IN THE MATTER OF THE FRAMEWORK AGREEMENT
TREATY LAND ENTITLEMENT MANITOBA

BETWEEN:

BUFFALO POINT FIRST NATION

Applicant,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA

Respondent.

ADJUDICATOR'S DECISION

Appearances:

For Buffalo Point First Nation:

Bradley D. Regehr, Legal Counsel
Ian Scarth, Legal Counsel

For Manitoba:

Jim Koch, Legal Counsel
Cynthia Nazar, Legal Counsel

BACKGROUND

1. This matter involves a dispute between Buffalo Point First Nation ("BPFN") and Her Majesty the Queen in Right of the Province of Manitoba. The dispute relates to BPFN's ability to select certain lands described as the "Birch Point selection", in partial fulfilment of the obligations which are owed to the First Nation under Treaty No. 3.

2. The Birch Point selection is comprised of 105 acres and includes all of Birch Point Provincial Park which comprises 32 of the 105 acres. This selection is in fairly close proximity to the community of BPFN which is located on Indian Reserve No. 36.

3. One could say that the history of this dispute goes back to 1994 when BPFN confirmed the Birch Point selection and other selections by way of Band Council Resolution ("BCR") No. 141 which it then delivered to the Department of Indian Affairs and Northern Development (formerly Indian Northern Affairs Canada). The roots of this dispute, however, trace back much further.

Treaty No. 3

4. BPFN and its members are an Ojibway First Nation located in the most southeast corner of Manitoba. This First Nation has historically used and occupied the lands and waters of southeast Manitoba, northwest Ontario and northern Minnesota including Lake of the Woods, Buffalo Bay and the land surrounding those bodies of water. The Birch Point selection is located on Buffalo Bay.

5. BPFN and its members having historically exercised all manner of aboriginal rights including hunting, fishing, trapping, and harvesting in these lands. On October 3, 1873 Her Majesty the Queen entered into Treaty No. 3 with BPFN and several other First Nations, in recognition of the Nation's aboriginal rights.

6. Treaty No. 3 covers a very large area. Counsel for BPFN advised that generally speaking it runs from the Canada/U.S. border north to Whitemouth Lake and then north along the

Whitemouth River up to the Winnipeg River. It runs eastward into Ontario and covers a very large portion of northwest Ontario.

7. The Treaty included a provision that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 640 acres or one square mile per each family of five. This promise is commonly referred to as "treaty land entitlement" ("TLE") or the "per capita provision".

8. While BPFN has received some lands to be set aside as reserve in partial satisfaction of its TLE, it has not received land of sufficient area to fulfil the promises that were made in Treaty No. 3 and those treaty rights remain outstanding.

Framework Agreement Treaty Land Entitlement Manitoba

9. In 1993 BPFN along with several other First Nations authorized the Treaty Land Entitlement Committee of Manitoba Inc. ("TLEC") to act as their representative in negotiating an agreement to address their outstanding treaty land entitlement, together with the fact that they had not received land of sufficient area to fulfil the requirements under the respective treaties into which they had each entered.

10. Those negotiations began in 1993 and culminated on May 29, 1997 when Canada, Manitoba and TLEC entered into the Framework Agreement Treaty Land Entitlement Manitoba (the "Agreement").

11. The Agreement is a treaty implementation agreement.

12. It sets out how the participating First Nations can select and in some cases acquire land to be converted to reserve status.

13. The preamble to the Agreement sets out a comprehensive history and description of the treaty land entitlement process between the Entitlement First Nations and the Crown.

14. A copy of the preamble is attached at Appendix A to this Award.[1]

15. Among other things, the preamble confirms that Canada has advised Manitoba that the Entitlement First Nations have not received land of sufficient area to fulfill the requirements of their per capita provisions. It contains an acknowledgment that insufficient unoccupied Crown land is available to fulfil the requirements of the per capita provision of certain Entitlement First Nations and acknowledges that Canada and Manitoba have agreed that Manitoba will satisfy its obligations to Canada under paragraph 11 of the Manitoba Natural Resources Transfer Agreement ("MNRTA") in the manner and to the extent provided in the Agreement.

16. The MNRTA was signed by Canada and Manitoba in 1930. Similar natural resources transfer agreements were signed in Saskatchewan and Alberta.

17. Pursuant to the MNRTA, Canada transferred to Manitoba all of its interest in Crown lands, mines and minerals (precious and base), waters, water powers and royalties and sums due or payable for any of those interests of Canada.

18. In transferring this land Canada recognized and advised Manitoba that many First Nations including Buffalo Point, had not received land of sufficient area to fulfil the treaty requirements.

19. Paragraph 11 of the MNRTA provides:

> "... the Province will, from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied crown lands hereby transfer to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they never passed through the Province under the provisions hereof."
>
> **Framework Agreement, Preamble, para R**

20. The MNRTA was ultimately recognized as a schedule to the *Constitution Act* of 1930.

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[1] All of the relevant sections from the Framework Agreement are attached in chronological order at Appendix "A"

21. Each First Nation that authorized the TLEC to negotiate the Agreement on its behalf then signed a Treaty Entitlement Agreement ("TEA") with the TLEC, Canada and Manitoba. The Agreement is attached as a schedule to each TEA. BPFN executed its TEA on March 24, 1998.

22. The period in which BPFN was formally able to select Crown land, therefore, commenced on March 24, 1998 and selections which it had made prior to that date were considered active as of that date. This included the selections it made pursuant to BCR No. 141, four years earlier, on March 8, 1994. BCR 141 indicated that BPFN had selected six parcels of land in partial fulfillment of its treaty land entitlement:

> "WHEREAS the Buffalo Point First Nation has selected six parcels of land known as:
>
> 1) Birch Point
> 2) The Galley Restaurant
> 3) Poplor Point [sic]
> 4) South Shore (Tommy's Bay)
> 5) Gould's Point
> 6) Remote Island Lake of the Woods and;
>
> WHEREAS the Buffalo Point First Nation is desirous of acquiring the above noted sites in partial fulfillment of treaty land entitlement, on a without prejudice basis"

BCR No. 141

23. With respect to the Birch Point selection, Manitoba has maintained a consistent position since 1995, that the portion of that selection which is located in Birch Point Provincial Park is not eligible to be selected and set aside as reserve land, because of the wording of subsection 3.03(6) of the Agreement. That section provides:

> "(6) An Entitlement First Nation may not generally Select land in a provincial park, ecological reserve or wildlife refuge, provided that:
>
> (a) Crown Land in the Amisk, Sand Lakes, Caribou River and Numaykoos Lake Provincial Parks shall be available for Selection;
>
> (b) Crown Land in a provincial park created after the Date of Execution shall be available for Selection; and

(c) the "Limestone Point Planning Area" as shown on Schedule "C" has been identified as land of ecological sensitivity and will not be available for Selection."

Framework Agreement, section 3.03(6), Appendix A, pg 7-8

24. The Birch Point Provincial Park was originally established in 1961 as the Birch Point Provincial Recreational Area, pursuant to an Order-in-Council under the *Provincial Parks Act*, SM 1960 Cap 53.

The Provincial Parks Act and Regulations

25. Parks are important to the public and their creation and use are governed by provincial legislation.

26. As the Province indicated in its Arbitration Brief: "As early as 1960, the legislative assembly of Manitoba considered the establishment of provincial parks to be of importance to citizens of Manitoba and visitors to Manitoba. In that year the Manitoba Legislature enacted the *Provincial Parks Act*, SM 1960 c. 53. Subsection 3(1) of that Act provided that the purpose of the Act was to authorize the Lieutenant Governor in Council to constitute, establish and maintain parks and recreational areas for the use, benefit, health, enjoyment recreation and education of the citizens of Manitoba and visitors to Manitoba." That Act has been repealed and replaced on a number of occasions resulting in the current Act known as the *Provincial Parks Act* CCSM c. P20.

27. *The Provincial Parks Act* continues to be the primary statute governing provincial parks. Its purposes are described in its preamble in the following manner:

> "WHEREAS provincial parks are special places that play an important role in the protection of natural lands and the quality of life of Manitobans; whereas existing and future provincial parks should be managed in a manner consistent with the principles of sustainable development so that representative examples of diverse natural and cultural heritage are conserved and appropriate economic opportunities are provided; AND WHEREAS a system of provincial parks will contribute to the province's goal of protecting 12% of its natural region."

***The Provincial Parks Act*, CCSM c P20**

28. Pursuant to this legislation, parks are designated by regulation and classified and categorized according to their main purpose or intended use. In its Arbitration Brief the Province submitted that while their specific classification and use can vary, all provincial parks under the *Provincial Parks Act* are dedicated to the public with the purpose of conserving ecosystems and maintaining biodiversity, preserving natural, cultural and heritage resources and providing outdoor recreational and educational experiences to the public.

29. The Province also identified that the *Park Activities Regulation* Man. Reg. 141/96 provides for a comprehensive regulatory regime that sets limits on the types of activities that can be engaged within a provincial park. This is in order to protect and manage parks in a manner consistent with the purposes of the Act.

30. The Province submitted that land use planning and management is also a key element of the *Provincial Parks Act*, point out that while the *Planning Act* of Manitoba applies throughout most of the province it does not apply to lands within provincial parks. Those lands are regulated by the Parks Act and Regulations.

31. Finally, the Province identified that under the *Provincial Parks Act*, the decision to amend, repeal, or replace a regulation establishing a provincial park requires providing the public with an opportunity for consultation (the *Provincial Parks Act*, sections 7, 8 and 9).

Establishment of the Binding Arbitration Process Leading to this Award

32. From March 8, 1994 when BPFN first made the Birch Point selection to the present, BPFN and Manitoba have been unable to reach agreement as to whether the Birch Point selection is eligible to be set aside as reserve land. Because of this, on November 27, 2014 BPFN passed BCR No. 397-14, requesting that the Implementation Monitoring Committee ("IMC") refer the dispute to binding arbitration.

33. The IMC is established pursuant to section 34 of the Agreement. Its role is to facilitate the implementation of the Agreement and any Treaty Entitlement Agreements. Section 34.01 provides:

> "34.01 Establishment of the Implementation Monitoring Committee
>
> (1) The Implementation Monitoring Committee will be established comprised of five members, consisting of two representatives appointed by the TLE Committee, one representative appointed by Canada and one representative appointed by Manitoba and an independent Chairperson appointed in accordance with Sections 34.03 and 34.05.
>
> (2) The Implementation Monitoring Committee will remain in existence until the parties agree that:
>
> (a) the provisions of this Agreement and any Treaty Entitlement Agreement have been substantially performed; or
>
> (b) the Implementation Monitoring Committee is no longer required."

Framework Agreement, section 34.01(1) and (2), Appendix A, pg 15

34. Section 34.03 provides for the appointment of an Independent Chairperson:

> "34.03 Appointment of Independent Chairperson
>
> (1) The members of the Implementation Monitoring Committee representing the TLE Committee, Canada and Manitoba shall consider the availability of persons resident in Manitoba that may have the appropriate qualifications and experience to undertake and effectively discharge the responsibilities of Chairperson and shall, within 90 days of the Date of Execution or such longer period as the parties may agree, recommend to the Senior Advisory Committee a person to be appointed Chairperson.
>
> (2) The Senior Advisory Committee shall, within 30 days of the date of receipt of the recommendation referred to in Subsection (1), appoint a person as Chairperson."

Framework Agreement, section 34.03(1) and (2), Appendix A, pg 15-16

35. The responsibilities of the IMC are as follows:

"34.07 Responsibilities of the Implementation Monitoring Committee

(1) The Implementation Monitoring Committee shall be generally responsible for facilitating the implementation of this Agreement and any Treaty Entitlement Agreements, including:

(a) establishing a budget of the reasonable estimated costs of its operation in each fiscal year, being the period from April 1 to March 31 in any year, or any part of a fiscal year in which it operates;

(b) monitoring of the progress of implementation;

(c) making recommendations to the parties for the resolution of any issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement Agreement;

(d) resolving any issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement Agreement which is referred to it by a party or an Entitlement First Nation under this Agreement or that Treaty Entitlement Agreement; and

(e) considering the appropriate method of resolution of an issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement Agreement in accordance with Article 35."

Framework Agreement, section 34.07(1)(a)-(e), Appendix A, pg 17-18

36. Section 34 provides a number of steps whereby the IMC may attempt to resolve the issue or matter in dispute, culminating in sending the matter to be reviewed by the Senior Advisory Committee ("SAC") pursuant to section 34.09(8).

37. The SAC is established pursuant to section 34.10 as follows:

"34.10 Establishment of the Senior Advisory Committee

(1) a Senior Advisory Committee representing the parties will be established consisting of:

(a) the President of the TLE Committee for the TLE Committee;

(b) the Regional Director General (Manitoba Region) or the Assistant Deputy Minister (Claims and Indian Government) of the Department of Indian Affairs and Northern Development for Canada; and

(c) the Deputy Minister of Northern Affairs for Manitoba.

(2) one member of the Council of an Entitlement First Nation specifically affected by an issue or matter in dispute may also participate in any meetings of the Senior Advisory Committee at which that issue or matter in dispute is addressed."

Framework Agreement, section 34.10(1) and (2), Appendix A, pg 23

38. Section 34.10 goes on to provide that where the SAC does not make a decision on resolving a matter in dispute, it notifies the IMC Chairperson to that effect and indicates its decision as to the appropriate method of dispute resolution to be used, in accordance with the provisions of the Agreement.

39. In this case, the SAC met on February 23, 2015 and directed that the IMC Representatives in attendance "prepare the necessary questions for the Binding Arbitration process to be initiated under Article 35.04 of the MFA-TLE for the BPFN Referral".

Minutes of the SAC meeting held February 23, 2015

40. The IMC referred the Birch Point selection dispute to binding arbitration on April 30, 2015, in accordance with the provisions of section 35 of the Agreement.

41. Section 35.04 provides the following procedure:

"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 Implementation

Monitoring Committee shall prepare and submit to the Adjudicator a reference setting out in writing:

(a) a question or the questions for the Adjudicator to determine; and

(b) any other terms of reference to define the jurisdiction of the Adjudicator."

Framework Agreement, section 35.04(1), Appendix A, pg 27

42. The IMC prepared a Reference for Binding Arbitration which set out the following questions:

"V. Questions to be answered by the Adjudicator specific to IMC Referral File 1999-BPFN-001

1. Is the Birch Point Selection by Buffalo Point First Nation (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 Manitoba Treaty Land Entitlement Framework Agreement?

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);

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

(b) What are the criteria and information that must be provided by Manitoba and the Entitlement First Nation in determining the eligibility of selections?

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

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

Adjudicator Reference, page 2

43. This Award is made pursuant to that Reference.

44. The Reference stipulated that a decision was to be rendered in writing within three months of the date on which the adjudicator signed an agreement to provide adjudicative services which in this case was July 30, 2015. I understand that the parties then considered some efforts to resolve this matter on their own. Those efforts were not successful, however, and the parties agreed that the period for adjudication should be extended. The hearing of this adjudication took place on October 17 and 18, 2016.

FACTS

Buffalo Point First Nation

45. BPFN presently includes two reserves: Buffalo Point Indian Reserve No. 36 which is located on the Buffalo Point Peninsula; and Reed River Indian Reserve No. 36A which is located on both sides of the Reed River. The Reed River empties into Buffalo Bay. BPFN also has an interest with all other Treaty No. 3 First Nations in the Agency 30 Indian Reserve which is located near Kenora, Ontario.

46. The land capability use and selection study which BPFN commissioned as part of its TLE selection process states that the Buffalo Bay area was BPFN's traditional use area at the time of treaty establishment and that Buffalo Point is the closest First Nation group in Canadian territory to the Birch Point selection area – including the acres comprised of the park.

47. I have attached as Appendix "B" to this Award a map that was contained in the land use and selection study. BPFN's selections are described on it in the area marked as the "Land Selections Context Map Area". The Birch Point Selection, including Birch Point Provincial Park, is contained within that area.

48. Chief John Thunder is the sixth hereditary chief of BPFN, having taken over as Chief in 1997. He testified at the hearing of this arbitration.

49. His evidence was that the peoples of BPFN have carried on the activities of hunting, fishing, harvesting wild rice and berry picking in the Birch Point area, since time immemorial. Birch Point was a well-used transportation route for BPFN including being used to gain access to the Reed River – an area where the First Nation has also engaged in its traditional harvesting activities.

50. The Chief advised that the traditional lands that BPFN occupied were not limited to Manitoba but also extended into Ontario and the US. In cross-examination, he pointed out that the community of BPFN is somewhat unique because it is on the border of several jurisdictions: Manitoba, Ontario and Minnesota.

51. In addition to the parcels of land selected in Manitoba, BPFN has selected two parcels in Ontario: Eagles Nest Rock and Cochrane Island. Ontario, however, the Chief said, has not cooperated with those selections.

52. The Chief also testified that the nature of the land that borders Buffalo Bay is pretty much all swamp. He said that that is one of the reasons why they have such a difficult time in selecting TLE and obtaining their final allocation. He also testified that unless Ontario starts cooperating he is not sure how they are going to be able to obtain their full entitlement – unless they go somewhere else like Steinbach or Winnipeg.

53. Information about the traditional use which BPFN has made of the Birch Point selection area is well documented in the correspondence which was carried on between the First Nation and Manitoba, from 1994 to the present.

54. In that correspondence and in his testimony at the hearing, the Chief identified various reasons for selecting Birch Point. Those reasons included his concerns that the province may give use of the Park to third parties which would be inconsistent with the First Nation's interests and BPFN's desire to exercise control over the area for the sake of environmental protection.

Birch Point Provincial Park

55. As noted earlier, this park was originally constituted and established as an area described as the Birch Point Provincial Recreational Area by Order-In-Council 1357/61 under the *Provincial Parks Act*, SM 1960, c. 53, on November 8, 1961.

56. In 1972 the *Provincial Park Lands Act*, SM 1972, c. 67 was enacted and on August 13, 1974 Manitoba designated the former Birch Point Provincial Recreational Area as a provincial recreation park, pursuant to a *Regulation under the Provincial Park Lands Act Respecting the Establishment and use of Provincial Park Lands*, Man. Reg. 199/74.

57. The *Provincial Park Lands Designation Regulation*, Man. Reg. 30/91 was made under the *Provincial Park Lands Act*, on February 5, 1991. It designated each of the lands described in the Schedules to it, as provincial park lands. Included among these were lands designated as provincial recreation parks which were described as "spacious areas close to concentrations of people, the natural attributes of which make it possible to serve large numbers of recreational users without degradation of the natural resources of the area. (*Provincial Parks Designation Regulation*, Man. Reg. 30/91)

58. Birch Point Provincial Recreation Park was one of the provincial recreation parks designated in that regulation.

59. The Province filed an Affidavit in these proceedings from Elisabeth Ostrop. She is the Manager of Recreation and Education Services in the Parks and Protected Spaces Branch, Parks and Regional Services Division, Department of Sustainable Development Government of Manitoba. She also testified at the arbitration hearing.

60. Ms. Ostrop's duties include being responsible for the parks reservation services, together with the compilation of annual park statistics and trend evaluation of information associated with use of the campground, day use and other recreational experiences in provincial parks.

61. She testified about the nature and extent of the public's use of Birch Point Provincial Park. She described the campground as a rustic campground which caters to those people who do not want a full service experience. The park has 26 campsites.

62. Although in her affidavit Ms. Ostrop attested that the park provides the only public access point within the Province of Manitoba to Lake of the Woods, in her testimony she clarified that in fact a land survey which was conducted in the summer of 2015, shows that the boat launch which provides that access is located outside the boundaries of the park.

63. In terms of rustic campgrounds Mr. Ostrop characterized the usage of the campground as being neither low nor high but right where it should be.

64. She said that from May 15 to September 5, 2015, the statistics averaged approximately three campers per day.

65. In her affidavit Ms. Ostrop also described Moose Lake which is a campground that is about 7 kilometres away from Birch Point. It has 76 nightly campsites and in 2015 was about three times as busy as Birch Point. Ms. Ostrop stated that many Moose Lake campers use Birch Point Provincial Park to access Lake of the Woods, but she acknowledged that no statistics have been kept on how many campers at Moose Lake use the boat launch in fact.

66. Ms. Ostrop testified that there could also be residents from the surrounding communities who use Birch Point Park during the day only, but she had no specific evidence of this. She also said that the park has significant winter use for ice fishing and that Manitoba Sustainable Development pays to have the road to the Birch Point boat launch plowed during the ice fishing season.

67. Ms. Ostrop testified in a very forthright manner. What was clear from her evidence was that the Province has fairly limited information as to the nature and extent of the public's use of Birch Point Park. As I set out later in my reasons, however, this finding has no bearing on my determination in this matter.

Communication Between the Parties, 1994-2015

68. The parties have maintained correspondence about the Birch Point selection, off and on for over 21 years. It is important to review significant portions of that correspondence, in order to fully understand this Award.

69. The Department of Indian and Northern Affairs Canada acknowledged receipt of the BCR 141 which confirmed BPFN's land selections, including Birch Point, in a letter to BPFN dated April 27, 1994. It copied the Province and the Land Entitlement and Claims Officer for Indian and Northern Affairs Canada and listed the six sites identified by BPFN for TLE consideration.

70. Manitoba acknowledged receipt of Canada's April 27, 1994 correspondence on May 13, 1994 and asked to be provided with exact legal descriptions and adequate mapping for each selection.

71. Canada provided that information on May 18, 1994 and on May 27, 1994 Manitoba recorded all of BPFN's selections on the Crown Land Registry System, thereby reserving the selections from further disposition.

72. On May 9, 1995 Manitoba wrote to Canada, providing its response to the March 8, 1994 BCR. With respect to the Birch Point selection, Manitoba stated that it was not available for the following reasons: "These lands are not available as this site is designated under the Provincial Park Lands Act, by Order-in-Council 1357/61. The Birch Point Provincial Recreation Park is significant in the provincial park system in that it contains considerable infrastructure and is the only provincial facility to provide access to Lake of the Woods."

73. On May 16, 1995 an internal memorandum from C.G. Prouse of Manitoba to I. Dubé, Chief of Land Programs for the Department of Natural Resources Manitoba stated that the Parks and Natural Areas Branch was not considering the divestiture of the Birch Point Recreation Park. Mr. Prouse identified that a third party had approached Manitoba with a proposal to operate both Moose Lake and Birch Point. The two sites, he indicated, have always been considered together

because of their proximity. From an operational point of view, his memo indicated, there would be some advantages to the department to having the third party look after the sites, however, with respect to Birch Point Mr. Prouse stated this would involve no more than a contract for services.

74. Mr. Prouse indicated that the Province's concern with having Birch Point considered as a TLE site included the need to provide access to Lake of the Woods from Manitoba. That concern, he said, would also preclude the Parks Branch from allowing any other individual or group to control the site.

75. On March 21, 1996 I. Dubé wrote to the Local Government District of Piney to advise of BPFN's land selection. She indicated that "The Birch Point site has been denied as it is a Provincial Park and the only access to Lake of the Woods."

76. On May 27, 1998 Indian and Northern Affairs Canada wrote to both Chief Thunder and Manitoba Department of Northern Affairs to provide Canada's response to BPFN's land selections. These included the six selections made in Manitoba and two in Ontario.

77. Although Canada confirmed the eligibility of the selections it indicated that the Province of Ontario said it expected to have consultation about the selections within its province.

78. Canada went on to say that it anticipated the response from Manitoba concerning the eligibility of the selections in due course and that it looked forward to working with BPFN, Manitoba Northern Affairs and the TLEC to have the land set apart as reserve.

79. On September 16, 1998 Manitoba provided its response to the BPFN selections again. It repeated its position that the Birch Point selection was not available because: "This site is not available for selection per section 3.03 subsection 6 of the Treaty Land Entitlement Agreement. The site was designated under the Provincial Park Lands Act by Order-in-Council 1357/61. The Birch Point Recreational Park is significant in the provincial park system in that it is the only provincial facility to provide access to Lake of the Woods."

80. The letter went on to say that the remaining five selections were available.

81. The Birch Point selection was discussed at a meeting held between the parties in the community of BPFN in March of 1999. Manitoba advised at the meeting that its position had not changed.

82. On March 11, 1999 TLEC wrote to BPFN recommending that the First Nation refer the matter to the IMC which BPFN did, on June 23, 1999.

83. In its referral letter, BPFN indicated that while it understood that subsection 3.03(6) of the Agreement states that an Entitlement First Nation may not generally select land within provincial parks:

> "We also feel that use of the word 'generally' implies that exceptions may be made. One of the major goals of Buffalo Point in selecting this parcel of land is in order to continue to operate Birch Point as a recreation area access point and campground, as well as to ensure that the site is preserved in the state it exists in today. Birch Point is clearly within the Buffalo Point traditional and treaty area. As well, public access to this site does not seem to be a major provincial concern as in the past they have indicated a desire to the lease [sic] the parcel to private parties. It is a fear on the part of Buffalo Point that the province of Manitoba while refusing the land selection of Buffalo point for lands within their traditional and treaty area, are willing to give up the very same land to outside interests."

84. The IMC discussed the Birch Point selection at a meeting held on June 24,1999.

85. On July 7, 1999 the Province wrote to BPFN and Canada, repeating its position with respect to the Birch Point selection – that the site was not available, stating: "This site is not available for Selection as per Subsection 3.03(6) of the Framework Agreement as it is located in Birch Point Recreational Park designated under the Park Lands Act by OC 1357/61."

86. In 1999 BPFN passed another BCR confirming its land selections including the Birch Point selection.

87. Between 2000 and 2009 there is no evidence of any negotiations or discussions having taken place between the parties regarding the Birch Point selection.

88. On February 18, 2009 representatives of BPFN, TLEC, Manitoba, Canada and Manitoba Hydro met to discuss BPFN's TLE selections.

89. On April 8, 2009 BPFN passed and forwarded to Manitoba, another BCR confirming its interest in selecting Birch Point. The parties met again to discuss the BPFN TLE selections. That meeting was summarized in a letter dated June 15, 2009 from the Province to Chief Thunder and Council. With respect to Birch Point, the letter indicated that "Manitoba remains committed to its position of September 16, 1998 whereby the First Nation was advised the Birch Point Provincial Park selection was not eligible for selection under subsection 3.03(6). Birch Point was designated under the Provincial Lands Act as a provincial park. The park provides access to the Lake of the Woods."

90. On July 29, 2009 the Province sent a letter to BPFN summarizing a TLE meeting which had taken place on June 16, 2009. With respect to Birch Point it stated: "Manitoba maintains its position that an Entitlement First Nation may not generally select land in a provincial park. The Birch Point Park consists of maybe 40 acres of the original selection of 105 acres. Manitoba Conservation will prepare additional mapping of the selection and the park and provide the mapping to the First Nation. Chief Thunder will meet with the Director, Crown Lands, Manitoba Conservation (Harley Jonasson) to reassess the selection and to discuss possible opportunities."

91. I note that this is the first time that Manitoba, in setting out its position identified that section 3.03(6) used the word "generally". The significance of this will be commented on later in this Award.

92. On May 6, 2010 Manitoba sent a letter to Indian Northern Affairs Canada and BPFN in which it reiterated its position with respect to the Birch Point selection. It referred to the responses it had previously provided on May 9, 1995, September 16, 1998 and July 7, 1999. It said that as previously confirmed, pursuant to section 3.03(6) of the Agreement "lands within an existing provincial park are not available for Selection. As such, Manitoba is amending the entry for this Selection on Manitoba's Crown Land Registry to remove the portion contained within the park." The letter went on to indicate that in accordance with other provisions of the Agreement, where a First Nation identifies land in a provincial park to be land of cultural or

historical significance "it is intended that Manitoba and the First Nation will enter into an agreement designed to protect the parcel of land in a manner that reflects the significance to the First Nation". It went on to say if there were specific areas within the Park that would benefit from the intent of this provision, it would be interested in discussing details.

93. The parties continued to correspond and on October 20, 2010 Chief Thunder sent a letter to the Province following a site visit to Birch Point which had taken place on September 17, 2010. In his letter, Chief Thunder reminded the Province that section 3.03(6) says that an entitlement first nation may not **generally** select land in a provincial park and that Buffalo Point understood this was not an exclusive prohibition. He invited the Province, therefore, to consider strategies to give effect to its selection.

94. On March 1, 2011 Chief Thunder sent a letter to the IMC regarding the referral of the Birch Point selection to the IMC. He advised that a site visit had taken place on June 10, 2010 with a representative of the Province of Manitoba, regarding developing cottages adjacent to Birch Point. He said, however, that the proposal was fruitless because during their visit he noticed the area being proposed was very saturated and boggy. He wrote that the only site that would be of any value to BPFN was the original site selected namely – the Birch Point Park Campgrounds and launch area on the lakeshore.

95. On April 20, 2011 the Province wrote to Chief Thunder and reiterated its previous responses to the Birch Point selection stating "Manitoba confirms that as contemplated in 3.03(6) of the Manitoba Framework Agreement, lands within an existing provincial park are not available for selection."

96. On May 5, 2011 Indian and Northern Affairs Canada wrote to the IMC providing its response to the draft protocol that the IMC had prepared relating to the Birch Point selection – IMC Referral 1999-BPFN-001. In its letter, Canada set out its view that while the terminology "may not generally select" may provide for an Entitlement First Nation to select land in a provincial park, beyond the exceptions noted this would ultimately be at the sole discretion of Manitoba and its determination with respect to eligibility.

97. On May 6, 2011 Chief Thunder wrote to the IMC asking that its provincial park selection be given priority before BPFN selected any further land. He stated: "Buffalo Point selections of Crown lands that are in limbo are burdened by the fact that there is no decent lands around our area and the selections of Birch Point, Thunder Lake, Cochrane Island and Eagle Nest Rock are in abeyance because of debatable provincial land status." The Chief also wrote to the Minister of Aboriginal and Northern Affairs for Manitoba expressing his concern regarding its outstanding TLE selection.

98. The IMC prepared the Referral Protocol on June 29, 2012. The Protocol set out the facts and issues relating to this dispute together with non-binding recommendations from the IMC Chairperson.

99. Those recommendations included the Chairperson's view that Manitoba had sole discretion to determine if a selection of land within a park will be eligible, after review and consideration of an Entitlement First Nation's assertion that its selection be considered as an exception to the general guidelines/principles.

100. The Chairperson recommended that the Province confirm its commitment to provide BPFN with a "first right of refusal" should it ever decide to withdraw the park from the *Provincial Park Lands Act*, by registering a Memorandum of Understanding to that effect in the Crown Lands Registry, against the Birch Point Park portion of the selection.

101. On August 13, 2012 Manitoba wrote to BPFN, Canada and the TLEC, responding to the IMC Referral Protocol. It repeated its position that the park was not available for selection because of subsection 3.03(6) which states that an Entitlement First Nation may not generally select land in a provincial park. It went on to say that the Province had registered a notice in the Crown Lands Registry that stated that BPFN was to be notified if at any point in the future the area was withdrawn from the Birch Point Provincial Park and that it was prepared to amend that notice to state that "Buffalo Point First Nation is to be consulted if at any point in the future Birch Point Provincial Park is withdrawn from the Provincial Parks Act or Manitoba proposes to issue to a third party interest, the right to use, manage or develop land within the park."

102. Manitoba also indicated that in accordance with the Agreement, when a First Nation identifies land in a provincial park as land of cultural and historical significance the Agreement provides that Manitoba and the First Nation will consider entering into a cooperative agreement designed to protect the parcel of land in a manner that reflects the significance to the First Nation.

103. On March 7, 2013 BPFN passed another BCR with respect to the Thunder Lake and Birch Point selections still requesting that Manitoba transfer the lands to Canada so that they could be set apart as reserve.

104. The parties continued to correspond regarding their respective positions.

105. Ultimately BPFN passed BCR 397-14 requesting that the IMC refer the Birch Point matter to binding arbitration which takes us to these proceedings.

ISSUES

106. The substantive issues to be determined are those established by the Adjudicator Reference for Binding Arbitration:

> *"1. Is the Birch Point Selection by Buffalo Point First Nation (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 Manitoba Treaty Land Entitlement Framework Agreement?*
>
> *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);*
>
> *(a) what are the circumstances under which such a selection could be considered eligible, and,*
>
> *(b) What are the criteria and information that must be provided by Manitoba and the Entitlement First Nation in determining the eligibility of selections?*

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

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

Adjudicator Reference, page 2

THE PARTIES' POSITIONS

107. At the outset of the hearing, the parties advised that they had reached agreement on a number of issues. First, they agreed that in light of the case law, the honour of the Crown is engaged in interpreting and applying the Agreement. Their positions differ, however, with respect to whether the honour of the Crown has been satisfied in this case.

108. Next, the parties agreed that the word "generally" used in section 3.03(6) provides an exception to the general rule that Entitlement First Nations may not select land from parks that were in existence at the time the Agreement was signed.

The Province's Position

109. The Province's position is that the Birch Point selection is not of such an exceptional nature that it would require a departure from the general rule.

110. It says its position is further informed by the fact that provincial parks are designated as lands that attract specific land use and regulatory considerations and any disposition of those lands, whether through TLE or otherwise, would engage a regulatory process under *The Provincial Parks Act* which is separate from the Agreement.

111. The Province accepts that BPFN has historic ties to at least certain sites within Birch Point Provincial Park. It is of the view, however, that those interests were recognized in other wording of the Agreement and codified in a way that would protect them while still maintaining the province's interest in provincial parks. Here it is referring to section 9.09 of the Agreement which will be discussed later.

112. It also says that the Agreement should be interpreted in a way that gives Manitoba the sole discretion to determine whether TLE selection is eligible within a provincial park. It says the rationale for this is because provincial parks reflect a wide range of interests which government is required to balance, including protecting cultural and historical sites within those parks and that section 9.09 has been incorporated into the Agreement to address those concerns. (See Appendix A, pg 13)

113. Finally, although the Province generally agrees that as adjudicator, I have jurisdiction to preside over the questions which are set out in the Adjudicator Reference, it says that the nature of my role is limited. Specifically, because the Province takes the position that the Agreement gives it sole discretion to determine whether BPFN's selection falls within the exception provided in section 3.03(6), the role performed by an adjudicator is analogous to one of judicial review. That is, 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 section 3.03(6) is concerned.

114. Counsel for the Province says that despite the position Manitoba has taken, the Province has listened to the concerns identified by BPFN and has taken steps to address them in a way that is consistent with both the Agreement and the Crown's public interest mandate regarding the significance of parks, to the public.

115. It submits that to satisfy the honour of the Crown the Province must avoid sharp dealing and proceed in good faith but it does not need to accede to the First Nation's requests.

116. The Province says that Manitoba has acted in an honourable fashion and in a manner that is consistent with the purposes of the Agreement.

BPFN's Position

117. In its Arbitration Brief BPFN says: "It is no longer acceptable for Manitoba to simply deny a selection based upon a narrow interpretation … the Framework Agreement must be

interpreted liberally to consider the rights of those First Nations who have either used the land in a traditional use or whose reserve would be enhanced by the addition of the land."

118. It submits that in light of the principles set out by the Supreme Court of Canada relating to the honour of the Crown and the principles which are set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, the circumstances under which a selection in a provincial park should be considered could include: 1. when a First Nation claims a historical use of the lands; 2. when a First Nation claims an existing aboriginal right on the land; and 3. when the land would be integral to the existing reserve of the selecting First Nation.

119. Having regard to these three criteria, BPFN states that it has used the land in question since the beginning of time for harvesting, ceremonial and cultural purposes. It also says that because the geographical boundaries of the existing reserve are restricted by international and provincial borders, water bodies and swamp lands, the Birch Point selection is one of the only selections available to add to its existing reserve.

120. All of these factors, it submits, bring the Birch Point selection within the exception which is provided for in subsection 3.03(6) of the Agreement.

121. BPFN also takes the position that the Province has not acted in accordance with the obligations required of it by the honour of the Crown.

122. Finally, it disagrees with the assertion that the Province has sole discretion to determine the eligibility of any selection. In so saying, it points to the dispute resolution process and mechanisms which are set out in the Agreement. None of the wording in those sections it says, gives sole decision making power to any one of the parties to the Agreement.

ANALYSIS

Determining the Eligibility of the Birch Point Selection

The Principles of Contractual Interpretation

123. The dispute between the parties and the questions I am required to answer pursuant to the Adjudicator Reference, involve interpreting the Agreement by applying principles of contractual interpretation.

124. My starting point for the law on contractual interpretation is the decision of Mr. Justice Rothstein in *Sattva Corporation v Creston Moly Corporation* 2014 SCC 53.

125. In that decision, Justice Rothstein said:

> "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"..."
>
> ***Sattva, supra,* para.47**

126. Justice Rothstein went on to explain that to do so:

> "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."
>
> ***Sattva, supra,* para.47**

127. He explained that 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:

> "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 (see Moore Realty Inc. v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]"
>
> ***Sattva, supra,* para.48**

128. The Manitoba Court of Appeal's decision in *Geoffrey Moore v. Manitoba Motor League*, 2003 MBCA 71, which was cited by Justice Rothstein in *Sattva*, *supra*, is also helpful in identifying the appropriate principles of contractual interpretation which I must apply in this case.

129. In *Geoffrey Moore,* the Court set out the following statement:

> "11 The cardinal principle of contract interpretation is that the court "should give effect to the intentions of parties as expressed in their written document." See Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415 at para. 79. If the contract is clear and unambiguous, the contract itself should be all that is required to determine the parties' intentions. That is, it will not be necessary to consider extrinsic evidence to assist in interpreting the contract. In Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, Iacobucci J. wrote (at para. 55):
>
> > Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face.
>
> ...

> 12 There are three other well-known principles of contract interpretation that should not be overlooked when considering the text of a contract:
>
> 1) all the words in the contract are to be given meaning, if possible (National Trust Co. v. Mead, [1990] 2 S.C.R. 410);
>
> 2) the contract should be construed as a whole (Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744 (C.A.), leave to appeal to the Supreme Court of Canada denied, [1993] S.C.C.A. No. 62, [1993] 2 S.C.R. x); and
>
> 3) the absence of words may be considered (Controls & Equipment Ltd. v. Ramco Contractors Ltd. et al. (1999), 209 N.B.R. (2d) 1 (C.A.))." (Emphasis added)
>
> ***Geoffrey Moore, supra*, paras 11 & 12**

130. Similarly, in a decision which was relied upon by the Province, this one from the British Columbia Court of Appeal: *Langley Lo-Cost Builders Ltd. v 474835 BC Ltd.* 2000 BCCA 365, the court confirmed that every effort should be made by a court to find a meaning, looking at substance and not mere form. At the same time the court cautioned that a court must not develop something which is at variance with any of the language of the clause.

131. Chief Justice McEachern in that case went on to confirm that the court:

> "must be careful not to add anything that cannot fairly be inferred from the words of the agreement but at the same time … must try to give commercial validity to a business arrangement if it is fair and reasonable to do so upon the application of the rules relating to the construction of agreements".
>
> ***Langley, supra*, para.41**

132. Applying all of these principles to the facts of this case, I find that the wording of section 3.03(6) clearly expresses an intention that although generally, TLE selections may not be made in the provincial parks that existed at the time the agreement was signed, there will be exceptions to that rule.

133. Indeed, this meaning is agreed upon by the parties.

134. Following the principles of contractual interpretation cited above, therefore, I find that I must give meaning to the exception which has been intentionally included in section 3.03(6). In doing so I must be careful not to add anything that was not objectively contemplated by the parties at the time that they entered into the Agreement while at the same time giving validity to the purpose of the Agreement.

135. In interpreting the wording of section 3.03(6) I find there is no ambiguity as to the parties' intentions. The parties deliberately chose not to itemize the circumstances that would fall within the exception. This is not surprising, given that the Agreement is, as the Province submitted, a very broad agreement whose scope must cover a number of different First Nations and a very large area of land.

136. The fact that the parties chose not to itemize which circumstances would fall within the exception, however, is not a reason to avoid making a determination as to whether a given selection falls within those circumstances.

137. As both the Manitoba and British Columbia Courts of Appeal stated above, all the words in the contract are to be given meaning, if possible.

138. Since the parties here have agreed that section 3.03(6) allows for an exception to the general rule it is necessary to determine whether BPFN's selection of Birch Point falls within that exception.

139. To make that determination, following the principles of contractual interpretation outlined by the Supreme Court in *Sattva*, I have considered the wording of the section having regard to the purpose of the Agreement, the nature of the relationship between the parties and the surrounding circumstances which existed at the time the parties entered into the Agreement, below.

Purpose of the Framework Agreement

140. I agree with counsel for BPFN when he characterized the purpose of the Agreement as being to fulfill the existing treaty right owed by Canada to Buffalo Point and many other First Nations and to have Manitoba fulfill its constitutional obligations under the Manitoba Natural Resources Transfer Agreement. As counsel pointed out, this purpose is of such importance that the facts supporting it are outlined in the twenty-six paragraphs of the preamble to the Agreement.

141. The Agreement implements a treaty promise – a right to have land set aside as reserve. It implements a broken promise by Canada in this case – a promise that was made 143 years ago in Treaty No. 3, then enshrined in the *Constitutional Act* 1930 and confirmed in the *Constitution Act* 1982.

142. This purpose was discussed by the Federal Court of Appeal in *Canada v. Long Plain First Nation*, 2015 FCA 177 – a case that involved interpretation of TLE agreements in Manitoba. The court confirmed that when interpreting TLE agreements it is important to remember that the purpose of those agreements is to redress Canada's broken promise under the Treaties.

***Long Plain First Nation, supra*, para.120**

Nature of the Relationship Between the Parties

143. Justice Rothstein in *Sattva, supra*, said that the meaning of an agreement is often derived from contextual factors such as the nature of the relationship created by the agreement.

144. In my view when interpreting a TLE agreement, the relationship between the parties that existed before the agreement was created, is equally important because it is a relationship that is protected by the principle of the honour of the Crown.

145. Although the parties in this case agree that the Agreement must be interpreted through the lens of the honour of the Crown, I feel it is important to review recent statements from the courts about this principle and how it applies to the interpretation of the TLE Agreements.

146. As counsel for BPFN submitted, the Agreement is not a commercial agreement.

147. The significance of this was recognized by the Federal Court of Appeal in *Long Plain First Nation, supra,* where the Court stated:

> "Agreements such as these are not to be interpreted like commercial contracts. Instead they must be interpreted in accordance with the objectives of honourable conduct, reconciliation and fair dealing with aboriginal peoples.

***Long Plain First Nation, supra,* para.118**

148. There have been several statements from the courts about how the principle of the honour of the Crown specifically affects the interpretive lens through which an agreement relating to treaties and treaty implementation must be interpreted.

149. The Supreme Court of Canada in *Manitoba Métis Federation Inc. v. Canada* 2013 SCC 14 identified that the honour of the Crown governs treaty making and implementation. This leads to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing and requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.

***Manitoba Métis, supra,* para.73**

150. The court stated that:

> "The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."

***Manitoba Métis, supra,* para.66**

151. The court also identified that:

> "[68] The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in Badger:
>
> > . . . the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41]" (Emphasis added)

***Manitoba Métis, supra*, para.68**

152. In *Bear v Saskatchewan* 2016 SKQB 73, the court held that the honour of the Crown is the interpretative lens through which Saskatchewan should view its obligations under its TLE Agreement. In doing so it also pointed out that:

> "[32] Upholding the honour of the Crown is not imposed on the federal government alone; Provincial governments also bear this obligation (paragraph 59).
>
> [33] Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388, added to the jurisprudence regarding the honour of the Crown by explaining that the honour does not stop at the making of the treaty. It is a continuing obligation (paragraph 54). "As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation..." (paragraph 57)." (Emphasis added)

***Bear, supra*, at paras 33 & 34**

153. The court also noted, however, that that did not mean that Saskatchewan could not say "no" to a given request.

***Bear, supra*, para 40.**

154. What is required by the honour of the Crown the court said, is that the province act honourably and with "intellectual honesty" and avoid the appearance of sharp dealings.

***Bear, supra*, para 41 (emphasis added)**

155. Returning to the *Manitoba Métis* decision, the court in that case said that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that "constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation."

***Manitoba Métis, supra*, para.77**

156. Further, the court held that:

> "… Crown servants must seek to perform their obligations in a way that pursues the purpose behind the promise. The Aboriginal group must not be left 'with an empty shell of a treaty promise [*Marshall* [1999] 3 SCR 456 at para.52]."

***Manitoba Métis, supra*, para.80**

157. These statements taken together confirm that the Province must not interpret this Agreement 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".

United Nations Declaration on the Rights of Indigenous Peoples

158. BPFN submitted that the Agreement should be interpreted not only through the lens of the honour of the Crown and reconciliation but also in accordance with the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples*. In particular, it pointed to Article 26 of the *Declaration* which addresses the rights of Indigenous People to their lands, territories and resources:

> "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned."

***United Nations Declaration on the Rights of Indigenous Peoples*, Article 26**

159. Manitoba committed itself to be guided by the principles set out in that *Declaration* when it enacted *The Path to Reconciliation Act,* CCSM c.R30.5, in recognition of the role the Province must play in advancing reconciliation.

160. In its argument on this point the Province agreed that the Agreement is a method by which certain principles set out in the *Declaration* can be given effect in a manner that reconciles First Nation rights and interests with the assertion of Crown sovereignty. It acknowledged that the Agreement was negotiated between the parties in an effort to give effect to the per capita provisions of the treaties, which is consistent with the principles described in the *Declaration* and it agreed that a commitment to those principles is reflected in *The Path to Reconciliation Act*.

161. It submitted, however, that recognition of a commitment to the principles in the *Declaration* does not derogate from the terms that were negotiated between the parties nor should it allow for a departure from the standard rules of contractual interpretation that offers certainty of process and results to the signatories.

162. BPFN agreed that the *Declaration* should not be used to modify the Agreement or alter the interpretation of a specific word. Rather, it submitted that I must consider the *Declaration* and the commitment Manitoba made in *The Path to Reconciliation Act*, because section 40.03 provides that the Agreement shall be governed by and construed in accordance with all applicable laws of Manitoba and Canada.

163. Accordingly, it submitted, I must determine whether Manitoba has given sufficient consideration for denying the Birch Point selection. That consideration it submitted, must be sufficient to uphold the honour of the Crown and the commitments that Manitoba made through the enactment of *The Path to Reconciliation Act.*

164. I agree that an interpretation of this Agreement involves not only the principles of contractual interpretation I have identified earlier 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.*

165. In my view, these additional considerations are consistent with the basic principles of contractual interpretation because they relate to both the underlying purpose of the Agreement to fulfill the broken promises that were made in the Treaties and to the nature of the relationship that exists between the parties.

166. All of these principles point to the need to make every effort to give meaning to the exception articulated in section 3.03(6) and to determine whether a given selection falls within the exception. How is one to do that? Returning to *Sattva, supra*, Justice Rothstein identified that a consideration of evidence of the surrounding circumstances, can be of assistance in this regard.

Nature and Role of Surrounding Circumstances

167. In discussing the role of the surrounding circumstances when interpreting a contract, Justice Rothstein stated:

> "The goal of examining such evidence is to deepen the decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract … while the surrounding circumstances are relied upon in the interpretative process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement …"
>
> ***Sattva, supra,* para.57**

168. Rothstein, J. identified that the nature of the evidence that can be relied upon under the rubric of surrounding circumstances will necessarily vary from case to case. He also cautioned that it has its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract:

> "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact."
>
> ***Sattva supra,* para.58**

169. Having regard to the evidence in this matter, I agree with counsel for the Province when he said that most of the evidence that was adduced at the hearing including the nature and extent of the use of this park would be of limited value to the exercise of contractual interpretation. Therefore, consistent with the principles I outlined above, the evidence that I have turned to is the surrounding circumstances that were known or reasonably ought to have been known to the parties at the time the Agreement was entered into.

170. That evidence – what the parties realistically knew or ought to have known at the time they entered into this Agreement points to the knowledge that BPFN would be unduly limited in its ability to make treaty land selections by both international and provincial boundaries. In my view this is precisely the type of exceptional circumstance which the parties would have contemplated and for which they intentionally made allowance by including an exception to the general rule in the wording of section 3.03(6).

171. Counsel for the Province himself acknowledged that BPFN is in a unique situation because of its location being adjacent to Ontario and the United States. Chief Thunder's unchallenged evidence was that this fact posed limits on the First Nation's ability to select land within Manitoba in satisfaction of its treaty entitlement – the very purpose which the Agreement was created to implement.

172. In making this determination I am mindful of the need to proceed carefully and to avoid inserting a term that the parties did not intend or contemplate.

173. The fact is, however, that the parties did insert the word "generally" in section 3.03(6).

174. I find that by doing so the parties reflected their recognition that in order to give effect to the purpose of this Agreement there would be occasions when selection in a park which existed at the time the Agreement was entered into would be necessary. I point out this qualification relating to parks which existed at the time the Agreement was signed because section 3.03(6)(b) provides that Crown land in a provincial park created after the date of execution shall be available for selection.

175. In his final argument, counsel for the Province said that the Province's interpretation of section 3.03(6) is that if there are exceptions those would usually be in some form of unique or exceptional case. I agree but I find that this is one of those cases.

176. The Province said it was important to recognize that unlike the original Treaties, this Agreement was negotiated by sophisticated parties who were well represented and who were on an equal footing.

177. Even so, that does not affect the clear statements by the Courts that agreements such as this Agreement must be interpreted in accordance with the objectives of honourable conduct, reconciliation and fair dealings with Indigenous Peoples.

178. In my view, the Province took a narrow approach to interpreting the relevant principles from the Agreement which was not consistent with its "heavy obligation" to consider the Birch Point selection fairly, and in an "intellectually honest" manner.

179. There is no evidence, for example, that the Province made any efforts to construe the meaning of the exception in section 3.03(6) and whether the Birch Point selection fell within that exception notwithstanding BPFN's continued submission that the exception should apply. It is true that BPFN referred to a number of reasons for selecting Birch Point but the fact of the geographical constraint on selection which was created by the boundaries of Ontario and the United States was known by the parties in 1997 when the Agreement was signed.

180. Looking at the whole of the correspondence between the parties, going back to 1995, it is clear that in almost every one of its communications the Province failed to acknowledge that the word "generally" was included in section 3.03(6) for a purpose. Instead it simply stated that the section did not allow for selection within existing parks.

181. In submitting that it acted in accordance with the honour of the Crown, the Province pointed to the fact that to the extent the First Nation identified that it had cultural and historical

interests in the site, Manitoba offered to enter into a co-management agreement in accordance with the provisions of section 9.09. That section provides:

> "Where an Entitlement First Nation identifies a specific parcel of land in any provincial park other than those referred to in subparagraphs (a) or (b) as land of cultural or historical significance for the Entitlement First Nation, it is intended that Manitoba and the Entitlement First Nation will enter into an agreement providing for the co-operative management of the parcel of land designed to protect the parcel of land in a manner that significance to the Entitlement First Nation."
>
> **Framework Agreement, section 9.09, Appendix A, pg 13**

182. The Province submitted that that section must be read along with section 3.03(6) to show that notwithstanding that the Province does not want parks to generally be eligible for selection, the Province will make arrangements to protect a First Nation's interest in a park, in satisfaction of the honour of the Crown.

183. I agree that section 9.09 of the Agreement provides a way for the Province to protect the interests of a First Nation over land the First Nation does not control. That section does not, however, detract from the need to give meaning to the exception created by the wording used in 3.03(6); nor does it ultimately satisfy the purpose of the Agreement – to fairly implement the promises made in the Treaties.

184. 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 section 3.03(6).

185. I further find that it would not be appropriate to codify or articulate a list of criteria which are meant to define the exception created by the word "generally" in this section. 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 above.

186. As counsel for the Province pointed out, the Agreement applies to over 19 First Nations and covers a vast area of land. Each First Nation's situation will, therefore, be different.

187. Looking at the Agreement as a whole, I find that its wording shows that the parties recognized when they drafted the Agreement that allowance would need to be made for a certain amount of flexibility, given the breadth of the Agreement's application.

188. For example, Section 3.01 of the Agreement recognizes that the Principles for land selection and acquisition, which I note the Agreement describes as "Guidelines", may not address all of the issues or circumstances to be encountered or considerations affecting the selection or acquisition of land by an Entitlement First Nation:

> **"3.01 Principles Provide Guidelines**
>
> (1) Sections 3.02 to 3.10 inclusive, including the other provisions of this Agreement incorporated into those Sections, constitute the Principles for Land Selection and Acquisition.
>
> (2) **The Principles provide guidelines applicable to the Selection or Acquisition of land by an Entitlement First Nation.**
>
> (3) The Principles are not listed in any particular order of priority and land shall be Selected or Acquired by an Entitlement First Nation and considered by the parties with reference to all applicable Principles.
>
> (4) **The Principles may not address all of the issues or circumstances to be encountered and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation.**
>
> (5) Any issues or circumstances encountered in and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation which are not addressed by the Principles shall be addressed by the parties and the Entitlement First Nation to the extent that they are able, and if they are unable to resolve any issues or circumstances encountered in or considerations affecting a Selection or Acquisition to the satisfaction of any party or the Entitlement First Nation, Section 3.11 shall apply." (Emphasis added)

Framework Agreement, section 3.01(1)-(5), Appendix A, pg 5-6

The Regulatory Process which Governs Provincial Parks

189. Counsel for the Province spent a fair bit of time addressing the regulatory process which is created by provincial parks legislation. He submitted that this Agreement must be reconciled with that regulatory process. He pointed out that if land is determined to be eligible for selection there is a process within the *Parks Act and Regulation* which requires public consultation before a park can be deregulated.

190. In my view that process cannot serve as an impediment to fulfilling the constitutionally entrenched rights which the Agreement was created to implement.

191. Under section 35.04(3)(c) of the Agreement an adjudicator is given the power to make "a determination that one or more of the parties or one or more Entitlement First Nations is required to take certain action to give effect to this agreement or Treaty Entitlement Agreement." I find this includes the ability to determine that the Province must take the necessary action required under *The Provincial Parks Act* and Regulation to give effect to the Agreement in a manner that is consistent with my determination regarding the eligibility of the Birch Point selection.

192. In making this determination, I have specifically considered the restrictions placed on an adjudicator's jurisdiction which are found at subsection 35.04(4) of the Agreement:

> "35.04(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 Entitlement First Nation 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 Entitlement First Nation and make recommendations to that party or any Entitlement First Nation concerning its policies affecting the due implementation of this Agreement or any Treaty Entitlement Agreement; and
>
> (ii) a party or an Entitlement First Nation 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"

Framework Agreement, section 35.04(a)(i)-(ii), Appendix A, pg 28

193. In my view, these provisions which relate to policies are not applicable and do not restrict my ability to determine that the province must take the necessary action required under the *Provincial Parks Act* and Regulation to give effect to the Agreement in accordance with my determination regarding the eligibility of the Birch Point selection.

Jurisdiction

194. The final argument to be addressed is Manitoba's position that the wording of the Agreement gives it the sole discretion to determine eligibility of a selection or at least one which is governed by section 3.03(6). I note that in at least some of its correspondence Canada and at one point an IMC Chairperson agreed with this interpretation.

195. Related to that point, the Province argued that in answering the questions posed in the Adjudicator Reference, I am only able to conduct a process which is analogous to judicial review. Specifically, the Province submitted that my jurisdiction as adjudicator does not allow me to interpret the wording of Section 3.03(6). I must instead, give deference to the Province's determination so long as I find that it proceeded fairly in making that determination.

196. The Province based its position that it has sole discretion to determine whether a First Nation's selection is eligible on the wording of 6.02(7) which reads:

> "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 Entitlement First Nation within 45 to 60 days of receipt of the items referred to in subsection (4)."

Framework Agreement, section 6.02(7), Appendix A, pg 12

197. I find, however, that the Province's interpretation that this gives it sole discretion, is not supported when one looks at section 6.02 in its entirety and at the Agreement as a whole. First, section 6.02(5) of the Agreement contains identical wording but with respect to Canada's role:

> "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 Entitlement First Nation within 45 to 60 days of receipt of the Council Resolution referred to in Subsection (3)"

Framework Agreement, section 6.02(5). Appendix A, pg 11

198. I find that this wording is inconsistent with the Province's position that the identical wording contained in subsection 6.02(7) gives it the sole discretion to make a determination as to eligibility.

199. Rather than giving any single party sole decision making power, section 6.02 ends by saying if the parties cannot agree, they may refer the matter to the IMC. Subsection 6.02(8) says:

> "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 120-180 days from the date of the later of those replies, the matter may be referred to the Implementation and Monitoring Committee."

Framework Agreement, section 6.02(8), Appendix A, pg 12

200. Similar provisions for dispute resolution are found at other parts of the Agreement. For example, section 3.01(5), cited earlier, contemplates that if the parties are not able to reach an agreement on issues or circumstances affecting the selection of land which are not addressed by the Principles, section 3.11 shall apply. Section 3.11 provides that any matters in dispute which the parties cannot resolve may be referred to the IMC:

> "3.11 Reference of Matters to the Implementation Monitoring Committee
>
> > Any issues or matters in dispute relating to the Selection or Acquisition of land Entitlement First Nation not resolved by the parties or an Entitlement First Nation may be referred to the Implementation Monitoring Committee."

Framework Agreement, section 3.11, Appendix A, pg 9

201. Sections 34 through 36 of the Agreement then sets out 20 pages of dispute resolution provisions which include the involvement of the IMC and the Senior Advisory Council, together with processes related to fact finding, mediation, non-binding arbitration and binding arbitration.

202. Considered as a whole, therefore, I find that the wording of the Agreement 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 Agreement. The Agreement is not designed to create a hierarchy of decision making rights between the parties. In light of the purpose of the Agreement 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.

203. Turning to the jurisdiction of an adjudicator, that jurisdiction is set out at subsections 35.04(3) and (4):

> "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 Implementation Monitoring Committee shall prepare and submit to the Adjudicator a reference setting out in writing:
>
> (a) a question or the 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 Implementation Monitoring Committee 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 Implementation Monitoring Committee, 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 Entitlement First Nations 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 Entitlement First Nation 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 Entitlement First Nation and make recommendations to that party or any Entitlement First Nation concerning its policies affecting the due implementation of this Agreement or any Treaty Entitlement Agreement; and

(ii) a party or an Entitlement First Nation 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 Entitlement First Nation to make a payment to any other party or Entitlement First Nation for or in respect of damages or loss alleged to have been suffered by that other party or Entitlement First Nation as a result of any action or inaction of that party or Entitlement First Nation."

Framework Agreement, section 35.04, Appendix A, pg 27-29

204. I find that these sections clearly give an adjudicator the jurisdiction to consider and interpret the Agreement and do not oblige the adjudicator to give deference to the position taken by any one party.

205. If I am wrong on this and I am constrained to considering whether Manitoba's actions demonstrate that it considered this matter fairly, I find that the Province did not afford the First Nation due process when it considered BPFN's Birch Point selection.

206. I say this because, as I set out above, there is no evidence that the Province made any or any adequate efforts to consider whether the Birch Point selection fell within the exception set out in the wording of section 3.03(6). In fact, for the most part the record shows that the Province did not even acknowledge the existence of the word "generally", that created that exception. This is so, despite the requirement at section 31.01 of the Agreement that says the parties are to use their best efforts to fulfill the terms of the Agreement.

207. Accordingly, I find that the Province did not afford BPFN due process in considering the eligibility of the Birch Point selection and its decision in that regard is not owed deference.

208. In saying this I want to emphasize that there is no obligation on the Province to agree with a First Nation's position. But it is obliged to make efforts to consider a selection in an "intellectually honest fashion". In this case, that required giving consideration to all of the wording of the section including the words which created the exception and then showing why, in its view the selection did not fall within that exception.

209. 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 Buffalo Point First Nation ("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 Manitoba Treaty Land Entitlement Framework Agreement?

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 Manitoba Treaty Land Entitlement Framework Agreement.

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 Entitlement First Nation 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 Entitlement First Nation 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 issue(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 obligation 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 stated 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.

DATED the 22nd day of December, 2016.

Sherri Walsh, Adjudicator

APPENDIX A

Relevant excerpts from the Framework Agreement Treaty Land Entitlement

FRAMEWORK AGREEMENT

TREATY LAND ENTITLEMENT

THIS AGREEMENT signed this 29th day of May, 1997.

AMONG:

TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC.,

a corporation incorporated under the laws of Manitoba,

on its own behalf and as general partner on behalf of **TLEC LIMITED PARTNERSHIP**, a limited partnership formed under the laws of Manitoba

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

-and-

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA,

WHEREAS:

A. The Entitlement First Nations assert that in recognition of their aboriginal rights, Canada and the First Nations in Manitoba entered into a treaty making process;

B. Certain First Nations entered into or adhered to various Treaties, particularly Treaties No. 1, 3, 4, 5, 6 and 10, with Canada between 1871 and 1910 which provided, among other things, that Canada would lay aside and reserve tracts of land for those First Nations;

C. Treaty No. 1, executed on August 3, 1871, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 160 acres for each family of five, or in that proportion for larger or smaller families;

D. The Brokenhead Ojibway Nation, being a signatory or adherent to, or a successor to a signatory or adherent to, Treaty No. 1, has not received land of sufficient area to fulfil the requirements of that Treaty;

E. Treaty No. 3, executed on October 3, 1873, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 640 acres for each family of five, or in that proportion for larger or smaller families;

F. The Buffalo Point First Nation, being a signatory or adherent to, or a successor to a signatory or adherent to, Treaty No. 3, has not received land of sufficient area to fulfill the requirements of that Treaty;

G. Treaty No. 4, first executed on September 15, 1874, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 640 acres for each family of five, or in that proportion for larger or smaller families;

H. Canada recognizes that the Wuskwi Sipihk Cree, Sapotaweyak Cree and Rolling River First Nations, each being signatories or adherents to, or each being successors to signatories or adherents to, Treaty No. 4, have each not received land of sufficient area to fulfill the requirements of that Treaty;

I. Treaty No. 5, first executed on September 20, 1875, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 160 acres for each family of five, or in that proportion for larger or smaller families;

J. The Sayisi Dene, Fox Lake, God's Lake, God's River, Nelson House, Norway House, Opaskwayak Cree, Oxford House, Shamattawa, War Lake and York Factory First Nations, each being signatories or adherents to, or each being successors to signatories or adherents to, Treaty No. 5, have each not received land of sufficient area to fulfill the requirements of that Treaty;

K. Treaty No. 6, first executed on August 23, 1876, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the First Nations in the amount of 640 acres for each family of five, or in that proportion for larger or smaller families;

L. The Mathias Colomb Cree Nation, being a signatory or adherent to, or successor to a signatory or adherent to, Treaty No. 6, has not received land of sufficient area to fulfill the requirements of that Treaty;

M. Treaty No. 10, first executed on August 28, 1906, provided, according to the written terms of the Treaty, among other things, that Her Majesty the Queen would lay aside and reserve tracts of land for the benefit of each of the signatory First Nations in the amount of 640 acres for each family of five, or in that proportion for larger or smaller families and, for those families and individuals who preferred to live apart from the reserve of those First Nations, Her Majesty would provide land in severalty to the extent of 160 acres for each individual;

N. The Barren Lands and Northlands First Nations, each being signatories or adherents to, or each being successors to signatories or adherents to, Treaty No. 10, have each not received land of sufficient area to fulfill the requirements of that Treaty;

O. Canada has recognized that the Entitlement First Nations have each not received land of sufficient area to fulfil the requirements of the Treaties;

P. Subsection 35(1) of the *Constitution Act, 1982* provides as follows:

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.";

Q. Under the terms of a "Memorandum of Agreement" between Canada and Manitoba, commonly referred to as "The Manitoba Natural Resources Transfer Agreement" ("MNRTA"), executed by Canada and Manitoba on December 14, 1929, effective July 15, 1930, and confirmed as Schedule 1 of the *Constitution Act, 1930*, Canada transferred to Manitoba, all of the interest of Canada in all crown lands, mines and minerals (precious and base), waters, water powers and royalties and sums due or payable for any of those interests of Canada, subject to certain specific exclusions, terms and conditions;

R. In particular, paragraph 11 of the MNRTA provides as follows:

" ... the Province will, from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter beadministered by Canada in the same way in all respects as if they never passed to the Province under the provisions hereof.";

S. Canada has advised Manitoba that the Entitlement First Nations have not received land of sufficient area to fulfil the requirements of the Per Capita Provisions;

T. The parties acknowledge that insufficient unoccupied Crown Land is available to fulfil the requirements of the Per Capita Provision of certain Entitlement First Nations;

U. The Entitlement First Nations have established, authorized and directed the TLE Committee to act as their representative in the negotiation of an agreement to address the entitlement of the Entitlement First Nations to land of sufficient area to fulfil the requirements of the Per Capita Provisions;

V. On October 14, 1993, the parties concluded a Protocol to guide and direct their negotiations on the entitlement of the Entitlement First Nations to land of sufficient area to fulfil the requirements of the Per Capita Provisions and negotiations have occurred among the parties since that date;

W. Canada has negotiated from the basis that its obligation to provide land of sufficient area to the Entitlement First Nations to fulfil the requirements of the Per Capita Provisions is calculated using the population of an Entitlement First Nation at the date the first reserve set apart for that Entitlement First Nation was surveyed;

X. The Entitlement First Nations have negotiated from the basis that Canada's obligation to provide land of sufficient area to the Entitlement First Nations to fulfil the requirements of the Per Capita Provisions is calculated using the population of the Entitlement First Nations at October 14, 1993;

Y. Despite their respective positions, the TLE Committee and Canada have agreed that the obligation of Canada to provide land of sufficient area to each Entitlement First Nation to fulfil the requirements of the Per Capita Provision of each Entitlement First Nation will be addressed in the manner and to the extent provided in this Agreement; and

Z. Canada and Manitoba have agreed that Manitoba will satisfy its obligations to Canada under paragraph 11 of the MNRTA in the manner and to the extent provided in this Agreement.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

PART II: LAND

2. Selection and Acquisition of Land

2.01 Amount of Land

Upon the coming into force of the Treaty Entitlement Agreement of an Entitlement First Nation, the Entitlement First Nation shall be entitled to:

(a) Select an amount of Crown Land up to the Crown Land Amount set out in Schedule "A" for that Entitlement First Nation; and

(b) where that Entitlement First Nation is an Entitlement First Nation identified in Schedule "B", Acquire an amount of land up to the Other Land Amount set out in Schedule "B" for that Entitlement First Nation

so that the total amount of land so Selected or Acquired does not exceed the Total Land Amount set out in Schedule "A" for that Entitlement First Nation.

2.02 Selection and Acquisition of Land in Accordance with Principles

(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.

3. Principles for Land Selection and Acquisition

3.01 Principles Provide Guidelines

(1) Sections 3.02 to 3.10 inclusive, including the other provisions of this Agreement incorporated into those Sections, constitute the Principles for Land Selection and Acquisition.

(2) The Principles provide guidelines applicable to the Selection or Acquisition of land by an Entitlement First Nation.

(3) The Principles are not listed in any particular order of priority and land shall be Selected or Acquired by an Entitlement First Nation and considered by the parties with reference to all applicable Principles.

(4) The Principles may not address all of the issues or circumstances to be encountered and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation.

(5) Any issues or circumstances encountered in and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation which are not addressed by the Principles shall be addressed by the parties and the Entitlement First Nation to the extent that they are able, and if they are unable to resolve any issues or circumstances encountered in or considerations affecting a Selection or Acquisition to the satisfaction of any party or the Entitlement First Nation, Section 3.11 shall apply.

3.02 General Principles for Selection and Acquisition of Land

(1) An Entitlement First Nation may Select its Crown Land Amount from:

(a) the area comprising its Treaty Area or Traditional Territory in the Province of Manitoba; or

(b) the area outside its Treaty Area or Traditional Territory, but within the Province of Manitoba where, on a case by case basis:

(i) the Entitlement First Nation can establish a reasonable social or economic development objective for the Selection; and

(ii) Manitoba concurs in the Selection, which concurrence will not be unreasonably withheld.

(2) An Entitlement First Nation identified in Schedule "B" may Acquire Other Land from within:

(a) the area comprising its Treaty Area or Traditional Territory in the Province of Manitoba; or

(b) the area outside its Treaty Area or Traditional Territory, but within the Province of Manitoba where, on a case by case basis, the Entitlement First Nation can establish a reasonable social or economic development objective for the Acquisition.

(3) Subject to Subsection (4), an Entitlement First Nation may Select or Acquire parcels of land of such size and configuration as the Entitlement First Nation determines will reasonably contribute to the enhancement of its historical and cultural identity or provide economic or social benefit.

are unable to agree on the reasonable use area for the tourist lodge or its outcamps or the eligibility of the Selection to be set apart as Reserve in accordance with this Principle, the matter may be referred to the Implementation Monitoring Committee.

(5) Where a Selection is made adjacent to a body of water where a tourist lodge is located, the impact of the Selection on the tourist lodge operation may be considered based on the following understanding:

(a) a Selection adjacent to

(i) a larger body of water; or

(ii) a body of water which may, upon reasonable examination, sustain additional development

should have less impact on the operation of the tourist lodge and is therefore more likely to be eligible for Selection under this Principle; and

(b) a Selection adjacent to

(i) a smaller body of water; or

(ii) a body of water which may, upon reasonable examination, have difficulty sustaining additional development; or

(iii) a body of water on which the tourist lodge has been established and is being operated as a "pristine wilderness experience" facility

should have more impact on the operation of the tourist lodge and is therefore less likely to be eligible for Selection under this Principle.

Land in a Provincial Park, Ecological Reserve, Wildlife Refuge or Proposed National Park:

(6) An Entitlement First Nation may not generally Select land in a provincial park, ecological reserve or wildlife refuge, provided that:

(a) Crown Land in the Amisk, Sand Lakes, Caribou River and Numaykoos Lake Provincial Parks shall be available for Selection;

(b) Crown Land in a provincial park created after the Date of Execution shall be available for Selection; and

(c) the "Limestone Point Planning Area" as shown on Schedule

"C" has been identified as land of ecological sensitivity and will not be available for Selection.

(7) Manitoba confirms that the Norway House Management Board established under the negotiations relating to the "Northern Flood Agreement" will give priority to the development of a land use or resource management plan for the "Limestone Point Planning Area" as shown on Schedule "C" to provide for the protection and conservation of that area.

(8) An Entitlement First Nation may Select land within the area of any proposed "national park" (as defined in the *National Parks Act)*, provided that:

(a) prior to the effective date of any agreement between Canada and Manitoba providing for the creation of the proposed "national park":

(i) Crown Land within the area of that proposed "national park" shall be available for Selection by an Entitlement First Nation with a Treaty Area or Traditional Territory which includes the area of the proposed "national park";

(ii) Canada and Manitoba will provide notice in writing to the TLE Committee and any Entitlement First Nation with a Treaty Area or Traditional Territory which includes the area of the proposed "national park" stating that Canada and Manitoba are considering the establishment of the "national park";

(iii) an Entitlement First Nation which receives a notice in accordance with Subparagraph (ii) may respond in writing within 120 days of receiving that notice to Canada and Manitoba expressing interest in Selecting land in the area of the proposed "national park"; and

(iv) Canada and Manitoba will participate in full and meaningful consultation with any Entitlement First Nation which expresses an interest in Selecting land within the area of the proposed "national park" in accordance with Subparagraph (iii) or its representatives;

(b) any agreement of the nature described in Paragraph (a) shall provide for the right of Selection of land in the area of the proposed "national park" by any Entitlement

3.11 Reference of Matters to the Implementation Monitoring Committee

Any issues or matters in dispute relating to the Selection or Acquisition of land by an Entitlement First Nation not resolved by the parties or an Entitlement First Nation may be referred to the Implementation Monitoring Committee.

4. Periods of Selection and Acquisition of Land

4.01 Periods

Subject to Section 4.02:

(a) an Entitlement First Nation may Select land up to its Crown Land Amount within three years from the date the Treaty Entitlement Agreement of the Entitlement First Nation comes into force; and

(b) an Entitlement First Nation identified in Schedule "B" may Acquire land up to its Other Land Amount within 15 years from the date the Treaty Entitlement Agreement of the Entitlement First Nation comes into force.

4.02 Extension of Periods

(1) Where:

(a) an Entitlement First Nation is unable to Select or Acquire its Total Land Amount within the periods of time set out in Section 4.01; and

(b) the Entitlement First Nation alleges that the inability to Select or Acquire its Total Land Amount within the periods of time set out in Section 4.01 is directly attributable to the failure of Canada or Manitoba to fulfill their respective obligations under this Agreement relating to the Selection or Acquisition of land by that Entitlement First Nation

the Entitlement First Nation may refer the matter to the Implementation Monitoring Committee.

(2) Where the Implementation Monitoring Committee determines that the reason for the inability of the Entitlement First Nation to Select or Acquire its Total Land Amount within the periods of time set out in Section 4.01 is reasonably attributable to the failure of either or both of Canada or Manitoba to fulfill their respective obligations under this

(b) where the Entitlement First Nation does not advise Manitoba of its interest in accordance with Paragraph (a), Manitoba may make the Disposition without further notice to the Entitlement First Nation; and

(c) where the Entitlement First Nation has advised Manitoba of its interest in Acquiring the surface interest in the land in accordance with Paragraph (a) but does not thereafter provide to Manitoba a copy of an agreement between the Entitlement First Nation or a Person on behalf of the Entitlement First Nation and the owner of that surface interest for the Acquisition of that surface interest within 180 days after the Entitlement First Nation receives the notice referred to in Subsection (4), Manitoba may proceed to make the Disposition without further notice to the Entitlement First Nation.

(6) This Section does not apply to the Disposition of Surplus Provincial Land.

6. Land Selection and Acquisition Process

6.01 General

The process for Selection and Acquisition of land, land transfer and the creation of Reserves will be in accordance with this Article and Articles 7 and 8.

6.02 Process for Land Selection and Acquisition

(1) Concurrent with commencing a Community Approval Process, an Entitlement First Nation will undertake or cause to be undertaken a Land Selection Study.

(2) Each Entitlement First Nation will consider all of the applicable Principles in the course of completion of its Land Selection Study and in Selecting Crown Land and Acquiring Other Land.

(3) An Entitlement First Nation will Select Crown Land and give notice of Other Land which it has Acquired by delivering to Canada a Council Resolution requesting that the land be set apart as Reserve together with:

(a) in the case of Crown Land, a 1:50,000 scale National Topographical Series map on which the land has been clearly identified by fine point pen; or

(b) in the case of Other Land:

(i) a legal description of the land;

(ii) a copy of the certificate of title of the land; and

(iii) a binding offer to purchase or option by which the Entitlement First Nation or any Person on behalf of the Entitlement First Nation may Acquire the land where the Entitlement First Nation or any Person for or on behalf of the Entitlement First Nation does not hold title to the land.

(4) Canada shall within seven days of receipt of the Council Resolution referred to in Subsection (3) forward to Manitoba copies of that Council Resolution, a description of the land by actual or theoretical section, township and range determined by Universal Transverse Mercator Coordinates (based on North American Datum, 1983) and including the documents referred to in Paragraph (3)(a) or (b) provided to Canada by the Entitlement First Nation.

(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 Entitlement First Nation within 45 to 60 days of receipt of the Council Resolution referred to in Subsection (3).

(6) Forthwith upon receipt by Manitoba of the items referred to in Subsection (4), Manitoba will enter the Selection or Acquisition on the Crown Land register maintained by Manitoba, where applicable, and upon that entry, Manitoba will not make any further Dispositions or Mineral Dispositions or issue any further quarry leases or quarry permits under *The Mines and Minerals Act* in respect of the Selection or Acquisition unless and until it is determined that the Selection or

Acquisition is not eligible to be set apart as Reserve in accordance with the Principles.

(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 Entitlement First Nation within 45 to 60 days of receipt of the items referred to in Subsection (4).

(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.

6.03 Crown Land Use Permit

(1) Upon Canada and Manitoba confirming that land Selected is eligible to be set apart as Reserve in accordance with the Principles, Manitoba shall issue to the Entitlement First Nation which Selected the land a Crown Land use permit which will provide the Entitlement First Nation with the exclusive right to use and occupy the land, subject to any existing Third Party Interests, until:

(a) Canada and the Entitlement First Nation advise Manitoba that they are both not satisfied with the results of the Environmental Audit of the land;

(b) Canada determines that the Selection does not meet the requirements of the Additions to Reserve Policy; or

(c) the acceptance by Canada of administration and control of the Selection from Manitoba

whichever shall first occur.

(2) Upon the issuance of a Crown Land use permit in accordance with Subsection (1), the Selection shall not be subject to change by the Entitlement First Nation.

(3) Upon the acceptance by Canada of administration and control of the Selection from Manitoba the Crown Land use permit issued in accordance with Subsection (1) will terminate and Canada will issue

9.07 Objections by Other First Nations

Where an Entitlement First Nation purchases or secures land outside the province of Manitoba and that land is eligible to be set apart as Reserve in accordance with Section 9.05 or 9.06 and another First Nation provides notice in writing to Canada objecting to the land being set apart as Reserve:

(a) Canada will provide the Entitlement First Nation with written notice of the objection; and

(b) the land will not be set apart as Reserve under this Agreement until the objection of the other First Nation is withdrawn or is otherwise resolved.

9.08 Process for Setting Land Outside Manitoba apart as Reserve

Where an Entitlement First Nation purchases or otherwise secures land outside the province of Manitoba and that land is eligible to be set apart as Reserve in accordance with Section 9.05 or 9.06, and Section 9.07, Articles 6 to 8 inclusive shall apply with necessary modifications.

Land of Cultural or Historical Significance in an Existing Provincial Park, Ecological Reserve, Wildlife Refuge and National Park:

9.09 Land of Cultural or Historical Significance in an Existing Provincial Park, Ecological Reserve, Wildlife Refuge and National Park

(1) Where an Entitlement First Nation 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 Entitlement First Nation, it is intended that Manitoba and the Entitlement First Nation 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 Entitlement First Nation.

(2) Where Rolling River First Nation identifies a specific parcel of land in the Riding Mountain National Park which is Land of Cultural or Historical Significance, it is intended that Canada and Rolling River First Nation will enter into discussions with a view to the negotiation of an agreement providing for special access to that

options for the investment and management of the Federal Payment and (if applicable) the Land Acquisition Payment;

(j) the Entitlement First Nation has provided to Canada a Council Resolution authorizing the Council to execute the Treaty Entitlement Agreement; and

(k) the Initial Trustees have provided to Canada a resolution passed at a duly convened meeting of the Initial Trustees authorizing the Initial Trustees to execute the Trust Agreement.

30.03 Effective Date of Treaty Entitlement Agreement

The Treaty Entitlement Agreement for an Entitlement First Nation comes into force on the date executed by the parties and the Entitlement First Nation.

31. Best Efforts and Undertakings

31.01 Undertaking of Parties

The TLE Committee, Canada and Manitoba agree that they will, in good faith, use their best efforts to fulfil the terms of this Agreement.

31.02 Best Efforts of TLE Committee

The TLE Committee will use its best efforts:

(a) to ensure that appropriate personnel are assigned to fully and effectively discharge obligations under this Agreement and any Treaty Entitlement Agreements;

(b) to provide technical support and assistance on a timely basis to any Entitlement First Nation which initiates a Community Approval Process;

(c) to provide, as requested, ongoing technical support and assistance in the course of land Selection and Acquisition to any Entitlement First Nation that executes a Treaty Entitlement Agreement;

(d) to assist each Entitlement First Nation that executes a Treaty Entitlement Agreement in the establishment of an effective local system of implementation of that Treaty Entitlement Agreement;

34. Implementation Monitoring and Senior Advisory Committees

34.01 Establishment of the Implementation Monitoring Committee

(1) The Implementation Monitoring Committee will be established comprised of five members, consisting of two representatives appointed by the TLE Committee, one representative appointed by Canada and one representative appointed by Manitoba and an independent Chairperson appointed in accordance with Sections 34.03 and 34.05.

(2) The Implementation Monitoring Committee will remain in existence until the parties agree that:

(a) the provisions of this Agreement and any Treaty Entitlement Agreement have been substantially performed; or

(b) the Implementation Monitoring Committee is no longer required.

34.02 Appointment of Implementation Monitoring Committee Members and Quorum

(1) The TLE Committee, Canada and Manitoba and shall each appoint their respective members of the Implementation Monitoring Committee by notice in writing to the other parties no later than 30 days following the Date of Execution.

(2) A member of the Implementation Monitoring Committee appointed by the TLE Committee, Canada and Manitoba may designate in writing an alternate to attend a meeting of the Implementation Monitoring Committee.

(3) The TLE Committee, Canada and Manitoba may each change their respective members of the Implementation Monitoring Committee from time to time by notice in writing to the other parties.

(4) A quorum of the Implementation Monitoring Committee shall be four members, with at least one member representing each of the parties and the Chairperson in attendance, unless a member not in attendance has agreed otherwise.

34.03 Appointment of Independent Chairperson

(1) The members of the Implementation Monitoring Committee representing the TLE Committee, Canada and Manitoba shall

consider the availability of persons resident in Manitoba that may have the appropriate qualifications and experience to undertake and effectively discharge the responsibilities of Chairperson and shall, within 90 days of the Date of Execution or such longer period as the parties may agree, recommend to the Senior Advisory Committee a person to be appointed Chairperson.

(2) The Senior Advisory Committee shall, within 30 days of the date of receipt of the recommendation referred to in Subsection (1), appoint a person as Chairperson.

34.04 Terms of Appointment of Chairperson and Vacancy

(1) Subject to Subsection 34.01(2), the Chairperson will be appointed on terms and conditions, including remuneration, as the parties may agree, for a term of two years from the date of appointment and any person so appointed will be eligible for re-appointment.

(2) A Chairperson shall serve until:

(a) his or her term of appointment or re-appointment expires;

(b) he or she dies;

(c) he or she resigns;

(d) he or she is declared incapable of managing his or her own affairs by a Court of competent jurisdiction; or

(e) the parties agree in writing to withdraw his or her appointment.

34.05 Appointment of Chairperson upon Vacancy

(1) In the event of a vacancy in the position of Chairperson, the members of the Implementation Monitoring Committee representing the TLE Committee, Canada and Manitoba shall consider the availability of persons resident in Manitoba that may have the appropriate qualifications and experience to undertake and effectively discharge the responsibilities of Chairperson and shall, within 90 days of the vacancy occuring or such longer period as the parties may agree, recommend to the Senior Advisory Committee a person to be appointed Chairperson.

(2) The Senior Advisory Committee shall, within 30 days of the date of receipt of the recommendation referred to in Subsection (1), appoint a person as Chairperson.

34.06 Consensus Model Decision Making

(1) Except in matters requiring the direction of the Chairperson under this Article and Articles 35 and 36, the Implementation Monitoring Committee will operate with and by the consensus of all of its members.

(2) Where the Implementation Monitoring Committee is unable to resolve an issue or matter in dispute on a consensus basis, it shall refer the issue or matter in dispute for resolution as further provided under this Article and Article 35.

(3) The members of the Implementation Monitoring Committee will be guided by the principle that the parties each have a continuing obligation to act in good faith in implementing this Agreement and any Treaty Entitlement Agreement including the resolution of any issue or matter in dispute.

(4) The Implementation Monitoring Committee may from time to time make rules of procedure to govern its operation not inconsistent with this Article.

34.07 Responsibilities of the Implementation Monitoring Committee

(1) The Implementation Monitoring Committee shall be generally responsible for facilitating the implementation of this Agreement and any Treaty Entitlement Agreements, including:

(a) establishing a budget of the reasonable estimated costs of its operation in each fiscal year, being the period from April 1 to March 31 in any year, or any part of a fiscal year in which it operates;

(b) monitoring of the progress of implementation;

(c) making recommendations to the parties for the resolution of any issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement Agreement;

(d) resolving any issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement

Agreement which is referred to it by a party or an Entitlement First Nation under this Agreement or that Treaty Entitlement Agreement; and

(e) considering the appropriate method of resolution of an issue or matter in dispute relating to the implementation of this Agreement or any Treaty Entitlement Agreement in accordance with Article 35.

(2) Subject to Subsections 34.03(1) and 34.05(1), the Implementation Monitoring Committee shall meet upon the call of the Chairperson in accordance with Subsections 34.09(2) and (3).

(3) The Implementation Monitoring Committee shall operate within the budget established in accordance with Paragraph (1)(a), unless the parties agree otherwise.

34.08 Technical Support and Independent Professional Advice

(1) The Chairperson may, where the members of the Implementation Monitoring Committee agree, retain technical support and independent professional advisors, including legal counsel, as necessary from time to time to assist in the proper discharge of the responsibilities of the Implementation Monitoring Committee, including the responsibilities of the Chairperson.

(2) Technical support and independent professional advisors retained by the Chairperson on behalf of the Implementation Monitoring Committee will provide advice, guidance and opinions to the Implementation Monitoring Committee and the Chairperson as required to assist in the interpretation of this Agreement or any Treaty Entitlement Agreement or to assist in the resolution of any issue or matter in dispute.

(3) Where the members of the Implementation Monitoring Committee do not agree to retain technical support and independent professional advisors in accordance with Subsection (1), the Chairperson may, within the established budget of the Implementation Monitoring Committee unless the parties agree otherwise, on behalf of himself or herself, retain technical support and independent professional advisors, including legal counsel, as required to assist the Chairperson in the proper discharge of his or her responsibilities, and Subsection (2) applies with necessary modifications.

34.09 Responsibilities of Chairperson

(1) In addition to the specific and other responsibilities of the Chairperson set out in this Article and Articles 35 and 36, the Chairperson will be responsible for the general administration of the Implementation Monitoring Committee including:

(a) subject to Subsections 34.03(1) and 34.05(1), calling meetings of the Implementation Monitoring Committee in accordance with Subsections (2) and (3);

(b) subject to Subsections 34.03(1) and 34.05(1), chairing all meetings of the Implementation Monitoring Committee;

(c) ensuring that written minutes and records are kept of:

(i) meetings and decisions of the Implementation Monitoring Committee;

(ii) decisions and notices of the Senior Advisory Committee;

(iii) decisions and Awards of Adjudicators; and

(iv) all other information necessary to complete the annual reports referred to in Paragraph (10)(b);

(d) distributing the minutes of the Implementation Monitoring Committee to the members of the Implementation Monitoring Committee on a timely basis;

(e) recommending a budget of the estimated costs of the operation of the Implementation Monitoring Committee in each fiscal year;

(f) submitting to each of the parties an invoice for the reasonable costs incurred by the Implementation Monitoring Committee or the Chairperson in each month, including receipts and supporting documents as the parties may reasonably request;

(g) maintaining records of all costs incurred by the Implementation Monitoring Committee and the Chairperson and the preparing of the annual financial statements referred to in Paragraph (10)(d);

(h) ensuring timely payment of the expenditures of the Implementation Monitoring Committee upon the receipt of payment from parties; and

(i) if directed by the parties, engaging an independent auditor to complete an audit of the financial affairs of the Implementation Monitoring Committee.

(2) The Chairperson shall call a meeting of the Implementation Monitoring Committee:

(a) at least once every three months; and

(b) at the request of at least two members of the Implementation Monitoring Committee representing at least two of the parties.

(3) A meeting of the Implementation Monitoring Committee shall be called by the Chairperson upon at least 14 days notice in writing to the members of the Implementation Monitoring Committee or upon a lesser period of notice where all members are in agreement.

(4) The Chairperson will assist the Implementation Monitoring Committee in determining the sufficiency of information relating to the implementation of the Agreement and any Treaty Entitlement Agreement provided to the Implementation Monitoring Committee, and, if necessary, may request any of the members of the Implementation Monitoring Committee to take steps the Chairperson deems appropriate to ensure the sufficiency of that information.

(5) In order to facilitate the resolution of issues or matters in dispute, the Chairperson may:

(a) propose time periods for the parties to respond to an issue or matter in dispute;

(b) direct any member to submit to the Implementation Monitoring Committee a report about any issue or matter in dispute and propose solutions to that issue or matter in dispute within a time period identified by the Chairperson;

(c) identify strengths and weaknesses of proposed solutions to an issue or matter in dispute;

(d) direct the members of the Implementation Monitoring Committee to assist in resolving an issue or matter in dispute by consensus; and

(e) propose solutions to an issue or matter in dispute.

(6) Where the Implementation Monitoring Committee makes a decision on a means to resolve an issue or matter in dispute, the Chairperson will record the decision in the minutes or records of the Implementation Monitoring Committee and provide notice of the decision to the parties and any Entitlement First Nation specifically affected by the issue or matter in dispute.

(7) Where the Chairperson determines that the Implementation Monitoring Committee is unable to make a decision on a means to resolve an issue or matter in dispute, the Chairperson will record in the minutes or records of the Implementation Monitoring Committee:

(a) that the Implementation Monitoring Committee has not been able to resolve the issue or matter in dispute;

(b) any means recommended by the Chairperson to resolve the issue or matter in dispute for the consideration of the members of the Implementation Monitoring Committee and any direction to the members to consider the recommendation within a specified time period; and

(c) any response by the members of the Implementation Monitoring Committee to a recommendation of the Chairperson made in accordance with Paragraph (b).

(8) Where an issue or matter in dispute is not resolved by the Implementation Monitoring Committee, the Chairperson, on behalf of the Implementation Monitoring Committee, will refer the issue or matter in dispute to the Senior Advisory Committee.

(9) The Chairperson may, when referring a matter to the Senior Advisory Committee on behalf of the Implementation Monitoring Committee in accordance with Subsection (8), set out in writing to the Senior Advisory Committee:

(a) any means recommended by the Chairperson for resolving the issue or matter in dispute made in accordance with Paragraph (7)(b);

(b) any response of the members of the Implementation Monitoring Committee provided in accordance with Paragraph (7)(c); and

(c) his or her recommendation on the proposed time period within which the Senior Advisory Committee should attempt to resolve the issue or matter in dispute.

(10) The Chairperson:

(a) may request and receive recommendations from any of the members of the Implementation Monitoring Committee concerning any aspect of implementation of this Agreement and any Treaty Entitlement Agreement;

(b) will, on behalf of the Implementation Monitoring Committee, provide to the President of the TLE Committee, the Minister of Indian Affairs and Northern Development of Canada and the Minister of Northern Affairs of Manitoba an annual written report including:

(i) a summary of the progress of implementation of this Agreement and any Treaty Entitlement Agreement;

(ii) the recommendations of the Implementation Monitoring Committee for the improvement of the implementation of this Agreement and any Treaty Entitlement Agreement;

(iii) a summary of the issues or matters in dispute which have been resolved during the reporting period;

(iv) a summary of the issues or matters in dispute still outstanding at the end of the reporting period; and

(v) recommendations for improvement of the implementation of this Agreement and any Treaty Entitlement Agreement;

(c) may, on behalf of the Implementation Monitoring Committee, provide to the President of the TLE Committee, the Minister of Indian Affairs and Northern Development of Canada and the Minister of Northern Affairs of Manitoba other reports from time to time as the Chairperson deems appropriate; and

(d) will, on behalf of the Implementation Monitoring Committee, provide to the President of the TLE Committee, the Minister of Indian Affairs and Northern Development of Canada and the Minister of Northern Affairs of Manitoba an unaudited annual financial statement including:

(i) all funds received by the Implementation Monitoring Committee from the parties during the fiscal year;

(ii) a statement of how those funds were disbursed; and

(iii) a statement of all contributions in kind to the costs of the Implementation Monitoring Committee.

(11) The first annual report of the Chairperson referred to in Paragraph (10)(b) and the first annual financial statement referred to in Paragraph (10)(d) shall be delivered on or before June 30, 1998 and subsequent annual reports and annual financial statements shall be delivered on or before June 30 of each year thereafter during the period the Implementation Monitoring Committee exists in accordance with Subsection 34.01(2).

34.10 Establishment of the Senior Advisory Committee

(1) A Senior Advisory Committee representing the parties will be established consisting of:

(a) the President of the TLE Committee for the TLE Committee;

(b) the Regional Director General (Manitoba Region) or the Assistant Deputy Minister (Claims and Indian Government) of the Department of Indian Affairs and Northern Development for Canada; and

(c) the Deputy Minister of Northern Affairs for Manitoba.

(2) One member of the Council of an Entitlement First Nation specifically affected by an issue or matter in dispute may also participate in any meetings of the Senior Advisory Committee at which that issue or matter in dispute is addressed.

(3) A meeting of the Senior Advisory Committee shall not be held without all members in attendance, unless a member not in attendance has agreed otherwise.

(4) Decisions of the Senior Advisory Committee shall be by consensus of all of the members in attendance.

(5) Where the Senior Advisory Committee makes a decision on a means to resolve an issue or matter in dispute, the Senior Advisory Committee will set out in writing the decision and will send it to the Chairperson who will record the decision in the minutes or records of the Implementation Monitoring Committee.

(6) Where the Senior Advisory Committee does not make a decision on a means to resolve an issue or matter in dispute within the time period proposed by the Chairperson or such longer time period as the Senior Advisory Committee may agree, the Senior Advisory Committee will give notice in writing to the Chairperson who will record in the minutes or records of the Implementation Monitoring Committee:

(a) that the Senior Advisory Committee has not made a decision on a means to resolve the issue or matter in dispute; and

(b) the appropriate dispute resolution mechanism to be used to resolve the issue or matter in dispute in accordance with Section 35.02, where the Senior Advisory Committee agrees on the mechanism to be used.

(7) Where the Chairperson receives a notice from the Senior Advisory Committee in accordance with Subsection (6), the Implementation Monitoring Committee will, within 30 days of notice from the Senior Advisory Committee:

(a) where there is an agreement among the members of the Senior Advisory Committee on the appropriate method of dispute resolution to be used, refer the issue or matter in dispute to be resolved in accordance with that agreement; or

(b) where there is no agreement among the members of the Senior Advisory Committee on the appropriate method of dispute resolution to be used, refer the matter to an appropriate method of dispute resolution in accordance with Section 35.02.

(8) Where the Implementation Monitoring Committee does not refer the issue or matter in dispute to an appropriate dispute resolution process within 30 days in accordance with Subsection (7), the Chairperson shall, within 30 days, refer the issue or matter in dispute to an Adjudicator to be resolved in accordance with Section 35.02.

35. Dispute Resolution

35.01 Identification of Adjudicators

(1) An issue or matter in dispute referred to a method of dispute resolution in accordance with Subsection 34.10(7) or (8) shall be resolved in accordance with this Article.

(2) The Implementation Monitoring Committee will identify persons qualified in the techniques of alternate dispute resolution to act as Adjudicators.

(3) Adjudicators identified in accordance with Subsection (2) shall be available to resolve issues or matters in dispute arising in the implementation of this Agreement or any Treaty Entitlement Agreement as may be referred to them from time to time upon reasonable notice for a period as may be agreed by the Implementation Monitoring Committee and the Adjudicator.

(4) The rates of remuneration for services to be provided by an Adjudicator shall be as determined by the Implementation Monitoring Committee having regard to the experience and qualifications of that Adjudicator.

(5) The Implementation Monitoring Committee or the Chairperson shall appoint an Adjudicator to resolve an issue or matter in dispute in accordance with this Article.

35.02 Methods of Dispute Resolution

(1) The methods of dispute resolution will be:

(a) "fact finding", being the review of the issue or matter in dispute by an Adjudicator who shall conduct the review and assist the parties in resolving the issue or matter in dispute by the determination of relevant facts bearing upon the issue or matter in dispute;

(b) "mediation", being the exploration of the positions of the parties to the issue or matter in dispute by an Adjudicator as a means of increasing the level of understanding of the positions of the parties, reconciling their positions to the extent possible and assisting the parties in reaching a consensus on the resolution of the issue or matter in dispute and the Adjudicator may offer

suggestions, recommendations and alternatives for consideration by the parties and, if requested, assist in preparing a written agreement on the means of resolving an issue or matter in dispute;

(c) "non-binding arbitration", being a hearing before an Adjudicator at which all parties to the issue or matter in dispute have an opportunity to be fully heard (orally or in writing) on an issue or matter in dispute after which the Adjudicator will make a decision in writing on the understanding that the parties will give serious regard to the decision, but the resulting decision is not legally binding on them; and

(d) "binding arbitration", being a hearing in accordance with the *Commercial Arbitration Act* before an Adjudicator at which all parties to the issue or matter in dispute have an opportunity to be fully heard (orally or in writing) on the issue or matter in dispute after which the Adjudicator will make a decision in writing and the resulting decision is legally binding on them.

(2) Subject to Subsection 36.01(5), the resolution of issues or matters in dispute shall be a progressive process, from fact finding to binding arbitration, unless determined otherwise by the Senior Advisory Committee in accordance with Paragraph 34.10(6)(b), the Implementation Monitoring Committee in accordance with Subsection 34.10(7) or the Chairperson in accordance with Paragraph 34.10(7)(b).

(3) All issues or matters resolved by non-binding arbitration or binding arbitration will be addressed by written decision of the Adjudicator.

(4) An Adjudicator who has provided dispute resolution services for one method of dispute resolution may not be appointed as an Adjudicator for the same issue or matter in dispute for another method of dispute resolution unless all parties to the issue or matter in dispute, including any Entitlement First Nation, agree.

35.03 Procedure for Dispute Resolution other than Binding Arbitration

Subject to any directions provided by the Implementation Monitoring Committee or Senior Advisory Committee, except where binding arbitration is being used to resolve the issue or matter in dispute, the Chairperson has the responsibility, in consultation with the members of the Implementation Monitoring Committee:

(a) to prepare appropriate written directions to the Adjudicator for the completion of the dispute resolution process;

(b) to provide the Adjudicator with information about the issue or matter in dispute, including a written definition of the issue or matter in dispute, any report on or proposed solution of the issue or matter in dispute submitted to the Implementation Monitoring Committee by any party, and any means of resolving the issue or matter in dispute recommended by the Chairperson;

(c) to determine a time period for the completion of the method of dispute resolution recognizing the parties agree that the following time frames should apply for each method unless an issue or matter in dispute is of a complex nature:

(i) fact finding should be completed in no more than three days of review;

(ii) mediation should be completed in no more than five days of meetings; and

(iii) non-binding and binding arbitration should be completed in no more than seven days of hearing; and

(d) to determine other appropriate procedures in order to ensure the issue or matter in dispute is resolved in a timely and cost efficient manner.

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 Implementation Monitoring Committee shall prepare and submit to the Adjudicator a reference setting out in writing:

(a) a question or the 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 Implementation Monitoring Committee 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 Implementation Monitoring Committee, 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 Entitlement First Nations 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 Entitlement First Nation 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 Entitlement First Nation and make recommendations to that party or any Entitlement First Nation concerning its policies affecting the due implementation of this Agreement or any Treaty Entitlement Agreement; and

(ii) a party or an Entitlement First Nation 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 Entitlement First Nation to make a payment to any other party or Entitlement First Nation for or in respect of damages or loss alleged to have been suffered by that other party or Entitlement First Nation as a result of any action or inaction of that party or Entitlement First Nation.

(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 Entitlement First Nation 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 Implementation Monitoring Committee 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).

35.06 Default of Obligations in Dispute Resolution Methods

(1) Where an issue or matter in dispute has been referred to a method of dispute resolution and the party which has submitted the issue or matter in dispute to the Implementation Monitoring Committee withdraws the issue or matter in dispute, the method of dispute resolution will end.

(2) Where a party to an issue or matter in dispute does not comply with any time period for the provision of information to the Adjudicator which is part of a method of dispute resolution, the method of dispute resolution may proceed.

(3) Where any party to an issue or matter in dispute does not appear at any hearing, the method of dispute resolution will proceed based on the information before the Adjudicator and a finding, direction, decision or Award may be rendered with respect to the issue or matter in dispute.

35.07 Costs of Dispute Resolution

(1) Subject to Subsection (2), the costs of fact finding, mediation and non-binding arbitration will be paid equally by the parties involved based upon invoices for services rendered by the Adjudicator.

(2) Where in a method of dispute resolution, a party does not comply with time periods for the provision of information or does not appear at a hearing and the method of dispute resolution proceeds in accordance with Subsection 35.06(3), the Adjudicator may determine the payment of costs in accordance with Subsection (5) as may be reasonable in the circumstances and Subsection (3) shall apply with necessary modifications.

(3) In matters referred to binding arbitration, the Adjudicator may, in addition to determining an Award on the issue or matter in dispute, determine:

(a) the allocation of the costs of arbitration; and

(b) the payment of costs of the parties to the proceedings.

(4) Where an issue or matter in dispute is resolved in accordance with Subsection 35.04(5), the Adjudicator may determine costs in accordance with Subsection (3) unless the parties and any Entitlement First Nation involved in that issue or matter in dispute otherwise agree.

(5) The Adjudicator shall be guided in making an Award relating to the payment of costs in accordance with Subsection (3) by the Manitoba Court of Queen's Bench rules relating to the award of costs in litigation, including the principle that ordinarily the unsuccessful party to the proceedings would be required to pay reasonable costs of the proceedings and of the other parties.

35.08 Record and Report of Issues or Matters in Dispute and Events of Default

(1) The Chairperson will maintain a record of all issues or matters in dispute and Events of Default and the means identified to resolve any issue or matter in dispute and any Event of Default.

(2) The record maintained by the Chairperson in accordance with Subsection (1) may be used:

(a) as a means of identifying problem areas in implementation which may require consideration by the parties or amendment of this Agreement or any Treaty Entitlement Agreement;

(b) as information which may be considered by an Adjudicator in determining if an Event of Default has occurred; and

(c) for inclusion in the annual report of the Implementation Monitoring Committee issued in accordance with Paragraph 34.09(10)(b) or other reports issued in accordance with Paragraph 34.09(10)(c).

36. Material Failure and Events of Default

36.01 Material Failure to Comply with Fundamental Term or Condition

(1) Where a party or an Entitlement First Nation alleges that another party or Entitlement First Nation has materially failed to comply with a fundamental term or condition of this Agreement or a Treaty Entitlement Agreement, the party or Entitlement First Nation making that allegation may submit a notice in writing to the other party or Entitlement First Nation containing:

(a) an identification of the fundamental term or condition of this Agreement or the Treaty Entitlement Agreement;

(b) a description of the circumstances of that alleged material failure; and

(c) a statement that:

(i) the party or Entitlement First Nation receiving the notice may within 30 days of the receipt of the notice:

A. remedy that material failure; or

B. refer the matter to the Implementation Monitoring Committee; and

(ii) where the alleged material failure to comply with the fundamental term or condition identified in Paragraph (a) is not remedied within 30 days of the receipt of the notice, the matter may be referred to binding arbitration to determine whether the party or Entitlement First Nation has failed to materially comply with that fundamental term or condition.

(2) A party or an Entitlement First Nation which receives a notice in accordance with Subsection (1) may within 30 days of the receipt of the notice:

(a) remedy the alleged material failure; or

(b) refer the matter to the Implementation Monitoring Committee.

(3) Where a party or an Entitlement First Nation which receives a notice in accordance with Subsection (1) refers the matter to the Implementation Monitoring Committee in accordance with Paragraph (2)(b), the Implementation Monitoring Committee shall consider the matter on a priority basis within 30 days of the matter being referred to it.

(4) Where a party or an Entitlement First Nation which receives a notice in accordance with Subsection (1) does not remedy the alleged failure or refer the matter to the Implementation Monitoring Committee in accordance with Subsection (2), the party or Entitlement First Nation which has been given that notice may by notice in writing refer the matter directly to the Chairperson.

(5) Where the Implementation Monitoring Committee does not resolve the matter on a priority basis in accordance with Subsection (3), or a matter is referred to the Chairperson in accordance with Subsection (4), the Chairperson shall refer the matter directly to binding arbitration to determine whether the party or Entitlement First Nation against which the allegation has been made has failed to materially comply with a fundamental term or condition of this Agreement or a Treaty Entitlement Agreement.

36.02 Matters Constituting Events of Default

The following constitute Events of Default by a party or an Entitlement First Nation:

(a) a party or Entitlement First Nation has failed to comply with any Award of an Adjudicator in binding arbitration within the time period specified in an Award or, where no time period is specified, within a reasonable period of time, provided that:

(i) the party or an Entitlement First Nation has not filed an appeal of that Award in accordance with Subsection 35.05(1); or

(ii) the failure of that party or Entitlement First Nation to comply with the Award does not result from the failure of any other party, an Entitlement First Nation or any Person to undertake or perform any action as an obligation under this Agreement or any Treaty Entitlement Agreement or a condition precedent to the party or an Entitlement First Nation complying with the terms of the Award;

(b) an Adjudicator in binding arbitration has determined:

(i) that a party or an Entitlement First Nation has, repeatedly and in a manner which clearly establishes a pattern, materially failed to comply with its obligations under this Agreement or any Treaty Entitlement Agreement; and

(ii) the failure of a party or an Entitlement First Nation to comply with its obligations under this Agreement or any Treaty Entitlement Agreement was not the result of the failure of a party, an Entitlement First Nation or any Person to undertake or perform any action as an obligation under this Agreement or the Treaty Entitlement Agreement or as a condition precedent to a party or Entitlement First Nation complying with its obligations under this Agreement or the Treaty Entitlement Agreement;

(c) a party or Entitlement First Nation has failed to comply with a decision of the Manitoba Court of Queen's Bench made in accordance with Subsection 35.05(2) within the time period specified in that decision or, where no time period is specified, within a reasonable period of time, provided that the failure of the party or an Entitlement First Nation to comply with the decision of the Manitoba Court of Queen's Bench does not result from the failure of any other party, an Entitlement First Nation or any Person to undertake or perform any action as an obligation under this Agreement or any Treaty Entitlement Agreement or a condition precedent to the party or an Entitlement First Nation complying with the terms of the decision; or

(d) an Adjudicator in binding arbitration has determined that a party or an Entitlement First Nation has materially failed to comply with a fundamental term or condition of this Agreement or any Treaty Entitlement Agreement and has not remedied that material failure within 30 days of receipt of notice in writing from another party or Entitlement First Nation in accordance with Subsection 36.01(1).

36.03 Identification of Means of Resolving Events of Default

Any party or Entitlement First Nation that admits, or is determined by an Adjudicator in binding arbitration to have committed, an Event of Default shall determine and identify reasonable means of remedying the Event of Default.

36.04 Loss or Damage as a Result of an Event of Default

(1) Where an Adjudicator in binding arbitration has determined that a party or Entitlement First Nation has committed an Event of Default, a party or an Entitlement First Nation which has suffered loss or damages as a result of that Event of Default may refer the matter of that loss or damage to the Implementation Monitoring Committee as an issue or matter in dispute.

(2) Where an issue or matter in dispute of the nature referred to in Subsection (1) is referred to an Adjudicator to be resolved by binding arbitration, the Adjudicator may make an Award setting damages to be paid by the party or Entitlement First Nation committing the Event of Default to the party or Entitlement First Nation suffering the loss or damages.

37. Taxation

37.01 Goods and Services Tax

Canada shall remit any tax under Part IX of the *Excise Tax Act,* or any other identical or substantially similar tax imposed under an act of Parliament, that is paid or payable in respect of:

(a) a supply to an Entitlement First Nation of land Selected or Acquired by the Entitlement First Nation; or

(b) a supply that is a purchase by or on behalf of an Entitlement First Nation, or a cancellation in favour of an Entitlement First Nation, of a Third Party Interest in land so Selected or Acquired by the Entitlement First Nation where the land is Selected or Acquired before the Entitlement First Nation has Selected its Crown Land Amount or Acquired its Other Land Amount, and Canada shall remit any penalties or interest relating to any such tax that is so remitted.

37.02 Land Transfer Tax, Retail Sales Tax or Other Value-Added Tax

Manitoba shall ensure that an Entitlement First Nation that, either directly or indirectly by its agent, lawyer or trustee, Acquires Acquired Property shall not, with respect to the Acquired Property, be subject, directly or indirectly, to land transfer tax imposed by Manitoba pursuant to *The Revenue Act* and retail sales tax imposed by Manitoba pursuant to *The Retail Sales Tax Act* or any other value-added tax, sales tax or other form of tax or fee calculated with reference to either:

(a) the consideration paid or payable for the Acquired Property by the

(2) Upon execution by Canada, Manitoba, the TLE Committee and an Entitlement First Nation of a Treaty Entitlement Agreement, this Agreement and the Treaty Entitlement Agreement, jointly, shall constitute the entire agreement between the parties and the Entitlement First Nation relating to:

(a) the fulfillment of Canada's obligation to lay aside and reserve tracts of land under the Per Capita Provision for that Entitlement First Nation or its Predecessor Band in the manner and to the extent herein provided; and

(b) Manitoba's obligations arising out of paragraph 11 of the MNRTA to provide Canada with unoccupied Crown land to permit Canada to satisfy its obligation to that Entitlement First Nation under the Per Capita Provision in the manner and to the extent herein provided.

(3) This Agreement supersedes, merges and cancels any and all pre-existing agreements and understandings in the course of negotiations between the parties including, without limitation, the Protocol on negotiations dated October 14, 1993.

40.02 Severability

(1) In the event any provision of this Agreement should be found to be invalid, the provision shall be severed and the Agreement read without reference to that provision.

(2) Where any provision of this Agreement has been severed in accordance with Subsection (1) and that severance materially affects the implementation of this Agreement, the parties agree to meet to resolve any issues as may arise as a result of that severance and to amend this Agreement accordingly.

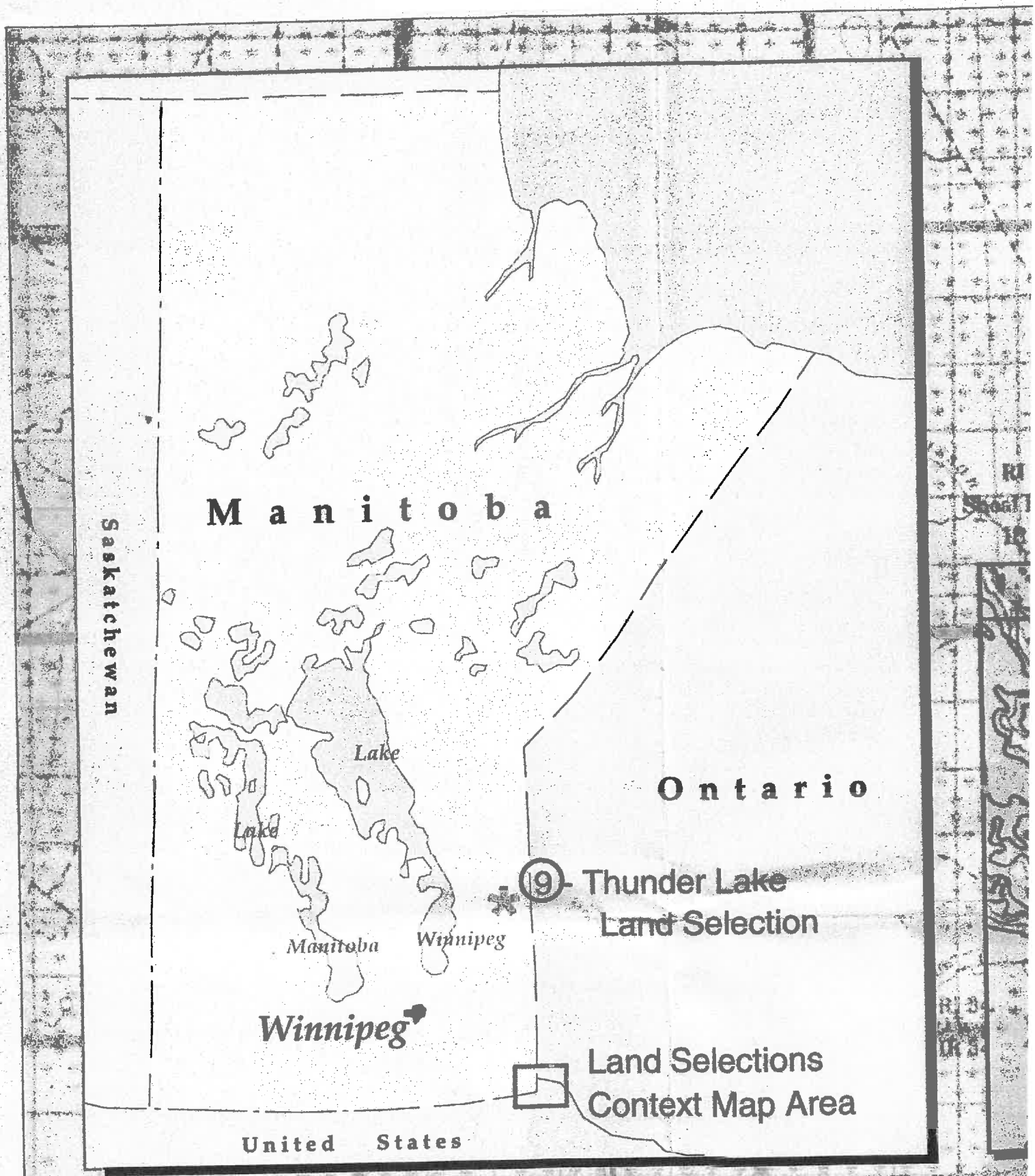
40.03 Applicable Law

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

40.04 Currency and Current Dollars

All references in this Agreement to dollars are expressed and shall be payable in Canadian currency and determined in the year of expenditure.

Appendix "B"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