Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

MANITOBA METIS FEDERATION INC.

Moving Party

- and -

THE CANADA ENERGY REGULATOR
AND
THE MANITOBA HYDRO-ELECTRIC BOARD

Respondents

APPLICATION UNDER subsection 72(1) of the *Canada Energy Regulator Act*, SC 2019, c 28, and Rule 352 of the *Federal Courts Rules*, SOR/98-106.

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY MANITOBA METIS FEDERATION INC.
(For the Manitoba Metis Federation Inc.'s Motion for Leave to Appeal)

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OVERVIEW

1. This motion for leave to appeal raises important and novel constitutional issues related to the Crown's duty to consult and accommodate owing to Indigenous peoples. It is well-established that this Crown duty flows from the honour of the Crown wherever the Aboriginal and Treaty rights (asserted and established) of Indigenous communities and peoples protected by section 35 of the *Constitution Act, 1982* are engaged. To date, courts have extensively considered issues relating to whether Crown consultation requirements have been met or whether accommodation is required. This appeal, however, engages the question of whether and how the honour of the Crown applies downstream of the decision to accommodate. It relates to an expressly modified accommodation measure created by a Crown decision-maker and left to Canada Energy Regulator ("**CER**"), as a regulator, to ensure that the Crown's duty is met following consultation.

2. Can Crown actors such as the CER, who are designated to implement these Crown accommodations, completely ignore the express wording and intent of these types of accommodations, effectively rendering them meaningless? Can these same Crown actors fail to consider the honour of the Crown and its practical application in the context of the implementation of a Crown accommodation secured by an Indigenous community in fulfillment of a duty to consult? The answer to both of these questions must be in the negative. Crown consultation and accommodation are two sides of the same coin. The honour of the Crown applies equally to both consultation and accommodation, including the implementation of accommodations reached, in order for the purpose of the duty to be met. Anything less would render the Crown's duty—as a constitutional imperative—hollow. This cannot be allowed to happen in the age of reconciliation.

3. The CER, in this case, has erred in answering the questions raised in this appeal. The Manitoba-Minnesota Transmission Project (the "**MMTP**" or the "**Project**") cuts through the heart of the Manitoba Métis Community's traditional territory (also known as the Métis Nation Homeland). The Project, traversing over 213 km from just outside Winnipeg down to the Manitoba-Minnesota border, bisects the lands where the Métis—as a distinct Indigenous people—emerged and call their home today. Throughout the entire Project area, the Manitoba Métis Community, as represented by the Manitoba Metis Federation Inc. ("**MMF**"), possess pre-exiting, collectively held Aboriginal rights protected by section 35 of the *Constitution Act, 1982* ("**Section 35 Métis Rights**").

4. The MMTP also bisects a region where members of the Manitoba Métis Community should collectively hold 1.4 million acres of land based on a constitutional promise made to them through negotiations and the creation of Manitoba in 1870. In 2013, the Supreme Court of Canada recognized that the federal Crown failed to implement this promise in a manner that upheld the honour of the Crown. Negotiations between the Government of Canada ("**Canada**") and the MMF on this constitutional grievance are ongoing. That outstanding claim, as well as the other established and asserted Section 35 Métis Rights in the Project area, inform the context for this proposed appeal.

5. The impacts of the MMTP on the Section 35 Métis Rights of the Manitoba Métis Community are significant, well-documented, and have been known by Manitoba Hydro ("**Hydro**") for years. As further detailed below, these impacts have now been addressed and accommodated—twice: once through a negotiated agreement with Hydro and once by Canada through a modified licensing condition.

6. First, in July of 2017, after years of collaborative efforts, the MMF and Hydro reached an accommodation agreement known as the "**Major Agreed Points"**, the stated purpose of which was to "fully and finally address and satisfy all concerns of the Metis with respect to . . . [the] MMTP," as well as other Hydro projects. In return for Hydro implementing certain accommodations regarding the Project, the MMF agreed to support the MMTP in the regulatory proceedings before the CER's predecessor, the National Energy Board (the "**NEB**").[1] However, eights months after this bargain was reached and after Hydro secured significant benefits from it, Hydro, on the direction of the Government of Manitoba ("**Manitoba**"), repudiated its commitments under the Major Agreed Points and has since refused to implement them.

7. At the end of the NEB hearing on the MMTP, despite Hydro's objections, the NEB included the Major Agreed Points in the hearing record. Ultimately, as a direct result of Hydro's failure to fulfill its promises to the MMF, Canada imposed the second accommodation measure regarding the Project's impacts on Section 35 Métis Rights: it amended Condition 3 of the MMTP's Certificate of Public Convenience and Necessity EC-059 (the "**Certificate**") from the text proposed by the NEB to require that "Manitoba Hydro must implement or cause to be implemented . . . all commitments made to Indigenous groups through its Project application or otherwise on the record of the EH-001-2017." This amendment was made following a supplemental Crown consultation process with the MMF wherein the MMF raised with Canada that Hydro's refusal to implement the accommodation measures it had agreed to in the Major Agreed Points left the MMTP's impacts on the Section 35 Métis Rights unaddressed. In response, new language, which altered the NEB's proposed condition language was chosen

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[1] For the purposes of this memorandum of fact and law, references to the CER include its predecessor the NEB.

because Canada was aware the Major Agreed Points had been placed "on the record" of the NEB proceedings.

8. The CER's Letter of Decision issued on August 11, 2020 (the "**Decision**"), renders the Crown's carefully crafted accommodation measure meaningless. The Decision interpreted Condition 3 as excluding the Major Agreed Points and leaves the Manitoba Métis Community with an empty shell of a promise. The Decision ignored both the clear language of Condition 3 and the context from which it stems. In effect, the CER's interpretation means the words—that were expressly added by the Crown—have absolutely no meaning whatsoever. Essentially, it is the CER's view that this condition only includes what Hydro says it includes. If that is the case, why were any changes made to the language in Condition 3? The original language proposed by the NEB was already limited in this manner. The CER's interpretation leads to an absurd and untenable result. It is an error of law.

9. The Decision also failed to consider the honour of the Crown and its application in the context of Condition 3. Decisions of the courts, including a recent decision of the Alberta Court of Appeal,[2] confirm that regulators such as the CER cannot turn a blind eye to this constitutional principle and its effects. The CER made only one throwaway reference to the honour of the Crown in its Decision and its reasons demonstrate a complete failure to engage in the constitutional analysis required in this case. This is also an error of law.

10. Those are not the only errors of law in the Decision. The CER also erred by failing to "consider any adverse effects" the Decision may have on the Section 35 Métis Rights impacted

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[2] *Fort McKay First Nation v Prosper Petroleum* (2020), 445 DLR (4th) 671, 2020 ABCA 163 [*Fort McKay*] [Authorities, Tab 8].

by the Project, contrary to section 56(1) of the *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10 (the "***CER Act***"). Moreover, the CER erred by failing to hold a public hearing before making the Decision, as required by section 52(1) of the *CER Act*.

11. Those four errors of law are each reviewable on appeal pursuant to section 72(1) of the *CER Act*. They each satisfy the threshold of a "fairly arguable case" required to grant leave to appeal. As a result, this Court should grant the MMF leave to appeal the Decision on each ground.

PART I STATEMENT OF FACTS

A. The Parties

i. The Manitoba Metis Federation Inc.

12. The MMF is the democratically elected representative government of the Manitoba Métis Community, which is a distinct Indigenous community that possesses Section 35 Métis Rights. The MMF's longstanding representative role on behalf of the Manitoba Métis Community has been recognized by the governments of both Canada and Manitoba, as well as the Supreme Court of Canada. The MMF is a non-share company incorporated pursuant to the laws of the Province of Manitoba with its registered office located in Winnipeg, Manitoba.

ii. The Canada Energy Regulator

13. The CER is a corporation established by the *CER Act* and is, for all purposes, an agent of Her Majesty in right of Canada. The CER's mandate includes overseeing the construction, operation, and abandonment of international power lines, such as the MMTP. The federal Crown

has confirmed that it is relying on the CER to fulfill its duty to consult and accommodate in relation to the MMTP.

iii. The Manitoba Hydro-Electrical Board

14. Hydro is a Crown corporation established pursuant to the *Manitoba Hydro Act*, C.C.S.M., c. H190. Hydro is the recipient of the Certificate, authorizing it to construct and operate the MMTP subject to the conditions set out therein.

B. The Project

15. The MMTP is a new 213 km, 500-kV international power transmission line traversing from the Dorsey Converter Station near Rosser, Manitoba, just outside of Winnipeg, to the Manitoba-United States border near Piney, where it connects with the Great Northern Transmission Line in Minnesota.[3]

16. On or around December 15, 2017, the MMTP was designated an "international power line" under the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the "***NEB Act***"), the predecessor to the *CER Act*.[4] As a result, the MMTP was required to be constructed and operated

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[3] Certificate of Public Necessity and Convenience No. EC-059 for the MMTP, issued by the NEB (18 June 2019), Preamble [C00016-3] ("**Certificate EC-059**") [Motion Record ("**MR**"), Tab 3O at 780].

[4] Certificate EC-059, Preamble [C00016-3] [MR, Tab 3O at 780].

under and in accordance with a certificate issued under section 58.16 of the *NEB Act*,[5] and now in accordance with a certificate issued under section 262 of the *CER Act*.[6]

17. As further outlined below, the Project was reviewed by the CER, after which the federal Crown undertook a supplemental Crown consultation process. The Certificate for the Project was issued by the CER on or around June 18, 2019.

18. Construction on the MMTP began in September 2019 and was substantially completed on June 1, 2020. The MMTP is now in service.

C. Background to the Decision

i. Section 35 Métis Rights and claims in the Project Area

19. Section 35 Métis Rights are established and recognized in Manitoba. In *R. v. Goodon*, the Manitoba Provincial Court recognized the pre-existing Métis right to harvest for food throughout southern Manitoba.[7] Following *Goodon*, the MMF negotiated a Métis harvesting rights recognition agreement with Manitoba, recognizing Métis section 35 harvesting rights throughout most of the province.[8]

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5 *National Energy Board Act*, RSC 1985, c N-7, s 58.16 [***NEB Act***] [Authorities, Tab 2].

6 *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, s 262 [***CER Act***] [Authorities, Tab 1].

7 *R v Goodon* (2008), 234 Man R (2d) 278, 2008 MPBC 59 [*Goodon*] [Authorities, Tab 17]. See also, *R v Beer* (2011), 273 Man R (2d) 101, 2011 MBPC 82 at para 31 [Authorities, Tab 16].

8 Manitoba-MMF Points of Agreement on Métis Harvesting in Manitoba (9 September 2012) ("**Points of Agreement**") [extracted from A84535-12] [MR, Tab 3A at 30].

20. In 2013, the Supreme Court of Canada recognized the outstanding constitutional grievance of the Manitoba Métis Community flowing from section 31 of the *Manitoba Act, 1870*.[9] In 2016, this outstanding claim was formally accepted for negotiation by the federal Crown.[10]

ii. History of Hydro's commitments to the MMF (2014–2017)

21. In November 2014, as part of an increasing recognition of Section 35 Métis Rights and claims in Manitoba, the MMF, Manitoba, and Hydro executed the Kwaysh-kin-na-mihk la paazh Agreement, which means "turning the page" in Michif, the Métis language (the "**Turning the Page Agreement**" or "**TPA**"). The purpose of the TPA was to "build a forward-looking, productive and non-adversarial working relationship" between the MMF, Manitoba, and Hydro,[11] and "turn the page" on the decades of Manitoba and Hydro denying the existence of Section 35 Métis Rights and refusing to meaningfully consult with the MMF or accommodate for the impacts of hydro developments in Manitoba.

22. The TPA provides for, among other things, a delegation and authorization to Hydro to bilaterally engage with the MMF on "Future Developments," such as the MMTP, to identify potential impacts from those developments on Section 35 Métis Rights. The TPA states that

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[9] *Manitoba Metis Federation Inc v Canada* (*AG*), [2013] 1 SCR 623, 2013 SCC 14 at para 44 [*MMF*] [Authorities, Tab 13]. See also *Daniels v Canada* (*Minister of Indian Affairs and Northern Development*), [2016] 1 SCR 99, 2016 SCC 12 at para 42-43 [*Daniels*] [Authorities, Tab 7].

[10] MMF-Canada Framework Agreement for Advancing Reconciliation (15 November 2016) [extracted from A84535-11] [MR, Tab 3D at 71].

[11] Kwaysh-kin-na-mihk la paazh Agreement between the MMF, Manitoba, and Hydro (26 November 2014) ("**TPA**"), para A [extracted from A92530-2] [MR, Tab 3B at 37].

where the MMF and Hydro agree that there are impacts "that have not been addressed through existing planning, design, construction, and mitigation of a Future Development, such impacts may be addressed through a variety of additional offsetting, mitigation, or, if necessary, compensation measures through negotiated agreement(s)."[12]

23. In January 2016, as contemplated by the TPA, the MMF and Hydro entered into a legally binding Workplan and Contribution Agreement related to the MMTP (the "**Workplan and Contribution Agreement**") to:[13]

a) identify the MMTP's impacts on Section 35 Métis Rights; and

b) where the MMF and Hydro agreed that those impacts had "not been addressed through existing planning, design, construction, and mitigation" measures, enter into discussions about how "such impacts may be addressed through a variety of additional offsetting, mitigation, or, if necessary, compensation measures through negotiated agreement(s)."

24. Central to this process was the completion of a Métis Traditional Knowledge and Land Use Study to identify the impacts of the MMTP on Section 35 Métis Rights (the "**MMTP Impact Study**") and fill gaps in Hydro's MMTP Environmental Impact Statement.[14]

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12 TPA, Articles 4.3.1 and 4.3.2 [MR, Tab 3B at 46].

13 MMF- Hydro Contribution Agreement for MMF Engagement on the MMTP (12 January 2016) [extracted from A84535-18] [MR, Tab 3C at 56].

14 Metis Land Use and Occupancy Study: Assessment of Potential Effects Prior to Mitigation, prepared by the Calliou Group on behalf of the Manitoba Metis Federation (December 2016) [Part 1 A91072-20, Part 2 A91072-21, Part 3 A91072-22, Part 4 A91072-23, Part 5 A91072-24, and Parts 6–10 A91072-25] ("**MMTP Impact Study**") [MR, Tab 3E at 84].

25. The MMTP Impact Study was completed in or around July 2016,[15] and identified, among other things, significant impacts of the Project on Section 35 Métis Rights.

26. In March 2017, based on the evidence in the MMTP Impact Study, the MMF and Hydro entered into negotiations with the express goal of "achieving a mutual agreement to address issues, including issues associated with the Manitoba-Minnesota Transmission Project [and other identified Hydro projects], through a comprehensive agreement or agreements."[16]

27. On or about June 29, 2017, the MMF and Hydro finalized the Major Agreed Points as the direct result of this negotiation process. The Major Agreed Points was subsequently ratified and approved by both the MMF Cabinet and Hydro's Board of Directors.[17]

28. The Major Agreed Points, on its face, acknowledges and provides an agreed-upon accommodation to address impacts of the MMTP on Section 35 Métis Rights. In exchange for a series of "commitments" from Hydro, the Major Agreed Points "fully and finally address and satisfy all concerns of the Metis"[18] with respect to impacts of the MMTP (as identified in the MMTP Impact Study) and other projects on "the Aboriginal Rights of Metis."[19]

29. Hydro has never disputed that the Major Agreed Points exist or that it is the product of these MMF-Hydro negotiations regarding the MMTP's impacts on Section 35 Métis Rights.

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15 MMTP Impact Study [MR, Tab 3E at 84].

16 MMF-Hydro Memorandum of Understanding, Preamble, para B (1 March 2017) [MR, Tab 3JJ at 1069].

17 Minute of Hydro Board Meeting held on July 5, 2017 [MR, Tab 3LL at 1168].

18 Major Agreed Points (29 June 2017), Article 3 [emphasis added] [extracted from A92530-2] ("**Major Agreed Points**") [MR, Tab 3F at 503].

19 Major Agreed Points, Article 8(d) [extracted from A92530-2] [MR, Tab 3F at 504].

iii. The MMF relies on the Major Agreed Points, as an accommodation measure, in the NEB hearings and ongoing Crown Consultation (Summer 2017–Spring 2018)

30. At the same time as the MMF and Hydro were negotiating and concluding the Major Agreed Points, the MMTP was also undergoing review by the NEB.

31. On or about April 29, 2018, Canada wrote to the MMF and advised that it was relying on the NEB processes to discharge its duty to consult and accommodate regarding the Project.[20]

32. The MMF tailored its participation in the NEB processes in accordance with its obligations in the Major Agreed Points, including supporting the MMTP,[21] based on its reliance on the processes and commitments in the Major Agreed Points.[22]

iv. Hydro repudiates its commitments to the MMF (March 2018)

33. On or about March 21, 2018, Manitoba issued Order in Council 82/2018 (the "**Manitoba OIC**"), under the purported authority of section 13(1) of *The Crown Corporations Governance*

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[20] Letter from NRCan to MMF (29 April 2018) [extracted from A91936-2] [MR, Tab 3I at 514].

[21] Letter from MMF to NEB (28 March 2018) [A90869-1] [MR, Tab 3H at 512].

[22] The MMF's forbearance in not introducing evidence before the NEB based on its reliance on the Major Agreed Points was expressly acknowledged by the NEB. See NEB Ruling No. 14, Hearing Order EH-001-2017 Hydro MMTP, Motion to Strike the Manitoba Métis Federation Response to Board Information Request No. 1 (28 June 2018) [A92734] ("**NEB Ruling No. 14**") [MR, Tab 3L at 567–568].

and Accountability Act, C.C.S.M. c. C336, directing Hydro "not proceed with the agreement with the Manitoba Metis Federation at this time."[23]

34. Since the OIC was issued, Hydro has refused to implement or cause to be implemented its commitments made to the MMF in the Major Agreed Points.[24]

35. On June 4, 2018, the MMF filed an application for judicial review seeking to quash the Manitoba OIC.[25] On March 16, 2020, the Manitoba Court of Queen's Bench dismissed the MMF application.[26] On May 5, 2020, the MMF filed an appeal of this dismissal with the Manitoba Court of Queen's Bench.[27] A hearing of that appeal is scheduled for December 16, 2020.

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[23] Order in Council 82/2018 and Directive, "A Directive to Manitoba Hydro Electric Board Respecting Agreements with Indigenous Groups and Communities" (21 March 2018) [extracted from A92530-2] [MR, Tab 3G at 507].

[24] Letter from Hydro to CER (16 October 2019) [C02280-1] [MR, Tab 3X at 906]. The MMF maintains that the Major Agreed Points is a legally binding agreement and has sought to overturn Manitoba's March 21, 2018 decision to issue the OIC and has sought to enforce the Major Agreed Points through the courts.

[25] MMF Notice of Application for Judicial Review in *Manitoba Metis Federation v Brian Pallister and others* (CI18-01-14927) (4 June 2018) [extracted from A92530-2] [MR, Tab 3J at 518].

[26] *Manitoba Metis Federation Inc v Brian Pallister*, 2020 MBQB 49, 2020 CarswellMan 113 (WL) [Authorities, Tab 12].

[27] MMF Notice of Appeal (AI20-30-09449) (5 May 2020) [C06675-1] [MR, Tab 3DD at 938].

v. The Major Agreed Points is put "on the record" of the NEB proceedings (June 2018)

36. On or about June 8, 2018, the MMF introduced the Major Agreed Points on to the record of the EH-001-2017 NEB proceeding reviewing the MMTP application.[28]

37. Hydro objected and brought a motion to strike the Major Agreed Points from the record; however, the NEB ultimately concluded that it should be included, as it "contains information relevant to the Board's IR No. 1 to Intervenors"[29] about "mitigation measures proposed by Manitoba Hydro to address concerns raised regarding potential project impacts."[30]

vi. The NEB decision (November 2018)

38. On or about November 15, 2018, the NEB released its decision recommending that the MMTP be approved and the Certificate granted, subject to 28 conditions. These conditions included a version of Condition 3, which read:

> Manitoba Hydro must implement or cause to be implemented all of the policies, practices, mitigation measures, recommendations, and procedures for the protection of the environment and promotion of safety referred to in its application, or as otherwise agreed to in its related submissions.[31]

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28 MMF Response to NEB Information Request No. 1 (8 June 2018) [A92389-1] [MR, Tab 3K at 561].

29 NEB Ruling No. 14 at 2 [A92734] [MR, Tab 3L at 568].

30 MMF Response to NEB Information Request No. 1 (8 June 2018) at 2 [A92389-1] [MR, Tab 3K at 561].

31 NEB Reasons for Decision in the Matter of Manitoba Hydro Application dated 16 December 2016 for the MMTP, EH-001-2017 (November 2018), Appendix III, Condition 3 at 179, Condition 3 [A95736-1] ("**NEB Reasons for Decision**") [MR, Tab 3M at 765].

vii. Canada engages in a supplemental Crown consultation process on the MMTP (November 2018–June 2019)

39. From November 2018 to June 2019, Canada engaged in a supplemental Crown consultation process with the MMF and other Indigenous groups "[i]n an effort to further address" the "potential impacts on Section 35 Aboriginal and Treaty Rights resulting from the Project"[32] and in order to fulfill its duty to consult and accommodate.

40. The MMF participated in this supplemental consultation process and repeatedly outlined its concerns that Hydro was not implementing its commitments to the MMF that addressed the impacts of the MMTP on Section 35 Métis Rights, including the Major Agreed Points commitments. The MMF outlined that if the Major Agreed Points was not implemented, the impacts of the MMTP on Section 35 Métis Rights would be left unaddressed and needed to be addressed some other way for Canada to fulfill its duty to consult and accommodate.[33]

viii. Canada amends the Conditions to fulfill its duty to consult and accommodate (June 2019)

41. Following the supplemental consultation process with the MMF and other Indigenous communities, Canada amended Condition 3 of the Certificate as follows:

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[32] Letter from NRCan to NEB (17 May 2019) [A99791-1] [MR, Tab 3N at 778].

[33] Consultation and Accommodation Report for the Manitoba-Minnesota Transmission Project (Manitoba Hydro) (EH-001-2017) (3 June 2019) [MR, Tab 3KK at 1072].

Condition 3, as set out in the NEB Decision	Condition 3, as amended by Canada
Manitoba Hydro must implement or cause to be implemented all of the policies, practices, mitigation measures, recommendations, and procedures for the protection of the environment and promotion of safety referred to in its application, or as otherwise agreed to in its related submissions.[34]	Manitoba Hydro must implement or cause to be implemented all of the policies, practices, mitigation measures, recommendations, and procedures for the protection of the environment and promotion of safety referred to in its application, or as otherwise agreed to in its related submissions as well as all commitments made to Indigenous groups through its Project application or otherwise on the record of the EH-001-2017.[35]

42. Canada also amended Condition 15 of the Certificate to require that Hydro specifically include in its monthly commitments tracking table all commitments made to Indigenous communities.[36] Canada expressly stated that "[t]hese changes ensure Manitoba Hydro follows through on commitments made to Indigenous groups and accounts for concerns raised by Indigenous groups regarding the impacts of the Project."[37]

43. The Certificate was issued by the NEB on or about June 18, 2019, and includes Conditions 3 and 15, as amended by Canada.

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[34] NEB Reasons for Decision, Appendix III, Condition 3 at 179 [A95736-1] [MR, Tab 3M at 765].

[35] Certificate EC-059, Condition 3 at 2 [emphasis added] [C00016-3] [MR, Tab 3O at 781].

[36] Canada's amendments to Condition 15 are linked to the amendments to Conditions 3; if something is a "commitment" within the meaning of Condition 3, it should be included in the commitments tracking table required by Condition 15. A decision with respect to a "commitment" under Condition 3 therefore has corresponding application to Condition 15.

[37] Major Projects Management Office, "Manitoba Minnesota Transmission Project (MMTP)," *Interim Measures for Major Project Reviews* [MR, Tab 3MM at 1173].

D. The Proceedings Before the CER

44. On or about July 23, 2019, the MMF wrote to the NEB advising that Hydro was failing to comply with Conditions 3 and 15, as Hydro was neither implementing the commitments made to the MMF in the Major Agreed Points or the Workplan and Contribution Agreement, as required by Condition 3, nor had it included those commitments (or other commitments to the MMF, such as a 10% Métis contracting commitment for the MMTP) within the tracking table that it was required to maintain pursuant to Condition 15. The MMF asked the NEB to enforce the Conditions.[38]

45. On or about August 2, 2019, after Hydro objected to the MMF's request that the Conditions be enforced,[39] the NEB wrote to the MMF and Hydro advising that the MMF's concerns would be considered.[40] This led to a series of correspondence between the parties.[41]

46. Within this period of time, on or about August 28, 2019, the *CER Act* came into force, with the CER replacing the NEB as the regulator with oversight of the MMTP.

47. On or about October 10, 2019, following further submissions from Hydro and the MMF, the CER wrote to the parties to advise that a panel of Commissioners had been appointed to

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38 Letter from MMF to NEB (23 July 2019) [C00653-1] [MR, Tab 3P at 795].

39 Letter from Hydro to NEB (26 July 2019) [C00704-1] [MR, Tab 3Q at 822].

40 Letter from NEB to Hydro (2 August 2019) [C00836-1] [MR, Tab 3R at 825].

41 Letter from MMF to Hydro (8 August 2019) [C00907] [MR, Tab 3S at 829]; letter from Hydro to NEB (9 August 2019) [C00912-1] [MR, Tab 3T at 884]; letter from MMF to NEB (16 August 2019) [C01061-1] [MR, Tab 3U at 890]; letter from MMF to NEB (5 September 2019) [C01479-1] [MR, Tab 3V at 899].

consider Hydro's compliance with the Conditions.[42] The CER's letter stated that "Hydro must demonstrate that it has complied with conditions attached to the Certificate."

48. Throughout the remainder of 2019, both the MMF and Hydro wrote to the CER.[43] The CER did not respond until on or about May 21, 2020, when it advised that it was continuing to consider the issue and asked for further submissions.[44]

49. On or about June 4, 2020, the MMF brought an application seeking declaratory relief that Hydro was in breach of Condition 3 of the Certificate and an Order compelling Hydro to implement its commitments made in the Major Agreed Points, in compliance with Condition 3.[45] In the alternative, the MMF requested that the Certificate be suspended until Hydro complied with Condition 3.[46] In its Notice of Application, the MMF also requested that the CER hold a public oral hearing, as required by section 52(1) of the *CER Act*.

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42 Letter from CER to Hydro (10 October 2019) at 2 [C02204-1] [MR, Tab 3W at 904].

43 Letter from Hydro to CER (16 October 2019) [C02280-1] [MR, Tab 3X at 906]; letter from MMF to CER (23 October 2019) [C02373-1] [MR, Tab 3Y at 915]; letter from MMF to CER (5 December 2019) [C03468-1] [MR, Tab 3Z at 921]; letter from MMF to Hydro (9 April 2020) [C05685-1] [MR, Tab 3AA at 924].

44 Letter from CER to Hydro and MMF (21 May 2020) [C06416-1] [MR, Tab 3BB at 929]; letter from Hydro to CER (4 June 2020) [C06665-1] [MR, Tab 3CC at 932]; letter from MMF to CER (4 June 2020) [C06675-1] [MR, Tab 3DD at 935]; letter from Hydro to CER (11 June 2020) [C06776-1] [MR, Tab 3FF at 1041]; letter from MMF to CER (11 June 2020) [C06785-1] [MR, Tab 3GG at 1044].

45 MMF Notice of Application to CER for Determination of MMTP Condition 3 (4 June 2020) [C06687-1] [MR, Tab 3EE at 1019].

46 CER Letter Decision (11 August 2020) at 5 ("**Decision**") [MR, Tab 2 at 9].

E. The Decision

50. On or about August 11, 2020, the CER issued its Decision without holding a public oral hearing and without considering the MMF's filed application.[47] The Decision interpreted Condition 3 as excluding the Major Agreed Points.

51. On October 13, 2020, the MMF filed this motion for leave to appeal with this Court.

PART II POINTS IN ISSUE

52. The only issue to be addressed on this motion is whether the MMF ought to be granted leave to appeal the Decision pursuant to section 72(1) of the *CER Act*.

PART III SUBMISSIONS

A. Leave to Appeal Shall Be Granted Where the Appellant Raises a "Fairly Arguable Case"

53. Section 72(1) of the *CER Act* provides that "[a]n appeal from a decision or order of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court."[48]

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47 Decision [MR, Tab 2 at 5]; letter from CER to Hydro and MMF (25 June 2020) [C06988-1] [MR, Tab 3HH at 1046]

48 *CER Act*, *supra*, s 72(1) [Authorities, Tab 1].

54. In order to be granted leave to appeal, a moving party "need only show a fairly arguable issue" of law or jurisdiction that requires the Court's review on appeal.[49] As this Court held in *Lukács v. Swoop Inc.*:

> [i]n this context, a "fairly arguable case" should be seen in a functional and purposive way and can be resolved down into a question: has enough been raised in the motion for leave to appeal to warrant a full review of the . . . decision, a review that will entitle a party to use all of the procedural rights and investigative techniques associated with reviews?[50]

55. While "the leave requirement is not just a cursory checkpoint,"[51] this Court has been clear that "[m]otions for leave to appeal are not full determinations of the merits of the matter" and are "supposed to be summary—a quick assessment whether a full review of the . . . decision is warranted."[52]

B. The Decision Raises Four "Fairly Arguable Issues" of Law

56. The Decision raises four issues of law that easily meet and exceed the "fairly arguable" standard for granting for leave to appeal:

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49 *Lukács v Swoop Inc*, 2019 FCA 145, 2019 CarswellNat 2010 (WL) at para 15 [*Lukács*] [Authorities, Tab 11].

50 *Lukács*, *supra* at para 15 [Authorities, Tab 11].

51 *Raincoast Conservation Foundation v Canada* (*AG*) (2019), 438 DLR (4th) 745, 2019 FCA 224 at para 13 [Authorities, Tab 18].

52 *Lukács*, *supra* at para 15 [Authorities, Tab 11].

a) The CER erred by failing to correctly interpret Condition 3, as the product of Order in Council PC 2019-0784 (the "**MMTP OIC**"),[53] which expressly amended the Certificate for the Project as originally proposed by the NEB;

b) The CER erred by failing to substantively consider or apply the honour of the Crown and specifically to determine and implement the requirements of the honour of the Crown in making the Decision regarding the enforcement of an accommodation measure expressly provided for by the federal Crown;[54]

c) The CER erred by failing to comply with section 56(1) of the *CER Act*;[55] and

d) The CER erred by failing to hold a public hearing before making the Decision, as required by section 52(1) of the *CER Act* where the suspension of a certificate such as the Certificate has been sought.[56]

i. The CER erred by failing to correctly interpret Condition 3

57. Condition 3, among others, is the product of the MMTP OIC, which expressly amended the Certificate as originally proposed by the NEB to include Condition 3 in its current form.[57]

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53 Order in Council PC 2019-0784 at 3 (13 June 2020) ("**MMTP OIC**") [MR, Tab 3II at 1052].

54 *Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, [2017] 1 SCR 1069, 2017 SCC 40 at paras 34 and 36–37 [*Clyde River*] [Authorities, Tab 5].

55 *CER Act*, *supra*, s 56(1) [Authorities, Tab 1].

56 *CER Act*, *supra*, s 52(1) [Authorities, Tab 1].

57 MMTP OIC [MR, Tab 3II at 1052].

The interpretation of the MMTP OIC and Condition 3 is a question of law

58. The Supreme Court of Canada has held that "orders in council must be interpreted in accordance with the modern principle of statutory interpretation."[58] The interpretation of the MMTP OIC is a question of law.[59] As such, the CER was required to correctly interpret the MMTP OIC. This requires that "words of an Act . . . be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[60]

The CER failed to correctly consider and analyze the Crown's changes to Condition 3

59. Condition 3 states that "Manitoba Hydro must implement or cause to be implemented . . . all commitments made to Indigenous groups through its Project application or otherwise on the record of the EH-001-2017."[61] The original language proposed by the NEB for Condition 3 did not include reference to "commitments" but only to Hydro's "policies, practices, mitigation measures, recommendations, and procedures." As originally drafted, Condition 3 was already limited to matters upon which Hydro had agreed or put on the record itself. In its Decision, the

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58 *Amaratunga v Northwest Atlantic Fisheries Organization*, [2013] 3 SCR 866, 2013 SCC 66 at para 36 [Authorities, Tab 3].

59 *Henderson v Canada* (*AG*) (2011), 108 OR (3d) 290, 2011 ONCA 696 at paras 45–46 [Authorities, Tab 10]; *Consumer Advocate v Newfoundland and Labrador* (*Board of Commissioners of Public Utilities*) (2015), 367 Nfld & PEIR 67, 2015 NLCA 24 at para 21 [Authorities, Tab 6].

60 *Rizzo & Rizzo Shoes Ltd* (*Re*), [1998] 1 SCR 27, 221 NR 241 at para 21 [*Rizzo Shoes*] [Authorities, Tab 19].

61 Certificate EC-059, Condition 3 [C00016-3] [MR, Tab 3O at 781].

CER did not consider, analyze, or apply the rationale or effect of the change in language adopted by the Crown decision-maker. This is an error in law.

60. The Decision renders the new words that Canada expressly added to Condition 3 meaningless and redundant by interpreting the Condition in the exact same manner as if those words had not been added. This is an untenable result and an error of law. The new language tracks to both the language used in the NEB's decision to put the Major Agreed Points "on the record"[62] and the language in the Major Agreed Points that refers to Hydro's "commitments"[63]—Cabinet does not speak in vain and that language must have meaning.

61. Further, contrary to the CER's interpretation, the language of Condition 3, on its face, does not support and makes no qualifications regarding who must place a commitment "on the record" in order for said commitment to fall within the ambit of the Condition. If Hydro was the only one that was able to put a commitment "on the record," there would have been no need for the Crown to change the original language proposed by the NEB, which already captured all of Hydro's self-accepted commitments, on the record or otherwise. There are also no words within Condition 3 that require Hydro's "acknowledgement" or "acceptance" of a commitment before it can be enforced by the CER.

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62 NEB Ruling No. 14 [A92734] [MR, Tab 3L at 567–568].

63 Major Agreed Points, Articles 2–7, and 8 [extracted from A92530-2] [MR, Tab 3F at 503–504].

The CER failed to properly consider the context and purpose of the Crown's changes to Condition 3

62. In its reasons for the Decision, the CER failed to consider the intention of the Crown decision-maker in any way. Canada clearly expressed that "in order to adequately discharge its duty to consult and to accommodate any outstanding concerns of Indigenous groups, [the Governor General in Council] adds or amends certain conditions that were set out in Appendix III of the National Energy Board's Reasons for Decision Manitoba Hydro EH-001-2017."[64] The CER was obligated to consider the context in which the revised conditions—including Condition 3—were developed and included in the Certificate as well as their intended purpose.[65] This context included the TPA, the Workplan and Contribution Agreement, and the Major Agreed Points. Instead, the CER ignored this context that was clearly before it and interpreted the words added to Condition 3, which were a direct result of the supplemental Crown consultation process, as having no meaning at all. In effect, they become a "me-fool-you" to the MMF and other Indigenous communities with commitments from or negotiated agreements with Hydro.

63. Based on the above, the CER incorrectly interpreted Condition 3. The CER's interpretation of Condition 3 is untenable textually, contextually, and purposively. It constitutes an error in law that should be subject to appellate review and intervention.

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64 MMTP OIC at 3 [MR, Tab 3II at 1052].

65 *Rizzo Shoes*, *supra* [Authorities, Tab 19].

ii. The CER erred by failing to consider the honour of the Crown

64. The honour of the Crown is a "constitutional principle."[66] In the leading Supreme Court of Canada case on the honour of the Crown, which bears the MMF's name, the Court held that the honour of the Crown refers to "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[67] The principle stands for the "assum[ption] that the Crown intends to fulfil its promises"[68] and that Indigenous peoples can rely on the commitments made to them by the Crown.

65. While the honour of the Crown is always at stake in the Crown's dealings with Indigenous peoples,[69] the courts have recognized that it imposes a heavy obligation and therefore "not all interactions between the Crown and Aboriginal people engage [the honour of the Crown]. . . . It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled."[70] What is required in order to uphold the honour of the Crown varies with the circumstances; in resolving the case in *MMF*, the Supreme Court of Canada posed the overall question as: "[when] [v]iewing the Crown's conduct as a whole in the context of [a] case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?"[71]

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66 *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 at paras 42, 105 [Authorities, Tab 4].

67 *MMF*, *supra* at para 66 [Authorities, Tab 13].

68 *R v Badger*, [1996] 1 SCR 771, 195 NR 1 at para 41 [Authorities, Tab 15].

69 *Haida Nation v British Columbia* (*Minister of Forests*), [2004] 3 SCR 511, 2004 SCC 73 at para 16 [Authorities, Tab 9].

70 *MMF*, *supra* at para 68 [Authorities, Tab 13].

71 *MMF*, *supra* at para 83 [Authorities, Tab 13].

66. To date, the Supreme Court of Canada has recognized that when the honour of the Crown is applied to specific fact situations, enforceable constitutional duties are implicated.[72] When Crown conduct has the potential to adversely affect Aboriginal or treaty rights (proven, accommodated, or credibly asserted), the Crown's duty to consult becomes engaged. The honour of the Crown applies equally to consultation and accommodation, including the implementation of accommodation that fulfills the duty. Consultation and accommodation are two sides of the same coin. Where the Crown has determined that a particular accommodation is required, its honour requires that the accommodation be implemented and fulfilled.

67. A direct conceptual line[73] can be drawn from the Manitoba Métis Community's asserted and established Section 35 Métis Rights, to the TPA, to the Workplan and Contribution Agreement, to the Major Agreed Points, and ultimately Condition 3. These processes, agreements and commitments were directed at the "reconciliation of Aboriginal rights with Crown sovereignty."[74] Based on this, the honour of the Crown is clearly engaged. This required the CER to substantively consider and apply the honour of the Crown and specifically to determine and implement the requirements of the honour of the Crown in making the Decision. The Decision, on its face, demonstrates that the CER did not substantively consider this question of law, much less arrive at a correct view of the law and its application in this case.

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72 *MMF*, *supra* at para 68 [Authorities, Tab 13].

73 *Muskoday First Nation v Saskatchewan*, 2016 SKQB 73, 2016 CarswellSask 158 (WL) at para 38 [Authorities, Tab 14].

74 *MMF*, *supra* at para 68: "The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty" [Authorities, Tab 13].

68. Instead, in its Decision, the CER only referred to the honour of the Crown in passing once, and, in the last paragraph of its Decision wrote—without providing any explanation in the preceding 15 pages—that it was "satisfied that its finding in this decision, namely that the MAP Documents are not a commitment, does not undermine the honour of the Crown or undermine the Crown's discharge of its duty to consult and accommodate."[75] This conclusory finding does not constitute analysis and does not demonstrate that the CER in fact considered the scope and implementation of the duties imposed by the honour of the Crown in the circumstances of this case, as required by the Supreme Court of Canada. More was required given that the CER should have been aware that the honour of the Crown was engaged and Condition 3 falls within the continuum of the Crown's duty to consult and accommodate the MMF.[76]

69. Given the fact that Condition 3 is an outcome of the Crown's duty to consult and accommodate, which means the honour of the Crown was already engaged, the CER was obligated—as the vehicle through which the Crown acts—to, at the very least, consider what the honour of the Crown required in terms of implementing and enforcing the Condition as an

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75 Decision at 13 [MR, Tab 2 at 17].

76 See, for example, see *Fort McKay*, *supra* at paras 42–43; 57–58; 65–67 where the Alberta Court of Appeal recognized that the failure of a Crown actor to consider the honour of the Crown—as a constitutional principle—in the context of a regulatory review constitutes an error of law [Authorities, Tab 8].

accommodation measure.[77] The CER did not, however, ask, consider, or provide any reasons in relation to that key question. This is a legal error.

iii. The CER erred by failing to comply with section 56(1) of the *CER Act*

70. Section 56(1) of the *CER Act* requires that the CER consider the section 35 rights of Indigenous peoples when making a decision, order, or recommendation. Specifically, section 56(1) of the *CER Act* states:

> When making a decision, an order or a recommendation under this Act, the Commission must consider any adverse effects that the decision, order or recommendation may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.[78]

71. The Section 35 Métis Rights within the Project area are established in the courts[79] as well as recognized by the Crown.[80] Moreover, the MMF's representative role, on behalf of the Manitoba Métis Community, as an Indigenous people and Métis community has been recognized by the Supreme Court of Canada.[81] As such, the CER was required to consider the impact its Decision would have on the Section 35 Métis Rights of the Manitoba Métis Community.

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77 For example, among other things, the CER did not consider what was required for Hydro to demonstrate that it was complying with the 10% Métis contracting commitment for the MMTP. Hydro acknowledged that this was a "commitment" and amended the monthly tracking table required by Condition 15 to include this commitment but otherwise provided no evidence that it was fulfilling this commitment, yet the CER in its Decision concluded this commitment had been met.

78 *CER Act*, *supra*, s 56(1) [Authorities, Tab 1].

79 *Goodon*, *supra* [Authorities, Tab 17].

80 Points of Agreement [MR, Tab 3A at 30].

81 *MMF*, *supra* at para 44 [Authorities, Tab 13]; See also *Daniels*, *supra* at para 42 [Authorities, Tab 7].

72. In making the Decision, the CER utterly failed to do so. While the Decision referred in passing to section 56 of the *CER Act*,[82] it does so only to state that "the Commission is satisfied that its finding in this decision, namely that the MAP Documents [the Major Agreed Points] are not a commitment, does not undermine the honour of the Crown or undermine the Crown's discharge of its duty to consult and accommodate."[83] This is not a consideration of the Decision's effects on Section 35 Métis Rights; rather, it completely ignored and abdicated the CER's jurisdiction and responsibility for discharging the required accommodation, consistent with the Crown's reliance and its own statutory obligations.[84]

73. At no point in the Decision did the CER turn its mind to, engage with, or apply any understanding of what the impacts of its Decision would be on the Section 35 Métis Rights of the Manitoba Métis Community. In particular, the CER failed to grapple at all with the fact that its Decision will leave the MMTP's adverse effects on the Section 35 Métis Rights of the Manitoba Métis Community entirely unaddressed and unaccommodated. This is inconsistent with section 56(1) of the *CER Act* and is an error of law that ought to be reviewed by this Court on appeal.

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82 Decision at 13 [MR, Tab 2 at 17].

83 Decision at 13 [MR, Tab 2 at 17].

84 *Clyde River*, *supra* at para 29: "Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. . .[t]he duty [to consult and accommodate], like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" [Authorities, Tab 5].

iv. The CER erred by failing to hold a public hearing before making the Decision, as required by section 52(1) of the *CER Act*

74. Section 52(1) of the *CER Act* requires that the CER hold a public hearing "with respect to the issuance, suspension or revocation of a certificate under Part 3 or 4" of the *CER Act*.[85]

75. The Certificate is a certificate under Part 4 of the *CER Act*. Moreover, in its Notice of Application filed on June 4, 2020, the MMF requested that the CER order that the Certificate be suspended as a result of Hydro's failure to comply with the Conditions.

76. As such, the CER was required by section 52(1) of the *CER Act* to hold a public hearing before making the Decision. The CER failed to do so, and, in fact, did not even turn its mind to whether it was required to do so by section 52(1) of the *CER Act*.

77. This is an error of law that warrants appellate intervention.

PART IV ORDER SOUGHT

78. The MMF requests that its motion seeking an order under the *Canadian Energy Regulator Act*, SC 2019, c 28, s 72(1) and Rule 352 of the *Federal Courts Rules*, SOR/98-106 granting leave to appeal the Decision be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October 2020.

for: _____
JASON MADDEN

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85 *CER Act*, *supra*, s 52(1) [Authorities, Tab 1].

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