



Review of the Modernizing Canada's Radioactive Waste Policy

**Review of Natural Resources Canada: Draft Policy
for Radioactive Waste Management and
Decommissioning**

Manitoba Métis Federation

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Executive Summary

In early 2022, Natural Resources Canada (NRCan) released a Draft *Policy for Radioactive Waste Management and Decommissioning* (the Draft Policy). The Manitoba Métis Federation (MMF), with support from Shared Value Solutions (SVS), has undertaken a review of the Draft Policy with a focus on how it interacts with the rights, claims, and interests of the MMF.

Through our review we have identified issues with the Draft Policy and the broader Modernizing Canada's Radioactive Waste Policy process and, where applicable, have provided recommendations to address these issues.

The MMF continues to be disappointed with the overall approach NRCan has taken in engaging with the MMF, as well as the lack of commitment to a distinctions-based approach to consultation and engagement provided as direction in the Draft Policy. The impact that Canada's nuclear industry has had on the rights of Métis Citizens is unique from Indigenous and stakeholder groups and, therefore, must be recognized and addressed appropriately through distinctions-based consultation.

In the review of the Draft Policy, we find that far too much responsibility for oversight and decision-making is delegated to radioactive waste owners and producers. We view this approach as problematic, not only because these waste owners and producers are incentivized by profit and efficiency, but they also do not hold the honour of the Crown and its associated obligations to the Red River Métis. Canada's nuclear industry presents significant, ever-present risks to the environment and those that interact with it, despite being an important contributor to Canada's power, medicine, and scientific needs. By shifting responsibility from the Crown to waste owners and producers, there is an increased risk that the voice of the Red River Métis may be muted as engagement is defined by regulations rather than by the *Constitution Act*. Further, where waste owners and producers are directed to engage with the Manitoba Métis Federation as the government of the Red River Métis, engagement may not reflect the evolving and nuanced view of meaningful dialogue and participation that accompanies Crown consultation and has been clarified through several court decisions.

Additionally, we raise concern that the Draft Policy does not reflect the established best practices for oversight, information sharing, and consent in the management of radioactive waste and decommissioning, as developed by the Nuclear Waste Management Organization. Canada must reflect strong commitments to enforcing best practices in policy, which, regrettably, is absent in the Draft Policy.

We recognize that the modernization of Canada's *Policy for Radioactive Waste Management and Decommissioning* represents an important opportunity to bring meaningful evolution to radioactive waste oversight. As a result, it is important that the Final Policy does not fall short of identified policy objectives. We request that the issues and recommendations we have raised throughout this document be the focus of subsequent meetings with NRCan and be reflected in the Final Policy.



1.0 Introduction

In 2021, Natural Resources Canada (NRCAN) produced four discussion papers titled: *Waste Minimization, Waste Storage Facilities, Decommissioning, and Waste Disposal* respectively. The papers outlined the policies and methods relating to each topic of managing Canada’s radioactive waste. These discussion papers served as a method to bring information focused on radioactive waste management strategies and policies to the public, stakeholders, and Indigenous Peoples.

The Manitoba Métis Federation (MMF), with support from Shared Value Solutions (SVS), undertook a review of the four discussion papers with a focus on how they interact with the rights, claims, and interests of the MMF. The results of this review were summarized in the *Review of Natural Resources Canada: Radioactive Waste Policy Discussion Papers on Waste Minimization, Waste Storage Facilities, Decommissioning, and Waste Disposal* (July 2021). Similarly, the MMF reviewed and, with the support of SVS, summarized the *What We Heard* report in a submission titled *Review of Natural Resources Canada: What We Heard: Modernizing Canada’s Waste Policy for Radioactive Waste Management and Decommissioning Report* (March 2022). For both submissions, the MMF has provided specific recommendations for inclusion and improvement to the Final Policy

In early 2022, NRCAN released a Draft *Policy for Radioactive Waste Management and Decommissioning* (the Draft Policy). The MMF, with support from SVS, has undertaken a review of the Draft Policy with a focus on how it interacts with the rights, claims, and interests of the MMF. The objectives of our review of the Draft Policy were to:

- Identify where the Red River Métis’ rights, claims, and interests overlap with and may be impacted by the information in the Draft Policy.
- Describe gaps observed between the *What We Heard* report and the Draft Policy, recommending opportunities to reconcile these gaps.
- Identify environmental, technical, or regulatory issues with the radioactive waste modernization process, and provide recommendations on where and how the Red River Métis rights, claims, and interests may need to be meaningfully considered through revisions and additions to the radioactive waste modernization process; and
- Identify issues and challenges with the Draft Policy and/or the radioactive waste modernization process that will require ongoing engagement and consultation with the MMF on behalf of the Red River Métis.

As part of the review, SVS considered any potential intersections with the activities and information provided in the Draft Policy with potential risks and impacts to the Red River Métis.

Using the results of the review, the MMF is providing specific recommendations to address the identified issues and concerns regarding the Red River Métis’ rights, claims, and interests concerning the Draft Policy and the Radioactive Waste Modernization process.

1.1 Modernization Process

The regulatory process that governs the management of radioactive waste, known as *Canada’s Radioactive Waste Policy Framework*, was established in 1996 and consists of the governing principles for



the disposal of radioactive waste. This framework outlines the responsibility of waste producers, waste owners, and the federal government. Further, this framework mandates that the federal government ensures that radioactive waste be disposed of in a safe, environmentally sound, comprehensive, cost-effective, and integrated manner. This framework is based on a “polluter pays” principle where producers and owners are responsible for funding and carrying out disposal activities for the waste for which they are responsible. Canada has commenced a policy review to modernize its radioactive waste policy. Through this modernization, Canada has established objectives to:

- Elaborate on the existing radioactive waste policy and provide clearer direction and greater leadership on radioactive waste management;
- Stimulate and facilitate progress on the safe, effective, and environmentally acceptable management of radioactive waste in Canada; and
- Continue to meet international practices for the management of Canada’s radioactive waste, align with best available science, and reflect the values and principles of Canadians.

Canada presented the modernization of Canada’s *Policy for Radioactive Waste Management and Decommissioning* through four discussion papers outlining the current regulatory state of radioactive waste policy in Canada, as well as opportunities. Interested parties were then able to provide comments on the discussion papers through a combination of written submissions and joint-engagement sessions. Canada summarized feedback on the discussion papers and from engagement sessions in a *What We Heard* report, which was circulated concurrently with the Draft Policy for final review. The draft policy presents principles for the management and handling of radioactive waste in Canada focusing on three key areas:

- Health, safety, security, and protection of the environment;
- Openness, transparency, and inclusive engagement to encourage the timely development of the necessary infrastructure for effectively dealing with all of Canada’s radioactive waste and decommissioning activities; and
- Global excellence in the field of radioactive waste management and decommissioning.

Canada proposes to continue to review its *Policy for Radioactive Waste Management and Decommissioning* as appropriate, ensuring it aligns with international guidance and best practice.

2.0 Red River Métis (Manitoba Métis)

2.1 History and Identity

The Métis Nation—as a distinct Indigenous People—evolved out of relations between European men and First Nations women who were brought together as a result of the early fur trade in the Northwest. In the eighteenth century, both the Hudson’s Bay Company and the Northwest Company created a series of trading posts that stretched across the upper Great Lakes, through the western plains, and into the northern boreal forest. These posts and fur trade activities brought European and Indigenous peoples into contact. Inevitably, unions between European men—explorers, fur traders, and pioneers—and Indigenous women were consummated. The children of these families developed their own collective



identity and political community so that “[w]thin a few generations, the descendants of these unions developed a culture distinct from their European and Indian forebears” and the Métis Nation was born— a new people, indigenous to the western territories (*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 at para. 5; 2008 MBPC R. v. *Goodon*, 59 at para. 25; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para. 2).

The Métis led a mixed way of life. “In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture” (*Alberta v. Cunningham*, at para. 5). The Métis were employed by both of the fur trades’ major players, the Hudson’s Bay and Northwest companies. By the early 19th century, they had become a major component of both firms’ workforces. At the same time, however, the Métis became extensively involved in the buffalo hunt. As a people, their economy was diverse; combining as it did, living off the land in the Aboriginal fashion with wage labour (*MMF v. Canada*, at para. 29).

It was in the Red River, in reaction to a new wave of European immigration, that the Métis Nation first came into its own. Since the early 1800s, the Manitoba Métis — as a part of the larger Métis Nation—has asserted itself as a distinct Indigenous collective with rights and interests in its Homeland. The Manitoba Métis share a language (Michif), national symbols (infinity flags), culture (i.e., music, dance, dress, crafts), as well as a special relationship with its territory that is centered in Manitoba and extends beyond the present-day provincial boundaries.

The Manitoba Métis has been confirmed by the courts as being a distinctive Indigenous community, with rights that are recognized and affirmed in section 35 of the *Constitution Act, 1982*. In *R. v. Goodon*, the Manitoba court held that:

The Métis community of Western Canada has its own distinctive identity [...] the Métis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States. This area was one community [...] The Métis community today in Manitoba is a well-organized and vibrant community (paras. 46-47; 52).

This proud independent Métis population constituted a historic rights-bearing community in present day Manitoba and beyond, which encompassed “all of the area within the present boundaries of southern Manitoba from the present-day City of Winnipeg and extending south to the United States” (para. 48).

The heart of the historic rights-bearing Métis community in southern Manitoba was the Red River Settlement; however, the Manitoba Métis also developed other settlements and relied on various locations along strategic fur trade routes. During the early part of the 19th century, these included various posts of varying size and scale spanning the Northwest Company and the Hudson Bay Company collection and distribution networks.

More specifically, in relation to the emergence of the Métis—as a distinct Indigenous Nation in Manitoba—the Supreme Court of Canada wrote the following in the *MMF v. Canada* case:



[21] The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba—the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson’s Bay Company, a company of fur traders’ operation of out London, control over a vast territory called Rupert’s Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose—people descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

[22] A large—by the standards of the time—settlement developed at the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson’s Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of Hudson’s Bay Company.

[23] In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population [approximately 10,000 Métis], and held leadership positions in business, church and government.”

The fur trade was vital to the ethnogenesis of the Métis Nation and was active in Manitoba from at least the late 1770s, and numerous posts and outposts were established along cart trails and waterways throughout the province. These trails and waterways were crucial transportation networks for the fur trade (Jones 2014; 2) and were the foundation of the Manitoba Métis’ extensive use of the lands and waters throughout the province. In the early 20th century, the Manitoba Métis continued to significantly participate in the commercial fisheries and in trapping activities, which is well documented in Provincial government records.



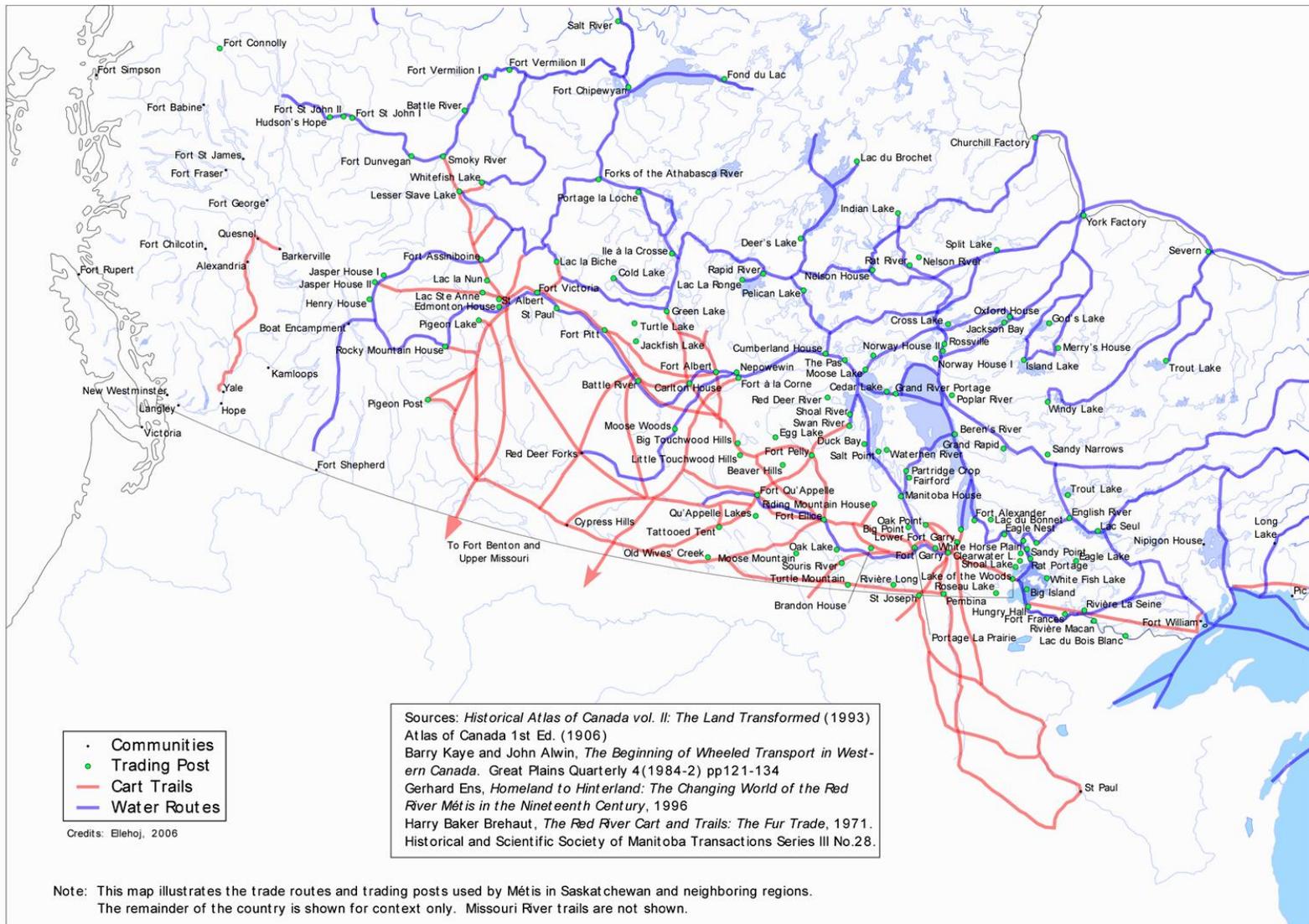


Figure 2. The Fur Trade Network: Routes and Posts Prior to 1870



2.2 Manitoba Métis Federation

On July 6, 2021, Canada and the MMF signed the Manitoba Métis Self-Government Recognition and Implementation Agreement which is the first agreement to give immediate recognition to an existing Métis government, namely, the Manitoba Métis Federation, which is the existing democratically elected government of the Manitoba Métis – also known as the Red River Métis. This Agreement will be followed by a Treaty between the MMF and Canada and ensures that the MMF will continue to provide responsible and accountable self-government.

The MMF is the democratically elected government of the Manitoba Métis. The MMF is duly authorized by the Citizens of the Manitoba Métis for the purposes of dealing with their collective Métis rights, claims, and interests, including conducting consultations and negotiating accommodations (as per **Error! Reference source not found.**). While the MMF was initially formed in 1967, its origins lie in the 18th century with the birth of the Manitoba Métis and in the legal and political structures that developed with it. Since the birth of the Métis people in the Red River Valley, the Manitoba Métis—as a part of the larger Métis Nation—has asserted and exercised its inherent right of self-government. For the last 50 years, the MMF has represented the Manitoba Métis at the provincial and national levels.

During this same period, the MMF has built a sophisticated, democratic, and effective Métis governance structure that represents the Manitoba Métis at the local, regional, and provincial levels throughout Manitoba. The MMF was created to be the self-government representative of the Manitoba Métis—as reflected in the Preamble of the MMF’s Constitution (also known as the MMF Bylaws):

“WHEREAS, the Manitoba Métis Federation Inc. has been created to be the democratic and self-governing representative body of the Manitoba Métis.”

In addition, the purpose “to provide responsible and accountable governance on behalf of the Manitoba Métis using the constitutional authorities delegated by its citizens” is embedded within the MMF’s objectives, as set out in the MMF Constitution as follows:

“To promote and instill pride in the history and culture of the Métis people.

To educate citizens with respect to their legal, political, social and other rights.

To promote the participation and representation of the Métis people in key political and economic bodies and organizations.

To promote the political, legal, social and economic interests and rights of its citizens.

To provide responsible and accountable governance on behalf of the Manitoba Métis community using the constitutional authorities delegated by its citizens.”



exercise their section 35 rights throughout and beyond the province of Manitoba.

2.3 MMF Resolution No. 8

Among its many responsibilities, the MMF is authorized to protect the Aboriginal rights, claims, and interests of the Manitoba Métis, including those related to harvesting, traditional culture, and economic development, among others.

In 2007, the MMF Annual General Assembly unanimously adopted Resolution No. 8 that sets out the framework for engagement, consultation, and accommodation to be followed by Federal and Provincial governments, industry, and others when making decisions and developing plans and projects that may impact the Manitoba Métis. Under MMF Resolution No. 8, direction has been provided by the Manitoba Métis for the MMF Home Office to take the lead and be the main contact on all consultation undertaken with the Manitoba Métis. Resolution No. 8 reads, in part that:

...this assembly continue[s] to give the direction to the Provincial Home Office to take the lead and be the main contact on all consultations affecting the Métis community and to work closely with the Regions and Locals to ensure governments and industry abide by environmental and constitutional obligations to the Métis...

The MMF Home Office works closely with the Regions and Locals to ensure the rights, interests, and perspective of the Manitoba Métis are effectively represented in matters related to consultation and accommodation.

Resolution No. 8 has five phases:

- Phase 1: Notice and Response
- Phase 2: Funding and Capacity
- Phase 3: Engagement or Consultation
- Phase 4: Partnership and Accommodation
- Phase 5: Implementation

Each phase is an integral part of the Resolution No. 8 framework and proceeds logically through the stages of consultation.

2.4 Manitoba Métis Rights, Claims, and Interests

The Manitoba Métis possess Aboriginal rights, including pre-existing Aboriginal collective rights and interests in lands recognized and affirmed by section 35 of the *Constitution Act, 1982*, throughout Manitoba. The Manitoba court recognized these pre-existing, collectively held Métis rights in *R. v. Goodon* (at paras. 58; 72):

I conclude that there remains a contemporary community in southwest Manitoba that continues many of the traditional practices and customs of the Métis people.



I have determined that the rights-bearing community is an area of southwestern Manitoba that includes the City of Winnipeg south to the U.S. border and west to the Saskatchewan border.

As affirmed by the Supreme Court of Canada, such rights are “recognize[d] as part of the special aboriginal relationship to the land” (*R. v. Powley*, 2003 SCC 43, at para. 50) and are grounded on a “communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land” (*MMF v. Canada*, at para. 5). Importantly, courts have also recognized that Métis harvesting rights may not be limited to Unoccupied Crown Lands (*R. v. Kelley*, 2007 ABQB 41, para. 65).

The Crown, as represented by the Manitoba government, has recognized some aspects of the Manitoba Métis’ harvesting rights through a negotiated agreement: The *MMF-Manitoba Points of Agreement on Métis Harvesting* (2012) (the *MMF-Manitoba Harvesting Agreement*). This Agreement was signed at the MMF’s 44th Annual General Assembly and “recognizes that collectively-held Métis Harvesting Rights, within the meaning of section 35 of the *Constitution Act, 1982*, exist within the [Recognized Métis Harvesting Zone], and that these rights may be exercised by Manitoba Métis Rights Holders consistent with Métis customs, practices and traditions...” (*MMF-Manitoba Harvesting Agreement*, section 1). In particular, the *MMF-Manitoba Harvesting Agreement* recognizes that Métis rights include “hunting, trapping, fishing and gathering for food and domestic use, including for social and ceremonial purposes and for greater certainty, Métis harvesting includes the harvest of timber for domestic purposes” throughout an area spanning approximately 169,584 km² (the “Métis Recognized Harvesting Area”) (*MMF-Manitoba Harvesting Agreement*, section 2; **Error! Reference source not found.**4). The MMF further asserts rights and interests exist beyond this area, which require consultation and accommodation as well.

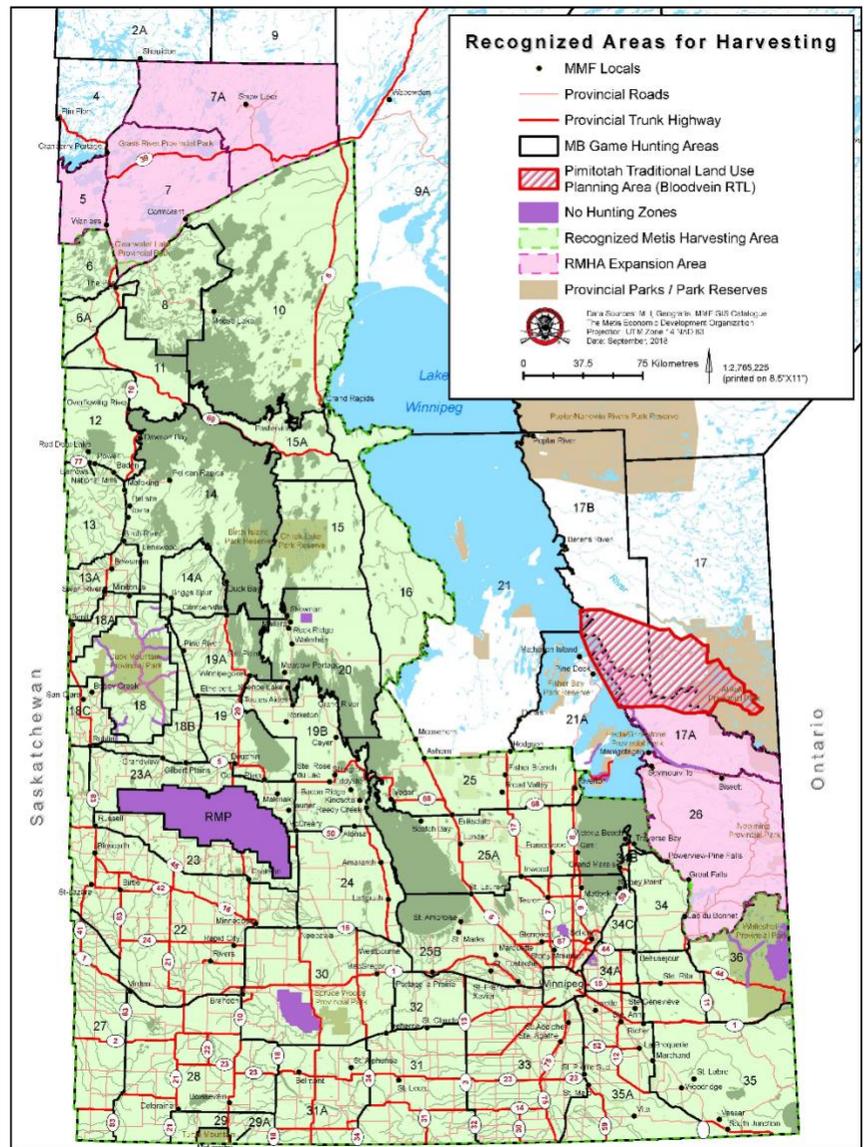


Figure 4. MMF-Manitoba Harvesting Agreement Recognized Manitoba Métis Harvesting Zones



Beyond those rights already established through litigation and recognized by agreements, the Manitoba Métis claims commercial and trade-related rights. Courts have noted that Métis claims to commercial rights remain outstanding (*R. v. Kelley* at para. 65). These claims are strong and well-founded in the historical record and the customs, practices, and traditions of the Manitoba Métis, and it is incumbent on the Crown and Proponents to take them seriously.

As noted above, the Manitoba Métis has its roots in the western fur trade (*R. v. Blais*, 2003 SCC 44 at para. 9 [*Blais*]; *R. v. Goodon* at para. 25). The Manitoba Métis are descendants of early unions between Aboriginal women and European traders (*MMF v. Canada* at para. 21). As a distinct Métis culture developed, the Métis took up trade as a key aspect of their way of life (*R. v. Powley* at para. 10). Many Métis became independent traders, acting as middlemen between First Nations and Europeans (*R. v. Goodon* at para. 30). Others ensured their subsistence and prosperity by trading resources they themselves hunted and gathered (*R. v. Goodon* at para. 31, 33, & 71). By the mid-19th century, the Manitoba Métis had developed the collective feeling that “the soil, the trade and the Government of the country [were] their birth rights.” (*R. v. Goodon* at para. 69(f)). Commerce and trade are, and always have been, integral to the distinctive culture of the Manitoba Métis. Today, the Manitoba Métis have an Aboriginal, constitutionally protected right to continue this trading tradition in modern ways to ensure that their distinct community will not only survive, but also flourish.

Unlike First Nations in Manitoba, whose commercial rights were converted and modified by treaties and the *Natural Resources Transfer Agreement (NRTA)* (*R. v. Horseman*, [1990] 1 SCR 901), the Métis’ pre-existing customs, practices, and traditions—including as they relate to commerce and trade—were not affected by the *NRTA* (*R. v. Blais*) and continue to exist and be protected as Aboriginal rights. First Nations’ treaty rights in Manitoba are, for example, inherently limited by the Crown’s power to take up lands (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 56). Métis rights, in contrast, are not tempered by the “taking up” clauses found in historic treaties with First Nations. Métis rights must be respected as they are, distinct from First Nations’ rights and unmodified by legislation or agreements.

In addition to the abovementioned rights to land use that preserve the Métis culture and way of life, the Manitoba Métis have other outstanding land related claims and interests with respect to lands. These include claims related to the federal Crown’s constitutional promise to all Aboriginal peoples, including the Manitoba Métis, as set out in the Order of Her Majesty in Council Admitting Rupert’s Land and the North-Western Territory into the Union (the “1870 Order”) which provides that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

The manner in which the federal Crown implemented this constitutional promise owing to the Manitoba Métis—through the *Dominion Lands Act* and the resulting Métis scrip system—effectively defeated the purpose of the commitment. Accordingly, the MMF claims these federal Crown actions constituted a breach of the honour of the Crown, which demand negotiations and just settlement outside of the ‘old postage stamp province’ within Manitoba as well.

The MMF also claims that the *Dominion Lands Act* and the resulting Métis scrip system were incapable of extinguishing collectively held Métis title in specific locations where the Manitoba Métis are able to meet the legal test for Aboriginal title as set out by the Supreme Court of Canada. These areas in the province,



which the Manitoba Métis exclusively occupied—as an Indigenous people—prior to the assertion of sovereignty, establish a pre-existing Métis ownership interest in these lands.

The Manitoba Métis also have an outstanding legal claim within what was the ‘old postage stamp province’ of Manitoba relating to the 1.4 million acres of land promised to the children of the Métis living in the Red River Valley, as enshrined in section 31 of the *Manitoba Act, 1870* (*MMF v. Canada* at para 154).

This land promised was a nation-building, constitutional compact that was meant to secure a “lasting place in the new province [of Manitoba]” for future generations of the Métis people (*MMF v. Canada* at para 5). This “lasting place” was to have been achieved by providing the Manitoba Métis a “head start” in securing lands in the heart of the new province (*MMF v. Canada* at paras 5-6).

Instead, the federal Crown was not diligent in its implementation of section 31, which effectively defeated the purpose of the constitutional compact.

In March 2013, the Supreme Court of Canada found that the federal Crown failed to diligently and purposefully implement the Métis land grant provision set out in section 31 of the *Manitoba Act, 1870* (*MMF v. Canada* at para 154). This constituted a breach of the honour of the Crown. In arriving at this legal conclusion, the Court wrote:

“What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in section 35 of the *Constitution Act, 1982* and underlying section 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that section 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import (*MMF v. Canada* at para 140).”

This constitutional breach is an outstanding Métis claim flowing from a judicially recognized common law obligation which burdens the federal Crown (*MMF v. Canada* at paras 156; 212). It can only be resolved through good faith negotiations and a just settlement with the MMF (see for example: *R v Sparrow*, [1990] 1 SCR 1075 at paras 51–53; *R v Van der Peet*, [1996] 2 SCR 507 at paras 229, 253; *Haida* at para 20; *Carrier Sekani* at para 32). Lands both within the ‘old postage stamp province’ as well as in other parts of Manitoba—since little Crown lands remain within the ‘old postage stamp province’—may need to be considered as part of any future negotiations and settlement in fulfillment of the promise of 1.4 million acres, together with appropriate compensation.

On November 15, 2016, the MMF and Canada concluded a *Framework Agreement for Advancing Reconciliation* (the “Framework Agreement”). The Framework Agreement established a negotiation process aimed, among other things, at finding a shared solution regarding the Supreme Court of Canada’s decision in *MMF v. Canada* and advancing the process of reconciliation between the Crown and the Manitoba Métis. It provides for negotiations on various topics including, but not limited to, the “quantum, selection and management of potential settlement lands.” Negotiations under the Framework Agreement are active and ongoing.



3.0 Review Findings

3.1 Stated Vision

The vision for radioactive waste management and decommissioning in Canada outlines the framework for the Draft Policy. While these vision statements are not explicitly stated as the policy goals, they do provide the foundation on which the Draft Policy is built. Generally, the MMF agrees with the stated vision for the future of radioactive waste management and decommissioning in Canada, as it outlines achievable targets for long-term management of waste, commits to minimizing waste production, leverages Canada's innovation to improve our state of knowledge, and recognizes the need for radioactive waste management decommissioning to be respectful of Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples Act*. However, we believe that the guiding vision and policy goals should be more ambitious and include removing the burden of radioactive waste management on future generations by directing all parties involved in the nuclear industry to strive for reducing the overall impacts of radioactive waste and fully engaging the MMF and other affected communities in ensuring ongoing respect of the rights, needs, and concerns of those affected.

In part, the stated vision of the Draft Policy outlines that in working with “radioactive waste producers and owners, governments, Indigenous peoples, scientific experts, and other interested Canadians and communities,” Canada aims to have key elements of radioactive waste disposal infrastructure in place by 2050. The MMF encourages Canada to make ambitious directive statements such as this, identifying specific timelines for achieving goals; however, this policy lacks substance in outlining how a plan to achieve this goal could be accomplished. It is necessary for Canada to solidify goals and timelines in the Draft Policy itself, directing Canada and waste producers and owners to develop the necessary infrastructure, rather than maintaining this goal as an ambiguous future target.

The vision for Canada's radioactive waste management and decommissioning regime states that Canada is committed “to implementing the United Nations Declaration of the Rights of Indigenous Peoples Act and the related Action Plan” within the *Policy for Radioactive Waste Management and Decommissioning* and associated practices. This is later reflected in Section 2.1 of the Draft Policy, where it acknowledges the duties and obligations Canada has to Métis Citizens and states that it will respect future measures as a result of Canada's new *United Nations Declaration on the Rights of Indigenous Peoples Act*. Policy statements such as this are important; however, until the Act and its Action Plan are developed and implemented, it is unclear whether the Draft Policy can effectively follow through on this statement. Canada must be committed to evolving the policy, as well as practices that are guided by this policy, to fulfill this pledge.



3.2 Section 1 - Health, Safety, and Environmental Protections

The protection of health, safety, and the environment should always be the priority of both Canada and waste producers and owners. Section 1 of the Draft Policy speaks to this priority outlining the responsibilities of Canada and waste producers to ensure that radioactive waste is managed and controlled appropriately over the long term.

One of the most evident gaps in the Draft Policy is the lack of direction by the Crown to radioactive waste producers and owners to *minimize* radioactive waste. A significant portion of the discussion papers and the *What We Heard* report was dedicated to outlining components of a strategy for waste minimization as well as comments received on minimization. However, although stated as the first Draft Policy goal, the direction for radioactive waste producers and owners to minimize radioactive waste is limited throughout the Draft Policy. Section 1.8 outlines that radioactive waste producers and owners are to “prevent and minimize, as far as practicable, the production of radioactive waste in their operations, and in the decommissioning and, as applicable, closure of their facilities and sites.” In our view, there is limited substance to the Draft Policy on how producers and owners are to achieve this directive, especially in the face of what could be a growing nuclear industry in Canada with the potential introduction of small modular reactor (SMR) technology. Canada must provide additional direction to radioactive waste producers and owners aimed at effective total waste minimization targets, through responsible management of all levels of radioactive waste involved in the nuclear industry, which avoids nuclear waste proliferation.

3.3 Section 2 - Openness, Transparency, and Inclusive Engagement

Much of the feedback captured within the *What We Heard* report describes concern regarding the roles of various parties involved in the nuclear industry, as well as the lack of transparency regarding decision-making.

While the Draft Policy does outline the roles and responsibilities of both the radioactive waste producers and owners, in describing these roles a great deal of responsibility is placed on radioactive waste producers and owners for engagement with the MMF. The MMF does encourage ongoing and meaningful engagement by radioactive waste producers and owners and is appreciative of specific direction being provided to ensure this engagement is fulfilled; however, it is the Crown that holds the ultimate duty to consult with the MMF. Shifting the burden of dialogue regarding decision-making, especially where it involves siting, operation, monitoring, and decommissioning plans, from the Crown to radioactive waste producers and owners is inappropriate. The Draft Policy must accurately reflect the roles and responsibilities of each party, as well as recognize the duties and obligations the Crown holds regarding decisions that impact the rights and interests of the MMF.

As described in the stated vision and in Section 2.1 of the Draft Policy, the Crown



acknowledges, respects and honours that First Nations, Inuit and Métis peoples have unique status and rights in Canada, as recognized and affirmed in the Constitution Act, 1982, and that the honour of the Crown guides the conduct of the Crown in all of its dealings, including consultation and engagement processes, and that the conduct of the Crown will be guided by any framework, measure or action plan developed by Canada for Indigenous reconciliation, consultation or engagement purposes and that is relevant to radioactive waste management and decommissioning, including any framework, measure or action plan developed as a result of the United Nations Declaration on the Rights of Indigenous Peoples Act.

However, contrary to the intentions of the United Nations Declaration on the Rights of Indigenous Peoples, the remainder of this policy continues to place complete decision-making in the hands of waste producers and owners and the Crown. It is difficult to fully understand how the relationship between waste producers and owners, the Crown, and the Red River Métis will differ once the *United Nations Declaration on the Rights of Indigenous Peoples Act* is fully implemented. As the *Act* has received royal assent, we call on NRCAN to be leaders in proactively aligning of this policy related to the Red River Métis specifically, and Indigenous Nations in general, involvement with the *United Nations Declaration on the Rights of Indigenous Peoples Act*. Additionally, the Draft Policy appears to ignore many of the concerns outlined in the *What We Heard* report, including those raised directly by the MMF, which highlighted the need for direct participation and involvement by affected communities through all stages of the radioactive waste management process. As a result, the absence of direction to include affected rights holders such as the Red River Métis from the decision-making process does not advance Crown-Indigenous relations or honour the intentions of the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

3.3.1 Distinctions Based Recognition, Consultation, and Engagement

Section 2.4 – 2.6 of the Draft Policy curiously alternates between directing waste producers to “plan radioactive waste management and decommissioning projects in an open and transparent manner, with early input from **Indigenous peoples...**” (s. 2.4), “work in partnership with **First Nations, Inuit and Métis** to gain a greater understanding of their Indigenous Knowledge, approaches and advice in implementing the siting, construction, operation and monitoring of radioactive waste management and decommissioning projects” (s. 2.5), and “engage with **Indigenous peoples...**to develop and maintain an integrated strategy for radioactive waste management and decommissioning activities that defines, reports on and sets out approaches to the long-term management, including disposal, of all of Canada’s current and future radioactive wastes” (s. 2.6). The Draft Policy, similar to the *What We Heard* report is inconsistent in providing direction for distinctions-based Indigenous engagement and consultation. The Draft Policy must reflect and recognize the unique values, interests, and perspectives the Red River Métis offer that are distinct from those of First Nations or Inuit. Further, there is a lack of acknowledgement that Métis, First Nations, and Inuit are rights holders, and that the Nations to which they belong must be regarded as such. As a result, while waste producers and owners must be directed to engage with Nations, the Crown must not provide direction that may imply a delegation of responsibility for consultation or confuse the need for meaningful bilateral government-to-government or Nation-to-Nation dialogue between the Crown and affected Nations.



3.3.2 Understanding the Relationship Between the Crown, Radioactive Waste Producers and Owners, and the Red River Métis

The Draft Policy reflects the role of the Government of Canada as a representative of the Crown holding duties to the Red River Métis and reflects the ongoing theme of nuclear policy in Canada, which delegates much of the responsibility to proponents rather than being held by the Crown. The ultimate concern is that while waste producers and owners will be tasked with significant Indigenous engagement responsibilities, they are not accountable for consultation.

The rights of Red River Métis, which the MMF represents, are significantly affected by the presence of the Whiteshell Laboratories reactor within the Métis Homeland, which impacts recognized Métis harvest areas. Section 2.5, while in spirit, ensures radioactive waste producers and owners will work with the MMF, the Draft Policy keeps the terms of this relationship undefined. The result of this ambiguity is that the Draft Policy does not ensure that the MMF will have a voice in engaging with radioactive waste producers and owners.

Subsection 2.6 of the Draft Policy is of significant concern as it places much of the responsibility for developing a strategy for radioactive waste management in the hands of the proponent, which may have interests that conflict with those of the MMF. Canada, being responsible for oversight, must have a more active role in this process to ensure that plans are effective, while also ensuring that plans for radioactive waste management respect the rights and interests of the MMF.

Although Métis rights holders will be collaborated with, they are not provided with the power of consent, or other assurance that radioactive waste management will not be conducted on Traditional Territories or harvest areas against the will of affected Métis, First Nations, and Inuit communities. The concept of free and prior informed consent is paramount to the *United Nations Declaration on Indigenous Peoples Act* and represent a necessary inclusion for the policy to achieve its stated goals. The Draft Policy must explicitly respect and enforce specific distinctions-based consultation or engagement approaches employed by affected Indigenous communities, such as the MMF Resolution 8, which is unique to the values, rights, and needs of the Red River Métis. Without this provision, it is possible that waste producers and owners will either apply blanket “Indigenous engagement” approaches or otherwise be responsible for identifying the terms of engagement.

3.3.3 Directing Meaningful Participation and Capacity

The *What We Heard* report outlined in significant detail the concerns of affected communities with regard to ensuring adequate capacity is provided so communities can effectively participate. Section 2.5 outlines the responsibilities of radioactive waste producers and owners with Indigenous communities; however, no direction is provided regarding capacity supports to ensure that Indigenous communities can be adequately represented. It is unclear how Canada proposes to work with Métis, provincial governments, technical experts, and other stakeholders to develop an integrated strategy for radioactive waste management activities in a meaningful and coordinated manner. While the MMF is in favour of participating in technical working groups or other similarly structured efforts, we expect that proponents and Canada will continue to engage and consult with the MMF bilaterally.



3.3.4 Clear Communication and Knowledge Sharing

Section 2.7 directs radioactive waste producers and owners to collaborate to plan and develop meaningful integrated waste management approaches for the future. Collaboration should be encouraged as innovative radioactive waste management and best practices are a shared interest by all. However, throughout section 2.7, radioactive waste producers and owners should be encouraged not to collaborate in isolation, but rather commit to sharing information and knowledge with affected communities, as well as recognizing the powerful insights Traditional Knowledge can provide in understanding how plans or activities can and are affecting the surrounding environment.

3.4 Section 3 - Global Excellence in Radioactive Waste Management and Decommissioning

As Canada looks to develop SMR technology, a significant knowledge gap exists in ensuring that Canada will be able to fulfill its commitments to global excellence in radioactive waste management aligning with the guidance of the International Atomic Energy Agency. The development of SMRs touts the potential for spent nuclear fuel and waste material to be reprocessed and utilized by SMRs; however, to date it remains unclear the full risk that new by-products may pose to Canada's overall goals of radioactive waste minimization. Further, the implementation of SMRs will de-centralize Canada's nuclear industry, shifting the generation of radioactive waste from a system of a handful of large nuclear facilities, which generate high amounts of waste, to one that includes a combination of existing facilities complemented by many smaller SMR facilities generating lower amounts of waste. We draw concern to this approach as it has significant potential to increase the overall amount of radioactive waste that is produced, as well as geographically disperses waste producers, impacting a much greater proportion of the country. In the context of ensuring that Canada is a leader in achieving global excellence in the handling of radioactive waste and decommissioning, the Draft Policy must safeguard information sharing on a global scale, as well as by empowering meaningful participation with communities on a local scale. It is not acceptable for Canada's policy for radioactive waste management and decommissioning to view Canada's global commitments through its various nuclear treaties and agreements, without also providing leadership on the application of the *United Nations Declaration on the Rights of Indigenous Peoples*, in consideration of radioactive waste management and decommissioning.

3.5 Policy Gaps

In the development of Canada's policy for radioactive waste management and decommissioning, Canada continues to fall short in addressing and codifying key principles of the Nuclear Waste Management Organization's (NWMO) site selection and adaptive phase management process. This remains most evidenced by continued allowances for Canadian Nuclear Laboratories to pursue in-situ decommissioning at the Whiteshell reactor site. Since there currently is not an established long-term site and solution for storing radioactive waste in Canada, it has led to current licensees developing interim measures and solutions, some of which do not align with the Draft Policy including ensuring radioactive waste is minimized, having Canada's long-term waste disposal infrastructure in place by 2050, committing to



meaningful dialogue with Indigenous communities, and implementing Canada's *United Nations Declaration on the Rights of Indigenous Peoples Act* within the Policy.

Ultimately, there remains significant policy dissonance between best practices established by the NWMO and Canada's policy.

3.5.1 Provisions Ensuring Collaborative Site Selection and a Right to Withdraw

It has long been Canada's position that in-situ decommissioning should be only utilized as a last-resort option, such as in the instance of a nuclear incident that makes safe decommissioning of a site impossible. The proposed application of in-situ decommissioning at the Whiteshell reactor site is based on convenience to the operator. This site is located within the Homeland of the Red River Métis, in an area where Red River Métis Citizens actively exercise their rights through various harvesting and land-based activities.

In-situ decommissioning of the Whiteshell reactor would, in essence, establish a permanent nuclear waste facility, which is not supported by the MMF. Specifically, our concern is that while waste producers and owners will "work in partnership with First Nations, Inuit and Métis communities to gain a greater understanding of their Indigenous Knowledge, approaches and advice in implementing the siting, construction, operation and monitoring of radioactive waste management and decommissioning projects" (s. 2.5), the Draft Policy falls short of the NWMO's established Right to Withdraw ensuring "Communities that decide to engage in the process for selecting a site as potential hosts must have the right to end their involvement in the siting process at any point up to and until the final agreement is signed, subject to all regulatory requirements being met and regulatory approval received" (NWMO 2010). The MMF believes that the siting of nuclear facilities and radioactive waste sites should be led by interested communities, which must capture a cross-section of all those potentially affected, ensuring consent for handling and storage is maintained throughout the siting process. If the MMF is to be assumed to be a "willing host" for nuclear waste within our territory, Canada must follow the same steps and process it is taking with other rights-bearing Indigenous Peoples whose territories include candidate sites for radioactive waste repository sites. This means following the Adaptive Phased Management process used by the NWMO.

Language regarding both the role of Canada and waste producers and owners' responsibility to maintain consent from impacted communities, aligning with the NWMO's Guiding Principles for site selection, is essential to protecting the federal government's commitments to openness, transparency, and inclusive engagement with Indigenous Peoples.

3.5.2 Adaptive Phased Management Processes

Adaptive Phased Management is Canada's plan for the long-term management of spent nuclear fuel, which was developed from consultation and dialogue with specialists, the Canadian public, and lessons



learned from nuclear policies in other countries. Adaptive Phased Management aims to develop a centralized containment facility for used fuel in a deep geological repository and includes important provisions for informing both the consenting host community as well as the development of a robust transportation plan.

Although Canada's policy for Radioactive Waste Management and Decommissioning has a scope that extends beyond the handling and management of spent nuclear fuel, it cannot be divorced from the practices outlined by Adaptive Phase Management. Canada's policy for Radioactive Waste Management and Decommissioning must build on important foundation principles of communication and engagement for all aspects of radioactive waste management and decommissioning. Further, Canada must align practices on the oversight of radioactive waste management and decommissioning to ensure all waste is handled in a manner that minimizes both waste generation and broader environmental impacts from existing and future facilities. This includes ensuring the management and decommissioning of the Whiteshell reactor site is conducted in a manner that prioritizes dialogue, consent, and long-term reclamation of the sites.

4.0 Conclusion

Our review of the *Draft Policy on Radioactive Waste Management and Decommissioning* focused on key issues of concern to the MMF, including impacts to the section 35 rights, claims, and interests of the Red River Métis, and the potential project interactions with the environment that may lead to effects on the Red River Métis. As a result of this review, the MMF has identified several issues and concerns with the Draft Policy and the broader Modernizing Canada's Radioactive Waste Policy process and, where applicable, has provided recommendations to address these issues.

The MMF is disappointed in the overall approach NRCAN has taken in engaging with the MMF for the broader Draft Policy process. The MMF was invited to participate in stakeholder engagement sessions, which included a combination of the public, non-governmental organizations, and Indigenous rights holders. As the Red River Métis are section 35 rights-holding Citizens, we do not believe this is an appropriate approach to the Crown's fulfillment of its Duty to Consult. NRCAN has a responsibility to consult specifically with the MMF. Further, the MMF was not provided sufficient notice and information to be able to adequately prepare for and participate fully in the engagement sessions held to date. We request a direct bilateral meeting between NRCAN and the MMF to discuss the proposed policy changes and the full impacts on Red River Métis Citizens.

Overall, we find that the Draft Policy delegates too much responsibility for oversight and decision-making to radioactive waste owners and producers. We view this approach as problematic, not only because these waste owners and producers are incentivized by profit and efficiency, but they also do not hold the honour of the Crown and its associated obligations to the Red River Métis. Canada's nuclear industry, although bringing many benefits to communities throughout Canada, and is an important contributor to Canada's power, medicine and scientific needs, presents significant ever-present risks to the environment and those that interact with it. By shifting responsibility from the Crown to waste owners and producers, there is an increased risk that the voice of the Red River Métis may be muted, as engagement is regulatory



rather than constitutional. Further, where waste owners and producers are directed to engage with the Red River Métis, engagement may not reflect the evolving and nuanced view of meaningful dialogue and participation that accompanies Crown consultation and has been clarified through several court decisions.^{1,2,3,4,5} The Red River Métis are significantly impacted by the Whiteshell reactor site and decommissioning activities and may expect further impacts from the transportation of radioactive waste material through traditional harvest areas in the future as a result of the proliferation of SMRs. It remains the Crown's duty and obligation to ensure that all decisions made about radioactive waste management, which impact the rights of the Red River Métis, include meaningful consultation and empowered participation. Further, in instances where engagement from waste owners and producers is appropriate, consideration must be made first and foremost to avoid, or where necessary accommodate, any impacts their application would have on the rights, interests, claims, and well-being of the Métis Nation, including the Red River Métis. This includes forging a process and framework for appropriately engaging and involving with the MMF as the duly authorized representatives of the Red River Métis regarding waste minimization decisions and matters occurring within our Homeland.

We request that the issues and recommendations we have raised throughout this document be the focus of subsequent bilateral meetings with NRCAN and be reflected in the Final Policy. Moreover, the MMF must be provided with regular updates on the steps that are being taken to address recommendations and concerns.

¹ *R. v. Sparrow* – Supreme Court of Canada

² *R. v. Powley* – Supreme Court of Canada

³ *Haida Nation v. British Columbia* – Supreme Court of Canada

⁴ *Taku River Tl'it First Nation v. British Columbia* – Supreme Court of Canada

⁵ *Rio Tinto Alcan Inc. v. British Columbia* – Supreme Court of Canada

