To: Doug Wilson, MNO Chief Operating Officer
Date: August 3, 2015
Re: Métis Community Business Opportunities
Matter No.: MNO-133

From: Jason Madden

Further to your request, I am providing this memorandum which clarifies the respective roles and responsibilities of the Métis Nation of Ontario (“MNO”), its Regions, its Chartered Community Councils (“Councils”) and the MNO’s Economic Development Structures (i.e., Infinity Investments), in relation to local or regional business opportunities available to Métis communities.1 Please feel free to circulate this memo throughout the MNO.

Background and Conclusion

We understand that one or more solar project promoters (the “Promoters”) have approached various Councils in connection with the current round of Ontario’s Feed-In-Tariff Program (the “FIT 4 Program”). We further understand that these Promoters have suggested partnering directly with one or more Councils for the purposes of participating in the FIT 4 Program. We also understand that some Councils are interested in better understanding the MNO’s Economic Development Structures’ role in relation to these potential opportunities and what, if any, role Councils can play. We have drafted this memo to answer questions arising from these situations so there is clarity throughout the MNO.

As explained in more detail below, the appropriate response when these types of business opportunities are presented to a Council or Region is to direct such opportunities to Infinity Investments so that Infinity Investments may determine whether to pursue that opportunity for the benefit of the MNO. That is the model the MNO Annual General Assembly has approved after years of consultation. Within the MNO, there is no ability for a Council or Region to “go it alone” or otherwise fail to engage Infinity Investments. Doing so is expressly contrary to the MNO’s laws, policies and a Council’s Charter Agreement.

1 Please note this memo does not apply to business opportunities that are available to individual Métis or Métis owned businesses that are not community-based. Métis individuals and businesses can access those opportunities without the MNO involvement in any way and independent from the MNO.
MNO Prosperity and Self-Sufficiency Law

Requirements of the Law

The starting point for our analysis is the MNO Prosperity and Self-Sufficiency Law (the “Law”), passed by the MNO Annual General Assembly. As you know, the Law recognizes the MNO as the government of Métis people in Ontario and identifies the MNO Economic Development Structures (as defined in the Law) as the means by which the MNO will pursue, promote advance Métis Nation prosperity and self-sufficiency at the local, regional and provincial levels.

Specifically, Section 8 of the Law identifies Infinity Investments as “the main business instrument of the MNO” and makes it “responsible for the holding, management and oversight of the corporations, shareholdings and other business interests” of the MNO. Section 19 of the Law describes this in more detail:

19. In order to protect the MNO’s legal liability and tax status as well as ensure transparency, consistency and credibility, all future economic development or business activities undertaken by the MNO at the local, regional and provincial levels shall be done under the MNO Economic Development Structures established pursuant to this Law. [Emphasis added.]

The highlighted text above means that the Law requires Councils and Regions to direct business opportunities to Infinity Investments. To proceed otherwise is directly contrary to the Law. It is clear that Section 19 of the Law applies to the business opportunities presented by the Promoters to Councils.

Local and Regional Allocations Under the Law

We understand that there is some concern about specific Regions or Councils being able to benefit, directly, from business opportunities in their Region. In this regard, we want to clarify that the Law provides for individual Councils or Regions to benefit directly from economic opportunities that they help to develop. Specifically, Section 21 of the Law states:

21. Where future economic development or business activities are available to a MNO Region, a Community Council or a combination thereof because of their geographic proximity to the opportunity, a mutually agreeable allocation model for any financial profits and/or allocations that ultimately flow to the MNO from the Infinity Trust as a result of said economic development or business activity shall be negotiated between the MNO, the Infinity Investment Structures and the participating MNO Region, Community Council or a combination thereof prior to pursuing said economic development or business activity. [Emphasis added.]

Section 21 clearly provides for allocations of financial profits to flow directly to Councils or Regions in appropriate circumstances. Note also that the determining factor for whether such an allocation applies is the Region or Council’s “geographic proximity to the opportunity”—not whether the opportunity is in a Region where the MNO makes rights assertions on behalf of a Métis community. This language, approved the MNO Annual General Assembly, is designed to accommodate the interests and circumstances of all Councils as well as MNO Regions across Ontario.
We are in the process of developing a policy based on PCMNO’s direction on this matter, which specifically describes the mechanics of this allocation model. Based on PCMNO’s direction, a given Council or Region that meets the criteria set out in the policy (i.e., the Council or Region creates a business advantage for Infinity Investment) will be provided 15% of the profits flowing from the designated business opportunity (if it is ultimately pursued and it is profitable). Importantly, in this relationship, Infinity Investments assumes all of the development costs, operation costs and risk related to the business opportunity, if it is pursued. We expect that this policy will go some way to clarifying expectations and resolving concerns. We hope to have a draft back to the MNO for its consideration by mid August.

Reasons for the Law

While it is clear that the Law prohibits a Council or Region from independently pursuing business or economic opportunities, we think it will be helpful to review the reasons why the MNO established the Economic Development Structures pursuant to the Law. We expect these reasons are familiar to most but it is always helpful to remember the history of how things came to be the way that they are.

First, the MNO is a not-for-profit corporation and, as such, cannot engage directly in business activities. If this were to occur the MNO could lose its tax status and this would jeopardize all of the MNO’s programs and services; indeed, the MNO’s very existence. As you know, the Councils and Regions are not separate legal entities from the MNO; they are parts of the overall MNO’s corporate structure, the sole incorporation for which is Métis Nation of Ontario Secretariat Inc. (“MNOSI”). This means that if individual Councils or Regions enter into business agreements it jeopardizes the MNO’s tax status. Infinity Investments was created to avoid just this problem.

The fact that the Councils and Regions are not separate entities from the MNO also means that the MNOSI is ultimately liable for any agreements entered into by Councils and Regions. These liabilities affect the entire MNO, not just a Council or Region. This is a major risk to MNO—as a whole—and creating Infinity Investments is the way the MNO has decided to mitigate this risk. (As discussed further below, this is also the reason that the Council Charter Agreements require the MNO to co-sign any agreements that the Councils do sign, such as Memorandums of Understanding or Impact Benefit Agreements with proponents.)

Second, from the MNO’s research, consultations and workshops on developing an economic development approach, it became clear that it is good business practice to separate politics from economic development. This is repeatedly recognized in credible studies on Aboriginal economic development (e.g., Harvard Study, Institute on Governance reports, etc.). This arms-length approach allows for business opportunities to be assessed and developed with a view to profitability, rather than by political motivations or judgment. These models recognize that Aboriginal leaders should be focused on governing—for the benefit of their people—not running business opportunities. This model also avoids the potential of conflicts of interest emerging. The creation of the MNO Economic Development Structures was designed to implement this well-recognized business practice with the Métis Nation. If Councils and Regions directly engage in business opportunities this principle is clearly undermined. The MNO has made a collective decision to implement this principle and individual Councils and Regions, as a part of the MNO, cannot breach this principle.
Thirdly, and uniquely, the MNO’s governance structure is largely sustained by the effort of Métis volunteers at the local and regional levels. In its consultations on pursuing economic development, it was repeatedly raised by many Métis leaders at the local and regional levels that they already have challenges in operating and maintaining their Council’s operation, let alone running a business. Expecting volunteers to operate businesses with risks, liabilities and significant costs would essentially be a “recipe for disaster” in the in MNO’s unique governance structure (as the MNO has been witness to in the past). While Councils and Regions want to make sure Métis communities are accessing opportunities, the MNO also needed to design a model that made it as easy as possible and did not impose additional burdens on volunteers who are already strapped for time and resources. The MNO’s previous experiences with respect to failed Council businesses or Council development corporations illustrated this point.

Finally, the MNO generally takes the strategic approach of pooling its resources to create “centres of excellence” for the aggregation of capacity and expertise. This allows all Councils and Regions across Ontario to access collective resources of a much higher caliber than would be available to individual Councils and Regions. This has been the MNO’s approach to Crown-Métis consultation and the creation of the Lands, Resources and Consultations Branch as well as in other program delivery areas (e.g., Healing and Wellness, Employment and Training, etc.), for example. Infinity Investments replicates this MNO “recipe for success” by hiring a professional and experienced Chief Executive Officer to investigate and pursue business opportunities. There is considerable due diligence and analysis required to determine whether a business opportunity is worth pursuing and the MNO has made a collective decision to engage experts to make these determinations.

Collectively, the factors above outline why the MNO Economic Development Structures must be relied upon for all business opportunities pursued by the MNO, including, its Councils and Regions.

**Community Council Charter Agreements**

In addition, the Community Council Charter Agreements (the “Charters”) contain a number of provisions that prevent individual Councils from pursuing business opportunities directly. This means that even if a Council wanted to violate the Law by independently pursuing a business opportunity, the Council does not have the legal authority or capacity to do this. While many are familiar with the terms of the Charters, we believe it will be helpful to review the relevant provisions again.

First, Section 3.4 of the Charter states that each Council subscribes to and agrees to be bound by the principles of the MNO as stated in the Statement of Prime Purpose. Those principles include explicit recognition that Métis in Ontario have bound themselves to collectively pursue shared objectives, including economic well-being, and that the MNO is the representative body through which Métis in Ontario will pursue these objectives. It is clearly contrary to these principles for individual Councils to independently pursue economic opportunities.

Second, Section 3.9 of the Charter states that a Council is prohibited from entering into agreements that are inconsistent with the MNO’s bylaws, regulations, policies or guidelines. As discussed above, the Law governs how the MNO will pursue economic development opportunities, and Section 3.9 of the Charter means that Councils are bound to follow the Law. Again, this means that Councils are prohibited from pursuing economic development opportunities other than through the MNO Economic Development Structures.
Finally, Section 8 of the Charter provides for oversight and approval by the MNO for any agreements entered into by a Council (e.g., Memorandums of Understanding, Impact Benefit Agreements, etc.). The reason for this has been stated above: the Councils are not legal entities and so any liabilities of the Councils ultimately are liabilities of the MNO. Section 8 of the Charter provides the MNO with the necessary controls in order to prevent surprise liabilities that will affect the MNO as a whole, not just the Council that (wrongly) signs the agreement.

Violating any of these provisions is grounds for suspension or revocation of the Charter by the MNO.

**FIT 4.0 Program Rules**

Finally, we want to briefly address the specific language of the FIT 4 Program rules (the “Rules”). Based on the MNO’s successful advocacy efforts several years ago, the Rules provide certain advantages to projects that feature partnerships with Aboriginal Communities. The term “Aboriginal Communities” includes a “ Métis Community,” and the term “Métis Community” includes “[t]he Métis Nation of Ontario or any of its active Chartered Community Councils”.

We expect there is some confusion about this definition: to be clear, this definition does not mean that individual Councils can partner with Promoters. There are two reasons for this. First, as discussed above, the Law and the Charters prohibit Councils from entering into such partnerships. (Instead, the Law requires that any such opportunities be directed to Infinity Investments.) Second, as also discussed above as well, the Councils are not separate legal entities, which means that the only entity the solar promoter could partner with is ultimately the MNO. Even if a Council signed such an agreement—in clear violation of its Charter and the Law—the Promoter would quickly realize, through due diligence, that its agreement requires MNO approval and co-execution by the MNOSI in order to be valid.

In short, the Rules do not allow Councils to enter into bilateral agreements with Promoters without MNOSI’s co-approval.

**Conclusion**

To recap the key points of this memo:

- The Law requires that business opportunities identified or presented to Regions or Councils be directed to Infinity Investments, which will use its experience and expertise to determine whether the opportunity should be pursued. If an opportunity is available because of a Region or Council’s geographic proximity to the opportunity then an allocation agreement will be executed amongst Infinity, the Region or Council, and the MNO.

- The Community Council Charters prevent a Council from entering into agreements directly with Promoters. Doing so could result in revocation of the Council’s Charter.

- The FIT 4 Program Rules do not allow a Council to enter agreements directly with Promoters, without MNOSI’s approval.

We hope you find this memo helpful and that it provides clarity to the issues you have raised with us. Please feel free to contact us if you have any further questions.