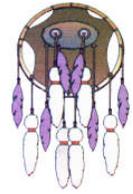


IMPLEMENTATION MONITORING COMMITTEE



BULLETIN

CONCEPT OF ELIGIBILITY OF SELECTIONS OR ACQUISITIONS

FEBRUARY 2009

Introduction:

The Implementation Monitoring Committee (“IMC”) is pleased to issue its first explanatory Bulletin. This is a new initiative of the IMC. IMC Bulletins are intended to serve as procedural and operational guidelines for the Parties of the 1997 Manitoba Framework Agreement on Treaty Land Entitlement (“MFA”), as well as to inform the Entitlement First Nations (“EFNs”) of policies or procedures affecting the Reserve creation process.

Bulletins may vary in subjects ranging from technical interpretations of the MFA to practical operational guidelines for the Parties and the EFNs. This first Bulletin deals with the concept of “eligibility” of Selections or Acquisitions under the MFA and provides practical directions which should be of assistance to EFNs in making decisions about Crown Land selection and private land acquisitions.

Background: Review of Concept of Eligibility of Selections or Acquisitions

As part of its recent implementation initiative which included the establishment of the office of the Chairperson, the IMC has identified a number of priority matters for its attention including, among other things, improvements in tripartite monitoring of Reserve creation, strategic planning of Reserve creation with the EFNs, organization of the dispute resolution process at the IMC and the overall improvement of day to day Reserve creation practices.

In relation to the improvement of day to day practices in relation to Reserve creation, one of the first areas of practice identified for review was the application of the concept of “eligibility” as reflected in the MFA.

In 1997 when the MFA was signed, it was anticipated that the EFNs would be selecting their Crown land within three years from the date of their Treaty Entitlement Agreement coming into force, and acquiring land within 15 years from the date of their Treaty Entitlement Agreement coming into force. Today, most land is encumbered with some type of interest (e.g. a land use permit, lease, utility easement, etc.) held by a third party

(“Third Party Interest or TPI”). The existence of those interests in land selected or acquired presented complications in Reserve creation. Therefore, in concluding the

MFA, Canada, Manitoba and the TLEC recognized the complications associated with the existence of third party interests and agreed upon detailed “**Principles for Land Selection and Acquisition**” (“Principles”) which constitute practical working guidelines for the EFNs to assist in the land selection and acquisition process.

In 2007, after some 10 years working with the Principles, Manitoba agreed to re-examine its approach to the review of Selections and its practice of “deeming” some TLE land ineligible for processing as land to be set apart as Reserve under the Manitoba Framework Agreement (MFA). The primary purpose of this specific operational review was to identify areas for improvement in related practice or procedure. Incidental benefits expected included more timely implementation and, to some degree, the development of a more positive working relationship among the parties. As a result of this review by Manitoba, and further discussions by the IMC, the interpretations of the MFA and the practice and procedures outlined in this Bulletin were recently confirmed by the IMC.

Discussion: Concept of “Eligibility” of Land

Discussion of the concept of eligibility of land Selections or Acquisitions to be set apart as Reserve and how the concept bears upon decisions of EFNs to select Crown land or acquire private land and the review of land Selections or Acquisitions submitted to Canada and Manitoba for processing under the MFA begins with Sections 2.02(1) and (2) which provide:

- (1) During the Period of Selection and Period of Acquisition, an Entitlement First Nation shall Select and Acquire land which conforms with the Principles.*

- (2) Land Selected or Acquired in accordance with the Principles shall be eligible to be set apart as Reserve subject to the provisions of this Agreement.*

As can be seen, the MFA does not only entitle EFNs to select or acquire land in conformance with the Principles, it says the EFNs **shall** Select and Acquire land which conforms with the Principles. If the EFNs do so, land so selected or acquired **shall** be eligible to be set apart as Reserve subject to the other applicable terms of the MFA. These are directions. The MFA is then written in a positive manner providing direction to each party. Even if the EFNs select or acquire land for Reserve in accordance with the Principles, the process has proven to be complicated; and therefore, it is important that the EFNs be fully aware of and actually apply the Principles before making land selections and acquisitions as a matter of standard practice (also see Subsection 6.02(2) for direction).

Accordingly, unless a certain MFA provision clearly indicates that a Selection of a certain nature is not eligible for Selection or that eligibility must be determined after discussion of other factors (competing considerations, tourist camps, land physically required by Hydro, etc.) it is appropriate practice for Manitoba and Canada to advise that they consider the Selections to be eligible to be set apart as reserve in accordance with the Principles subject to compliance with the requirement of the applicable provisions of the MFA.

Whenever Manitoba or Canada identifies a requirement under the MFA to be satisfied, it would affirm the eligibility of the Selection “subject to” the MFA requirements. In most cases, this approach ensures that the party responsible for attending to satisfaction of a

requirement – typically the EFN with TLEC support – is identified at the outset, and all parties can either deal with the qualification on eligibility or monitor progress in resolving the requirement leading to Reserve creation.

Application of the Principles in this manner will:

- a) present opportunities for discussion in advance of selection/acquisition to ensure that when an EFN selects or acquires land that the EFN appreciates, at the time of selection or acquisition, that the land is affected by a provision of the MFA;
- b) ensure that once the selection/acquisition is affirmed as eligible “subject to” the MFA requirements, that the EFN has determined a plan to deal with the complications associated with applicable provisions of the MFA that the selection/acquisition is “subject to”;
- c) assist with the resolution of provisions of the MFA that may affect either the affirmation of eligibility or the setting apart of the land as Reserve under the MFA during parcel review meetings;
- d) assist in the overall Reserve creation process, likely resulting in less time for processing and fewer impediments for all parties.

Since the Principles provide direction to the EFNs when making land selections and acquisitions and to Canada and Manitoba when considering selections made by EFNs, it is important that there be a common understanding as to the Principles and other provisions of the MFA that land selected or acquired are “subject to” prior to being ready to be set apart as Reserve. In examining the Principles, it is clear that there are several categories of “eligibility” within which land may fall:

A. Land Not Eligible for Selection in any circumstances

Under the terms of Treaties involving land in Manitoba, all land not taken up for settlement by the Crown (unoccupied land) within the Treaty or traditional territory of the signatory First Nations is available for selection for Reserve subject to Canada’s right to deal with “settlers” within the area selected as it deems appropriate. Under paragraph 11 of the Manitoba Natural Resources Transfer Agreement, part of the *Constitution Act, 1930*, Canada transferred administration and control of unoccupied land held by it to Manitoba. In that Act, Canada reserved its right to require the re-transfer of Crown land back to Canada to enable Canada to meet Treaty land obligations.

Paragraph 11 referred to all unoccupied land transferred to Manitoba by Canada at that time and provided that Manitoba had the right to concur in the selections prior to transfer of the land to Canada for Reserve.

The MFA and Principles contain guidelines that will enable Manitoba and Canada to approve of selections that will be transferred to Canada and set apart as reserve for EFNs. Further, the MFA identifies certain land that may not be selected for Reserve and land that may be selected despite encumbrances described within the provisions of the MFA.

Firstly then, what land is not eligible for Selection under the MFA?

By definition at Subsection 1.01 (19), there is a limited list of the type of Crown Land that is **not eligible for Selection in any circumstances:**

- (a) land administered by Manitoba on behalf of a local government district, under the 1964 inter-ministerial agreement; or
- (b) Surplus Provincial Land (although it may be Acquired in accordance with Section 3.02).

And also, per the Principles, Crown Land that is occupied, in active use, being developed within the normal course of events and land held by Manitoba for a certain purpose by way of legal obligation is **not eligible for Selection at all**, such as:

- Section 3.03(9), Land in a Wildlife Management Area (WMA) that is essential to the purpose of designation as a WMA (e.g. critical habitat), or that was transferred or gifted to Manitoba for the purpose of designation as a WMA;
- Section 3.03(10), Land in a Public Shooting Ground that was designated as a public shooting ground prior to July 15 1930, or transferred or gifted to Manitoba for that specific purpose;
- Section 3.03(15), Land Used for an Airport Operated by Manitoba (although an EFN may buy the land if and when it is designated as Surplus Provincial Land);
- Section 3.03(20), land that will be used to construct a Transmission Line to begin within 4 years of the date of Selection; and
- Section 12.02, land below the OHWM on Navigable Waterways;

And finally, a unique situation to avoid subsurface Indian Reserve without the surface interest in Manitoba:

- Section 11.04, Mines and Minerals, the subsurface interest is not eligible to be set apart as Reserve under the Principles, unless and until the surface interest is acquired and that surface interest is confirmed as eligible to be set apart as Reserve under the Principles.

B. Land Eligible for Selection with Consent

Secondly, other Crown Land is **eligible for Selection only if the party affected by the Selection consents** to the Selection.

For example, per the Principles:

- Section 3.03(19), land used for a Transmission Line by Manitoba Hydro (unless it consents to the Selection);
- Section 12.09 (1), land physically required by Manitoba Hydro (unless it consents to the Selection)

Or perhaps, **eligible for Selection once an agreement or other accommodation is reached** after discussion:

- Section 3.03(5), land adjacent to a Tourist Camp or Outpost, the impact of the Selection on an existing tourist lodge operation must be discussed, in particular any plans of the EFN for development as it may affect the fishery or “pristine wilderness experience” upon which a lodge may be based.
- Section 3.03(6), land in provincial park, ecological reserve or wildlife refuge, while an EFN may not “generally” Select land in these specific sensitive areas, the provision does not absolutely prohibit a Selection in these types of area, and in fact states that Crown land in the Amisk, Sand Lakes, Caribou River, and Numaykoos Lake Provincial Parks shall be available for selection. The use of the word “generally” suggests that Manitoba might consider some type of exceptional circumstances in the determination of eligibility of the Selection in this case. From the EFN perspective, there are unique sites in some of these locations. Manitoba might therefore consider this an opportunity to communicate with the involved EFN about the circumstances of the Selection and begin to address what exceptional circumstances, if any, might lead Manitoba to consider a Selection of this nature to be eligible for Selection. Understanding that this type of Selection will need to be supported by the specific exceptional circumstances, the EFN would be obliged to provide a description of these exceptional circumstances and submit this description along with the notice of Selection. But other than in these instances, the intent of this provision is to indicate that land in these areas is not available for Selection or Acquisition. In addition, section 9.09 (1) provides that where an EFN identifies a specific parcel of land within any provincial park, ecological reserve or a wildlife refuge as Land of Cultural or Historic Significance for the EFN, it is intended that while the land may not be set apart as reserve, that Manitoba and the EFN will enter into an agreement providing for the cooperative management of the parcel of land designed to protect the parcel of land in a manner that reflects that significance to the EFN.

C. Land Eligible for Selection Subject to requirements in the MFA

Thirdly, most other Crown Land in Manitoba is land eligible for Selection or Acquisition provided that the requirements of the MFA, including the Principles are met and will, upon review, be confirmed as eligible to be set apart as Reserve subject to requirements set out in provisions of the MFA. Upon confirmation of the eligibility of the Selection or Acquisition per Section 6.02 the process of Reserve creation can begin.

After notice of the Selection or Acquisition from the EFN (6.02(3)), Canada and Manitoba must review the notice and confirm whether or not the Selection or Acquisition is eligible to be set apart as Reserve under the MFA within 45 to 60 days. Most of the Principles set out directions and requirements to be met prior to the setting apart of the land as Reserve, or transfer of Crown Land to Canada for that purpose, but the Selection or Acquisition is in fact, per the MFA and applicable Principles, eligible to be set apart as Reserve "subject to" compliance with the MFA provisions as stated in Section 2.02.

For example:

- Section 12.07(3) provides that at least 50% of each parcel Selected must be located above the Easement Line. An EFN may Select land on a Developed Waterway although it will be subject to a Hydro Easement. Since the Easement Line is not determined until after the Selection is made by the EFN, there is a practical problem to address in the course of the review of these types of Selections – the location of the upper level of the area that could be affected by the Hydro Easement. Accordingly, upon the review of these Selections, Manitoba must assume that the EFN is aware of this provision of the MFA and in its reply to the EFN indicate that the Selection is eligible for Selection "subject to" the requirement for a Hydro Easement and Subsection 12.07(3) – that 50% of the Selection must be above the Easement Line once the Easement Line is determined. To avoid any misunderstanding, the EFN could confirm its understanding that 50% of the Selection must be above the Easement Line when submitting this type of Selection to Manitoba and Canada for review. Where after the Easement Line is determined it appears that less than 50% of the area of the parcel is above the Easement Line, the Entitlement First Nation may adjust the area of the Selection to provide for at least 50% being above the Easement Line.

Until recently, Manitoba had, in its response to Selections from Entitlement First Nations under 6.02(7) of the MFA, characterized Selections that had complications or requirements to be addressed by the MFA or Principles to be ineligible to be set apart as Reserve in accordance with the Principles unless and until those complications or requirements were addressed. Manitoba now characterizes these circumstances as being eligible to be set apart as reserve provided the relevant issue is addressed. This is preferable because it acknowledges that it is legitimate for the Entitlement First Nation to make the Selection – acknowledging the intent of Section 2.02 – and that the parties should then seek to address the relevant issue. .

Therefore, unless a parcel of land Selected or Acquired is not eligible to be set apart as Reserve in accordance with the Principles in any circumstances as noted above, Manitoba will advise in its response under 6.02(7) that the parcel is eligible to be set apart as Reserve “subject to” the consent of a relevant party or to conforming with

relevant provisions of the MFA. This is a positive step, and an improvement in practice and procedure now implemented by Manitoba.

In the future, Manitoba’s letters of reply to specific EFN Selections or Acquisitions are likely to better inform the EFNs of their responsibilities in relation to the Selections or Acquisitions being set apart as Reserve. As well, in anticipation of the clarification and additional information that may be required by Manitoba and Canada to fully consider a land Selection or Acquisition, an EFN should submit a full explanation of the reasons for submissions along with the Council Resolution giving notice of a Selection or Acquisition.

All parties should be able to rely upon the other parties’ adherence to the MFA/TEA provisions. This is the best course of action that will provide certainty to the Parties and assist in establishing a more positive working relationship over time. In doing so, the parties should develop a constructive, flexible approach that will assist all parties in meeting the ultimate goal and purpose of the MFA/TEAs – the setting apart of the Total

Land Amount as Reserve underlying which are historic, legal Treaty rights and obligations reflected in the obligations of each party under the MFA/TEAs.

The IMC believes that a more considered application of the concept of eligibility by the EFNs in the Selection and Acquisition process and the updated procedure for review of Selections and Acquisitions by Canada and Manitoba to determine eligibility of the land to be set apart as Reserve will have a positive effect on the Reserve creation process in the future.

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