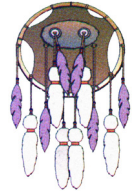


IMPLEMENTATION MONITORING COMMITTEE



BULLETIN NO. 3

ACQUISITIONS ADJACENT ROADS AND HIGHWAYS

APRIL 16, 2012

Introduction:

This is the third Bulletin issued by the Implementation Monitoring Committee (“IMC”). Bulletins are an initiative of the IMC, intended to serve as procedural and operational guidelines for the Parties to the 1997 Manitoba Framework Agreement on Treaty Land Entitlement (“MFA”), and to inform the Entitlement First Nations (“EFNs”) of policies or procedures affecting the Reserve creation process.

Bulletins will address a variety of subjects selected by the IMC or as proposed by the EFNs ranging from technical interpretations of the MFA to practical operational guidelines.

This Bulletin deals with the treatment of acquisitions adjacent roads and highways, a subject recently considered by IMC in relation to a Buffalo Point First Nation referral. This bulletin will ensure that the consensus reached by the IMC on this matter is shared, and clarifies this implementation matter for the benefit of the MFA Parties and the EFNs contemplating acquisitions adjacent roads and highways.

Topic:

MFA land acquisitions by Schedule “B” EFNs adjacent roads and highways.

Principles are Guidelines:

Discussion of the Selection or Acquisition of land to be set apart as Reserve under the MFA begins with the recognition that the MFA does not supersede Treaty rights of EFNs. Rather, as stated below, the MFA provides guidelines to assist the Parties to the MFA and the EFNs with the land selection/acquisition process in light of the complexity of doing so today, after more than a century of growth, development and land occupancy within Manitoba.

The MFA could not cover all circumstances to be encountered during implementation, and MFA Subsection 3.01(2) confirms that the Principles provide guidelines applicable to the Selection or Acquisition of land by an Entitlement First Nation. In general, situations that are encountered during MFA implementation should be governed by the MFA provisions, and the provisions should be followed; however some MFA provisions are not absolute, and in these situations the principles/guidelines are to be cooperatively adapted to the circumstances of a particular selection or acquisition by the Parties.

MFA Section 13 is clear that the “controlled areas” as defined in *The Highways Protection Act* are ordinarily excluded from land that is set apart as reserve, but the key point is the right of

exclusion by Manitoba is not absolute. The relevant provisions indicate that circumstances may at times be encountered by the Parties that would support the modification of that part of the ROW which is ordinarily to be excluded. (Note: the right of exclusion and the width of the right of way to be excluded are both qualified by the word "ordinarily").

Relevant MFA Principles:

Principles for land selection and acquisition are found in MFA Sections 3.02 to 3.10 inclusive, as well as other articles of the MFA which are incorporated into these Sections (including MFA Sections 13.01 – 13.07 which relate to selections and acquisitions adjacent roads and highways) by reference.

MFA Section 13.01 states:

" Land Selected or Acquired by an Entitlement First Nation will ordinarily exclude:

- (a) Provincial Trunk Highways;*
- (b) Provincial Roads ...*
- (c) roads other than Provincial Trunk Highways and Provincial Roads which are under the jurisdiction of the Department of Highways and Transportation of Manitoba; (Now known as Manitoba Infrastructure and Transportation or MIT)*
- (d) municipal roads unless the Municipality in which the land is located agrees to the transfer ...*
- (e) Developed Road allowances unless the Municipality in which the land is located agrees to the transfer ...*
- (f) ferry landings,*
- (g) airports operated by Manitoba;*
- (h) land withdrawn from disposition to the extent reasonably required and presently used by the Department of Highways and Transportation for gravel, sand, and borrow to maintain a road of the class referred to in paragraphs (a), (b), and (c) and ferry landings...."*

MFA Section 13.03 states:

" The width of the Road Right of Way for land excluded under Paragraphs 13.01 (a) to (e) inclusive will be of sufficient width to include:

- (a) the road surface;*
- (b) lateral drainage ditches;*
- (c) "controlled areas" as defined in The Highways Protection Act,*
- (d) any power lines, telephone lines or natural gas lines which are located adjacent to the road*

and without limiting the generality of Paragraphs (a) to (d) inclusive, the width of the Road Right of Way will ordinarily be:

- (e) 335 meters (about 1,099 feet) for a divided Provincial Trunk Highway;*
- (f) 140 meters (about 459 feet) for an undivided Provincial Trunk Highway;*
- (g) 130 meters (about 427 feet) for an undivided Provincial Road and other roads under the jurisdiction of the Department of Highways and Transportation;..."*

In summary, land selected or acquired by an EFN will ordinarily exclude Provincial Trunk Highways, Provincial Roads, and other roads under the jurisdiction of Manitoba Infrastructure and Transportation (MIT).

Excluded rights of way are to be of sufficient width to include the road surface, lateral ditches, “controlled areas” as defined in *The Highways Protection Act*, and utility lines. Ordinarily the width of the right of way to be excluded will be:

- 335 meters for a divided Provincial Trunk Highway,
- 140 meters for an undivided Provincial Trunk Highway, and
- 130 meters for an undivided Provincial Road,

The Highways Protection Act:

The “controlled areas”, as defined in *The Highways Protection Act*, are ordinarily part of the right of way to be excluded from acquisitions before they are set apart as reserve land, and therefore *The Highways Protection Act* needs to be reviewed to understand the definition of “controlled areas”.

The Highways Protection Act is divided into four main parts. Part I is entitled Limited Access Highways; Part II is entitled Freeways, Part III is entitled Controlled Areas, and Part IV is entitled General.

The Highways Protection Act also defines key words and phrases, which are relevant to this discussion, as follows:

“controlled area” means the area between the limited access highway or freeway and the control line in relation thereto.

This means in part that controlled areas are not found along every road, but rather only “limited access highways” or “freeways”.

“limited access highway” means a highway or a part of a highway that has been designated as, or is, a limited access highway under Part I. (of *The Highways Protection Act*)

“freeway” means a highway or a part of a highway designated as a freeway under Part II. (of *The Highways Protection Act*)

Subsection 2(2) confirms the broad application of *The Highways Protection Act*, as follows,

“Every owner, lessee, tenant, and other occupant of, and every person exercising any licence or right in or to, land that is situated within a controlled area, or that is contiguous or adjacent to a limited access highway, freeway, or provincial trunk highway, is subject to the Act, and, in the construction of structures on the land, the construction and location of entrances to and exits from the highway and the use of structures, land, entrances and exits, shall comply with this Act and the regulations.”

This means in part that as soon as an EFN acquires property adjacent to a limited access highway or freeway, *The Highways Protection Act* applies to its acquired property.

The purposes of *The Highways Protection Act* are found in Section 2(1).

“The purposes of this Act are:

- a) to control the location, construction and use of entrances to and exits from certain highways,*
- b) to control the use made of land that is contiguous or adjacent to, or lies near certain highways; and*
- c) control the erection of structures along certain highways.*

with the objects of protecting the interests of the public in the highways, promoting the safety of persons using the highways, and generally furthering the amenities of travel on the highways.”

In Part I, entitled Limited Access Highways, it is confirmed in Subsection 6(2) that the Highway Traffic Board may by regulation designate a highway, or a part thereof, other than a freeway, as a limited access highway, in accordance with a procedure described in Subsection 6(3). Subsection 6(4) confirms that a provincial trunk highway is a limited access highway, unless the Highway Traffic Board specifically declares by regulation that it is not.

Subsection 5(1) confirms that no person shall construct, relocate, or substantially alter an entrance to, or an exit from, a limited access highway unless he holds a valid permit for the purpose. For this reason, an EFN wishing to add or relocate an entrance to, or exit from, the limited access highway must get a permit to do so. Subsection 7(1) confirms that Part I of *The Highways Protection Act* does not affect any entrance to, or exit from, a limited access highway that was in existence at the time when the highway became a limited access highway, subject to subsection 7(2).

Subsection 7(2) confirms that an entrance to, or an exit from, a limited access highway may be closed by the traffic board, but if this is done alternate means of access to and from the highway are to be constructed, and in addition, subject to subsection 7(6), compensation may be paid to the owner, as follows:

*“Where the traffic board recommends that an existing entrance to, or exit from a limited access highway be closed and other means of access to and from the highway be provided, the traffic authority, without the consent of the owner, or the lessee of, or other person having an interest in, the land to or from which the entrance or exit leads, may close the entrance to, or exit from, the highway; and, if it does so, it shall construct such other means of access to and from the highway as to it seems reasonable and, in addition, subject to subsection (6) shall pay such compensation as may be determined under *The Expropriation Act* to the owner and lessee of, and any other person who has an interest in, the land.”*

Since Subsection 7(2) is subject to Subsection 7(6), it is important to understand that Subsection 7(6) confirms that if a service road is constructed to replace an entrance to, or exit from, the land, no compensation for loss of access shall be paid. Subsection 7(6) states,

“Where the entrance to, or an exit from, a limited access highway is closed under subsection (2), and the other means of access to and from the highway constructed under subsection (2) is a service road that has an exit from, and an entrance to, that limited access highway, no compensation for loss of access shall be paid or is payable

to the owner of any land or interest in the land from which access to the service road is available.”

This means that if MIT approaches an EFN to purchase the “controlled area” portion of its acquisition, and in this “controlled area” there are existing entrances to, and exits from, the limited access highway which will be closed and no longer available to the EFN, that compensation for this is due unless these entrances to, and exits from, the limited access highway are replaced with a service road. This is confirmed in subsection 7(3), which states;

“Subject to subsection (6), the traffic authority may enter into an agreement with the owner of any lands or an interest in lands whose ownership, rights, or privileges, are affected by action taken under subsection (2) for compensating him for loss or inconvenience suffered by him, or for damage to his property, by reason of that action.”

Presumed Objective of MFA Principle contained in Subsection 13.03:

The presumed objective of the MFA principle contained in MFA Section 13.03, (whereby the width of road ROW for land excluded under MFA Paragraph 13.01(c) will be sufficiently wide to include “controlled areas” as defined in *The Highways Protection Act*), is to ensure the purposes and objectives of *The Highways Protection Act* can be achieved. *The Highways Protection Act* does not apply on reserve land, and therefore excluding that portion of the land acquisition from becoming reserve land ensures that *The Highways Protection Act* continues to apply on the “controlled area” portion of the acquisition.

The presumption is that Manitoba negotiated the MFA Section 13.01 – 13.03 provisions as principles to serve as guidelines during MFA implementation to ensure that *The Highways Protection Act* purposes and objectives would ordinarily be preserved after the land acquisition is set apart as reserve.

The purposes of *The Highways Protection Act* do not include the control of land adjacent to a highway for the purpose of acquiring land for a highway expansion or twinning, and the objectives underlying the application of “controlled areas” to private property do not expressly include the acquisition of land for future highway upgrading projects. While the private property owner’s land is already affected by the provisions of *The Highways Protection Act*, (In that there are restrictions on the future uses of the land and on the erection and construction of structures on the land within the “controlled area”) a separate and distinct process needs to be engaged for MIT to purchase (or expropriate) land from private property owners to enable future highway expansion or twinning projects. As a result Manitoba does not need to have a plan in place for future highway upgrading projects to accompany its request for the “controlled area” to be included within the highway right of way and not set apart as reserve along with the balance of a First Nation acquisition. That being said, it is clear that if Manitoba purchases that portion of a First Nation acquisition that is defined as a “controlled area”, future highway expansion or twinning will be facilitated through provincial ownership.

The Highways Protection Act also controls entrances to and exits from limited access highways, which includes Provincial Trunk Highways, unless the traffic board specifically declares, by regulation, that it is not a limited access highway. Subsection 5(1) states,

“No person shall construct, relocate or substantially alter an entrance to a limited access highway from any road or driveway or from any adjoining land, or construct, relocate or

substantially alter an exit from a limited access highway to any other road or driveway or to any adjoining land, unless he holds a valid and subsisting permit for the purpose.”

This subsection of *The Highways Protection Act* confirms that MIT does not need to acquire the “controlled area” portion of an EFN acquisition to control the location of future entrances to or exits from a limited access highway. MIT already controls this on recently acquired EFN land, as well as on existing reserve land, that is adjacent a limited access highway or freeway.

It is important for the EFNs to understand that if MIT purchases the “controlled area” from the EFN, the existing entrances to, and exits from, the limited access highway are effectively closed, unless provisions to retain them are negotiated and confirmed. In this case, the provisions of Section 7 of *The Highways Protection Act* come into play and the EFN should, unless a service road is constructed, be compensated for loss or inconvenience suffered by the EFN, or for damage to its property, by reason of action taken that closed the entrances to, and exits from, the limited access highway.

For this reason it is important that the EFN and MIT discuss the future access points required by the EFN at the time that the EFN and MIT discuss the width of the right of way to be excluded, and the effect that this will have on existing entrances to, and exits from, the limited access highway.

“Controlled area” as defined in *The Highways Protection Act*:

As discussed above, *The Highways Protection Act* defines “controlled area” as the area between a limited access highway or freeway and the control line in relation thereto.

The Highways Protection Act defines “control line” as a line that is parallel to the centre line of the limited access highway or freeway and 125 feet (38.1 meters) distant from the edge of the right of way unless the Highway Traffic Board has specifically established control lines.

In those cases in respect of which the Highway Traffic Board has specifically established control lines, *The Highways Protection Act* defines control lines as,

“a line that is parallel to the centre line thereof and such distance from the edge of the right-of-way thereof as the traffic board may have designated, or a line that forms the circumference, or part of the circumference of a circle with the centre at the point of intersection of the centre line of a limited access highway or freeway and another highway and a radius of such length as the traffic board may have designated.”

The Highways Protection Act is clear that a variety of widths of “controlled areas” are in place to achieve the purposes and objectives of *The Highways Protection Act*.

Subsection 15(2) enables the Highway Traffic Board to establish control lines or remove them altogether by regulation.

Subsection 15(4) of *The Highways Protection Act* sets out the maximum distance for control lines, (as 250 feet from the edge of the right of way) and also sets out the maximum circumference of “controlled area” circles at highway intersections (as 1,500 feet from the point of intersection of the centre lines of the highways).

In summary, not all control lines are the same distance from the edge of the right of way, and therefore “controlled areas” are also of variable size. Presumably then, *The Highways Protection Act* purposes and objectives can be achieved with various set backs for the control line and various sizes of controlled areas, dependent upon the specifics of the situation.

Size of the “controlled area” affecting acquisitions:

Since the purpose of *The Highways Protection Act* (from Subsection 2(1)) is in part to control the use made of land that is contiguous or adjacent to the highway and to control the erection of structures along certain highways; it is important that private landowners know where the control lines are in relation to their private land holdings, in order to be in compliance with *The Highways Protection Act*.

One means of ensuring that private landowners know where the control lines are located on their private property, and what portion of their private land is located within a “controlled area” is to consult *The Highways Protection Act*. *The Highways Protection Act* references a controlled area of 125 feet (38.1 meters), unless the Highway Traffic Board has specifically made it larger or smaller by regulation. The Highway Traffic Board can then confirm if the controlled area on a property is 125 feet in width, or if it has been made larger or smaller by regulation.

The set back for the control line requested of an EFN by MIT should match the setbacks referenced above, and if they do not, the EFN should request the Traffic Board regulation by which the controlled area was specifically made larger on the property acquired by the EFN. If Manitoba intends to request that a controlled area larger than 125 feet (38.1 meters) be excluded from the future reserve, Manitoba should accompany that request with evidence that the Highway Traffic Board specifically made the controlled area wider by regulation.

A second means of determining where the control lines are located on private property is to consult the maps entitled, “Control Lines and Control Circles Established under The Highways Protection Act”, which are schedule “A” of Regulation 569/88 R filed December 19, 1988, and which are filed in the Planning, Design and Land Surveys Branch of the Department of Highways and Transportation. (now known as MIT) The TLEC has a complete set of these maps in house for reference by the EFNs.

Subsection 18(2.1) of The Highways Protection Act confirms that,

“In a regulation under this section, a limited access highway or a control line is sufficiently described if its location is indicated on a map adopted or incorporated by reference in the regulation.”

Options:

With respect to an EFN acquisition, the MFA principles/guidelines are clear that the PTH right of way is to be excluded from the acquisition. The issue relates to the width of the controlled area/right of way that is sufficient to achieve the purposes and objectives of *The Highways Protection Act* at a specific location. The “controlled areas”, as defined within *The Highways Protection Act* are found in variable widths from location to location throughout Manitoba. The question for the parties is how the qualifying phrase “ordinarily” should be applied when

determining the width of the ROW Manitoba is seeking to exclude from the Reserve to be set apart in each given set of facts and circumstances.

There are three main options to address the MFA principles that are applicable to an acquisition adjacent a limited access highway. These three options are for an EFN to;

- 1) Determine the existing control line location and sell the “controlled area” portion of the acquisition to MIT at fair market value,
- 2) Determine the existing control line location and hold the “controlled area” portion as private “fee simple” land and have the balance of its acquisition set apart as reserve, or
- 3) Meet with MIT to discuss details of the EFN’s proposed development and access management issues, and through that discussion seek agreement on; highway access points, use of the land adjacent the highway, and the size of a controlled area/right of way that addresses the interests of each party at this location.

With respect to Option #3 above, there are different possible outcomes for similar situations dependent upon the specific circumstances. In order for Manitoba to agree with a smaller controlled area/ highway ROW size it needs to understand the EFN’s development intentions, if any. This EFN development plan discussion will also facilitate discussion on the existing and future highway access points that will be required, which is an important issue for both MIT and EFNs.

There are advantages and disadvantages to each of the three options:

Option #1: Determine the existing control line location and sell the “controlled area” portion of the acquisition to MIT at fair market value. Note: If this action leads to closure of existing entrances to, and exits from, the limited access highway, the EFN is also eligible for compensation in accordance with Section 7 of *The Highways Protection Act*.

Advantages:

- This is advantageous to MIT. MIT achieves ownership and decision making on all future land uses within the “controlled area”.
- MIT controls future highway access as it purchases the existing highway access points and frontage from the EFN.
- MIT owns the land should Manitoba in the future wish to expand or improve the highway and additional land is required for this.

Disadvantages:

- This is disadvantageous to the EFN. The EFN’s existing driveways and other developments in the controlled area are purchased from the EFN and closed. Unless the continued existence of the highway entrances and future access points is confirmed at the time of the sale to MIT, new entrances to and exits from the highway are restricted and only available by way of application for a permit from the traffic board.
- MIT can use the land for itself, lease it, or sell it; and those uses may or may not be compatible with the intended EFN development.
- A large setback (125 feet or 38.1 meters) is not available for future development, and while this land had development restrictions previously, it also had acceptable/authorized land uses previously that are no longer available.

Safety issues:

- The simple act of purchasing the “controlled area” does not address safety issues identified by Manitoba or the EFN. MIT may or may not have confirmed plans for highway improvements and therefore its acquisition of the “controlled area” may or may not address identified safety issues.
- In so much as the sale of the “controlled area” to Manitoba results in closure of all existing access onto the highway, it can be assumed that the safety of the highway has been increased through decreasing the access points.

Option #2: Determine the existing control line location and hold the “controlled area” portion as private “fee simple” land and have the balance of the EFN’s acquisition set apart as reserve

Advantages:

- The EFN retains its; existing highway access points (grandfathered), developments if any are located in the controlled area (grandfathered), and developable land with the same land use restrictions as at present. The land is still available for internal service roads, parking, signage, landscaping and to meet green space development requirements.
- Maintaining EFN ownership maintains EFN control of the future use of the “controlled area” and in this way the EFN can ensure that the future use is compatible with the EFN’s future development plans.
- Option #2 is neutral for Manitoba as *The Highways Protection Act* continues to apply on the fee simple land holding of the EFN, and the purposes and objectives of *The Highways Protection Act* are maintained.

Disadvantages:

- It is not reserve land, and is taxable.
- The land use and development restrictions that were in place when the land was acquired, continue over a 125 feet width (ordinarily) along the highway.
- If new access points are required for purposes of an EFN development, this option does not address this.
- If Manitoba was seeking to close entrances to, and exits from, the limited access highway through purchase of the controlled area, this option does not address this.

Safety Issues:

- Option #2 does not address safety issues identified by either the EFN or MIT.

Option #3: MIT and the EFN meet to discuss details of any future development intended by the EFN and related access management issues, and through that discussion reach agreement on; highway access points, use of the land adjacent the highway, and the size of a controlled area/right of way that addresses the interests of each party.

Advantages:

- This option has the potential to;
 - a) Reach a resolution that is advantageous to both Parties depending on the outcome of the discussions,

- b) Address the issue of future access points as well as the retention or relocation of existing access points, which is a topic important to both the EFN and MIT,
- c) Address safety issues specific to the site which are important to the EFN and MIT,
- d) Maintain the purpose and objectives of *The Highways Protection Act*, while ensuring that the economic viability of the EFN acquisition is not negatively impacted.
- e) Maintain the EFN's existing developments (grandfathered) which are located in the controlled area, if any.

Summary:

A negotiated resolution can secure the purposes and objectives of *The Highways Protection Act*, (which are presumed to be the objective of the MFA principle/guidelines found in MFA Sections 13.01–13.03), while accommodating and facilitating EFN opportunities for economic development. It can also address the access and safety matters not addressed by Options #1 and #2. The negotiated resolution is dependent upon the specific circumstances of each acquisition.

Reviewing examples of reserves set apart adjacent highways illustrates and confirms that while a “controlled area” is ordinarily 125 feet (38.1 meters) in width, variable widths that are specifically enabled within *The Highways Protection Act*, are possible depending on the circumstances with each EFN acquisition.

Closing Comments:

In general, the MFA Schedule B EFNs have only acquired a small percentage of their MFA “Other Land” to date. It is likely therefore that many future acquisitions will be located along provincial roads and highways. If EFNs acquire land adjacent to limited access highways, (which usually includes Provincial Trunk Highways) or freeways, the frontage will most often be a “controlled area”, which is subject to land use and development restrictions via the provisions of *The Highways Protection Act*.

Ordinarily, the portion of the acquisition that is subject to the existing “controlled area” as defined in *The Highways Protection Act* is 125 feet (38.1 meters) wide and will be excluded from the land to be set apart as reserve.

Understanding the purpose and objectives of *The Highways Protection Act* and the use of the “controlled areas” to achieve the purposes and objectives of that Act, could lead the Parties into discussions on how best to achieve the purpose and objectives while being mindful of the EFN's development aspirations associated with their acquired property.

If EFNs discuss their proposed development plans with MIT and MIT is equally open about its future development intentions with respect to the “controlled area” portion of the EFN acquisition it is interested in purchasing; the possibility of the two Parties working cooperatively together and reaching a negotiated resolution is increased. These open discussions will naturally include highway access management and safety issues, and from that discussion and dependent on the circumstances, an outcome might be reached whereby arrangements on access management are agreed to and the depth of the controlled area reduced. This negotiated resolution can

achieve the purpose and objectives of *The Highways Protection Act*, and accommodate the EFN's development plans.

Access points are very important to both the EFN and MIT and confirmation of the continued existence and location of existing access points will facilitate a negotiated resolution. Confirming the number of access points the EFN requires for its proposed development plan, and if the existing authorized highway access points are sufficient may address MIT concerns with highway safety. If MIT and the EFN negotiate an agreement on access management, the size of the controlled area can sometimes be reduced in depth. In order for MIT to agree with a smaller controlled area/ highway ROW size it needs to understand the EFN's development intentions, and access requirements.

Recommendations for EFN/MIT discussions:

It is recommended that given the sensitivity of an EFN to a Manitoba request to purchase a portion of its acquired land (that the EFN has just purchased for purposes of it being set apart in partial fulfillment of its outstanding TLE); that the second option for the EFN, (to retain private title to the controlled area), also be confirmed as an option at the first meeting between the EFN and MIT.

It is recommended that Manitoba explain at the first parcel review meeting why in the specific circumstances associated with each acquisition that it needs to exclude the ROW to the extent proposed.

It is recommended that Manitoba confirm at the first meeting that it is not offering to purchase the "controlled area" for purposes of highway expansion or twinning, and that MIT has no confirmed plans to do so.

It is recommended that MIT and the EFN discuss details of the EFNs proposed development and related access management and safety issues, and through that discussion seek agreement on; future highway access points, use of the land adjacent the highway, and the size of a controlled area/highway right of way that reflects the specific circumstances while addressing the legitimate interests of Manitoba to maintain highways and the legitimate economic development interests of the EFN.

.....