IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

	)	***J. R. Aldridge, Q.C.,***
	)	***J. J. T. Madden,***
	)	***M. S. Clark*** *and*
MANITOBA METIS FEDERATION INC.	)	***M. E. W. Gibson***
	)	*for the Appellant*
	)	*(via videoconference)*
(Applicant) Appellant	)	
	)	***D. A. Bedford*** *and*
	)	***J. M. Carvell***
- and -	)	*for the Respondent*
	)	*The Manitoba Hydro-Electric*
	)	*Board*
BRIAN PALLISTER, PREMIER OF	)	*(via videoconference)*
MANITOBA, CLIFF CULLEN, MINISTER	)	
OF CROWN SERVICES, THE EXECUTIVE	)	***M. E. Killoran, Q.C.*** *and*
COUNCIL FOR THE GOVERNMENT OF	)	***S. Sutherland***
MANITOBA, THE GOVERNMENT OF	)	*for the remaining*
MANITOBA, and THE MANITOBA HYDRO-	)	*Respondents*
ELECTRIC BOARD	)	*(via videoconference)*
	)	
	)	*Appeal heard:*
(Respondents) Respondents	)	***December 16, 2020***
	)	
	)	*Judgment delivered:*
	)	***May 6, 2021***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB*, Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 49

CHARTIER CJM

Introduction and Issues

[1] This is an appeal from a dismissal of a judicial review application made by the applicant, the Manitoba Metis Federation Inc. (the MMF), for an order of *certiorari* against the respondents, the Premier, the Minister of Crown Services (the Minister), the Executive Council (Cabinet) and the Government of Manitoba (collectively, Manitoba), reviewing an order in council which set aside a term sheet between the MMF and the Manitoba Hydro-Electric Board (Hydro).

[2] The major issue in the appeal is whether the principle of the honour of the Crown was engaged in the circumstances of this case and, if so, whether Manitoba had acted contrary to that principle in making the order in council.

[3] For the reasons that follow, I agree with the MMF that the judge who heard the judicial review application (the reviewing judge) erred in deciding that the honour of the Crown had no application in this case. However, while the honour of the Crown was engaged, I am satisfied that, in the circumstances, Manitoba acted reasonably as to its obligation to act honourably.

[4] In simple terms, the principle of the honour of the Crown means that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign (see *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 65 (the *Metis* case)). As explained by the Supreme Court of Canada, the honour of the Crown, as it relates to Aboriginal matters, goes back to *The Royal Proclamation (1763)*, George R,

Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1, with the Crown's assertion of sovereignty over lands held by Indigenous peoples (see the *Metis* case at para 66). I start with an extract from that case (at para 72):

> . . . Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown [citation omitted].
>
> [emphasis added]

[5] This "special relationship" exists because of certain realities. Prior to the assertion of Crown sovereignty over what was to become Canada, certain nations and societies lived on the territory: First Nations peoples, the inhabitants of New France and then the Métis people. The Supreme Court of Canada, in the *Metis* case, explains how the honour of the Crown characterizes this "special relationship" (at para 67) by adopting what Brian Slattery, in "Aboriginal Rights and the Honour of the Crown" (2005), 29 SCLR (2d) 433, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1086&context=sclr> (date accessed 23 April 2021), stated (at p 436):

> . . .
>
> . . . [W]hen the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples. . . .

[6] The Métis are one of the "aboriginal peoples of Canada" within the meaning of section 35(2), Part II of the *Constitution Act, 1982*. The record before this Court states that the Métis were born of relations between European men and First Nation women brought together through the fur trade in what is now known as western Canada. They are recognized as a distinct Indigenous group because of a unique shared history, culture, kinship, language, territory and collective consciousness as a people.

[7] Historical context informs the current issues before the courts. It helps courts understand why certain societies, which pre-existed the assertion of Crown sovereignty, have specific collective rights guaranteed by the *Constitution Act, 1867* and the *Constitution Act, 1982*, and why the Crown has certain constitutional obligations and responsibilities towards them. For example, because of *The Quebec Act 1774* (UK), 14 Geo III, c 83, reprinted in RSC 1985, App II, No 2, the French civil law, not the English common law, prevails in respect of property and civil rights in Quebec, and section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides collective minority language educational rights. For Indigenous peoples, their rights find their origin in *The Royal Proclamation (1763)* and the different treaties entered into since then. In addition, section 25 of the *Charter* and section 35 of the *Constitution Act, 1982* recognize and affirm their Aboriginal and treaty rights.

[8] Simply put, Indigenous peoples have a special relationship with the Crown that imposes certain constitutional obligations on the Crown, and that provides Indigenous peoples with certain collective constitutional Aboriginal and treaty rights. This special relationship requires the Crown to deal honourably with Indigenous peoples.

[9] This brings me to the issues that arise on this appeal.

[10] The MMF applied for judicial review in the Court of Queen's Bench seeking to review OIC 82/2018 (the OIC) issued pursuant to section 13(1) of *The Crown Corporations Governance and Accountability Act*, CCSM c C336 (as it then appeared) (the *CCGAA*). The OIC authorized the issuance of a directive (the Directive), which ordered, amongst other things, that Hydro not proceed with the MMF/Hydro term sheet called the "Major Agreed Points" (the MAP) "at this time" (the Decision).

[11] The MMF sought the prerogative writ of *certiorari* against Manitoba to set aside the OIC, the Directive and the Decision. It also sought a declaration that Manitoba had not acted in accordance with the honour of the Crown in making the OIC, the Directive and the Decision.

[12] The reviewing judge, in a comprehensive decision, dismissed the application. He concluded that the Directive was a lawful and reasonable exercise of Cabinet's statutory power to enforce its stewardship role over Hydro; that neither a 2014 agreement (see para 22 of these reasons), the OIC, the Directive nor the Decision engaged the honour of the Crown; and that the MMF was not entitled to any special procedural rights in regard to the issuance of the OIC. Alternatively, he found that, if the honour of the Crown was engaged, Manitoba acted honourably in the circumstances.

[13] The MMF now appeals to this Court. It argues that the reviewing judge erred in finding, first, that the honour of the Crown did not apply to the Directive and the Decision, such that the MMF was entitled to consultation before it was issued; second, that the Directive was within Cabinet's statutory

authority; and third, that the MMF was not owed distinct procedural rights in relation to the approval and issuance of the Directive and the Decision.

[14] The MMF also argues that the reviewing judge erred when he struck certain portions of the evidence filed by the MMF. Given that this fourth ground was not seriously pursued in written or oral argument, I would dismiss it summarily.

Standard of Review

[15] This matter came before the reviewing judge by way of judicial review, not by way of a statutory appeal. On appellate review from a decision of a judge hearing an application for judicial review, appellate courts simply determine whether the reviewing judge chose the right administrative law standard of review and correctly applied it. Those two questions are questions of law and are to be reviewed by the appellate court on the standard of correctness (see *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 43-44).

[16] The first issue is whether the honour of the Crown was engaged. By which standard is a reviewing judge to review this issue? The short answer is that, given the constitutional nature of the question, the correctness standard of review applies. However, the review is comprised of several steps sometimes requiring the application of different standards of review (similar to the multi-faceted analysis when deciding whether there is a *Charter* breach (see *R v Farrah (D)*, 2011 MBCA 49 at para 7)). A reviewing judge must seek to understand the decision-maker's reasoning process and must be alive to the relevant factual and legal constraints that bear on the decision (see

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 99). The multi-faceted standard of review analysis, to determine whether the honour of the Crown (the ultimate issue) is engaged, follows:

a) on constitutional matters there can only be one correct answer—reasonable people cannot disagree on the answer. Since the honour of the Crown pertains to the scope of Aboriginal rights under section 35 of the *Constitution Act, 1982*, the reviewing judge must apply the correctness standard of review to the ultimate issue (see *Vavilov* at para 55);

b) the reviewing judge will review the agreement to determine whether the honour of the Crown is engaged. The principles of contractual interpretation generally apply to agreements with Indigenous peoples (see *Quebec (Attorney General) v Moses*, 2010 SCC 17; and *Canada (Attorney General) v Fontaine*, 2017 SCC 47). Contractual interpretation (outside of standard form contracts) is a question of mixed fact and law to be reviewed on the standard of reasonableness (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53);

c) certain duties (i.e., duty to consult and accommodate) flow from the principle of the honour of the Crown. To the extent that the manner in which these duties are carried out is "premised on an assessment of the facts", the adequacy of how they are discharged is owed deference and will generally be reviewed on the reasonableness standard (*Haida Nation v*

British Columbia (Minister of Forests), 2004 SCC 73 at para 61);

d) certain obligations (i.e., to act honourably, with integrity and in good faith) also flow from the principle of the honour of the Crown. Once again, to the extent that the manner in which they are carried out is "premised on an assessment of the facts" (*ibid*), the adequacy of how they are discharged is generally reviewed on the reasonableness standard (see *Haida* at paras 60-63);

e) where the reasonableness standard applies (see steps b), c) and d)), the party challenging the decision has the burden to show that it is unreasonable. Before it can be set aside, the reviewing judge "must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). To set the decision aside, its flaws "must be more than merely superficial or peripheral to the merits of the decision" (*ibid*; see also para 101); and

f) once steps b), c), d) and e) have been considered, the reviewing judge will take a last look at the accepted factual foundation and, applying the correctness standard of review, decide the ultimate issue (whether the honour of the Crown is engaged in the circumstances).

[17] In the case at hand, on the issue of whether the honour of the Crown was engaged, the reviewing judge correctly found that the applicable standard

of review was correctness. On whether Manitoba acted honourably in the circumstances, assuming the honour of the Crown was engaged, the reviewing judge correctly found that the applicable standard of review was reasonableness.

[18] On whether the Directive was within Cabinet's statutory authority, both the MMF and Manitoba submit to this Court, on the basis of the new framework and methodology explained in *Vavilov*, that the reviewing judge should have applied the standard of reasonableness, not correctness. I agree with the parties that, in selecting the correctness standard, the reviewing judge chose the wrong standard (see *Vavilov* at paras 23-24, 29-30, 65-70, 115-17). *Vavilov* provides that the presumption of reasonableness applies to the review of an administrative decision and, regardless of whether this is a jurisdictional question, such questions are no longer recognized as a distinct category attracting correctness. This question will be reviewed on the standard of reasonableness. I note that *Vavilov* was released after the parties had made their submissions to the reviewing judge. As a result, this Court will assess the merits of the administrative decision anew on the presumed reasonableness standard.

[19] Finally, on whether the MMF was owed distinct procedural rights in regard to the approval and issuance of the Directive and the Decision, the standard of review is correctness.

Factual Background

[20] The critical issue on this appeal is whether certain agreements engaged the honour of the Crown. This requires an interpretation of those

agreements. Given that factual context plays a significant role in contractual interpretation, it will be necessary to set out the factual background in detail.

[21] In 2013 and 2014, the MMF appealed decisions to license two Hydro projects: the Bipole III Transmission Project (Bipole III); and the Keeyask Generation Project (Keeyask). The basis for the MMF's court challenges was its claim that the Crown had failed to fulfill its duty to consult and accommodate the Métis people with respect to adverse impacts of Hydro developments on Métis rights.

[22] On November 26, 2014, the MMF, Hydro and Her Majesty the Queen in Right of Manitoba executed the *Kwaysh-kin-na-mihk la paazh Agreement*, 26 November 2014, online: <mmf.mb.ca/docs/hydro_docs /MMF-Hydro-Manitoba-Turning-the-Page-Agreement.pdf> (date accessed 3 May 2021), also known as the "Turning the Page Agreement" (the TPA). It had a 20-year term and provided for an early termination clause without cause upon 30 days' notice. The TPA required Hydro to pay $2 million to the MMF on closing. In return for the payment, the MMF withdrew the two aforementioned appeals.

[23] The TPA also required Hydro to make annual $1 million payments to the MMF during the term of the agreement for the purpose of supporting certain costs of the MMF to maintain a non-adversarial working relationship with Hydro and to participate, amongst other things, in initial processes relating to unaddressed impacts of Bipole III and Keeyask. The non-adversarial process included optional "without prejudice" discussions or agreements regarding existing Hydro projects. It also provided for a dispute resolution process whereby a Tripartite Steering Committee (TSC) could

attempt to resolve disputes relating to the TPA. As a final point, the TPA had a clause (see article 7.1.9), stating that nothing in the TPA affects any constitutional rights of the Métis or the Crown's duty to consult and accommodate.

[24] On March 1, 2017, and consistent with the processes agreed to in the TPA for reaching agreements (see articles 4.1.1, 4.3.2), the MMF and Hydro executed a memorandum of understanding (the MOU) that established a six-month, time-limited, confidential and without prejudice discussion process to achieve an agreement to address issues associated with the Manitoba-Minnesota Transmission Project, St. Vital Transmission Complex and Bipole III (the Transmission Project).

[25] On March 9, 2017, Manitoba introduced a bill, which became the *CCGAA* (see para 94 of these reasons). It came into force on June 2, 2017. The *CCGAA* governs Manitoba's relationship with four named Crown corporations, one of which is Hydro.

[26] On June 29, 2017, the MMF and Hydro finalized the MAP, an unsigned "DRAFT – For Discussion Purposes Only" point-form term sheet to address issues associated with the Transmission Project. Manitoba was not part of those discussions. It contemplates Hydro paying the MMF a one-time lump sum payment of $37.5 million; another $30 million paid over 20 years at the rate of $1.5 million per annum; and additional annualized payments based on two per cent of the estimated capital costs of future projects, which are licensed after the initial 20 years, but within 50 years of the agreement. In exchange, the MMF would provide Hydro with legal releases with respect to

existing transmission projects, identified projects and future transmission projects undertaken during the initial 20 years of the agreement.

[27] On July 5, 2017, Hydro held a meeting. The extract of the minutes of that meeting, referenced as "880.10" and "MMF Relationship Agreement", states that the MAP, described as "a new form of relationship with the MMF", was reviewed. Following discussion, it was resolved as follows:

> . . .
>
> That [Hydro] be authorized to negotiate and sign a Relationship Agreement with the MMF, substantially in accordance with the terms set out in [the MAP], including a lump sum payment of $37.5 million for a Fund to be used by the MMF on behalf of the Metis People of Manitoba, and annual payments, adjusted by CPI [Consumer Price Index], of $1.5 million for 20 years.
>
> . . .

[28] The minutes also record that the authorization was subject to four provisos: 1) briefing government; 2) "fully flesh[ing]" the terms of the MAP; 3) legal counsel reviewing the terms; and 4) seeking further Hydro approval for substantive changes. The minutes read as follows:

> . . .
>
> Government is to be briefed, and the Relationship Agreement is to be fully fleshed out and reviewed by legal counsel. Management undertook to seek further approval from the Board should there be substantive changes to the terms as described in [the MAP].

[29] The MMF was of the view that the unsigned MAP was a binding legal agreement. Manitoba and Hydro were not of the same view. This led the MMF to request, on January 4, 2018, a meeting of the TSC pursuant to

article 5.1.3 of the TPA. This clause provided a process to amicably resolve disputes. Three meetings of the TSC were held to try to resolve the MAP dispute. At the end of the third meeting on March 8, 2018, the MMF invoked article 5.1.4 of the TPA and put Hydro and Manitoba on notice that it would commence legal action if the MAP issue was not resolved within 60 days.

[30] On March 21, 2018, Manitoba approved the OIC and issued the Directive to Hydro pursuant to section 13(1) of the *CCGAA*. That Directive includes the Decision (that Hydro not proceed with the MAP "at this time"). For ease of reference, the OIC, which includes section 13 and the Directive, is reproduced and attached as an appendix hereto. On the same day, nine members of the board of Hydro wrote to the Minister, advising him they had determined that it was necessary to resign, after having "been informed [Manitoba] intend[ed] to remove the Chair and ha[d] therefore lost confidence in the Board."

[31] After several correspondence exchanges, the parties met one last time on May 15, 2018. Unfortunately, they were unable to resolve the matters in dispute. On June 4, 2018, the MMF filed this application for judicial review. On October 30, 2018, the Deputy Minister to the Minister wrote to the MMF and Hydro giving notice that it was terminating the TPA effective 30 days from the date of the letter, being November 29, 2018.

The Decision of the Reviewing Judge

[32] The reviewing judge found the TPA to be a good faith attempt by the parties "to facilitate a non-adversarial working relationship" (at para 32). He found that neither the TPA nor the Directive engaged the honour of the Crown because, by design, neither affects Métis rights. The reviewing judge

also found that, in the event that the honour of the Crown was engaged by the TPA and the Directive, Manitoba acted honourably and its actions were taken in the broader public interest. Finally, he concluded that the Directive: 1) is consistent with the terms of the TPA and Manitoba's constitutional obligations; 2) does not bar a revised version of the MAP; and 3) was issued only after a number of TSC meetings were held to try to resolve the MAP dispute.

Analysis

[33] The act or event that caused these and other proceedings is the Directive issued by Manitoba. The Directive requires ministerial approval for all Hydro relationship and community benefit agreements with Indigenous communities "to which this directive applies". There are three types of agreements to which the Directive does not apply: 1) agreements for the provision of goods and services; 2) agreements that provide legally required mitigation or compensation measures to address thoroughly defined adverse effects; and 3) agreements that are necessary to carry out the day-to-day business of Hydro.

[34] The Directive also ordered the Decision (that Hydro not proceed with the MAP "at this time"). To reiterate, the MAP is the June 29, 2017 draft term sheet that would have had Hydro pay the MMF $67.5 million in return for the MMF agreeing not to file legal challenges to existing, identified or future Hydro projects. The reason for making the Decision can be understood from the terms of the Directive; since the $67.5 million in compensation payments was not linked to defined adverse effects or legal obligations,

Manitoba viewed the MAP as not falling under one of the three exceptions stated above, thereby requiring ministerial approval.

[35] The MMF decided to challenge the Decision. The MMF had to decide whether to proceed by application for judicial review (to set aside the OIC and the Directive) or by way of action (to issue a statement of claim). It chose both.

[36] On June 4, 2018, the MMF applied for judicial review, challenging Manitoba's authority to approve the OIC and issue the Directive. The relief sought was to set aside or quash the OIC and Directive, as well as a declaration that Manitoba had not acted in accordance with the honour of the Crown. On March 3, 2020, the MMF also issued a statement of claim to determine what, if any, obligations arise from the MAP. This appeal deals with the former issue, not the latter. In arriving at this decision, I have not drawn conclusions that would be binding on any future court considering the latter issue.

[37] On this appeal, the MMF argues that the reviewing judge erred in three ways. First, that the honour of the Crown did not apply to the Directive and the Decision, such that the MMF was entitled to consultation before it was issued; second, that the Directive was within Cabinet's statutory authority; and third, that the MMF was not owed distinct procedural rights in relation to the approval and issuance of the Directive and the Decision.

[38] While there are three remaining grounds of appeal, the critical issue on this appeal is whether the TPA and the Directive engaged the honour of the Crown and, if so, whether Manitoba acted honourably in the circumstances.

Was the Honour of the Crown Engaged by the TPA and/or the Directive?

[39] The principle of the honour of the Crown is easily understood. It requires the Crown to act honourably in its dealings with Indigenous peoples. Certain obligations and duties flow from the principle of the honour of the Crown. In terms of obligations, the Crown is obliged to act honourably, meaning that it must act with integrity and in good faith (see *Haida* at paras 19, 41). In terms of duties, they will vary with the circumstances of the case and the terms of any agreement (see the *Metis* case at para 74).

[40] The prevailing duty that flows from the honour of the Crown is the duty to consult and accommodate. That duty requires the Crown to consult with the Aboriginal party prior to taking actions or making decisions that may potentially adversely impact its claims or rights (see *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 55). However, as explained in *Haida*, while the duty to consult and accommodate requires "good faith efforts to understand each other's concerns and move to address them" (at para 49), it does not encompass a duty to agree.

[41] While the MMF concedes that not all interactions between the Crown and Indigenous peoples engage the honour of the Crown, it submits that the TPA does because it is an accommodation agreement. It argues that, because the TPA involved reconciliation of Aboriginal rights with Crown sovereignty, the TPA engaged the honour of the Crown and the duty to consult and accommodate.

[42] The MMF takes the position that the MAP emanates from the TPA. Given this, the MMF argues that the Directive, which includes the Decision (that Hydro not proceed with the MAP "at this time"), also engages the honour

of the Crown and the duties that flow therefrom. As a result, the MMF says that the honour of the Crown required Manitoba to consider the impact of issuing the Directive on the Métis rights and had a duty to consult and accommodate.

[43] Manitoba and Hydro answer that the TPA was not a reconciliation or accommodation of any Aboriginal right and that any rights that did arise were contractual rather than constitutional. They point to a number of articles in the TPA including, most notably, article 7.1.9, which specifically recognizes that "[n]othing in [the TPA] affects any Aboriginal Rights of Métis".

[44] Manitoba and Hydro also highlight that the inclusion of broad, unconstrained and unilateral termination provisions in the TPA (see article 2.3.2—terminable without cause on 30 days' notice) is also inconsistent with an agreement that triggers the honour of the Crown. Finally, Manitoba and Hydro submit that the TPA does not fit into the four situations that engage the honour of the Crown identified at para 73 in the *Metis* case.

[45] To determine whether the honour of the Crown is engaged and whether duties flow therefrom, a review of the TPA is necessary. As the Supreme Court of Canada explained in *Moses*, the principles of contractual interpretation generally apply to agreements with Indigenous peoples and close attention must be paid to the terms of the agreements. Binnie J explained (at para 7):

> . . . The contract analogy is even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not

> understand ([*R v Badger*, [1996] 1 SCR 771 at] paras. 52-53). The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. . . . We should therefore pay close attention to its terms.

[46] More recently, in *Fontaine*, Brown and Rowe JJ, in commenting on principles of contractual interpretation in regard to the *Indian Residential Schools Settlement Agreement*, 8 May 2006 (the IRSSA), stated (at para 35):

> . . . While the IRSSA undoubtedly has "very significant implications for Canada and our aboriginal peoples" (C.A. reasons [*Fontaine v Canada (Attorney General)*, 2016 ONCA 241], at para. 294), it is at root a contract, the meaning of which depends on the objective intentions of the parties. . . .

[47] Later in *Fontaine*, they cited the modern contractual decision of *Sattva* (at para 37):

> Interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract (*Sattva*, at para. 57, relying on G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 15 and 30-32). Surrounding circumstances, including "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting", may be considered in interpreting the terms of a contract, although they may not overwhelm the contract's express words (*Sattva*, at para. 58).

[48] To sum up, in order to determine what the parties actually agreed to, courts must interpret the agreement according to the text of the agreement construed objectively and having regard to the factual matrix (the surrounding circumstances).

[49] The MMF submits that the TPA is an accommodation agreement and relies on that fact to argue that the honour of the Crown applies to it. It also submits that, since the honour principle applies to the TPA, it necessarily applies to the Directive because the MAP is connected to both the TPA and the Directive. This point is critical to the MMF's argument because, if the TPA triggers the honour of the Crown, it is the MAP link that causes the honour of the Crown to apply to the Directive as well (TPA→MAP→Directive).

[50] There can be no doubt of the link between the MAP and the Directive, given that the Directive ordered the Decision (that Hydro not proceed with the MAP "at this time"). While the link between the MAP and the TPA is not as clear, I accept the MMF's submission that the MAP emanates from the TPA for three reasons. First, as the record shows, the MOU that led to the MAP refers to the TPA in its opening paragraph and sets out a negotiation process that is consistent with the TPA. Second, the MAP refers to the TPA in three of its 10 clauses. Finally, and more importantly, by participating in the processes set out in the TPA, Manitoba and Hydro agreed that the processes in the TPA were engaged by the MAP.

[51] Returning to the critical issue at hand, do the TPA and the Directive trigger the honour of the Crown? The reviewing judge found that neither the TPA nor the Directive engaged the honour of the Crown. He also found that the TPA was not a reconciliation or accommodation agreement. His reasoning for these findings are stated numerous times in his reasons—neither the TPA nor the Directive impact or affect the Aboriginal rights of the Métis (see paras 101, 110-11, 115-16, 120). He reaches this conclusion, in large part, because of the inclusion of article 7.1.9 in the TPA, which specifically

states that "[n]othing in [the TPA] affects any Aboriginal Rights of Métis in the Province of Manitoba".

[52] This raises the issue of whether the Crown can contract out of the obligations and duties that flow from the honour of the Crown. The subject of contracting out was addressed in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53. Writing in the context of the duty to consult, Binnie J, writing for the majority, opined (at para 61):

> . . . The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.
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> [emphasis added]

[53] The above view was repeated, more recently, by LeBel J, writing for the Court, in *Behn v Moulton Contracting Ltd*, 2013 SCC 26 (at para 27):

> . . . The Crown cannot in a treaty contract out of its duty to consult Aboriginal peoples, as this duty "applies independently of the expressed or implied intention of the parties": *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 61.
>
> [emphasis added]

[54] The reviewing judge dealt directly with the issue of contracting out in both his reasons dealing with a motion on the admissibility of certain evidence (see *Manitoba Metis Federation Inc v Brian Pallister et al*, 2019

MBQB 118 at para 145), and his reasons dealing with the merits of the issues in this appeal. In the latter reasons, he stated (at para 110):

> . . . 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.
>
> [emphasis added]

[55] While it would have behooved the reviewing judge to avoid the specific comment later in his reasons, that "the honour of the Crown has no application to the TPA" (at para 101), he fully recognized, as he directly stated at para 28, that the TPA did not affect or limit Manitoba's duty to consult and, if necessary, accommodate. Moreover, and as stated in *Beckman* and *Behn*, the Crown's duty of honourable dealings with Indigenous peoples is a principle that applies independently of the expressed or implied intention of the parties. Accordingly, giving up certain legal remedies in an agreement does not mean that the concept of the honour of the Crown is somehow an inapplicable or alien principle. As stated in *Beckman*, the duty to consult "can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people" (at para 61).

[56] Likewise, while one cannot "contract out" of the honour of the Crown, neither can one read in supplementary duties when the parties have agreed on specific terms to address outstanding issues. Rather, the honour of the Crown requires that the Crown adhere to and implement the terms of a carefully worded agreement in an open and fair manner, and in a manner consistent with the wording of the agreement and the principles of contractual interpretation. The honour of the Crown principle does not mean that the agreement can be ignored or rewritten (see *Moses* at para 6; and *Canada v Peigan*, 2018 FCA 141 at paras 12-13).

[57] Put in the context of this case, when I interpret the TPA according to the text of the agreement, construed objectively and having regard to the factual matrix, there are a number of considerations that lead me to conclude that the TPA and the Directive engaged the honour of the Crown.

[58] First, there is the breadth of the honour of the Crown. As stated in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, the honour of the Crown "is always at stake in its dealings with Aboriginal peoples" (at para 23) and, later, "the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples" (at para 63). This is in accord with the rule that the Crown cannot contract out of its constitutional honour of the Crown obligation. Contractually agreeing to give up specified legal rights does not mean that the honour of the Crown does not still apply to the agreement, it simply means that certain legal remedies that are grounded in those rights may not be available.

[59] Second, one of the main underlying purposes of the TPA was to resolve unaddressed claims (see article 3.1.2 and article 4—Process Matters)

and to address outstanding disputes constructively and in good faith (see article 5—TSC). When dealing with such matters, the honour of the Crown is triggered. In *Haida*, the Supreme Court of Canada stated (at para 17):

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. . . .
>
> [emphasis added]

See also the *Metis* case at para 70.

[60] The TPA was certainly the result of considerable negotiations between the parties. While the TPA was not a modern day treaty, and its terms differed in many respects from the typical accommodation agreement, it was still a very important agreement whose underlying purpose was to establish a process to resolve outstanding claims by the Métis relating to Hydro projects. Indeed, the very name of the TPA, "Turning the Page", suggested an attempt to move ongoing and simmering disputes forward. The reviewing judge also viewed the TPA as a significant agreement, stating that it was "an attempt to usher in a perhaps heretofore unseen level of collaboration on matters of significance" (at para 115).

[61] Third, the TPA was, at least in part, an accommodation agreement. In addition to resolving certain claims, the TPA established a process to resolve disputes. From *Haida*, it is clear that the meaning of "accommodation" incorporates an attempt to harmonize conflicting interests (at para 49):

> This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

[62] The TPA provided, at article 3.1.2, that the parties could engage in additional, and without prejudice, future discussions on the impacts of existing developments on the Aboriginal rights of the Métis. It also provided for a dispute resolution process whereby the TSC could be used to attempt to resolve disputes relating to the TPA. The parties agreed that, if there was a dispute, they would endeavor to resolve it by referring the matter to the TSC and "make a good faith effort to amicably resolve such dispute" (see article 5.1.3(a)). The fact that the TPA sets out a process for future discussions, as well as a dispute resolution process, are strong indicators that the TPA is, in part, an accommodation agreement.

[63] One last point supports the view that the TPA was, in part, an agreement that engaged the duty to consult and to accommodate. The TPA referred to this duty twice. First, in the preamble, as follows:

> . . .
>
> **Manitoba** recognizes that the Crown has a duty to consult with Métis when any proposed Crown decision or action might adversely affect the exercise of the **Aboriginal Rights of Métis** and to reasonably accommodate concerns about the effects of the

> decision or action raised in the consultation by attempting to substantially address those concerns.
>
> . . .
>
> [emphasis added]

[64] The second place is at article 7.1.9, which states that nothing in the TPA "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." Accommodation agreements typically come about when the establishment of a right is pending. See *Haida*, which establishes a general framework for the duty to consult and accommodate "before Aboriginal title or rights claims have been decided" (emphasis added) (at para 11). In my view, article 7.1.9 reflects the intention of the parties that the Crown's duty to consult and to reasonably accommodate are engaged pending the determination of future negotiated agreements with Hydro on rights claims.

[65] The fourth point leading me to conclude that the TPA and the Directive engaged the honour of the Crown is that, the Directive had the potential to adversely affect the accommodation of Métis rights as found in the TPA. The Directive included the Decision (that Hydro not proceed with the MAP "at this time"). Had the MAP become operational, it would have extended the term of the TPA from 20 years to 30 years.

[66] In the end, the MMF has persuaded me that the reviewing judge erred in deciding that the TPA and the Directive did not trigger the honour of the Crown. The considerations that have led me to the conclusion that the principle of the honour of the Crown was engaged in the circumstances

include: 1) the breadth of the principle, which typically causes it to be infused in any relationship between the government and Indigenous peoples involving Aboriginal and treaty rights or claims; 2) the TPA was an accommodation agreement which created such a relationship because it provided: a) a negotiation process to try to settle outstanding claims; and b) a resolution process to attempt to resolve any disputes over pending claims; 3) the TPA referenced, on two occasions, the duty to consult and to accommodate, duties which typically flow from the principle of the honour of the Crown; and 4) the Directive had the potential to adversely affect the accommodation of Métis rights as found in the TPA.

[67] In the result, I am of the view that the TPA engaged the honour of the Crown and the corresponding obligations and duties. These Crown obligations and duties are to act honourably, with integrity, as well as in good faith and to consult and accommodate. Given the interrelationship between the TPA, the MAP and the Directive and its potential to adversely affect the TPA's accommodation of Métis rights, I view the Directive as also engaging the honour of the Crown.

[68] The question now becomes whether the obligation to act honourably and the duty to consult and reasonably accommodate were breached by Manitoba. The reviewing judge correctly decided that this question was to be reviewed on the reasonableness standard. He found that, if the honour of the Crown was engaged by the TPA and the Directive, Manitoba acted honourably in the circumstances. On appellate review, this Court must step "into the shoes" of the reviewing judge to ensure that he correctly used the applicable standard of review, which, in this case, is reasonableness (*Jhanji v The Law Society of Manitoba*, 2020 MBCA 48 at para 38; and *Prairie Acid*

Rain Coalition v Canada (Minister of Fisheries and Oceans), 2006 FCA 31 at para 14, leave to appeal to SCC refused, 31370 (20 July 2006)).

[69] The MMF appeals, arguing that, by failing to act in accordance with the TPA, Manitoba frustrated a process intended to be part of the accommodation of Métis rights. It submits that Manitoba breached article 5.1 of the TPA by issuing the Directive before the TSC had defined the dispute to be resolved. For its part, Manitoba submits that the Directive is consistent with the terms of the TPA and that, by participating in the TSC meetings, its conduct was honourable and easily meets the applicable standard of reasonableness.

[70] The text of the TPA is very important in determining whether, on the facts of the case, the honour of the Crown has been breached. This requires an examination of what the TPA says and whether Manitoba did what it was contracted to do.

[71] The TPA provided that the parties would make a good faith effort to amicably resolve any dispute by referring it to the TSC (see article 5.1.3(a)). The record shows that on January 4, 2018, while Manitoba was still considering the MAP, the MMF requested a meeting of the TSC. The stated purpose for the meeting was to discuss the MAP issue. As already stated, the MAP is the June 29, 2017 unsigned term sheet. A term sheet is a point-form agreement that guides legal counsel towards a binding legal agreement. The MAP term sheet contemplates the future "drafting of a binding legal agreement once the terms of th[at] 'Term Sheet' have been agreed to by the MMF and [Hydro]".

[72] The MMF held the view that the MAP was a binding legal agreement, given that the board of Hydro had approved it in principle. Hydro held a different view. It says that authorization was given to proceed with negotiations with the assistance of legal counsel after briefing Manitoba. However, Hydro did agree to the MMF's request for a TSC meeting by stating that it was "hopeful that such a meeting [could] be organized and held as soon as possible." Manitoba also agreed to the TSC meeting.

[73] From February 6 to March 8, 2018, the TSC met three times to try to resolve the MAP dispute. At the March 8 meeting, after being unable to resolve matters, the MMF advised Hydro and Manitoba that it was invoking article 5.1.4 of the TPA and instructing its legal counsel to commence legal action "if a mutually agreeable resolution—consistent with the commitments in the TPA and [the MAP]—[could not] be found within 60 days". This was confirmed in a March 13, 2018 letter from the MMF Chief of Staff to Hydro and the Deputy Minister to the Minister. In its letter, the MMF also requested, pursuant to article 5.1.3(b) of the TPA, a meeting of the presidents of the MMF, Hydro and the Minister.

[74] On March 21, 2018, Manitoba approved the OIC and issued the Directive to Hydro which included the Decision (that Hydro not proceed with the MAP "at this time"). On the same day, nine members of the Hydro board wrote to the Minister, advising him that, after having "been informed [Manitoba] intend[ed] to remove the Chair and ha[d] therefore lost confidence in the Board", they had determined that it was necessary to resign.

[75] On March 23, 2018, the Minister responded to the March 13, 2018 letter from the MMF Chief of Staff, advising that he was willing to meet with

the presidents of the MMF and Hydro. That meeting was set for April 20, 2018. However, on April 17, 2018, the MMF Chief of Staff wrote to Hydro and the Deputy Minister to the Minister advising that, in the MMF's opinion, the April 20, 2018 meeting did not comply with article 5.1.3 of the TPA because "it [was] unclear to the MMF what actions or decisions [Manitoba] has taken and how those effect the TPA and [the MAP]". The letter explained that "it [was] impossible to properly define the 'dispute' to be addressed" for the April 20 meeting.

[76] On April 19, 2018, the Deputy Minister to the Minister responded that it would reschedule the April 20 meeting to allow the TSC to meet to define the dispute. On the same date, Hydro wrote to the MMF making it clear that a number of important issues remained outstanding in regard to the MAP which "must be resolved before a final agreement could be drafted, approved and concluded." Hydro agreed to convene the TSC and asked it to "properly define the issue requiring resolution." It concluded by stating that "properly defining the issue is an important first step in [its] process under the [TPA]."

[77] On May 15, 2018, the Minister, Hydro and the MMF met again, but were not able to resolve their dispute over the MAP. On June 4, 2018, the MMF filed the application for judicial review in the Court of Queen's Bench that is the subject of these proceedings.

[78] For the reasons that follow, and after stepping into the shoes of the reviewing judge, I would find, as he did, that, on the standard of reasonableness, Manitoba acted honourably in the circumstances.

[79] First, it was the MMF that withdrew from the TPA resolution process, not Manitoba. Manitoba and Hydro willingly, and without delay, participated in the TSC meetings to try to resolve the MAP issues when requested to do so by the MMF on January 4, 2018. After the third TSC meeting, it was the MMF that invoked a provision of the TPA on March 13, 2018, as is its right, putting Manitoba and Hydro on notice that it would be instructing counsel to commence legal action in 60 days. A week later, Manitoba issued the OIC and Directive, which contained the Decision (that Hydro not proceed with the MAP "at this time").

[80] Second, the TSC meetings provided the MMF with the opportunity to be heard both prior to and after the issuance of the Directive. During the 60-day notice period provided above, Manitoba and Hydro advised the MMF of their willingness to continue to try to resolve the MAP issues. The Directive did not preclude a revised version of the MAP. In fact, the Directive would not apply to a new MAP if it had compensation based on "thoroughly defined" adverse effects of Hydro's projects on Métis rights claims.

[81] Third, the Crown's stewardship obligations are not set aside by its obligation to act honourably. The Crown has many responsibilities and answers to more than one constituency, including the broader public interest. The "broader public interest" is a relevant factor when considering Aboriginal rights under section 35 of the *Constitution Act, 1982* (see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 71, 139; and *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at para 39).

[82] While it is in the public interest for the Crown to abide by the principle of the honour of the Crown, it does not displace the Crown's

obligations to take into account the broader public interest. Manitoba's insistence that the MMF and Hydro revise the MAP in a manner consistent with the Directive (that compensation be "reasonably required to address a legal obligation" in regard to "thoroughly defined" adverse effects of Hydro's projects on Métis rights) is certainly neither an unreasonable request nor dishonourable conduct. Moreover, it cannot be said that the stipulation that any compensation be "required", is not in line with the terms of the TPA. See articles 4.1.1, 4.1.2 and 4.3.2, where the link that compensation be "necessary" is stated.

[83] Fourth, that the TSC representatives of Manitoba refused to reveal to the MMF the content of the Cabinet policy deliberations on the MAP issues at the TSC meetings, is not dishonourable conduct. Cabinet had claimed privilege over that information. Moreover, the MMF never challenged the privilege claim with respect to confidential Cabinet policy decisions.

[84] In the end, and as explained in *Haida*, while the duty to consult and accommodate requires "good faith efforts to understand each other's concerns and move to address them" (at para 49), it does not encompass a duty to agree. In addition to the common law, the TPA itself states, at article 3.1.2, that nothing in the TPA is to be interpreted as a commitment to arrive at an agreement in relation to the impact of existing Hydro projects. In fact, the TPA allows a party to seek legal remedies when a dispute cannot be resolved (see article 5.1.4). That article was invoked by the MMF in this case.

[85] While the MMF is understandably disappointed on how things transpired, the honour of the Crown and the duties flowing therefrom do not include a duty to reach an agreement or to compel Manitoba to accept the

MAP. In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, the Supreme Court of Canada wrote, "The Province was not under a duty to reach agreement with the [First Nation], and its failure to do so did not breach the obligations of good faith that it owed the [First Nation]" (at para 22).

[86] Similar observations are found in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, where McLachlin CJC and Rowe J, for the majority, noted that the obligation to consult and accommodate "is a right to a process, not to a particular outcome" (at para 83), and that "[w]hile the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible" (at para 114). Most recently, this view was affirmed in *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to SCC refused, 39111 (2 July 2020). After noting that "[t]he goal is to reach an overall agreement, but that will not always be possible" (at para 52), the Court stated, "Like consultation, accommodation does not guarantee outcomes" (at para 58).

[87] In summary, Manitoba did act honourably in regard to the issues surrounding the MAP. When the MMF requested it to do so, Manitoba willingly, and without delay, followed the process stipulated in the TPA. It participated in the TSC meetings to try to resolve the MAP issues both prior to and after the issuance of the Directive. The Directive ordered Hydro not to proceed with the MAP "at this time". It did not preclude a revised version of the MAP. Manitoba's insistence that the MMF and Hydro revise the MAP in a manner consistent with the Directive (that compensation be "reasonably required to address a legal obligation" in regard to "thoroughly defined"

adverse effects of Hydro's projects on Métis rights) is certainly in line with its stewardship obligations and is neither, in my view, an unreasonable request nor dishonourable conduct. Finally, that Manitoba's TSC representatives refused to reveal to the MMF the content of the Cabinet policy deliberations on the MAP issues at the TSC meetings, is not dishonourable conduct.

[88] In the result, the MMF has not established that there are sufficiently serious shortcomings in Manitoba's decision to issue the Directive such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. For these reasons, while the TPA and the Directive engaged the honour of the Crown, I would come to the same findings as the reviewing judge that, on a reasonableness standard of review, Manitoba acted honourably in the circumstances.

[89] As I indicated throughout these reasons, the critical issue on this appeal is the first ground: was the honour of the Crown engaged and, if so, did Manitoba act honourably in the circumstances? My reasons on the last two grounds will be more succinct.

Was the Directive Within Cabinet's Statutory Authority?

[90] The MMF first argues that the reviewing judge erred in applying the correctness standard. Manitoba and Hydro agree. For the reasons indicated earlier, I am of the same view and this question will be reviewed on the standard of reasonableness. However, I do note that the reviewing judge found that the Directive "clearly addresses" (at para 81) matters of policy and is a lawful exercise of authority, applying the more exacting correctness standard.

[91] The MMF submits that the Directive improperly transferred the authority to enter into agreements from Hydro to Manitoba. It submits that no reasonable interpretation of section 13(1)(a)(i) of the *CCGAA* allows Manitoba to issue the Directive and to order the Decision (that Hydro not proceed with the MAP "at this time").

[92] The scope of section 13 is a matter of statutory interpretation. The modern principle of statutory interpretation states that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). This process is also guided by section 6 of *The Interpretation Act*, CCSM c I80, which requires that all acts be given the fair, large and liberal interpretation that best ensures the attainment of its remedial objects.

[93] As I indicated earlier in these reasons, Manitoba is called upon to perform several roles. The people have left the stewardship of the province to Manitoba. Manitoba is entrusted with the careful, transparent and responsible management of government. As the steward of public funds, it has the duty to deploy those resources in an effective and responsible way. It must also reasonably balance the interest of one individual, group or entity with the interest of all others. Finally, Manitoba has to answer publicly for the discharge of all those responsibilities (public accountability).

[94] When the *CCGAA* was read a first time in the Legislative Assembly, the then Minister declared that it "will improve transparency and clearly

define a governance model that will clarify the accountability relationship and understanding of the respective roles of minister[s], boards, executive offices and officials of our Crown corporations" (Bill 20, *The Crown Corporations Governance and Accountability Act*, 1st reading, Manitoba, Legislative Assembly, *Debates & Proceedings (Hansard)*, 41-2, vol 70, No 23B (9 March 2017) at 583 (Hon Ron Schuler), online: <www.gov.mb.ca/legislature/hansard/41st_2nd/hansardpdf/23b.pdf> (date accessed 23 April 2021)).

[95] The *CCGAA* includes a power to issue mandatory ministerial directives to Crown corporations (see section 13(3)). These directives must be issued by order in council and made public within 30 days "of the directive being given to the corporation" (at section 13(4)). When Bill 20 was read a second time (see Manitoba, Legislative Assembly, *Debates & Proceedings (Hansard)*, 41-2, vol 70, No 36 (10 April 2017) (Hon Ron Schuler), online: <www.gov.mb.ca/legislature/hansard/41st_2nd/hansardpdf/36.pdf> (date accessed 26 April 2021)), the then Minister stated (at pp 1209-10):

> . . .
>
> Mr. Deputy Speaker, this new legislation is aimed at furthering our government's commitment of separating and clearly defining the respective roles of government and the boards of directors of Manitoba's major Crown corporations. The legislation will establish a clear governance model to ensure boards are accountable for governing and overseeing the management of the corporation <u>within the parameters provided by government</u>.
>
> . . .
>
> [emphasis added]

[96] The then Minister also said (at p 1212):

. . .

> What governments should be doing is when they're directing Crown corporations, it should be in a very open and public and transparent way. And what this piece of legislation does is it allows the government to set direction, but it must be done by order-in-council, and that prevents conversations being done between government–or direction given between government and the Crown corporation and it not be made public. So what this does is it still allows for policy direction, but it must be done publicly through an order-in-council.
>
> [emphasis added]

[97] This "policy direction" power is found at section 13(1)(a) of the *CCGAA*. It allows the Minister to issue a "directive" to a corporation respecting "matters of policy". While the *CCGAA* does not define the meaning of "directive", the Treasury Board of Canada Secretariat in *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations* (Report to Parliament), Catalogue No BT33-4/1-2005 (Ottawa: Treasury Board, 2005), online: <publications.gc.ca /collections/Collection/BT33-4-1-2005E.pdf> (date accessed 26 April 2021), does provide some guidance when referencing the *Financial Administration Act*, RSC 1985, c F-11 (at p 11):

. . .

> Directive power is the government's authority to intervene in the management of a Crown corporation by directing the Board of Directors to follow a particular course of action when the government believes it is in the public interest to do so.
>
> . . .
>
> [emphasis added]

[98] The MMF's argument is that, because the Directive transfers authority on whether to enter into certain agreements from Hydro to Manitoba, it cannot be a "matter of policy". This submission stands or falls on whether the Directive concerns "matters of policy". If it is, it falls within the ambit of section 13(1)(a) of the *CCGAA* and is therefore within Cabinet's statutory authority. For the reasons that follow, I am of the view that the Directive addresses matters of policy.

[99] First, the stated purpose of the Directive relates to matters of policy. Its purpose is "to ensure the alignment of government policies and priorities with the policies and practices of [Hydro] relating to relationship agreements, community benefit agreements or other similar agreements with Indigenous communities and groups." The Directive reasonably requires that the respective policies of Hydro and Manitoba align. It does not transfer the authority to enter into certain types of agreements from Hydro to Manitoba. By ordering the Decision (that Hydro not proceed with the MAP "at this time"), Manitoba was clearly of the view that the MAP did not align with government policy in its present form. The Directive set out a path for it to align with government policy; any agreement emanating from the MAP has to provide legally required mitigation or compensation measures to address thoroughly defined adverse effects.

[100] Second, the Directive requires ministerial review before certain types of agreements can be executed by Hydro. In my view, this is a policy statement and not, as characterized by the MMF, a transfer of authority from Hydro to Manitoba. Rather, the Directive is an exercise of Cabinet's statutory power to enforce its stewardship role over Hydro. The *CCGAA* confers the directive power onto Cabinet. It requires that any directive be issued through

an order in council (see section 13(1)). I agree with Manitoba's submission that, by vesting the directive power in Cabinet, the Legislature assigned "policy" its broadest possible meaning, given that Cabinet represents all constituencies within government and considers the widest range of polycentric and diffuse factors. Cabinet is "a body of diverse policy perspectives representing all constituencies within government" (*Gitxaala Nation v Canada*, 2016 FCA 187 at para 144). The Directive was about "matters of policy" and, as the Supreme Court of Canada recognized in *Dr Q*, "increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies" (at para 30; see also para 31).

[101] The MMF also submits that the Directive improperly constrains Hydro's statutory powers under its home statute. While I agree with the MMF that the OIC-issued Directive does limit Hydro's statutory powers, it does not do so improperly.

[102] Unless constrained by the constitution, Parliament and the provincial Legislatures are supreme. I point out that the MMF does not attack the validity and constitutionality of the *CCGAA*. It gives Cabinet the authority to issue mandatory directives to Hydro on "matters of policy". The *CCGAA* also provides that its provisions prevail to the extent of any inconsistency or conflict with another act (see section 3(1)). As I have explained above, the Directive does, in my view, address a matter of policy. I agree with Manitoba's submission that Cabinet cannot ensure that Hydro is operating within the parameters it set without in some way interfering in Hydro's own statutory authority. To say, as the MMF suggests, that a properly issued directive on a matter of policy cannot constrain Hydro's statutory powers

under its home statute would remove the force or effectiveness of the directive power.

[103] For these reasons, I am of the view that Cabinet had the authority under the *CCGAA* to issue the Directive and order the Decision (that Hydro not proceed with the MAP "at this time").

Was the MMF Owed Distinct Procedural Rights in Relation to the Directive?

[104] With respect to the final ground of appeal, the MMF argues that it was owed certain procedural rights. It says Manitoba failed: 1) to provide the MMF with advance notice that the Directive was going to be issued; 2) to provide the MMF with an opportunity to respond to Manitoba's concerns; 3) to engage in the dispute resolution process in good faith; and 4) to provide reasons for the Directive.

[105] In his reasons, the reviewing judge correctly reviewed whether the statutory and constitutional requirements had been met. He reviewed the law regarding procedural rights in relation to Cabinet's policy-making process. He acknowledged that the extent of procedural rights varies from case to case based on context. He then considered a number of factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28; see also *Vavilov* at para 77, to determine the extent of the procedural rights in this case. These included the nature of the decision and the process followed; the nature and terms of the legislation; the importance of the decision to individuals affected; and the legitimate expectations of the parties.

[106] After concluding that the extent of the procedural rights was at the lower end of the spectrum, the reviewing judge found that Manitoba's participation in the TSC meetings and the 30-day public notice of the Directive, as required by section 13(4) of the *CCGAA*, were sufficient in the circumstances in regard to any procedural requirements. Critical to his decision was the temporal component of "at this time" found in the Directive in regard to the MAP. He stated in his reasons (at para 146):

> . . . 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 [MAP] were truly intended to address unmitigated adverse effects on the Aboriginal rights of Métis, the related requirements would not be difficult or onerous.
>
> [emphasis added]

[107] Legislatures regularly delegate certain powers to Cabinet. In this case, the *CCGAA* gave Cabinet the power to issue directives to Crown corporations respecting matters of policy. The Directive is a policy decision authorized by Cabinet. The confidential character of Cabinet deliberations has long been established (see *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 18). The extent of the procedural rights sought by the MMF (advance notice, opportunity to respond, etc.) are simply incompatible with the confidential Cabinet policy-making function that caused the Directive to be issued. The TSC meetings provided the MMF with the opportunity to be heard both prior to and after the issuance of the Directive.

[108] In the end, I have not been persuaded that there is reason to intervene with the reviewing judge's decision on this ground.

Conclusion

[109] I agree with the MMF that the reviewing judge erred in deciding that the TPA and the Directive did not trigger the honour of the Crown. However, while the honour of the Crown was engaged, I am satisfied that, in the circumstances, Manitoba acted reasonably as to its obligation to act honourably.

[110] In the result, the appeal is dismissed with costs.

Chartier CJM

I agree: Cameron JA

I agree: Mainella JA

APPENDIX

No. 82/2018

ORDER IN COUNCIL

ORDER

1. Approval is given to the minister responsible for [the *CCGAA*] (the "Minister") to issue a directive to [Hydro] in the form attached at Schedule "A".

2. This Order comes into effect immediately.

AUTHORITY

[The *CCGAA* (as it then appeared)], states:

> **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.

BACKGROUND

1. The Minister recommends that the attached directive be issued to [Hydro].

. . .

PURPOSE

The purpose of this directive is to ensure the alignment of government policies and priorities with the policies and practices of [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 [Hydro] and any Indigenous communities or groups.

This directive does not apply to agreements for the provision of goods or services. This directive does not apply to agreements that provide for mitigation or compensation measures to address adverse effects of activities of [Hydro] where [Hydro] has thoroughly defined the adverse effects, and where [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 [Hydro].

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

DIRECTIVE

[Hydro] is directed to not proceed with the agreement with the [MMF] at this time.

Going forward, all relationship agreements, community benefit agreements or other similar agreements to which this directive applies between [Hydro] and Indigenous communities and groups require review by the [Minister] before being executed.

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