



IMPLEMENTATION MONITORING COMMITTEE



BULLETIN NO. 5

LAND SELECTIONS IN PROVINCIAL PARKS, AND GUIDANCE ON MFA INTERPRETATION

FINAL SEPTEMBER 20, 2019

Introduction:

This is the fifth Bulletin issued by the Implementation Monitoring Committee (“IMC”). IMC issues Bulletins to provide practical procedural and operational advice for the Entitlement First Nations (“EFNs”) and the Parties to the 1997 Manitoba Framework Agreement on Treaty Land Entitlement (“MFA”), in support of more effective MFA implementation and in hope of avoiding disputes going forward.

On December 22, 2016, Adjudicator Ms. Sherri Walsh rendered her decision report on IMC Referral File No. 1999-BPFN-001 respecting the Buffalo Point First Nation (“BPFN”) Birch Point Provincial Park Selection: a dispute between BPFN and Her Majesty the Queen in Right of Manitoba (“Manitoba”). Similar to Bulletin No. 4, this Bulletin draws upon an Adjudicator’s Decision, the second rendered under the MFA’s dispute resolution provisions.

This Bulletin highlights not only the specific decision related to selections within a provincial park but provides additional useful insight on how the MFA and its provisions were interpreted and relied upon by the Adjudicator when rendering her decision. As such, the Adjudicator’s words are used verbatim as much as possible (and referenced by the paragraph number in her decision report) in order to avoid adding additional layers of interpretation.

This Bulletin attempts to maximize its usefulness by distilling Ms. Walsh’s forty-six page report down to its most salient points. Should the reader wish to better understand the Adjudicator’s reasoning, which is articulated with reference to numerous court decision precedents, do not hesitate to refer directly back to the decision report. As always, before relying upon the advice provided herein, it is advisable that the facts of each situation be compared to determine the applicability, and when in doubt consult legal counsel.

Topic:

MFA land selections within provincial parks, as well as general guidance on MFA interpretation.

The Dispute:

In March 1994, during the negotiation of the MFA, BPFN selected a 116.4 acre parcel of land known as Birch Point, in close proximity to the Buffalo Point community. That selection included the entire 32 acre Birch Point Provincial Park, originally established in 1961 as the Birch Point Provincial Recreational Area and designated as a Provincial Park in 1991. In March 1998, after the signing of the MFA, BPFN executed its Treaty Entitlement Agreement and therein confirmed that the previously made selections, including the Birch Point selection, would be considered under the terms of the MFA.

Upon first reviewing the Birch Point selection in 1995, Manitoba took the position that the 32 acres within the provincial park “is not eligible to be selected and set apart as reserve” [#23]. This position remained unchanged after application of the terms of the MFA, although Manitoba then began relying upon MFA subsection 3.03(6), with the operative words being:

3.03(6) An Entitlement First Nation may not generally Select land in a provincial park...

BPFN’s position was that the word “generally” in subsection 3.03(6) indicates the parties contemplated that exceptions would be made, and that the unique circumstances respecting BPFN should constitute such an exception. Those circumstances include BPFN’s existing reserve bordering both Minnesota to the south and Ontario to the east, and particularly given Ontario’s lack of cooperation in considering BPFN’s two selections there, this has effectively restricted BPFN’s ability to select land only to the west and north of its existing reserve. Moreover, pervasive swamp in the area further restricts BPFN’s ability to select productive or otherwise desirable land to implement the MFA and thereby fulfill the terms of Treaty No. 3 signed with Her Majesty the Queen in right of Canada in October 1873.

Discussions between the parties concerning this matter continued for over 21 years without resolution. On November 2014, BPFN formally requested the IMC to refer the dispute to binding arbitration. In accordance with the MFA dispute resolution provisions, the disputing parties, as coordinated by the IMC Chairperson, agreed on a series of questions to pose to the Adjudicator. The parties then had the opportunity to argue the merits of their respective positions at an Adjudication Hearing that took place on October 17 and 18, 2016, in Winnipeg.

At the hearing, Manitoba argued that “because provincial parks reflect a wide range of interests which government is required to balance”, the MFA “should be interpreted in a way that gives Manitoba the sole discretion to determine whether TLE selection is eligible within a provincial park” [#112]. Manitoba also asserted that because of this sole discretion, the nature of the Adjudicator’s role “is limited” to being “analogous to one of judicial review” [#113]. In other words, “so long as the Adjudicator determines that the Province has proceeded fairly and in accordance with the honour of the Crown, he or she must defer to the Province’s decision regarding a selection’s eligibility, at least where the wording of subsection 3.03(6) is concerned” [#113]. Additionally, Manitoba referenced the regulatory process that would be engaged in any disposition of land from a provincial park to allow for reserve creation [#110], implying that this would further limit the Adjudicator’s jurisdiction [#189 - #190].

BPFN countered that “it is no longer acceptable for Manitoba to simply deny a selection based upon a narrow interpretation...the MFA must be interpreted liberally” [#117] and in accordance with principles set out by the Supreme Court of Canada relating to the honour of the Crown and in the *United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)* [#118].

BPFN argued that Manitoba had not acted “in accordance with the obligations required of it by the honour of the Crown” [#121], and disagreed “with the assertion that the Province has sole discretion to determine the eligibility of any selection” [#122].

In reaching her decision, the Adjudicator was required to analyze and interpret the MFA, and in particular determine the meaning of subsection 3.03(6). The decision also required her to consider the application of the honour of the Crown, as well as the issues of party discretion and the jurisdiction of the Adjudicator. The Adjudicator’s Report culminates in answers to the four questions that the disputing parties posed to the Adjudicator (reproduced in their entirety in

Annex A). The various assumptions, interpretations and conclusions made by the Adjudicator to answer those questions may serve as guidance for the EFNs and the parties going forward, and are summarized below.

Contractual Interpretation and the Honour of the Crown:

The Adjudicator's analysis begins with a review of various commercial agreement-related court decisions that articulate, as she states, "the appropriate principles of contractual interpretation which I must apply in this case" [#128], as follows¹:

1. "give effect to the intentions of parties as expressed in their written document" [#129];
2. "the contract should be construed as a whole" [#129];
3. words used should be given "their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" [#126] and "the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement" [#127];
4. "the absence of words may be considered" [#129];
5. "be careful not to add anything that cannot fairly be inferred from the words of the agreement" [#131].

However, "the MFA is not a commercial agreement" [#146]. Its purpose and the clear intention of the parties is to "fulfill the existing treaty right owed by Canada to BPFN, and many other First Nations, and to have Manitoba fulfill its constitutional obligations under the Manitoba Natural Resources Transfer Agreement" [#140]. It "implements a treaty promise", in the case of BPFN made under Treaty No. 3 in 1873, "enshrined in the *Constitution Act* 1930 and confirmed in the *Constitution Act* 1982" [#141].

Therefore, the principles of contractual interpretation must be applied through an "interpretive lens" [#148] defined by the honour of the Crown which "governs treaty making and implementation" [#149], and "the performance of every treaty obligation" [#152]. This "requires the Crown to act in a way that accomplishes the intended purposes of the treaty" [#149] which ultimately is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty" [#150].

For further explanation, the Adjudicator references several court decisions including a particularly relevant and at that time recent court decision² "which involves interpretation of TLE Agreements in Manitoba" [#142]. Hence, agreements such as the MFA "must be interpreted in accordance with the objectives of honourable conduct, reconciliation and fair dealing with aboriginal peoples" [#147]. This requires "honourable negotiation and the avoidance of the appearance of sharp dealing" [#149].

¹ It is worth noting that these principles are consistent with how Adjudicator Cherniak proceeded with MFA interpretation in the Adjudication Report summarized in Bulletin No. 4

² *Canada v. Long Plain First Nation*, 2015 FCA 177

Although this does not mean that the Crown cannot “say no to a given request” [#153], it must “act honourably and with intellectual honesty” [#154] in making any such determination, and “an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose” [#155]. “Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation” [#155].

Furthermore, the honour of the Crown “imposes a heavy obligation” [#151] on Crown officials, individually and collectively, who must “pursue the purpose behind the promise” so that Aboriginal groups are not “left with an empty shell of a treaty promise” [#156].

Moreover, the honour of the Crown does not only apply to the federal government: “Provincial governments also bear this obligation” [#152].

Additionally, the Adjudicator agrees that Manitoba’s commitment, articulated in *The Path to Reconciliation Act*³, “to be guided by the principles set out in” *UNDRIP* [#159] must also factor into interpretation of the MFA [#164] due to MFA section 40.03 [#162], which states:

40.03 Applicable Law: This Agreement shall be governed by and construed in accordance with all applicable laws of Manitoba and Canada.

As a result, the Adjudicator concludes that interpretation of the MFA “involves not only the principles of contractual interpretation...but also an approach which takes into account: the honour of the Crown, reconciliation and the commitment Manitoba made through *The Path to Reconciliation Act*” [#164]. She states that “these additional considerations are consistent with the basic principles of contractual interpretation because they relate to both the underlying purpose” of the MFA “to fulfill the broken promises that were made in the Treaties and to the nature of the relationship that exists between the parties” [#165]. Taken together, these statements “confirm that the Province must not interpret” the MFA “in a narrow way. Rather, it has a heavy obligation to approach its interpretation with intellectual honesty and in a manner that...pursues the purpose behind the promise” [#157].

It is within this context (which is summarized in Annex B as an aid for future reference) that the Adjudicator focusses her analysis on the meaning and application of the exception articulated in subsection 3.03(6), as described below.

Meaning and Application of “Generally” in Subsection 3.03(6):

In focussing the analysis on subsection 3.03(6), particularly on the essence of the word ‘generally’, the Adjudicator states that there is a “need to make every effort to give meaning to the exception articulated...and to determine whether a given selection falls within the exception” through “a consideration of evidence of the surrounding circumstances” [#166].

“That evidence - what the parties realistically knew or ought to have known at the time they entered into” the MFA “points to the knowledge that BPFN would be unduly limited in its ability to make treaty land selections by both international and provincial boundaries”, and that “this is precisely the type of exceptional circumstance which the parties would have contemplated and

³ CCSM c.R30.5

for which they intentionally made allowances by including an exception to the general rule” [#170].

The Adjudicator states that by inserting the word ‘generally’ in subsection 3.03(6), “the parties reflected their recognition that in order to give effect to the purpose” of the MFA “there would be occasions when selection in a park which existed” at the time that the MFA was entered into “would be necessary” [#174]. Furthermore, such occasions would “usually be in some form of unique or exceptional case”, and the Adjudicator finds that BPFN’s Birch Point selection “is one of those cases” [#175].

She also submits that Manitoba “took a narrow approach to interpreting the relevant” provisions of the MFA, “which was not consistent with its heavy obligation to consider the Birch Point selection fairly, and in an intellectually honest manner” [#178]. This opinion is based on the lack of evidence that Manitoba “made any efforts to construe the meaning of the exception in subsection 3.03(6) and whether the Birch Point selection fell within that exception” [#179]. In fact, the record shows that for the first 14 years of correspondence between the disputing parties, Manitoba “failed to acknowledge that the word ‘generally’ was included” in the subsection, and instead “simply stated that the subsection did not allow for selection within existing parks” [#180]. It was in 2009 that Manitoba finally acknowledged in writing that subsection 3.03(6) included the word ‘generally’ [#90 & #91].

Manitoba had also argued that its offer “to enter into a co-management agreement” with BPFN for the Birch Point Park in accordance with the provisions of section 9.09⁴, to protect BPFN’s cultural and historical interests, was evidence that Manitoba “acted in accordance with the honour of the Crown” [#181]. However, the Adjudicator responded that whereas section 9.09 “provides a way” for Manitoba to protect EFN interests over land that an EFN does not control, this does not “detract from the need to give meaning to the exception” in subsection 3.03(6), “nor does it ultimately satisfy the purpose” of the MFA: “to fairly implement the promises made in the Treaties” [#183].

In summary, the Adjudicator articulates her decision respecting BPFN’s Birch Point selection as follows: “Having regard to the purpose of this Agreement, the nature of the relationship between the parties, including principles relating to the honour of the Crown and reconciliation, I find that the constraints on BPFN’s selection which are imposed by virtue of geographic and political boundaries are precisely the type of exceptional circumstances which the parties would have intended be addressed when they used the word ‘generally’ in subsection 3.03(6)” [#184].

The Adjudicator then turned her attention to whether or not it would be possible to frame how the subsection should be applied to other selections going forward. She found that “it would not be appropriate to codify or articulate a list of criteria which are meant to define the exception” [#185]. Instead, “whether a given selection falls within that exception will depend on the particular circumstances of the case having regard to the principles that I have referenced” [#185]. Given the application of the MFA to 21 EFNs, “its wording shows that the parties recognized...that allowance would need to be made for a certain amount of flexibility” [#187],

⁴ MFA 9.09(1) Where an EFN identifies a specific parcel of land in any provincial park, ecological reserve or a wildlife refuge other than those referred to in Paragraph 3.03(6)(a) or (b), as Land of Cultural or Historical Significance for the EFN, it is intended 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.

and that “the nature of the evidence that can be relied upon under the rubric of surrounding circumstances will necessarily vary from case to case” [#168].

Based on the Adjudicator’s interpretation of subsection 3.03(6), Annex C provides a process chart to assist in determining if a selection made within a provincial park falls within the exception, thereby making it eligible to be set apart as reserve.

The Adjudicator’s Jurisdiction and Party Discretion:

Manitoba raised the issue that the regulatory requirement under provincial park legislation for a “public consultation before a park can be deregulated” [#189] would limit the Adjudicator’s jurisdiction. The Adjudicator states that such a requirement “cannot serve as an impediment to fulfilling the constitutionally entrenched rights which” the MFA “was created to implement [#190]. Furthermore, she asserts that her jurisdiction “includes the ability to determine that the Province must take the necessary action required under *The Provincial Parks Act*” to give effect to the MFA “in a manner that is consistent with” her determination regarding the eligibility of the Birch Point selection [#191].

In asserting her jurisdiction, she relied on paragraph 35.04(3)(c)⁵, in which an adjudicator is given the power to make “a determination that one or more of the parties...is required to take certain action to give effect” to the MFA [#191]. Further, she determined that any restrictions placed on that jurisdiction by virtue of subsection 35.04(4) “relate to policies” and are therefore “not applicable and do not restrict” her ability to determine that Manitoba “must take the necessary action required...to give effect” to the MFA in accordance with her “determination regarding the eligibility of the Birch Point selection” [#193].

Lastly, the Adjudicator turned to Manitoba’s position that the wording of the MFA, specifically subsection 6.02(7)⁶, “gives it the sole discretion to determine eligibility of a selection...governed by subsection 3.03(6)” [#194], and the related contention that this would effectively limit the Adjudicator’s jurisdiction to conducting a process “analogous to judicial review” [#195].

The Adjudicator states that the notion of sole party discretion “is not supported when one looks at section 6.02 in its entirety and at” the MFA “as a whole” [#197]. For one thing, subsection 6.02(5)⁷ contains identical wording to 6.02(7), “but with respect to Canada’s role” [#197] and subsection 6.02(8)⁸ refers to the decisions by Canada and Manitoba, under 6.02(5) and (7) respectively, to the MFA dispute resolution process should the EFN disagree with such decisions [#199].

⁵ See Annex D for the full text of MFA 35.04: Procedure for Binding Arbitration, and 35.05: Appeal of Binding Arbitration Awards, which frame an adjudicator’s jurisdiction.

⁶ MFA 6.02(7): Manitoba shall consider the eligibility of the Selection or Acquisition to be set apart as Reserve in accordance with the Principles and provide its written reply to Canada and the EFN within 45 to 60 days of receipt of the items referred to in Subsection (4).

⁷ MFA 6.02(5): Canada shall consider the eligibility of the Selection or Acquisition to be set apart as Reserve in accordance with the Principles and provide its written reply to Manitoba and the EFN within 45 to 60 days of receipt of the Council Resolution referred to in Subsection (3).

⁸ MFA 6.02(8): In the event that either or both of Canada or Manitoba in the replies provided in accordance with Subsections (5) and (7) advise that, in their opinion, the Selection or Acquisition is not eligible to be set apart as Reserve in accordance with the Principles, and the matter is not resolved within 120 to 180 days from the date of the later of those replies, the matter may be referred to the Implementation Monitoring Committee.

Therefore, the Adjudicator found that “considered as a whole...the wording of” the MFA “reflects an intention that where possible the parties should achieve agreement, failing which they may turn to a number of dispute resolution processes that are set out” in the MFA [#202]. Furthermore, the MFA “is not designed to create a hierarchy of decision making rights between the parties” because “in light of the purpose of” the MFA “and the nature of the relationship between the parties, it would make no sense to give one of the parties what amounts to a *de facto* veto of a First Nation’s treaty land selection” [#202].

In addition, the Adjudicator found that subsections 35.04(3) and (4) “clearly give an adjudicator the jurisdiction to consider and interpret” the MFA “and do not oblige the adjudicator to give deference to the position taken by any one party” [#204].

Annex A:

Verbatim Adjudicator's Answers to the Questions Submitted by the IMC

For all of these reasons, my answers to the questions which are set out in the Adjudicator Reference for Binding Arbitration are as follows:

1. Is the Birch Point selection by BPFN eligible to be set apart as Reserve in accordance with the Principles for Land Selection and Acquisition, having regard to subsection 3.03(6) of the MFA?

2. In considering question 1, the Arbitrator may consider if the word "generally" enables the EFN to select lands within a provincial park under subsection 3.03(6):

- *I find that the Birch Point selection is eligible to be set apart as Reserve in accordance with the Principles for Land Selection and Acquisition, having regard to the wording of subsection 3.03(6) of the MFA.*
- *In accordance with section 35.04(3)(c) I also find that the Province is required to take the necessary action to give effect to this determination.*

(a) what are the circumstances under which such a selection could be considered eligible;

- *The word "generally" as used in subsection 3.03(6) is intended to enable an EFN to select lands within a provincial park under subsection 3.03(6) when it can be established that there are exceptional circumstances which affect the ability to implement the Treaty obligations owed to the First Nation, in accordance with the scheme and purpose of the Agreement.*

(b) what are the criteria and information that must be provided by Manitoba and the EFN in determining the eligibility of selections?

- *There is no fixed list of criteria to be applied in determining whether a given selection falls within the exception. Each case will turn on its specific facts.*
- *With respect to the nature of the information that must be provided, as the Supreme Court of Canada set out in *Sattva, supra*, the nature of the evidence that can be relied upon in determining the eligibility of a selection should consist only of objective evidence of the background facts in existence at the time of the execution of the Agreement - facts that were or reasonably ought to have been within the knowledge of the parties at or before the date they entered into the Agreement.*

3. A determination as to the costs of the proceedings as per 35.07(3) of the MFA.

- *The Province reserved the right to speak to costs following the outcome of these proceedings. Accordingly, I am prepared to hear from the parties before I make any determination as to costs.*

4. To answer any other question that the Arbitrator deems necessary to resolve the issues(s) in dispute, including procedural matters.

- *In its submission as to how this dispute should be resolved the Province took the position that the Agreement gave it sole discretion to make a determination as to the eligibility of this selection, so long as it proceeded fairly in doing so and met its obligations to uphold the honour of the Crown. It also submitted that the jurisdiction of an adjudicator is limited to assessing whether the Province proceeded fairly and if the adjudicator found that to be true, he or she must give deference to the Province's determination.*
 - *For the reasons above, I find that the Agreement does not give the Province sole discretion to make a determination as to eligibility of this selection, nor does it restrict an adjudicator's authority to interpret the Agreement, in accordance with the terms set out in the Reference and the provisions of the Agreement itself.*
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Annex B:

Principles For Interpreting the MFA

A. Principles of contractual interpretation

1. Give effect to the intentions of the parties and the purpose of the MFA, which is to fulfill the existing treaty right owed by Canada, and to have Manitoba fulfill its constitutional obligations under the Manitoba Natural Resources Transfer Agreement". These purposes engage the honour of the Crown.
2. Construe the MFA as a whole.
3. Give words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the MFA was signed, and in consideration of any contextual factors such as the purpose of, and the nature of the relationship created by, the MFA.
4. Words not used in the MFA were intentionally not used.
5. Be careful not to add anything that cannot fairly be inferred from the words of the MFA.

B. Principles for the Application of the Honour of the Crown to the MFA

1. There is a heavy obligation on both federal and provincial Crown officials to act honourably, with intellectual honesty, and to avoid all appearance of sharp dealing.
2. Always pursue the purpose behind the promise, by avoiding interpreting MFA provisions in a narrow or strictly legal manner that divorces the words from their purpose.
3. The MFA is a treaty implementation agreement, recognizing the parties as partners in treaty implementation; therefore, interpret the MFA in accordance with the objectives of honourable conduct, reconciliation and fair dealing with aboriginal peoples.
4. In interpreting the MFA, Manitoba must also consider its commitment articulated in *The Path to Reconciliation Act*⁹ to be guided by the principles set out in *UNDRIP*.

⁹ CCSM c.R30.5

Annex C:

Determining Eligibility Under the Exemption Within MFA Subsection 3.03(6)

This process assumes that a land selection has been made within a provincial park, ecological reserve or wildlife refuge created before the signing of the MFA in May 1997.

1. Is the Selection eligible in accordance with all other applicable Principles of Selection?

NO: Resolve other issues.

YES: Proceed to step 2.

2. Having regard for the Principles for Interpreting the MFA (see Annex B), are there unique or exceptional circumstances respecting the EFN which would or should have been known to the parties at the time of the signing of the MFA, including, but not limited to geographic and/or political constraints concerning the EFN's ability to select productive or otherwise desirable land to fulfill the terms of the MFA?

NO: Communicate the decision, and consider including:

- documentation of the decision making process to demonstrate that it was conducted with due regard to the purpose of the MFA, the nature of the relationship between the parties, and the principles relating to the honour of the Crown and reconciliation;
- an offer to enter into a cooperative agreement in accordance with MFA subsection 9.09(1) to protect the land in a manner that reflects the cultural or historical significance to the EFN.

YES: Proceed to step 3.

3. Are those unique or exceptional circumstances identified in step 2 justification for applying the exception articulated in subsection 3.03(6)?

NO: Communicate the decision, and consider including:

- documentation of the decision making process to demonstrate that it was conducted with due regard to the purpose of the MFA, the nature of the relationship between the parties, and the principles relating to the honour of the Crown and reconciliation.

YES: Trigger the regulatory process to remove the "park" (etc.) designation.

Annex D:

MFA Sections 35.04 and 35.05: Adjudicator Jurisdiction

35.04 Procedure for Binding Arbitration

- 1) Subject to Subsections (2) and (4), where binding arbitration is used as a means to resolve an issue or matter in dispute, the IMC shall prepare and submit to the Adjudicator a reference setting out in writing:
 - (a) a question or questions for the Adjudicator to determine; and
 - (b) any other terms of reference to define the jurisdiction of the Adjudicator.
- 2) Subject to Subsection (4), where the IMC does not prepare and submit to the Adjudicator a reference referred to in Subsection (1) on a timely basis or the Chairperson refers a matter to binding arbitration in accordance with Subsection 34.10(8) or 36.01(5), the Chairperson shall, after consultation with the other members of the IMC, prepare and submit a reference of the nature referred to in Subsection (1) to the Adjudicator.
- 3) Subject to Subsection (4), on an issue or matter in dispute submitted to binding arbitration, an Adjudicator shall make an Award which addresses the issue or matter in dispute in accordance with the reference, and which may include:
 - (a) the determination of facts relating to the issue or matter in dispute;
 - (b) an interpretation of this Agreement or a Treaty Entitlement Agreement;
 - (c) a determination that one or more of the parties or one or more EFNs is required to take certain action to give effect to this Agreement or a Treaty Entitlement Agreement; or
 - (d) a finding that an Event of Default has occurred.
- 4) An Adjudicator on an issue or matter in dispute submitted to binding arbitration shall not have jurisdiction to make an Award which:
 - (a) requires any of the parties or an EFN to change any of its policies, provided that:
 - (i) the Adjudicator may identify and determine any inconsistencies or deficiencies in the policies of any party or EFN and make recommendations to that party or any EFN concerning its policies affecting the due implementation of this Agreement or any Treaty Entitlement Agreement; and
 - (ii) a party or an EFN which receives a recommendation from the Adjudicator made in accordance with Subparagraph (i) shall have due regard for its obligations under this Agreement or a Treaty Entitlement Agreement in the

consideration of any determination or recommendation of the Adjudicator;
or

- (b) subject to Subsection 36.04(2), requires any of the parties or an EFN to make a payment to any other party or EFN for or in respect of damages or loss alleged to have been suffered by that other party or EFN as a result of any action or inaction of that party or EFN.
- 5) The resolution of an issue or matter in dispute referred to binding arbitration that is resolved by the consent of the parties and any EFN involved in that issue or matter in dispute shall issue as an Award.

35.05 Appeal of Binding Arbitration Awards

- 1) An Award, other than an Award issued in accordance with Subsection 35.04(5), may be appealed to the Manitoba Court of Queen's Bench within 30 days of the date of the Award by a party to the issue or matter in dispute on the grounds of:
 - (a) failure of the Adjudicator to consider the matter fairly;
 - (b) bias of the Adjudicator;
 - (c) failure of the Adjudicator to act within the jurisdiction provided to the Adjudicator; or
 - (d) error of law committed by the Adjudicator, including an error in interpretation of the Agreement or a Treaty Entitlement Agreement.
- 2) Where an Award is appealed in accordance with Subsection (1), the Manitoba Court of Queen's Bench may:
 - (a) dismiss the appeal;
 - (b) allow the appeal and remit the issue or matter in dispute to the Adjudicator or to the IMC to appoint a different Adjudicator to be reconsidered based on the decision of the Court; or
 - (c) allow the appeal and substitute the decision of the Court in place of the Award where the determination of the appeal would reasonably resolve the issue or matter in dispute

and may make an order for costs.

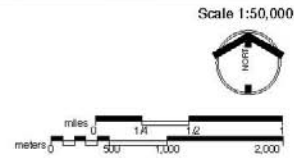
- 3) There shall be no right of appeal from a decision of the Manitoba Court of Queen's Bench made in accordance with Subsection (2).

Annex E:

Maps of BPFN Birch Point Selection



Treaty Land Entitlement (TLE)
Land Capability Use And Selection Study
Land Selection Area
1. Birch Point: 105 acres ±





Buffalo Point First Nation
Site: 1, Birch Point

Legend Depending on the scale of the digital graphic themes available in an area, boundaries may not match. The TLE & Encumbrance themes have been digitized to an approximate scale of 1:50000.

	Treaty Land Entitlement Sites		Ecological Reserves
	Encumbrances		Wildlife Management Areas
	Municipal Boundaries		Parks
	Indian Reserves		Forests
	Water (Lakes, Rivers, etc.)		Roads
	Twp Lines		Railways
			PTH's

Site Map
Site Acreage: +/- 138.75 ac.
Unencumbered Acreage: +/- 0.00 ac.
Note: Map is for illustrative purposes only. All features may not be displayed in their entirety.
 Scale: 1:50000
 Date: June 11, 1999
 Prepared by: bh
 File: BuffBirch2_site_lex

