 50. If additional procedural requirements were intended (for example, in respect of the requirement for advance notice), such additional language and requirements would have been added to the legislation.

[146] As it relates to the importance of the decision to the individuals affected, I acknowledge the obvious engagement and interest on the part of the MMF. Nonetheless, I repeat my earlier determination that the Directive has no impact on the Aboriginal rights

of Métis. To the extent that the Directive stipulates that Hydro not proceed with the Major Agreed Points "at this time", it is not unfair for Manitoba to argue that this leaves open the possibility of Hydro and the MMF concluding a binding agreement on terms that will more transparently connect compensation to adverse project impacts. In this regard, I share Manitoba's view that if the Major Agreed Points were truly intended to address unmitigated adverse effects on the Aboriginal rights of Métis, the related requirements would not be difficult or onerous.

[147] Finally, it is far from clear that legitimate expectations were pled by the MMF. Even if legitimate expectations were pled by the MMF, an expectation is "legitimate" only when it is based on "a clear unambiguous and unqualified representation". See ***Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)***, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29. In the circumstances of the present case, the TPA cannot reasonably be seen to give rise to a legitimate expectation. I take that view because first, the ***CCGAA*** did not exist at the time the TPA was executed. Second, it would not have been reasonable for the MMF to have expected to be able to limit or constrain what Manitoba says must be its capacity "to impose new procedures for new statutory powers".

[148] Given the low requirements for procedural fairness in this case, when I consider what procedures Manitoba did follow, I have no difficulty concluding that even if procedural fairness had application, any such procedural requirements in this case were met. In that connection, I note the TSC did meet several times. This was before Manitoba issued the Directive. Presumably, the MMF would have had a chance to express its views

in relation to the Major Agreed Points. In the same context however, it would not have been reasonable nor should it have been expected that Cabinet would waive what are longstanding and well known confidentiality norms for the purpose of sharing the contemplated policy before the issuance of the Directive.

[149] When the Directive was finally issued, it can be seen to have expressed in a transparent, predictable fashion those things that Manitoba will require in the future for furtherance of its particular policies and priorities. Those things include reference to such matters as what type of relationship and community benefits will further its priorities and policies.

[150] I note as well, that even after the issuance of the Directive, despite the absence of a resolution, the TSC process continued which potentially could have been used as Manitoba suggests, "to revisit the Major Agreed Points to more thoroughly define adverse impacts for which the MMF sought compensation from Hydro for existing and proposed projects". Such discussions appeared not to have taken place and they certainly did not take place once the MMF determined to seek judicial review.

[151] Accordingly, if in the circumstances there were procedural rights which the MMF was owed by Manitoba, I have determined that any such requirements were met.

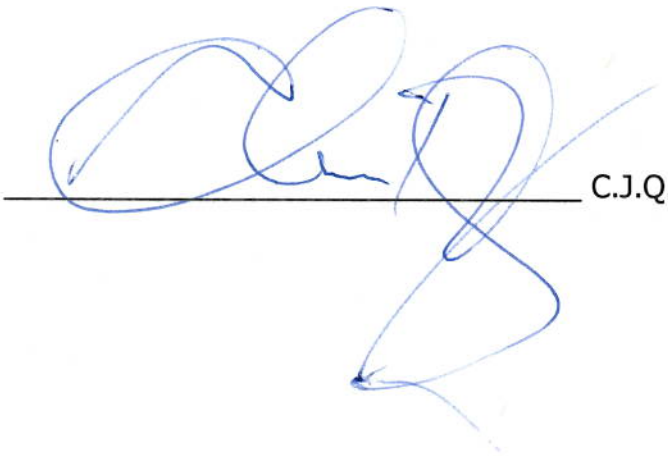
IX. CONCLUSION

[152] Based on the foregoing reasons, I have come to the following determinations:

1. The Directive is a lawful and reasonable exercise of Cabinet's statutory power to enforce its stewardship role over Hydro.

2. Cabinet's authorization of the Directive and any consequent involvement in or effect on the MMF's negotiations with Hydro, do not engage the honour of the Crown.
3. Neither the honour of the Crown nor the common law entitled the MMF to any special procedural rights in relation to a Cabinet policy decision in the circumstances of this case.

[153] In the result, this application for judicial review and any and all related relief is dismissed.



C.J.Q.B.