Federal Court of Appeal | Cour d'appel fédérale

Date: 20230206

Docket: A-17-21

Citation: 2023 FCA 24

CORAM: **RENNIE J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

MANITOBA MÉTIS FEDERATION INC.

Appellant

and

THE CANADA ENERGY REGULATOR AND THE MANITOBA HYDRO-ELECTRIC BOARD

Respondents

and

THE ATTORNEY GENERAL OF MANITOBA

Intervener

Heard by online videoconference hosted by the Registry
on June 21 and June 22, 2022.
Judgment delivered at Ottawa, Ontario, on February 6, 2023.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

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I. Introduction

[1] The appellant, the Manitoba Métis Federation Inc. (the MMF), represents the interests of the Métis people of Manitoba in this appeal. The MMF appeals the decision of the Commission of the Canadian Energy Regulator (the Commission) dated August 11, 2020, in file OF-FAC-IPL-M180-2015-01 04 (the Decision). The Decision concerns the implementation and tracking of commitments made to the Métis in connection with the Manitoba-Minnesota Transmission Project (the Project).

[2] The Project is an international power line spanning 213 kilometres in length, extending from Winnipeg to the Manitoba-Minnesota border. The Project development area comprised just under 716 hectares of Crown land, of which 293 hectares were unoccupied Crown land. This unoccupied Crown land represents areas where the Métis are free to exercise their harvesting rights without requiring permission from the Crown. The Project cuts through the heart of the Métis community's territory on which the Métis hunt, trap, fish and gather food, rocks and minerals for domestic, social and ceremonial purposes.

[3] The respondent, the Manitoba Hydro-Electric Board (Manitoba Hydro) is a provincial Crown corporation and an agent of the provincial Crown of Manitoba, established pursuant to *The Manitoba Hydro Act*, C.C.S.M., c. H190. Manitoba Hydro is the proponent of the Project and responsible for its construction and operation.

[4] The first intervener, the Canadian Energy Regulator (CER), is participating in these proceedings to assist the Court in understanding the regulatory mandate and jurisdiction of the

CER and its Commission, including the Commission's role in ensuring that proponents, such as Manitoba Hydro, comply with the conditions attached to certificates of public convenience and necessity issued for the construction and operation of international power lines. The CER takes no position on the merits of the appeal.

[5] The second intervener, the Attorney General of Manitoba, represents the Government of Manitoba, and participates in these proceedings because the issues raised in the appeal are of general importance to the Province of Manitoba.

[6] The Project crosses an international border. Accordingly, it was subject to a variety of provincial and federal regulatory requirements. Manitoba Hydro was required to seek a provincial licence pursuant to Manitoba's *The Environment Act*, C.C.S.M., c. E125, which involved an environmental assessment and hearings before Manitoba's Clean Environment Commission. Manitoba Hydro also required federal approvals pursuant to the *National Energy Board Act*, R.S.C. 1985, c. N-7, as repealed by *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28, s. 44 (the NEB Act) and the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, as repealed by *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28, s. 9 (the CER Act). The provincial and federal processes were coordinated.

[7] In December 2016, Manitoba Hydro applied for a permit for the Project under section 58.11 of the NEB Act, seeking authority from the National Energy Board (the NEB) to construct and operate the Project (the Project application).

[8] In October 2017, in response to concerns raised by Indigenous groups, the NEB recommended to the Minister of Natural Resources (designated by the Governor in Council as being responsible for the NEB Act) that the Project require a certificate of public convenience and necessity under section 58.16 of the NEB Act, rather than a permit under section 58.11 of the NEB Act. The NEB did so because it considered the certificate assessment more robust than the permit process. The certificate assessment allows more procedural flexibility and necessitates a public hearing before the NEB. Public hearings facilitate the discharge of the constitutional duties owed by the NEB to the Indigenous groups affected by the Project, and ensure the NEB has adequate remedial powers to address Indigenous concerns that may arise in the circumstances of the Project application. The certificate assessment also requires approval of the Project from the Governor in Council before a certificate can be issued.

[9] In December 2017, the Governor in Council designated the Project as an international power line to be constructed and operated in accordance with a certificate issued under the NEB Act.

[10] In March 2018, the Federal Crown advised the NEB and all interested parties that it would rely on the certificate assessment under the NEB Act to fulfill its constitutional duty to consult with Indigenous groups whose rights may be affected by the Project.

[11] In June 2018, the NEB held oral public hearings over several weeks; it heard oral traditional evidence, held cross-examinations, heard oral arguments, and received written arguments.

[12] After the NEB completed the public hearings but prior to releasing its reasons, this Court issued its decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 [*Tsleil-Waututh I*]. As a result of the guidance set out in *Tsleil-Waututh I*, the Federal Crown, represented by the Major Projects Management Office, expanded its consultations with the Indigenous groups affected by the Project.

[13] On November 15, 2018, the NEB submitted its reasons for decision EH-001-2017 (decision EH-001-2017) to the Minister of Natural Resources, in which it recommended approval of the Project, subject to 28 conditions.

[14] On June 3, 2019, the Major Projects Management Office provided its *Consultation and Accommodation Report for the Manitoba-Minnesota Transmission Project* (the CCAR) to the Governor in Council.

[15] On June 13, 2019, the Governor in Council amended certain conditions set out in decision EH-001-2017 by Order in Council PC Number 2019-0784 (the Federal Order in Council). As I will explain further, the issues raised in this appeal pivot on the Commission's understanding of the amendments made to Condition 3 and, in particular, the meaning of the phrases "all commitments made to Indigenous groups" and "or otherwise on the record".

[16] On June 18, 2019, the NEB issued Certificate EC-059 (the Certificate), authorizing Manitoba Hydro to proceed with the construction and operation of the Project, subject to 28 conditions attached to the Certificate (the NEB conditions, as amended by the Federal Order in Council).

[17] Construction of the Project is now complete.

[18] On July 23, 2019, by letter to the NEB, the MMF asserted that Manitoba Hydro was not implementing the commitments captured by Condition 3 of the Certificate nor was it tracking those commitments as required by Condition 15. I will describe Conditions 3 and 15 more fully in paragraphs 58 and 59 of these reasons.

[19] On August 28, 2019, the NEB Act was repealed and the *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10 (the CER Act) was enacted. Pursuant to the CER Act, the NEB was replaced with the CER, and every certificate issued by the NEB is considered to have been issued under the CER Act.

[20] On June 4, 2020, the MMF filed a Notice of Application with the Commission requesting a declaration stating that Manitoba Hydro was in breach of Condition 3 of the Certificate, as amended by the Federal Order in Council. In the Notice of Application, the MMF alleged Manitoba Hydro "fail[ed] to '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'" [emphasis removed].

[21] On August 11, 2020, the Commission issued its Decision and found that Manitoba Hydro was in compliance with Conditions 3 and 15 of the Certificate. This Decision is the subject of this statutory appeal.

II. Issues

[22] The MMF advances four grounds of appeal:

1. Did the Commission err by failing to consider or apply the honour of the Crown in the Decision?

2. Did the Commission err by failing to correctly interpret the words of Condition 3, as amended by the Federal Order in Council?

3. Did the Commission err by failing to consider the effects of the Decision on the rights of the Métis, affirmed by section 35 of the *Constitution Act, 1982*, as required by subsection 56(1) of the CER Act?

4. Did the Commission err by failing to hold a public hearing before making the Decision, as required by subsection 52(1) of the CER Act?

[23] The MMF submits these questions are all questions of law.

[24] The MMF argues that the Commission erred on every question and requests that this Court grant the appeal, overturn the Decision, and send it back to the Commission for redetermination.

[25] For the reasons that follow, I would dismiss the appeal with costs.

III. Standard of Review

[26] Subsection 72(1) of the CER Act provides that an appeal from a decision of the Commission to this Court may be granted with leave on any question of law or of jurisdiction. This Court granted leave on November 19, 2020. Consequently, the appellate standard of correctness applies to questions of law arising from this appeal (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37 [*Vavilov*]; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[27] *Vavilov* requires this Court to depart from our previous jurisprudence, where a statutory appeal from the CER's predecessor, the NEB, would have attracted a reasonableness standard of review (see, for example, *Tsleil-Waututh I* at paras. 212–19; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at para. 145).

[28] In my view, the four grounds of appeal all raise questions of law.

[29] On the first ground of appeal, the standard of correctness applies to the question of whether the Commission erred by failing to consider or apply the honour of the Crown in the Decision.

[30] The MMF's second ground of appeal concerns the interpretation of the wording of Condition 3. While it seems like the law and the facts are somewhat "mussed together", the legal content here is high and the answer to the question is driven mainly by law/legal standards. The Court should adopt the "extricable question of law or legal principle standard" here (see *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at paras. 26–28 [*Emerson Milling*]).

[31] Going further, following the approach adopted by this Court in *Emerson Milling,* the essential character of this ground of appeal according to the MMF is that the Commission erred in law by taking a legally incorrect view of the commitments made to an Indigenous group on the record of the NEB proceedings. This ground of appeal is a matter of statutory interpretation: what is the meaning of "commitments […] made on the record of the EH-001-2017"? Specifically here, do commitments include the MAP?

[32] This is an extricable question of law. There is only one correct answer to the question of whether the MAP is a commitment made on the record of the EH-001-2017. This question is constrained by the specific context in which the NEB proceedings led to decision EH-001-2017, by the supplemental consultations that followed, and by the Federal Order in Council.

[33] Put another way, the Commission was asked, in essence, to determine the scope of its own record. As an administrative tribunal and court of record, it has the authority to determine what constitutes a commitment made on the record which will, in effect, become an enforceable condition attached to the Certificate.

[34] As the standard of correctness applies to this issue, no deference is owed by this Court to the Commission. We must embark on our own statutory interpretation exercise in order to determine whether the Commission committed an error.

[35] The third ground of appeal raises the question of whether the Commission erred by failing to consider section 35 rights. The standard of review is correctness.

[36] The last ground of appeal involves questions of procedural fairness. The Supreme Court of Canada recently confirmed that the standard of review applicable to questions of procedural fairness in a statutory appeal is correctness (*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328 at paras. 27, 30).

IV. Background

[37] Before commencing the analysis, it is helpful to situate the issues by reviewing the background in more detail. The story of how the MMF got before this Court and the role of the CER as a regulator will assist in understanding the text, context, and purpose behind Condition 3. It will also inform whether the Commission discharged its duty pursuant to subsection 56(1) of

the CER Act to consider any adverse effects that the Decision may have on the section 35 rights of the Métis.

[38] I will repeat some of the events mentioned under the Introduction section of these reasons for the sake of chronological clarity.

A. History of the Métis people of Manitoba and the MMF

[39] For years, the Métis have fought and succeeded to have their constitutional Aboriginal rights recognized and protected by the courts. Their history includes the very creation of the province of Manitoba in 1870. At that time, 85 percent of the population of what is now Manitoba was Métis.

[40] In 2013, the Supreme Court of Canada was the first court to recognize that the honour of the Crown was engaged by constitutional obligations owed to the Métis pursuant to section 31 of the *Manitoba Act, 1870,* S.C. 1870, c. 3 (the Manitoba Act). The Supreme Court found that section 31 of the Manitoba Act was not a treaty, but it was a constitutional obligation crafted for the purpose of resolving Aboriginal concerns which then permitted the creation of the province of Manitoba (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at paras. 93, 94 [*2013 MMF-SCC*]). The Supreme Court concluded that the honour of the Crown was engaged and gave rise to a duty of diligent, purposive fulfillment towards the Métis (*2013 MMF-SCC* at para. 94). The Supreme Court found that this was not done and that a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better (*2013 MMF-SCC* at para. 128).

[41] In the same Supreme Court decision, for the first time, the MMF was granted standing to represent the collective interests of the Métis people of Manitoba (*2013 MMF-SCC* at para. 44).

[42] The Métis have also been recognized as part of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11. As a result, the Métis enjoy a constitutionally protected right under section 35 to engage in practices that were historically important features of their distinctive communities, such as hunting (*R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207).

B. The process leading to the approval, construction, and operation of the Project

[43] In 2014, the MMF, the Province of Manitoba, and Manitoba Hydro entered into the *Kwaysh-kin-na-mihk la paazh* Agreement ("turning the page" in the Michif language) (the TPA). The TPA describes the parties' intent to build a forward-looking, productive, and non-adversarial working relationship in the context of Manitoba Hydro's existing and future developments and operations. It includes a process for the parties to identify the effects of existing and future Manitoba Hydro developments on the section 35 rights of the Métis and, if necessary, a process to determine how to accommodate those effects.

[44] From 2014 onwards, in accordance with the TPA, Manitoba Hydro and the MMF met to discuss the Project and other existing and future transmission projects.

[45] On January 12, 2016, Manitoba Hydro and the MMF entered into a contribution agreement (the Contribution Agreement) which provided funding to the MMF for it to conduct a

study to assess the potential effects of the Project on Métis land use and occupancy. In December 2016, the Métis Land Use and Occupancy Study was released.

[46] On March 1, 2017, Manitoba Hydro and the MMF entered into a Memorandum of Understanding. This Memorandum of Understanding referenced the TPA and set out a specific, time-limited negotiation process to be followed by Manitoba Hydro and the MMF in connection with the Project.

[47] As a result of the negotiations, a number of major points were agreed upon with respect to the Project, as well as other existing and future transmission projects. The major agreed-upon points were reduced to writing on June 29, 2017 (the MAP). The MAP provided for: (1) the payment by Manitoba Hydro to the MMF of 1.5 million dollars annually for 20 years and (2) a one-time lump sum payment of $37,500,000 to be held in a legacy fund for the benefit of the Métis. In exchange for these payments, the MMF was to provide full and final releases for the Project, as well as releases for other existing transmission projects and future transmission projects undertaken by Manitoba Hydro during the initial 20 years of the agreement.

[48] On July 5, 2017, the Board of Manitoba Hydro confirmed in its minutes that it was prepared to negotiate and sign an agreement with the MMF, substantially in accordance with the terms set out in the MAP. However, the MAP remained subject to Manitoba Hydro briefing the Government of Manitoba, fleshing out the details of the agreement, and legal counsels' review.

[49] On October 31, 2017, the NEB recommended to the Minister of Natural Resources that the Project be designated by order of the Governor in Council as an international power line to be constructed and operated under a certificate of public convenience and necessity pursuant to section 58.16 of the NEB Act.

[50] On December 15, 2017, the Governor in Council designated the Project as an international power line to be constructed in accordance with a certificate issued under the NEB Act.

[51] On December 21, 2017, the NEB issued an order providing notice and establishing public hearings for the certificate assessment. Nineteen parties were granted intervener status, including the MMF. Hearings took place over six months, between December 2017 and June 2018.

[52] The public hearings provided an opportunity for Manitoba Hydro and the interveners to submit information requests, letters of comment and written evidence, give oral evidence and cross-examine, and make oral and written final arguments. Indigenous interveners were able to provide oral traditional evidence. The NEB gathered and considered all of this information and evidence in order to make its decision, prior to seeking approval of the Project from the Governor in Council. I will return to this later at paragraph 211 when I consider whether the Commission breached the principles of procedural fairness before making the Decision.

[53] On March 21, 2018, while the public hearings before the NEB were ongoing, the Manitoba Lieutenant Governor in Council passed Order in Council No. 00082/2018 (the

Manitoba Order in Council) directing Manitoba Hydro not to proceed with the MAP at this time. The Manitoba Lieutenant Governor in Council derived its authority to issue the directive from subsection 13(1) of *The Crown Corporations Governance and Accountability Act*, C.C.S.M., c. C336.

[54] From June 4 to 8, 2018, during the public hearings, the NEB heard oral traditional evidence from various Indigenous interveners. The MMF provided no written or oral traditional evidence. However, at the close of the NEB hearings, the MMF included the TPA and MAP documents on the record of the NEB hearing as part of its response to the NEB's Information Request No.1. During oral submissions before the NEB, Manitoba Hydro sought a ruling for the NEB to strike the MMF's response from the record because it contained the MAP. The NEB denied Manitoba Hydro's motion, thereby allowing the TPA and MAP to remain on the record of the proceedings, despite Manitoba Hydro's objections.

[55] In August 2018, this Court released its decision in *Tsleil-Waututh I*, which provided guidance on how the Federal Crown can engage in meaningful, specific, and focused two-way dialogue with Indigenous groups whose rights could potentially be impacted by major projects such as pipelines. The Federal Crown immediately followed the guidance of *Tsleil-Waututh I* and tasked the Major Projects Management Office with expanding consultations with 21 Indigenous groups potentially impacted by the Project, including the MMF.

[56] In November 2018, the NEB released its decision for the Project, decision EH-001-2017, which recommended approval of the Project, subject to 28 conditions.

[57] On June 3, 2019, in advance of a decision from the Governor in Council regarding the approval of the Certificate, the Major Projects Management Office released the CCAR, which recommended that Conditions 3, 15, 21, 22, and 26 contained in decision EH-001-2017 be amended to address concerns raised by the Indigenous groups during the supplemental consultations.

C. The amended text of Conditions 3 and 15

[58] On June 13, 2019, the Governor in Council agreed with the recommendations set out in the CCAR and issued the Certificate. In so doing, Condition 3 (as recommended by the NEB) was amended as follows. The Governor in Council's amendments to Condition 3 are *italicized and underlined*. The **bold** text was bolded in the original conditions recommended by the NEB in its Decision EH-001-2017:

3. Implementation of Commitments	**3. Mise en œuvre des engagements**
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.*	Manitoba Hydro doit appliquer, ou faire appliquer, l'ensemble des politiques, pratiques, mesures d'atténuation, recommandations et marches à suivre, concernant la protection de l'environnement et la promotion de la sécurité dont il est fait mention dans la demande ou dont elle a convenu dans les documents connexes *de même que tous les engagements pris envers les groupes autochtones dans la demande ou autrement consignés dans les dossiers de l'instance EH-001-2017*.

[59] Condition 15 was also amended and obligated Manitoba Hydro to file a commitments tracking table listing. The relevant portion is reproduced here [the Governor in Council's amendments to Condition 15 are *italicized and underlined*].

15. Commitments Tracking Table	**15. Tableau de suivi des engagements**
Manitoba Hydro must:	Manitoba Hydro doit:
a) file with the [Commission] and post on its website […] a commitments tracking table listing all commitments made in its application, *including all commitments made to Indigenous communities*, and otherwise agreed to during questioning or in its related submissions in the [NEB]'s EH-001-2017 proceeding, as well as commitments from the Clean Environment Commission hearing process that are of federal interest, and that includes references to:	a) déposer auprès de l'Office et afficher sur son site Web […] un tableau de suivi des engagements énumérant tous les engagements qu'elle a pris dans sa demande, *y compris tous les engagements pris envers les collectivités autochtones*, ou dont elle a convenu dans ses réponses aux questions ou dans les documents déposés au cours de l'instance EH-001-2017 de l'Office, de même que les engagements d'intérêt fédéral pris devant la Commission de protection de l'environnement, et indiquant :
i. the document in which each commitment appears (for example, the application, responses to information requests, hearing transcripts, permit requirements, condition filings, or other document);	i) le document où chaque engagement est énoncé (p. ex., la demande, les réponses aux demandes de renseignements, les transcriptions de l'audience, les exigences relatives aux permis, les dépôts liés aux conditions ou d'autres documents),
ii. the accountable lead for implementing each commitment; and,	ii) la personne responsable de la réalisation de chaque engagement,
iii. the estimated timeline associated with the fulfillment of each commitment;	iii) les délais estimatifs pour la réalisation de chaque engagement;
[…]	[…]

[The underlined and italicized portion represents the amendments made to Condition 15].	[Le texte souligné et en italique représente les amendements faits à la Condition 15].

[60] As I mentioned earlier, the Commission's understanding of the phrase contained in Condition 3 ("all commitments made to Indigenous groups through its Project application or otherwise on the record of the EH-001-2017") is the central issue in this appeal.

D. The MMF complaint to the NEB (replaced later with the CER Commission)

[61] On July 23, 2019, the MMF complained in writing to the NEB that Manitoba Hydro was not implementing or tracking commitments made to the MMF and captured by Conditions 3 and 15. The MMF took the position that the Contribution Agreement and the MAP, taken together, were commitments made to the MMF within the meaning of Condition 3, and Manitoba Hydro must honour those commitments as part of the licensing conditions imposed on the Project by the Governor in Council.

[62] Over a period of months, the MMF and Manitoba Hydro submitted several letters to the NEB setting out their respective positions on this question. During this time, on August 28, 2019, the CER Act came into force and, as a result, the Commission became responsible for managing the Project.

[63] On June 4, 2020, the MMF filed a Notice of Application with the Commission, requesting that the Commission exercise its jurisdiction to grant a declaration that Manitoba Hydro was in breach of Condition 3 of the Certificate. The MMF asked that the Certificate be

suspended. The MMF also requested a public oral hearing pursuant to subsection 52(1) of the CER Act.

[64] The MMF framed its grounds in the Notice of Application as follows:

- The impacts of the Project on the Métis people's section 35 constitutional rights are significant and well documented in the Metis Land Use and Occupancy Study and are on the record of the NEB. In response to these identified impacts, the MMF and Manitoba Hydro reached the MAP. The MMF describes the MAP as an accommodation agreement that fully and finally addressed and satisfied all concerns of the Métis with respect to the Project.

- Over Manitoba Hydro's objections, the MMF successfully introduced the MAP on the record of the NEB.

- The question for the Commission's determination is whether the MAP is a commitment made to an Indigenous group through Manitoba Hydro's Project application or otherwise on the record of the EH-001-2017 that must be enforced by the Commission.

- This question engages the honour of the Crown, as it is the honour of the Crown that gives rise to the Crown's duty to consult and, where appropriate, accommodate impacts on section 35 constitutional rights, and led to Canada's amendment of Condition 3. The honour of the Crown requires not only that the Crown engage in

> consultations and put in place specific accommodations, but also that those accommodations be implemented and enforced so that Indigenous groups, such as the MMF, are not left with an empty shell of a promise.

[65] The MMF argued the MAP was a commitment made to Indigenous groups "on the record of the EH-001-2017". According to the MMF, by failing to implement the MAP or cause it to be implemented, Manitoba Hydro breached Condition 3 of the Certificate.

[66] The Commission, in its Decision issued by letter dated August 11, 2020, found Manitoba Hydro to be in compliance with Conditions 3 and 15. In coming to its decision, the Commission had access to the record created during the public hearings and the letters exchanged between Manitoba Hydro and the MMF setting out their respective positions. The Commission also considered the CCAR relied upon by the MMF in its written submissions.

E. The litigation history before the Manitoba courts in connection with the Project

[67] As indicated in paragraph 53 above, in March 2018, the Government of Manitoba issued its Order in Council directing Manitoba Hydro not to proceed with the MAP "at this time". The Manitoba Order in Council was the subject of a judicial review application brought by the MMF before the Manitoba Court of Queen's Bench (*Manitoba Métis Federation Inc. v. Brian Pallister et al.*, 2020 MBQB 49, [2020] 8 W.W.R. 523) [*Pallister MBQB*], which was subsequently appealed to the Manitoba Court of Appeal (*Manitoba Métis Federation Inc. v. Brian Pallister et al.*, 2021 MBCA 47, [2021] 7 W.W.R. 475, leave to appeal to SCC refused, 39799 (3 March 2022) [*Pallister MBCA*]).

[68] The Manitoba Court of Appeal agreed with the MMF and stated that the application judge erred when he found that the honour of the Crown was not engaged and did not apply to the TPA or the Manitoba Order in Council. The Court of Appeal accepted the MMF's submissions that the honour of the Crown applies to the TPA, which in turn applies to the MAP, and is therefore connected to the Manitoba Order in Council (*Pallister MBCA* at paras. 49–51). However, the Court of Appeal concluded that the Government of Manitoba had acted honourably in regard to issues surrounding the MAP (*Pallister MBCA* at paras. 55, 67, 87). The MMF's application for leave to appeal to the Supreme Court of Canada was dismissed.

[69] In addition to the judicial review applications, the MMF filed a statement of claim in Manitoba's Court of King's Bench against Manitoba Hydro and the Government of Manitoba in which it requests, *inter alia*, that the MAP be found to be a legally binding agreement. That litigation is ongoing.

[70] I will now turn to the impugned Decision.

V. The Decision under appeal

[71] The Commission found that Manitoba Hydro was in compliance with Conditions 3 and 15 of the Certificate. The Commission held there was no basis to grant the relief sought by the MMF either in its letters or in its Notice of Application (Decision at pp. 1–2).

[72] The Commission noted it was not being asked to adjudicate the "legal characterization" of the TPA, the Contribution Agreement, or the MAP (collectively the MAP documents). Rather, the Commission found that what was in dispute between the MMF and Manitoba Hydro was whether the MAP documents and, in particular, the MAP itself, are commitments within the meaning of Condition 3 of the Certificate. If the MAP documents and, in particular, the MAP itself are commitments, the Commission had to consider whether those commitments need to appear in the Commitment Tracking Table as required by Condition 15 of the Certificate (Decision at p. 7).

[73] The Commission found that Manitoba Hydro did not make or acknowledge any commitment with regard to the MAP documents in its application materials or on the record from decision EH-001-2017. The Commission noted that Manitoba Hydro objected to the MAP documents, and particularly the MAP itself, being before the NEB because, according to Manitoba Hydro, the MAP itself was neither binding on it nor part of its application before the NEB. The Commission found that there was no explicit commitment or formal acknowledgement by Manitoba Hydro that the MAP documents were a commitment (Decision at p. 10).

[74] Accordingly, the Commission determined that the MAP documents were not a commitment made by Manitoba Hydro on record of decision EH-001-20177 or in its Project application (Decision at p. 10).

[75] In conclusion, the Commission found that the MAP documents were not a commitment within Condition 3, and therefore it was not necessary to list them as a commitment in the Commitment Tracking Table pursuant to Condition 15. Having reached this conclusion, the Commission indicated there was no basis for it to take further steps related to condition compliance or grant any of the relief requested by the MMF (Decision at p. 15).

[76] I will now turn to my analysis of the issues.

VI. Analysis

A. Did the Commission err by failing to consider or apply the honour of the Crown in the Decision?

[77] The principle of the honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 32 [*Haida Nation*]). The honour of the Crown originates in the *Royal Proclamation* of 1763 in which there is reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection" (*2013 MMF-SCC* at para. 66), and in which the Crown "pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 42 [*Little Salmon*]).

[78] The purpose of the honour of the Crown is the reconciliation between the assertion of Crown sovereignty and the pre-existing Aboriginal societies that were never conquered (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at para. 24; *2013 MMF-SCC* at para. 66; *Haida Nation* at para. 25). The honour of the Crown is a constitutional principle engaged by section 35 of the *Constitution Act, 1982* (*Little Salmon* at para. 42, *2013 MMF-SCC* at para. 69). It applies whether or not the parties intend it to (*Little Salmon* at para. 61).

[79] There is no debate in the present appeal that the honour of the Crown applies to the Decision. The CER Act contains several provisions that mandate the application of the principles of the honour of the Crown. For example, subsection 10(2) specifies that the CER is an agent of the Crown. Paragraph 11(*h*) stipulates that the CER's mandate includes "exercising its powers and performing its duties and functions in a manner that respects the Government of Canada's commitments with respect to the rights of the Indigenous peoples of Canada." Further, with respect to the Commission, section 56 requires that, when making an order, decision or recommendation under the CER Act, the Commission "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*."

[80] In its submissions, the MMF argues that the Commission failed to consider or apply the principle of the honour of the Crown in reaching the Decision.

[81] The MMF does not take issue with the Federal Government's consultations. Rather, it argues that the Commission itself failed to recognize and protect the accommodations reached between Manitoba Hydro and the MMF during the NEB certificate assessment process. It argues that "[t]he honour of the Crown is just as engaged *downstream* when an accommodation is being implemented as it is *upstream* during consultation. Accordingly, regulatory bodies, [such as the Commission], who act as—*the Crown*—downstream, are required to interpret and implement accommodations in a manner that ensures the honour of the Crown is upheld from a project's approval throughout its lifecycle" (Appellant's Memorandum of Fact and Law at para. 50, emphasis in original).

[82] I disagree with the MMF's submissions, for the following reasons.

[83] First, I note that the question before the Commission was not about the adequacy of the Federal Government's consultation obligations with the Indigenous groups. The Federal Government, as it was allowed to do, relied in part on the NEB public hearing process to discharge its obligations to consult with the Aboriginal groups impacted by the Project: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099 at paras. 32–34; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 at paras. 21–22; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at para. 56.

[84] In addition to relying on the NEB hearing process, as I have explained earlier, following the guidance of this Court in *Tsleil-Waututh I*, the Federal Government extended its consultations

with the Indigenous groups regarding the impact of the Project on their rights. The resulting CCAR offered additional information to the Governor in Council for it to consider before approving or denying the Certificate. Indeed, the CCAR was the genesis of the amendments to Conditions 3 and 15 attached to the Certificate. These consultations are not the subject of this appeal.

[85] Turning now to the Decision, the Commission first outlined the review it undertook with respect to the CCAR and noted that the CCAR gave rise to the amendments to Conditions 3 and 15. The Commission did not accept the MMF's arguments that the purpose of the amendments was to address the dispute it had with Manitoba Hydro regarding the MAP documents (Decision at pp. 11–12).

[86] In reaching this conclusion, the Commission also noted the wording of the preamble of the Federal Order in Council, wherein the Governor in Council indicated it is of the opinion that outstanding Indigenous concerns can be accommodated by amending some of the terms and conditions set out in decision EH-001-2017. The Commission stated that the wording of the preamble, read in conjunction with the CCAR, supported the view that the MAP documents do not fall within the scope of commitments captured by Conditions 3 and 15 (Decision at p. 13).

[87] The Commission found that, when considering how to accommodate outstanding Indigenous concerns, the Governor in Council "chose to make amendments to the NEB conditions that linked commitments to those that were made on the record of the Proceeding,

with knowledge of cancelled or disputed agreements between Manitoba Hydro, the MMF, and other Indigenous groups" (Decision at pp. 13–14).

[88] The Commission concluded that "in accordance with section 56 of the CER Act, [it] is satisfied that its finding in [the 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" (Decision at p. 13).

[89] This review demonstrates that the Commission did in fact consider and apply the principles of the honour of the Crown in the Decision. It examined the record of the NEB hearings, which included the MMF's submissions and the MAP documents themselves. It considered the CCAR, which was the product of supplemental consultations. It examined the Federal Order in Council, which spoke of the accommodation of Indigenous concerns. Indeed, the Commission was mindful of the accommodation measures taken by the Governor in Council through its amendments to Conditions 3 and 15. It cannot be said that the Commission failed to consider and apply the honour of the Crown when it embarked on its analysis and rendered its Decision.

[90] In addition, the Commission understood and considered the importance of the MMF's litigation with the Government of Manitoba. The Commission was alive to the Manitoba Court of Queen's Bench decision rendered in connection with the judicial review application brought by the MMF against the Manitoba Order in Council (*Pallister MBQB*), which found that the honour of the Crown was not engaged.

[91] Indeed, the Manitoba Court of Queen's Bench, having found that the honour of the Crown did not apply to the TPA, and therefore did not apply to the MAP itself, went further. The Court stated that even if it was in error in respect of its determination that the honour of the Crown does not apply to the TPA, it remained of the view that the Manitoba Order in Council and the directive issued to Manitoba Hydro requiring it not to proceed with the MAP did not engage the honour of the Crown.

[92] Prior to the release of the *Pallister MBQB* decision, the MMF had asserted in its previous submissions to the Commission that the Manitoba Order in Council was unlawful and did not uphold the honour of the Crown. Following the release of *Pallister MBQB*, the Commission asked the MMF and Manitoba Hydro to provide updates and their views on this decision (Decision at pp. 4–5).

[93] The Commission took steps to consider the impact of *Pallister MBQB* prior to rendering the Decision. One can assume that, had the Manitoba Court of Queen's Bench come to a different conclusion, the Commission would similarly have taken it into consideration when rendering its Decision.

[94] The Manitoba Court of Appeal's decision in *Pallister MBCA* was released on May 6, 2021, some months after the Decision at issue here. While the Manitoba Court of Appeal found that the Manitoba Court of Queen's Bench had erred in law and that the honour of the Crown was engaged, it found nonetheless that the Government of Manitoba had "acted reasonably as to its obligation to act honourably" (*Pallister MBCA* at para. 109).

[95] I note that, since the Supreme Court of Canada refused leave to appeal, the decision in *Pallister MBCA* is the final word on the applicability of honour of the Crown for Manitoba on this subject insofar as the MMF is concerned. The Manitoba Court of Appeal found it was not dishonourable for the Manitoba Lieutenant Governor in Council to direct Manitoba Hydro not to proceed with the MAP documents. In light of this finding, it cannot be said that the Commission acted dishonourably when it declined to consider the MAP documents as commitments with which Manitoba Hydro must comply under Condition 3 of the Certificate.

[96] I conclude that the Commission appreciated its role and applied and considered the honour of the Crown in the Decision. The Commission did not err when it concluded that the honour of the Crown does not require the MAP documents to be recognized as commitments within the meaning of Condition 3 of the Certificate, as amended by the Federal Order in Council.

[97] I would observe nonetheless that the governments' duty to consult and to accommodate Indigenous groups is a continuing obligation because the honour of the Crown is always at play (*Haida Nation* at para. 16; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, 444 D.L.R. (4th) 298 at para. 60, leave to appeal to SCC refused, 39111 (2 July 2020) [*Coldwater*]). Post-approval consultations are relevant and important to determining whether this duty has been met (*Coldwater* at para. 60). In other words, as the MMF argues, regulatory bodies, such as the CER, acting as the Crown "downstream", continue to owe a duty to Indigenous groups affected by the Project throughout its lifecycle. The MMF is entitled to raise

with the Commission concerns about Manitoba Hydro's implementation of commitments throughout the life of the Project.

B. Did the Commission err by failing to correctly interpret the meaning of Condition 3, as amended by the Federal Order in Council?

(1) The MMF's submissions

[98] The MMF argues that the Commission's interpretation of Condition 3 is contrary to its ordinary meaning. It submits the Commission erred when it concluded that Manitoba Hydro was the only party who could make a commitment on its behalf. This reasoning, according to the MMF, incorrectly conflates the factual question of whether Manitoba Hydro made a commitment with the interpretative issue of "who" may place a commitment on the record for the purposes of Condition 3.

[99] The MMF further argues that the Commission failed to consider the history and context of the relationship between the MMF, Manitoba Hydro, and the Crown that led to the drafting of Condition 3. The MMF refers to the Government of Manitoba's "unexplained and unilateral actions" and to the supplemental consultations being needed "because the NEB had not done its job". The MMF submits that these considerations should have informed the Decision but that the Decision does not describe this history (Appellant's Memorandum of Fact and Law at para. 57).

[100] Finally, the MMF submits that, in interpreting Condition 3 as it did, the Commission impermissibly engaged in a "results-oriented" analysis, not the neutral, dispassionate, and objective interpretation of the text that the law requires in order to "discern and apply its

authentic meaning" (Appellant's Memorandum of Fact and Law at para 82, citing *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at para. 42, aff'd 2022 SCC 30, 471 D.L.R. (4th) 391; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at para. 50).

(2) The Commission's Decision

[101] Turning now to the Decision, I agree with the MMF that the Commission did not conduct a formal statutory interpretation exercise of Condition 3 when it considered the issues put to it by the MMF. The following passages of the Decision illustrate its interpretation of Condition 3.

[102] First, the Commission correctly acknowledged that its task was to "attempt to follow the plain and obvious meaning of the amendments, when read in totality with the Condition" (Decision at p. 10). However, the Commission did not explicitly analyze the term "commitment".

[103] Then, the Commission wrote that it "understands Condition 3 to require Manitoba Hydro to implement commitments to Indigenous peoples, but also notes that the Governor in Council amendment includes a qualification that refers specifically to commitments made by Manitoba Hydro to Indigenous peoples 'through its Project application or otherwise on the record of [the] EH-001-2017'" (Decision at p. 10, emphasis added).

[104] Next, the Commission found "there was no explicit commitment or formal acknowledgement by Manitoba Hydro that the MAP Documents were a commitment. To the contrary, Manitoba Hydro took steps to record its position that this document was neither binding, nor part of its application before the NEB" (Decision at p. 10).

[105] In the Commission's view, pursuant to a plain reading of Condition 3, "the only party who could make a commitment on behalf of Manitoba Hydro is Manitoba Hydro itself" (Decision at p. 11).

[106] Finally, the Commission noted that "this interpretation does not mean that Manitoba Hydro would have discretion to cancel or terminate any commitment once the commitment or promise was made on the hearing record, as the language of Condition 3 would establish the commitment as a regulatory requirement" (Decision at p. 11).

[107] A review of the questions put to the Commission by the MMF reveals that the questions were fluid and evolved over time.

[108] On the one hand, the Commission was asked to determine whether certain *processes* contained in the MAP documents were commitments. On the other, the question put to the Commission in the Notice of Application was whether the MAP itself was a commitment made to an Indigenous group through Manitoba Hydro's project application or otherwise on the record. The Commission determined that its task was to consider whether the MAP documents and, in

particular, the MAP itself were commitments according to Condition 3. I see no problem with the manner in which the Commission delineated its task.

[109] At the hearing before this Court, in response to questions from the panel, the MMF put more emphasis on the *processes* set out in the Contribution Agreement and MAP as being the commitment made by Manitoba Hydro to the MMF, not the MAP itself.

[110] In particular, during its oral submissions to this Court, the MMF argued that Manitoba Hydro needs to complete the *processes* that could ultimately lead to additional mitigation measures, and even compensation, for the Métis. The MMF argued that "even if the MAP is removed, it does not mean the Manitoba Hydro can wash away and fail to address the underlying impacts the Project has on Métis people's rights. It does not wash away the honour of the Crown."

[111] To follow through with this line of argument, this Court asked the MMF whether it could identify any residual commitments made to the MMF during the supplemental consultations regarding impacts on their section 35 rights that were not addressed in the Certificate. The MMF could not provide a precise answer to this question.

[112] Essentially, the MMF's arguments can be distilled down to the following. It is not necessary for Manitoba Hydro to have agreed to put the commitment on the record of the EH-001-2017 proceedings. The MMF put the MAP documents on the record of the proceedings leading to decision EH-001-2017. If the MAP documents, and the processes they contain, are on

the record, they are to be identified as commitments made to the MMF notwithstanding Manitoba Hydro's disagreement and objections.

[113] If I were to accept the MMF's arguments, it would mean that a party other than Manitoba Hydro could create an enforceable commitment on Manitoba Hydro simply by putting it on the record of the NEB proceedings. This is a strange proposition. At no time did Manitoba Hydro commit to the MAP documents before the NEB. It is all the more concerning that, in this case, Manitoba Hydro did not have the legal authority to make the alleged commitment (entering into the MAP) because of the Manitoba Order in Council.

[114] Notwithstanding my concerns, I will turn to the question put to the Commission, and my analysis, to see if any of the MMF's arguments can be accepted.

[115] The statutory interpretation exercise will resolve the question of whether the MAP is a commitment within the meaning of Condition 3.

(3) Principles of statutory interpretation applicable to Condition 3

[116] Under sections 247 and 262 of the CER Act, the Certificate is the official document authorizing Manitoba Hydro to construct and operate the Project. The Commission issued the Certificate with amended conditions, as approved by the Governor in Council.

[117] The Certificate is therefore a product of the Federal Order in Council and must be interpreted in a manner that is consistent with the interpretation of orders in council. The modern

principles of statutory interpretation apply to orders in council, even though orders in council emanate from the executive branch of government (*Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866 at para. 36).

[118] The central objective in statutory interpretation is to "determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 40 [*Canada Trustco*]). According to the modern approach to the interpretation of statutes, statutes must "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 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21 (SCC), citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87). In *Canada Trustco*, at paragraph 10, the Supreme Court asserted that "[t]he interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."

[119] Some years later, the Supreme Court of Canada clarified that, although the ordinary meaning is presumed to be the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of the work of interpretation even where there is no patent ambiguity in the provision because the context might reveal a latent ambiguity (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 43 [*McLean*]). That is, even where the ordinary meaning is, on first impression, obvious, courts are to "dig deeper" into the context to determine its authentic meaning (*McLean* at para. 44). Here,

that context includes the legal and regulatory framework of the Commission and the proceedings before it.

[120] I will now turn to my interpretation of Condition 3. First, I will review the text and meaning of the terms “commitment” and “or otherwise on the record” used in Condition 3. Then, I will examine the context under which Condition 3 and its amendments were made. Finally, I will consider the purpose of Condition 3 and its amendments.

(a) *The analysis of the text of Condition 3*

[121] What is the meaning of the words in the phrase “Manitoba Hydro must implement or cause to be implemented […] all commitments made to Indigenous groups […] or otherwise on the record of the EH-001-2017”?

[122] In its Decision, the Commission does not explicitly interpret the meaning of the term “commitment”. The term commitment is not defined in the NEB Act or in the CER Act nor is it defined in the overall public law regulatory context. It is therefore helpful for me to examine the meaning of “commitment” in its grammatical and ordinary sense.

[123] Various dictionaries define the term “commitment” as follows:

- *Canadian Oxford Dictionary*, 2nd ed. (Don Mills, ON: Oxford University Press, 2004) sub verbo “commitment”: “an engagement or (esp. financial) obligation that restricts freedom of action”.

- *Cambridge Dictionary*, online: <dictionary.cambridge.org> sub verbo "commitment": "a promise or firm decision to do something".

- *Merriam-Webster Collegiate Dictionary*, 11th ed. (Springfield, Mass: Merriam-Webster, 2016) sub verbo "commitment": "an agreement or pledge to do something in the future".

- *Collins English Dictionary*, 13th ed. (Glasgow: Collins, 2018) sub verbo "commitment": "an obligation, promise, etc that restricts one's freedom of action".

[124] From these definitions, I gather that a commitment is not necessarily a contract. It is a binding promise that can be made unilaterally or by agreement.

[125] The beginning of the phrase "Manitoba Hydro must implement or cause to be implemented […] all commitments made to Indigenous groups" is clear; Manitoba Hydro is the proponent required to fulfill the binding promise. The balance of the phrase is what is contentious. I will examine the meaning of "or otherwise on the record of the EH-001-2017".

[126] The Commission does not interpret the meaning of "or otherwise on the record of the EH-001-2017". That may be because the meaning of "record" here is uncontroversial. The Commission, as was its predecessor, is a court of record under subsection 31(1) of the CER Act. There is no dispute that the terms "on the record of the EH-001-2017" refer to the record of the NEB when it rendered decision EH-001-2017.

[127] Thus, the "record" referred to in Condition 3 is the record created before the NEB during the public hearings. The record includes: Manitoba Hydro's project application, any orders and

reasons given in the course of the application, all transcripts of oral evidence and oral submissions including cross-examinations, written information requests and responses, oral and written final arguments, as well as any and all other written documents (whether hard copies or electronic) allowed to remain on the record by the NEB. In other words, the record includes all evidence and documentation provided in connection with the Project to the decision maker (the NEB, and later the CER) from the date of Manitoba Hydro's Project application to the date the NEB issued decision EH-001-2017.

[128] To avoid duplication of the measures taken by Manitoba Hydro and the Government of Manitoba in respect of the Project, the NEB incorporated into its hearing record the entire record created during the provincial environmental assessment held by the Clean Environment Commission established pursuant to Manitoba's *The Environment Act.*

[129] Therefore, the record before the NEB includes documents created outside of the Project application through the provincial environmental assessment completed by the Clean Environment Commission. On September 12, 2017, the Clean Environment Commission completed the assessment, and the Government of Manitoba issued a Class 3 license (No. 3288) to Manitoba Hydro authorizing it to construct and operate the Project.

[130] I would add there is no doubt that the MAP documents were on the record of the proceedings that led to decision EH-001-2017. The NEB allowed the MAP documents to remain on the record, despite Manitoba Hydro's objections.

[131] A review of the French text of Condition 3 points to the same conclusion. The dictionary *Le petit Larousse illustré,* (Paris: Larousse, 2017) sub verbo "engagement" defines *engagement* (commitment) as *"fait de s'engager à faire qqch ; promesse, contrat par lesquels on s'engage à accomplir qqch"*. The dictionary *Le Petit Robert de la langue française*, (Paris: Dictionnaires Le Robert, 2022) sub verbo "engagement" defines *engagement* as *"action de se lier par une promesse ou une convention"*. In addition, the phrase *"ou autrement consignés dans les dossiers de l'instance EH-001-2017"* (or otherwise on the record of the EH-001-2017) clearly refers to the record of the NEB proceedings leading to the decision EH-001-2017.

[132] Therefore, the text of Condition 3 leads me to understand that Manitoba Hydro must have made the binding promise (commitment) in its Project application during the NEB proceedings or, in the alternative, during the provincial environmental assessment completed by the Clean Environment Commission.

(b) *The analysis of the context of Condition 3*

[133] Next, I will examine the context in which the Certificate and attached conditions were issued. Any ambiguity or uncertainty in the text is put to rest when considered in its context.

[134] Context here is important, as the CER is a highly specialized regulator and there are several contextual aids to assist in the interpretation of Condition 3. We know that the physical location of the Project, partially unoccupied Crown land where the Métis exercised their harvesting rights, automatically engaged the principles of the honour of the Crown. In addition, section 74 of the CER Act mandated the CER to consult with the Indigenous groups affected by

the Project, in addition to any consultations undertaken separately by the Government of Manitoba and Manitoba Hydro.

(i) A brief framework of the CER Act

[135] The CER is a departmental corporation established pursuant to section 10 of the CER Act. It is responsible, among other things, for the regulation of international power lines (in this case, the Project) (CER Act, s. 11(*b*)).

[136] The CER includes the Commission, an independent decision maker that decides, among other things, on the issuance of permits for a power line and makes recommendations to the Governor in Council regarding the issuance of a certificate of public convenience and necessity for a power line. The Commission is also responsible for the ongoing oversight of operations taking place pursuant to certificates (CER Act, ss. 26(1)–(2), 257, 262).

[137] An international power line must be approved through either a permit or a certificate assessment (CER Act, s. 247). The Governor in Council may make an order to designate a project as an international power line, such that it requires a certificate (CER Act, s. 258(1)).

[138] When such a designation is made, the Commission must hold a public hearing and may issue a certificate (CER Act, ss. 52, 262). As mentioned previously, the Commission is a court of record.

[139] After the public hearings have concluded, the Commission decides whether a certificate should issue and, if so, recommends to the Minister of Natural Resources that the Governor in Council approve the issuance of the certificate (CER Act, ss. 262(1), 262(4)).

[140] In deciding whether to recommend issuance of a certificate, the Commission must take into account any Indigenous knowledge provided to the Commission. The Commission must also consider the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes and the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982* (CER Act, s. 262(2)).

[141] The Governor in Council may approve the issuance of the certificate or refuse to approve its issuance (CER Act, s. 262(9)). As it did here, the Governor in Council may also impose additional conditions on the certificate. The consultation process does not dictate a particular substantive outcome (*Tsleil-Waututh I* at para. 634).

[142] The Commission may, on the issuance of a certificate, make the certificate subject to the conditions that the Commission considers necessary or in the public interest (CER Act, s. 278(2)). Every certificate is subject to the condition that the provisions of the CER Act and regulations must be complied with (CER Act, s. 279).

[143] It is apparent from my review of the CER Act that the certificate assessment process allows the Commission to carry out its duty of consultation towards Indigenous groups affected

by a project and to impose conditions on the certificate that the Commission considers necessary to fulfill those duties and to protect the public interest.

(ii) Decision EH-001-2017

[144] A second important contextual aid is decision EH-001-2017.

[145] Decision EH-001-2017 provides a detailed account of the reasons supporting the NEB's recommendation to the Governor in Council that the Certificate for the Project should issue, and all the terms and conditions the NEB considered necessary or desirable in the public interest to which the Certificate would be subject. Decision EH-001-2017 includes ten distinct chapters, three appendices, a list of figures, and a list of various tables.

[146] Chapter 3 of decision EH-001-2017 provides an overview of the Project, the Province of Manitoba environmental assessment process, and the NEB process. Section 3.3.7 states that, of the 28 conditions to be attached to the legal instruments required for the Project, the NEB considers these conditions necessary or desirable in the public interest.

[147] In Section 3.3.7, the NEB confirms that the 28 conditions are discussed throughout the other chapters of decision EH-001-2017 and notes that any commitments made by Manitoba Hydro in its Project application or in its related submissions during the proceeding have also become regulatory requirements. To be satisfied that Manitoba Hydro complies with all of its commitments for this Project, the NEB imposed Condition 15 requiring Manitoba Hydro to file a Commitments Tracking Table for the Project.

[148] Chapter 8 of decision EH-001-2017 is devoted to Indigenous matters. In addition, Appendix II provides a summary of the general and specific concerns and issues raised by Indigenous communities throughout the proceeding as well as summaries of the responses to the concerns provided by Manitoba Hydro, the responses by the NEB (including conditions), and the applicable requirements provided through regulation and legislation.

[149] Matters relating specifically to the MMF are referred to throughout Chapter 8 and Appendix II of decision EH-001-2017. There is one reference to the MAP documents in Chapter 8, which is not reproduced in Appendix II. The NEB notes that "the MMF said that its outstanding issues and concerns were addressed in a July 2017 document. However, this document is currently the subject of a dispute before the Manitoba Court of Queen's Bench" (Appeal Book, Vol. 4, Tab 21 at pp. 900–01).

[150] Appendix III provides the NEB's list of 28 conditions. As an overview, the NEB states that "[a] primary purpose of conditions is to mitigate potential risks and effects posed by a project throughout all phases of its lifecycle so that it is designed, constructed, and operated in a manner that protects property and the environment, and promotes the safety of the public. […] Conditions imposed by the Board are enforced pursuant to the *National Energy Board Act*" (Appeal Book, Vol. 4, Tab 21 at p. 1022).

[151] From this review of decision EH-001-2017, it is clear that the NEB was aware of the directive imposed on Manitoba Hydro through the Manitoba Order in Council to not proceed with the MAP. The NEB understood that Manitoba Hydro did not have the legal authority to

undertake the MAP. Furthermore, the NEB understood that the MMF was challenging the "legality" of the Manitoba Order in Council before the Manitoba Courts. Therefore, when understood in this context, "commitments" under Condition 3 cannot include the MAP.

(iii) The CCAR

[152] A third contextual aid is the CCAR, which was released after the release of decision EH-001-2017.

[153] The CCAR is the source of the amendments made to Condition 3 and Condition 15 by the Governor in Council.

[154] The CCAR described the active consultation and two-way dialogue between the Major Projects Management Office and 21 interested Indigenous groups (including the MMF) after the conclusion of the public hearings before the NEB. The CCAR explained that supplemental consultations were held to better understand the potential impacts of the proposed Project on section 35 rights and to enquire whether Indigenous groups had suggestions for proposed accommodations.

[155] As a result of concerns raised by multiple Indigenous groups, the CCAR proposed amendments to five NEB conditions, including Conditions 3 and 15. The report explained that the amendments were proposed to accommodate Indigenous concerns by ensuring that Manitoba Hydro follows through on commitments made to Indigenous groups and that Manitoba Hydro considers concerns raised by the Indigenous groups regarding the impacts of the Project.

[156] The CCAR listed the following concerns as the issues Condition 3 and its amendments were supposed to resolve:

- Potential adverse impacts from use of herbicides on water, fish and fish habitat, wildlife and wildlife habitat, human health, and ability of Indigenous groups to exercise section 35 Aboriginal and Treaty rights (Appeal Book, Vol. 4, Tab 23 at p. 1095).

- Indigenous employment opportunities (Appeal Book, Vol. 4, Tab 23 at p. 1100).

- Concerns regarding the protection of heritage sites (Appeal Book, Vol. 4, Tab 23 at p. 1114).

- Concerns regarding the Project's potential impact to sensitive cultural resource sites, including undiscovered sites (Appeal Book, Vol. 4, Tab 23 at p. 1114).

- The importance of emergency response plans and the involvement of Indigenous communities in developing the plans (Appeal Book, Vol. 4, Tab 23 at p. 1116).

- The potential for accidents and malfunctions during construction and operations (Appeal Book, Vol. 4, Tab 23 at p. 1117).

- The cumulative effects of development on section 35 Aboriginal and Treaty rights (Appeal Book, Vol. 4, Tab 23 at p. 1120).

- Concerns regarding navigation and safety (Appeal Book, Vol. 4, Tab 23 at p. 1123).

- Concerns with respect to inadequate funding of Indigenous knowledge studies (Appeal Book, Vol. 4, Tab 23 at p. 1126).

- Concerns regarding the Project's potential impact to wetlands and associated vegetation, as well as the ability of Indigenous Peoples to exercise section 35 Aboriginal and Treaty in relation to wetlands, such as fishing and plant harvesting (Appeal Book, Vol. 4, Tab 23 at p. 1128).

[157] Other than protecting Indigenous employment opportunities through requiring Indigenous content in the transmission construction contract, nowhere did the CCAR state that amendments to Condition 3 would address concerns related to economic benefits or financial compensation in respect of the Project. The MAP documents focused on economic benefits.

[158] Indeed, the CCAR specifically concluded that no further action was required regarding Indigenous concerns related to economic benefits and financial compensation in respect of the Project. The CCAR based this conclusion on Manitoba Hydro's commitments to Indigenous content, including incentives to increase Indigenous content in contracts as well as NEB Conditions 22 and 26 regarding Crown land and wetland (Appeal Book, Vol. 4, Tab 23 at p. 1101).

[159] Similar to what I noted in paragraphs 149 and 151 above, at the time the CCAR was prepared, the Governor in Council knew that Manitoba Hydro did not have the legal authority to undertake the MAP. Therefore, the term "commitments" cannot, when understood in this

context, include the MAP nor can it logically be read to encompass “commitments” Manitoba Hydro was legally incapable of making.

[160] This conclusion is reinforced by the CCAR itself, which confirmed that the Federal Crown developed a tool to “track all correspondence with each Indigenous group. It also tracked issues raised by Indigenous groups during the NEB proceedings” and recorded their concerns based on the evidence on the NEB record as well as information requests and responses (Appeal Book, Vol. 4, Tab 23 at p. 1070). In particular, the CCAR took note of certain concerns raised during the supplemental consultations, two of which are relevant to meaning of Condition 3:

- Indigenous concerns that may have been beyond the scope of the NEB assessment of the Project; and,

- A legal dispute between the MMF, Manitoba Hydro, and the Government of Manitoba over Manitoba’s direction to Manitoba Hydro to not proceed with a $67 million compensation agreement. The CCAR specifies that, in instances where the Crown did not have information about the existence of an agreement between Manitoba Hydro and section 35 Aboriginal and Treaty rights holders, it assumed that no such agreement exists (Appeal Book, Vol. 4, Tab 23 at p. 1066).

[161] The CCAR noted that, in the case of this Project, Manitoba Hydro signed six community-specific agreements with Indigenous groups and cancelled the negotiation of six others (including with the MMF). These agreements were not intended as mitigation or financial

compensation to rights impacts but rather as economic benefits for the Project (Appeal Book, Vol. 4, Tab 23 at 1098).

(iv) The Federal Order in Council

[162] The balance of the Federal Order in Council is a fourth important contextual aid. Its preamble specifies that the Governor in Council has been made aware of project-related concerns in the CCAR raised by Indigenous groups during the consultations for the Project that affect its assessment of whether Canada has fulfilled its duty to consult.

[163] The preamble further says that, in the opinion of the Governor in Council, outstanding Indigenous concerns can be accommodated by amending some of the terms and conditions of decision EH-001-2107. It reads that "[w]hereas the Governor in Council, having considered Indigenous concerns and interests identified in the [CCAR], is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated, including by amending some of the terms and conditions […]".

[164] The Federal Order in Council in its entirety, but in particular the amendments to Condition 15, provide more context to the meaning of Condition 3. The relevant text of Condition 15 is reproduced at paragraph 59 above.

[165] Condition 15 clarifies that a commitment "otherwise on the record" is one that must have been agreed to by Manitoba Hydro during its questioning or in its submissions in the NEB's EH-

001-2017 proceeding or in the provincial hearing before the Clean Environment Commission in respect of an issue of federal interest. Condition 15 requires that all commitments made by Manitoba Hydro to Indigenous communities or others be specifically listed on Manitoba Hydro's website, tracked, and updated quarterly. This tracking allows not only the Commission to monitor Manitoba Hydro's progress in fulfilling the commitments, it more importantly allows all third parties who have received commitments from Manitoba Hydro to keep track of them and ensure that Manitoba Hydro follows through during the lifecycle of the Project.

[166] I will add that the Commitment Tracking Table for the Project, dated July 16, 2019, was included in the materials before this Court. It contained a total of 314 commitments. Each commitment is identified, described, and referenced with a link providing the source description of the commitment and the relevant exhibit entered during the proceedings leading to EH-001-2017. Some of the source descriptions include the Clean Environment Commission Hearing Transcript. The MAP was not included on the Commitment Tracking Table (Appeal Book, Vol. 5, Tab 29 at p. 1184).

[167] Therefore, Conditions 3 and 15 are meant to cover the same commitments. Condition 3 is the requirement to implement the commitments and Condition 15 is the requirement to track them. Accepting that Conditions 3 and 15 cover the same ground, the more precise wording in Condition 15 constrains the scope of Condition 3 in two important ways.

[168] First, Condition 15 clearly states that Manitoba Hydro made the commitments in its application, or otherwise agreed to the commitments in questioning or in its submissions before

the NEB proceedings resulting in decision EH-001-2017. Manitoba Hydro must have agreed to these commitments on the record. Therefore, commitments cannot include the MAP documents, which Manitoba Hydro did not agree to during the NEB proceedings but, in fact, objected to.

[169] Second, in addition to the commitments described above, the Commitment Tracking Table created through Condition 15 must include commitments arising from the Clean Environment Commission hearings that are of federal interest. The Clean Environment Commission commitments and those agreed to during questioning are the commitments that are "otherwise on the record".

[170] This concludes my review of the contextual aids. I will now turn to the purpose behind the amendments made to Condition 3.

(c) *The analysis of the purpose of Condition 3*

[171] The purpose behind the wording of Condition 3, as amended by the Federal Order in Council, can be gleaned from a review of the CER Act.

[172] The preamble of the CER Act informs that the fundamental objective behind the CER and its power to impose conditions on the proponent of project is to ensure that such projects are constructed in a safe and secure manner that protects people, property, and the environment.

[173] In addition, the preamble includes the Government of Canada's commitment to achieving reconciliation with Indigenous groups and to using transparent processes built on early

engagement and inclusive participation under which the best available scientific information and Indigenous knowledge can be taken into account in the decision-making.

[174] Section 6 of the CER Act specifies that its purpose is to regulate certain energy matters within Parliament's jurisdiction and, in particular, to ensure that power lines "are constructed, operated and abandoned in a manner that is safe, secure and efficient and that protects people, property and the environment". Paragraph 6(*d*) refers to the regulatory hearings and decision-making processes related to those energy matters being fair, inclusive, transparent, and efficient.

[175] The purpose of the conditions attached to certificates of public convenience and necessity is clearly to ensure that such projects are constructed in a safe and secure manner that protects people, property, and the environment. In addition, as part of the reconciliation process, the Commission is required to take into account commitments made to Indigenous groups through the certificate assessment process.

(4) Conclusion of the interpretation of Condition 3

[176] In my view, the statutory interpretation of the amendments to Condition 3 results in the following interpretation with regard to the MMF. A commitment in Condition 3 consists of a binding promise made by Manitoba Hydro to the MMF as a form of accommodation during the NEB regulatory process and hearing leading to decision EH-001-2017 and during the provincial environmental assessment leading to the issuance of the Class 3 licence (No. 3288). The Governor in Council did not amend Condition 3 to address concerns arising from the Government of Manitoba's cancellation of the MAP.

[177] Having conducted the textual, contextual, and purposive analysis of Condition 3, as amended by the Federal Order in Council, I conclude that the MAP documents and, in particular, the MAP itself were not "commitments made to Indigenous groups […] otherwise on the record of the EH-001-2017". I reach this conclusion for the following reasons.

[178] First, it is clear that the Certificate is the product, in part, of consultations and accommodations of the Federal Crown, the Government of Manitoba, and Manitoba Hydro, as the proponent of the Project, with various Indigenous groups affected by the Project. The Project must be approved by the Governor in Council. In addition, to issue the Certificate, the CER must, among other things, have considered the effects of the Project on section 35 rights and be satisfied that the Project is and will be required by the present and future public convenience.

[179] Once issued, the Certificate provides Manitoba Hydro with the federal authority to construct and operate the Project, subject to certain regulatory conditions. The Certificate and its conditions are enforceable by the Commission against Manitoba Hydro during the lifetime of the Project. In terms of commitments to the MMF captured in Condition 3, Manitoba Hydro must have agreed to the commitments in order for the Commission to be in a position to enforce them as regulatory conditions.

[180] Next, the ordinary meaning of commitment (a binding promise that can be made unilaterally) is not ambiguous. The amendments to Condition 3 of the Certificate require Manitoba Hydro to fulfill binding promises (commitments) made to Indigenous groups that are otherwise on the record before the Commission. Condition 15 creates a Commitments Tracking

Table by which the Commission and, by extension, the Indigenous groups may track Manitoba Hydro's progress and fulfillment of those commitments during the lifecycle of the Project.

[181] Turning now to the context, it informs me that all commitments under Condition 3 are captured by Condition 15. Condition 15 limits commitments to those agreed upon by Manitoba Hydro during the NEB regulatory process and put on the record before the NEB during the proceedings leading to decision EH-001-2017 and those made by Manitoba Hydro to Indigenous groups during the provincial environmental assessment conducted by the Clean Environment Commission resulting in the issuance of the Class 3 licence (No. 3288).

[182] As a result, while a party other than Manitoba Hydro may have put the commitment on the record of the proceedings leading to decision EH-001-2017, Manitoba Hydro must have agreed to the commitment in the context of the proceedings before the NEB or during the provincial environmental assessment for the commitment to come within the scope of Condition 3.

[183] This limitation on the scope of the word "commitment" is reinforced by the letter from the Deputy Minister of Natural Resources Canada to the NEB, dated July 8, 2019. In the letter, the Deputy Minister wrote:

> As part of its decision, and to provide further accommodation for Indigenous concerns regarding potential Project impacts to section 35 Aboriginal and Treaty rights, the [Governor in Council] directed the NEB to issue the certificate with amendments to five NEB conditions […]. The purpose of this letter is to provide further information on Crown's [*sic*] rationale for those amendments […]
>
> […]

> With respect to amendments to NEB Conditions 3 (Implementation of Commitments) and 15 (Commitments Tracking Table), the Crown sought to provide additional certainty that Manitoba Hydro will abide by commitments made to Indigenous groups through the Clean Environment Commission (CEC) and NEB regulatory reviews, as well as in its project application. In particular, amendments to NEB Condition 15 increase transparency for Indigenous groups on the details of these commitments and provides NEB oversight of their implementation. It provides for the NEB to hold Manitoba Hydro to account for commitments made to Indigenous groups, as a condition of the certificate.
>
> (Appeal Book, Vol. 5, Tab 28 at pp. 1178–79)

[184] Next, the purpose of the amendments made to Condition 3 by the Governor in Council was to address concerns raised by Indigenous groups during the supplemental consultation process. The amendments to Condition 3 were made as a result of a variety of concerns expressed by Indigenous groups, but not to address compensation or economic benefits (with the exception of Indigenous content in construction contracts).

[185] In response to the arguments raised by the MMF, while I would agree that a commitment may have been put been on the record by the MMF, Manitoba Hydro must nonetheless have agreed to the commitment on the record for it to be a binding promise and for it to become a regulatory condition the Commission can enforce against Manitoba Hydro. It is too simplistic to contend that because the MAP was entered onto the record of the NEB proceedings, it falls within the scope of Condition 3. As I have shown, this interpretation is inconsistent with the text, context, and purpose of Condition 3.

[186] Having conducted the statutory interpretation of Condition 3, I cannot accept the MMF's submissions that the Commission's interpretation of Condition 3 constitutes a reviewable error. While the Decision could have been clearer, the Commission addressed the question it was asked

and determined whether the MAP itself was a commitment enforceable against Manitoba Hydro. That was a question of law that the Commission answered in the negative. Having reached the same conclusion, I see no error.

[187] I would add a word about the MMF's submissions that the NEB "had not done its job" and therefore supplemental consultations were necessary. I cannot agree with this characterization.

[188] As I have expressed in paragraphs 12, 55, and 84 above, the Federal Crown extended the consultations with the Indigenous groups that might have been affected by the Project as a direct result of the timing of this Court's decision in *Tsleil-Waututh I*. There is no evidence that the Federal Crown identified a failing in the NEB process.

[189] Finally, for the sake of completeness, it is important to understand that the question of whether the MAP documents, or the MAP itself, are enforceable agreements between the MMF, Manitoba Hydro, and the Government of Manitoba is a question outside the Commission's jurisdiction, outside this Court's jurisdiction, and is before the Manitoba courts to resolve.

C. Did the Commission err by failing to consider the effects of the Decision on the section 35 rights of the Métis, as required by subsection 56(1) of the CER Act?

[190] The MMF states that the Commission failed to engage with subsection 56(1) of the CER Act. Subsection 56(1) of the CER Act states the following:

Duty to consider — Commission **Considération par la Commission**

56 (1) 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*.	56 (1) La Commission est tenue, lorsqu'elle rend une décision ou une ordonnance ou qu'elle formule une recommandation au titre de la présente loi, de prendre en compte les effets préjudiciables que la décision, l'ordonnance ou la recommandation peut avoir sur les droits des peuples autochtones du Canada reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.

[191] The MMF argues that the Decision fails to fulfill this statutory duty. Nowhere does the Decision address what subsection 56(1) requires the Commission to do and, according to the MMF, failing to do so is particularly egregious given that the Decision was the first opportunity for the Commission to engage with this new provision.

[192] During its oral submissions before this Court, the MMF added a new argument: the inadequacy of the reasons for Decision. The MMF argues that the Commission did not adequately explain why it believed the Crown had acted honourably or met its duty to consult and accommodate. According to the MMF, the Commission failed to take into account the perspective of the Métis and engage with the MMF's specific situation as they relate to the honour of the Crown.

[193] I cannot agree with the MMF's submissions.

[194] First, I note that the Decision specifically mentions section 56 of the CER Act and indicates that "the Commission is 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" (Decision at p. 13).

[195] Next, it is understood that, when examining the reasons for their decisions, triers of fact benefit from a presumption that they have considered the whole record before them (*Simpson v. Canada (Attorney General)*, 2012 FCA 82, 213 A.C.W.S. (3d) 223 at para. 10).

[196] The record here is voluminous. The previous sections in these reasons describe in some detail the documents that were before the Commission as it was making the Decision. One can glean from the record the reasoning of the Commission.

[197] With respect to the MMF's new argument regarding the sufficiency of reasons, I rely on guidance from the Supreme Court of Canada that explains when reasons are inadequate. Reasons are inadequate when they prevent meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paras. 25, 28 [*Sheppard*]. While *Sheppard* was rendered in a criminal context, it is helpful to understand the threshold required to determine whether reasons are adequate.

[198] The duty to give adequate reasons does not require perfection. Reasons do not need to "show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion": *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 17 [*R.E.M.*], emphasis in original. An appellate court must simply be able to see "why" the trial judge decided in a particular way (*R.E.M.* at para. 17).

[199] This Court adopted and summarized the principles from *Sheppard* to allow appeals from the Federal Court due to inadequate reasons in *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at para. 143. In that case, while this Court ultimately did not give effect to this ground of appeal, it did reinforce the importance of assessing reasons in their overall context.

[200] Adopting a practical and functional approach to the adequacy of the Commission's reasons, I find that while they are not perfect and could have been more fulsome, they do not prevent meaningful appellate review. A review of the record allows me to find that the Commission implicitly considered the effects of the Decision on section 35 rights of the Métis, as required by section 56(1) of the CER Act. For the same reasons as set out in paragraphs 83 to 97 above, the Commission was well aware of its statutory duties and considered the honour of the Crown and the effects its Decision would have on the constitutional rights of the Métis.

[201] I see no error of law.

D. Did the Commission err by failing to hold a public hearing before making the Decision, as required by subsection 52(1) of the CER Act?

[202] The last legal question raises a question of procedural fairness before the Commission, which is a question of law.

[203] In its Notice of Application, the MMF requested that the Commission consider revoking or suspending the Certificate. In this appeal, the MMF argues that the Commission was obliged to hold a public hearing because of the relief it requested.

[204] I do not agree.

[205] Here, there is no dispute that Condition 3 is part of the Certificate, which is an "order" the Commission has the jurisdiction to enforce. As a court of record, the Commission has all the powers, rights, and privileges vested in a superior court of record with respect to any matters within its jurisdiction, including the enforcement of its orders.

[206] It is true that certain proceedings before the Commission must be public, including hearings if related to the issuance, suspension, or revocation of a certificate (CER Act, s. 52(1)). A public hearing may also be held for any other matters if appropriate (CER Act, s. 52(3)).

[207] In this case, the primary issue in the MMF's Notice of Application was whether the MAP was a commitment under Condition 3 and whether Manitoba Hydro had failed to implement it; in other words, whether Manitoba Hydro was non-compliant with respect to Condition 3. The Commission found no such commitment and, as a result, found that Manitoba Hydro was compliant. The question of revocation or suspension therefore did not arise.

[208] A public hearing is not required under subsection 52(1) by the simple fact that a party requested the revocation or suspension of a certificate. Revocation or suspension must actually become a live issue before the Commission.

[209] Furthermore, the Commission is empowered to conduct its proceedings in a flexible manner and adapt them to the circumstances at hand, subject to the common law requirements of procedural fairness (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685, 69 D.L.R. (4th) 489). Therefore, the factors used to determine what procedural rights are contained in the duty of fairness, set out *in Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paragraphs 22–28, apply to the Commission.

[210] Applications and proceedings before the Commission "must be dealt with as expeditiously as the circumstances and procedural fairness and natural justice permit" (CER Act, s. 31(3)). To this end, the Commission may make rules governing its procedures and practices (CER Act, s. 35(*d*); see also the *National Energy Board Rules of Practice and Procedure, 1995*, S.O.R. 95/208, which remain in effect). That is what the Commission did here. It was not required to hold a public hearing in these circumstances.

[211] In the present appeal, the MMF did not argue that it had not been heard or that it did not have the opportunity to provide fulsome submissions to the Commission regarding its concerns. There is no question here that the MMF was allowed to provide fulsome written submissions to the Commission over the course of several months.

[212] I am satisfied there was no breach of procedural fairness and find no error of law.

VII. Conclusion

[213] In conclusion, there are no errors of law that would allow this to Court to intervene. I would therefore dismiss the appeal with costs. I would make no award of costs in favour of or against the Canadian Energy Regulator or the Attorney General of Manitoba.

[214] I would like to thank all counsel for their oral and written submissions and the assistance they have provided to the Court.

"Marianne Rivoalen"
J.A.

“I agree.
Donald J. Rennie J.A.”

“I agree.
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-17-21
STYLE OF CAUSE:	MANITOBA MÉTIS FEDERATION INC. v. THE CANADA ENERGY REGULATOR AND THE MANITOBA HYDRO-ELECTRIC BOARD AND THE ATTORNEY GENERAL OF MANITOBA
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
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CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
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