IN THE MATTER OF AN ARBITRATION

BETWEEN:

TREATY LAND ENTITLEMENT COMMITTEE INC. (HEREINAFTER "TLEC")

the Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA (HEREINAFTER "CANADA")

the Respondent

A W A R D

Prepared by:

Sherri Walsh
Hill Sokalski Walsh Olson LLP
Litigation Counsel
2670 – 360 Main Street
Winnipeg, MB R3C 3Z3

Date: March 19, 2018

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TREATY LAND ENTITLEMENT COMMITTEE INC. (HEREINAFTER "TLEC")

the Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA (HEREINAFTER "CANADA")

the Respondent

Table of Contents

INTRODUCTION

1. These proceedings arise pursuant to the binding arbitration provisions under the Framework Agreement Treaty Land Entitlement (referenced in this Award as the "Agreement" or the "MFA").

2. The MFA is a tripartite agreement which was made between The Treaty Land Entitlement Committee Inc. ("TLEC"), Her Majesty the Queen in right of Manitoba and Her Majesty The Queen in right of Canada. It was signed on May 29, 1997.

3. In signing the Agreement, TLEC acted as the representative for a number of First Nations who are referred to in the Agreement as "Entitlement First Nations" ("EFNs").

4. The Terms of Reference which established these proceedings identify that TLEC is pursuing this adjudication on its own behalf and on behalf of the Entitlement First Nations whose lands are identified in Schedule "A" to that document– the "Lands at Issue".

5. The "Lands at Issue" are defined in the Terms of Reference to mean

> *"...those specific lands identified in Schedule "A" hereto having been Selected or Acquired by individual Entitlement First Nations, and Exclusive Use Permits having been granted to the Entitlement First Nation who Selected or Acquired those lands."*

6. At the hearing of these proceedings, the parties agreed that Schedule "A" needed one correction with respect to the parcel identified as "Bolton Lake A(3-01A) 134.29". A corrected version of the Schedule was attached to the Affidavit of Chris Henderson sworn July 11, 2017 as Exhibit "A" and is attached as Appendix A to this Award.

7. The MFA is a treaty implementation agreement. Its goal is to satisfy the long outstanding *per capita* treaty land entitlement promises set out in Treaties that were entered into during the period 1871-1910, in what is now Manitoba.

8. As I have set out in this Award, when the parties entered into the Agreement they understood that it would be implemented over the course of a number of years and that they would be required to work together as equal partners in a long term relationship.

9. The parties also anticipated that circumstances could arise in the future that might affect the implementation of the Agreement and they included provisions in the document which stipulate how they should govern themselves should such circumstances arise. Those provisions

require that all parties reach agreement as to how to implement the MFA having regard to the new circumstances, and to the goal of the Agreement which is – to set apart land as Reserve.

10. And indeed, 15 years after the parties signed the Agreement, just such a circumstance arose. In December 2012, Canada advised TLEC that it had decided it would no longer proceed to set apart land as Reserve in accordance with the terms of the Agreement, until it had completed a consultation process with other Indigenous groups, in particular – with the Métis.

11. Canada made this decision without reaching an agreement with the other parties.

12. This decision has had a significant, adverse impact on the implementation of the Agreement and has imposed delay and uncertainty into the treaty implementation process.

13. For the reasons that follow, and without commenting in any way on Canada's consultation with the Métis, I have, therefore, determined that from December 2012 to the present, Canada has failed to comply with the treaty land entitlement obligations it owes to the Entitlement First Nations whose lands are at issue in these proceedings.

OVERVIEW OF THE AGREEMENT

14. Copies of the sections of the Agreement which are referenced in this Award are attached as Appendix B to this Award.

Preamble

15. The preamble to the Agreement sets out a comprehensive history and description of the Treaty Land Entitlement process that was agreed upon between the parties.

16. It 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.

17. The MNRTA was signed by Canada and Manitoba in 1930. Pursuant to that agreement 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 to Manitoba, Canada recognized and advised the Province that many First Nations had not received land of sufficient area to fulfill the Treaty requirements.

19. Accordingly, 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 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 be administered by Canada in the same way in all respects as if they never passed through the Province under the provisions hereof."*

20. The MNRTA was recognized as a schedule to the *Constitution Act*, 1930 and the *per capita* land entitlement promises made by the Crown in the Treaties, have been recognized and affirmed as constitutional promises, pursuant to section 35 of the *Constitution Act*, 1982.

Land Selection and Acquisition Process

21. The terms and conditions of the Agreement expressly set out the policies and procedures which govern how the Crown will fulfill its *per capita* treaty land entitlement obligations.

22. They start by giving the First Nations the right to "Select" Crown land or to "Acquire" in the sense of purchase, "Other Land", to be set apart as Reserve (Article 2) in accordance with the Agreement's Principles for Land Selection and Acquisition ("the Principles") (Article 3).

23. An Entitlement First Nation has a period of 3 years to "Select" Crown land, and a period of 15 years to "Acquire" private land (section 4.01).

24. The Agreement says that Lands which have been Selected or Acquired "shall be eligible to be set apart as Reserve" subject to the provisions of the Agreement (Subsection 2.02(2)).

25. The processes for: Selection and Acquisition of land; land transfer; and the creation of Reserves are set out in Articles 6, 7 and 8 of the Agreement, respectively.

26. Those Articles require that once an Entitlement First Nation makes its Selection or Acquisition, it delivers a Band Council Resolution to Canada, requesting that the land be set apart as Reserve (Subsection 6.02(3)). Within 7 days of receiving the Resolution, Canada forwards it to Manitoba, along with a description of the land (Subsection 6.02(4)).

27. As soon as Manitoba receives the Band Council Resolution and land description, it is required to enter the Selection or Acquisition on the Crown land register which is maintained by

the Province. Manitoba undertakes that it will not make any further dispositions in respect of that land 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 (Subsection 6.02(6)).

28. Within no later than 60 days of receiving the Band Council Resolution, Canada is required to consider the eligibility of the Selection or Acquisition to be set apart as Reserve in accordance with the Principles, and to provide its written reply to Manitoba and the Entitlement First Nation (Subsection 6.02(5)).

29. Within no later than 60 days of receipt of the land description and Band Council resolution (Subsection 6.02(7)), Manitoba must 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.

30. Once Canada and Manitoba confirm that the land Selected or Acquired is eligible to be set apart as Reserve in accordance with the Principles, Manitoba must issue a Crown Land Use Permit which provides the respective Entitlement First Nation with the exclusive right to use and occupy the land, subject to any existing Third Party interest 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 Reserves Policy; or

(c) the acceptance by Canada of administration and control of the Selection or Acquisition from Manitoba, whichever occurs first (Subsection 6.03(1)),

whichever occurs first.

31. Once a Crown Land Use Permit is issued, the Entitlement First Nation cannot change its Selection (Subsection 6.03(2)).

32. After both Crowns have confirmed the eligibility of the Entitlement First Nation's Selection or Acquisition a number of steps must occur.

33. First, Canada undertakes to carry out an Environmental Audit of the land in accordance with Article 23 (Paragraph 7.01(1)(a)).

34. If both Canada and the Entitlement First Nation are satisfied with the results of that Environmental Audit, Canada determines whether the Selection or Acquisition satisfies the requirements of the Additions to Reserves Policy (Paragraph 7.01(1)(b)).

35. Once Canada determines that the Selection or Acquisition satisfies the requirements of the Additions to Reserves Policy, it undertakes to have a survey of the boundaries of the land carried out in accordance with Article 23 (Paragraph 7.01(1)(c).

36. Once the Entitlement First Nation confirms the boundaries of the Selection or Acquisition as determined by the survey, through Band Council Resolution, Canada undertakes to provide Manitoba with a legal description of the land reflecting the survey which was undertaken (Paragraph 7.01(1)(d)).

37. When Manitoba receives the legal description of the land it undertakes to transfer administration and control of all its interests in the lands, to Canada, by Order in Council (Subsection 7.01(2)).

38. Canada then undertakes to accept administration and control of those interests by instrument under the Federal *Real Property Act* or otherwise (Subsection 7.01(4)).

39. Once Canada accepts administration and control of the interests transferred to it by Manitoba, it undertakes to proceed with due diligence and use its best efforts to set that land apart as Reserve for the Entitlement First Nation which has Selected or Acquired the land (Section 8.01).

40. The process of adding lands to Reserve culminates in a parcel being put before the Minister of Indigenous and Northern Affairs Canada (the "Minister") with the recommendation that the Minister issue an Order setting the land apart as Reserve. Once that Order is signed, the Reserve is created.

Additions to Reserves Policy

41. The reference in Paragraph 7.01(1)(b) that Canada must be satisfied that the Selection or Acquisition has satisfied the requirements of the Additions to Reserves Policy, is of particular significance in this case.

42. The Agreement says that the Additions to Reserves Policy which shall apply to the setting apart of land as Reserve in accordance with the Agreement, is the Policy in place as at the Date of Execution (Subsection 8.02(2)).

43. Terms which have a specific definition in the Agreement are identified by the use of capital letters.

44. The "Date of Execution" is defined at Subsection 1.01(23) as meaning the date on which the Agreement was executed by the parties -- May 29, 1997.

45. The Agreement says that the Additions to Reserves Policy may be amended by Canada after the Date of Execution but only with the written agreement of the parties (Subsection 8.02(3)).

46. Further, Subsection 8.02(4) provides that where Canada proposes any amendment to the Additions to Reserves Policy after the Date of Execution, it may not delay a determination of whether a Selection or Acquisition satisfies that policy, pending the parties' written agreement to the amendment.

47. Finally, Subsection 8.02(5) provides that if there is any inconsistency between the Additions to Reserves Policy and the Agreement, the Additions to Reserves Policy shall be modified to the extent of the inconsistency and the terms of the Agreement shall apply.

THE QUESTIONS IN THE TERMS OF REFERENCE

48. The Terms of Reference set out the following questions to be answered by the Adjudicator:

Questions Related to Jurisdiction

1. *Does the Adjudicator have jurisdiction to issue an award regarding an issue or matter in dispute under the MFA that has arisen from a failure by Canada to implement the MFA related to its legal or constitutional obligation to consult the Métis regarding the Lands at Issue?*

2. *If it is determined that Canada has committed an Event of Default, does the Adjudicator have jurisdiction to:*

    a. *Make an award setting damages to be paid as a result of an Event of Default before:*

        i. *TLEC or the Entitlement First Nation refer the matter to the Implementation Monitoring Committee as an issue or matter in dispute in accordance with section 36.04 of the MFA; and*

ii. *Canada exercises a right of appeal in accordance with section 35.05 of the MFA?*

b. *Have a supervisory role in relation to Canada's determination and identification of reasonable means of remedying an Event of Default under section 36.03 of the MFA, or compel Canada to pay for any costs of any ongoing supervisory role by the Adjudicator, either as damages or as costs?*

c. *Make rulings or determinations other than those specified in section 35.04(3) of the MFA?"*

Questions Related to the Issue or Matter in Dispute

3. *Is Canada's decision to consult with the Métis or the process that Canada has employed in consulting the Métis in respect of the Lands at Issue contrary to Canada's obligations under:*

   a. *section 8.02 of the MFA?*

   b. *section 31.03 of the MFA?*

   c. *section 40.07 of the MFA?*

   d. *Any other provision of the MFA?*

4. *If Canada has not complied with its obligations under the MFA, due to either its decision or the process that Canada has employed to consult the Métis in respect of the Lands at Issue, does such non-compliance constitute an Event of Default:*

   a. *On the basis that there is an established pattern within the meaning of subparagraph 36.02(b) of the MFA whereby Canada has materially failed to comply with its obligations under the MFA; or*

   b. *On the basis that Canada has, within subsection 36.02(d), materially failed to comply with a fundamental term or condition of the MFA and did not remedy the failure within 30 days in accordance with subsection 36.01(2) of the MFA?*

5. *What award should the Adjudicator fashion in this case:*

   a. *If it is determined that Canada has acted contrary to its obligations under the MFA;*

   b. *If it is determined that Canada has committed an Event of Default;*

c. *To address the issues or matters in dispute even if it is determined that Canada has not acted contrary to its obligations under the MFA or committed an Event of Default?*

6. *A determination as to the costs of the proceedings.*

7. *The Adjudicator is also authorized to answer any other question within its jurisdiction that the Adjudicator deems necessary or appropriate in order to resolve the issues or matters in dispute, including ruling upon his/her jurisdiction or upon procedural matters.*

THE EVIDENCE

49. To reach my decision in this Award, I considered the following evidence:

Affidavits filed prior to the hearing:

a. Affidavit of Chris Henderson sworn July 11, 2017;

b. Affidavit of Dianna Watson sworn July 31, 2017;

c. Affidavit of Jonathan Arnold sworn July 31, 2017 (Evidence Re: the 35 Parcels of Land Proposed by TLEC for Arbitration); and

d. Affidavit of Jonathan Arnold sworn July 31, 2017 (Evidence Re: Agreement Implementation and Consultation with Aboriginal Groups).

Evidence at the Hearing

50. The Applicant called Christopher Daniel Henderson and Nelson Manual Genaille to testify on its behalf.

51. The Respondent called Dianna Jane Watson and Jonathan Arnold to testify on its behalf.

52. Although not a party to these proceedings, Manitoba provided answers to a series of questions that were presented to it by Canada. which were then entered into evidence as Exhibits. It also agreed to identify a witness who could speak to the questions posed by Canada – Mr. Dave Hicks. His testimony was led at the hearing by Counsel for Canada.

53. Eleven exhibits were entered into evidence at the hearing, as well as 3 exhibits for identification.

The Lands at Issue

54. With the exception of 2 parcels, all of the 35 Lands at Issue are Crown lands which were Selected to be set apart as Reserve, by Entitlement First Nations. The other 2 were Acquired by Entitlement First Nations.

55. Crown Land Use Permits were issued for each of the 35 parcels, granting exclusive use and occupancy to the respective Entitlement First Nations who made the Selections or Acquisitions.

56. For each of the Lands at Issue, evidence was adduced by both parties which identified dates relating to the following events:

a. An Entitlement First Nation's Selection or Acquisition of specific parcels of land;

b. The signing of the Individual Treaty Land Entitlement Agreement between the respective Entitlement First Nation and the Crown;

c. Confirmation of eligibility by Canada;

d. Confirmation of eligibility by Manitoba;

e. Granting of the Crown Land Use Permit;

f. Canada's letters to the Métis, concerning consultation;

i. The Métis' responses to those letters;

j. The date a parcel was sent to the Federal Minister with a recommendation to set it apart as Reserve;

k. The creation of a Reserve.

57. The dates for these events are not in dispute and for the purposes of my decision, I do not need to specifically identify them.

58. By the time of the hearing, 6 of the Lands at Issue had been converted to Reserve.

Evidence of Chris Henderson

59. Mr. Henderson has served as the Executive Director of TLEC since 2010. In that capacity he has had the responsibility to oversee all aspects of the Treaty Land Entitlement process in Manitoba.

60. He started working for TLEC as its Communications Officer in 1998, shortly after the parties entered into the Agreement and served in that capacity until 2001. Between 2001 and 2004 he worked as the Communications Officer for the Southern Chiefs Organization and from 2004 to 2007 he served as Grand Chief of that organization.

61. Following his term as Grand Chief, up until the time he became Executive Director of TLEC, Mr. Henderson was employed by the Province of Manitoba in the provincial Department of Aboriginal Affairs - Consultation Unit.

62. This experience, he testified, made him aware of how and when the provincial Crown would consider whether a duty to consult existed and how that process would unfold.

63. Much of Mr. Henderson's affidavit evidence addressed whether Canada has an obligation to consult with the Métis regarding the Lands at Issue and if so, in what manner that consultation should proceed.

64. His evidence was that were it not for the delay caused by Canada's decision to consult the Métis and the slow manner in which it has engaged in that process, Canada would have long ago been in a position to request that the Minister set apart as Reserve, each of the Lands at Issue.

65. In his affidavit, he stated that his evidence about the matters in issue in this dispute comes from his knowledge of the factual matrix surrounding the completion of the Agreement, his knowledge of the facts surrounding the delays in setting apart the Lands at Issue as Reserve and his understanding of the consultative requirements of the Crown.

66. He also said that one of the fundamental factual circumstances that the parties to the Agreement appreciated at the time the Agreement was being negotiated and finalized was that "once lands were either privately owned or once exclusive use and occupancy of Crown lands selected was secured by an EFN, the land would be protected from any competing claims; - be they from government, industry, or other Aboriginal groups, including the Métis, Inuit or even from other First Nations."

67. The promise of not having to wait until land is set apart as Reserve in order to secure exclusive use and occupancy rights over those lands, he said, is a fundamental feature of the Agreement and the terms and conditions of the Agreement that secure those rights are fundamental to achieving that goal.

68. His evidence was that once lands Selected or Acquired are determined by the Crown to be eligible to be set apart as Reserve, they are immediately removed from the inventory of lands that might otherwise be claimed by or available for use by any other persons, be they industry, other First Nations, Métis or non-Aboriginals. Accordingly, the duty to consult does not exist for such lands.

69. He stated in his affidavit that "at no time during the period from the signing of the Agreement in 1997, to December 2012 did Canada ever indicate to TLEC that it was contemplating consulting with the Métis."

70. It came as a surprise, therefore, he said, when in December 2012, Canada announced to TLEC that it would not accept administration and control over lands and would not recommend to the Minister that lands be set apart as Reserve under the Agreement, before Canada had completed a consultation process with the Métis.

71. He said that the Entitlement First Nations made their views about consultation known to Canada early on, including calling for Canada, Manitoba and the Entitlement First Nations to determine a process for how to deal with this issue.

72. For example, on March 28, 2013, the Grand Chief of the Assembly of Manitoba Chiefs, Derek Nepinak, wrote to the Honourable Bernard Valcourt, Minister Aboriginal Affairs and Northern Development (ultimately INAC), to object to Canada's new consultation policy. He wrote that among his concerns was the fact that "TLE First Nations were not consulted nor advised as to the reason why the decision was made to create such a policy 15 years after the Agreement was signed in Manitoba." He expressed concern that the decision would cause additional and unnecessary delay for the First Nations who wished to convert their TLE land Selections and Acquisitions to Reserve status by Canada.

73. His letter went on to say:

> *"As it stands now, it takes on average 7.4 years to convert TLE land Selections (Crown land) to Reserve status and up to 9 years for TLE Acquisitions (Other Lands) to convert to Reserve status. To complicate this process with consultation processes with non-TLE First Nations or Métis locals who may or may not veto such land Selections/Acquisitions detracts from the work that has been underway for the last 15 years.*

These sovereign Nations have been forced to live without the use of their ancestral lands for well over a century due to the policy implementation on the part of Canada when they concluded Treaty Land Agreements in Manitoba. These policy decisions are an affront to these sovereign Nation Treaty Agreements. The Assembly of Manitoba Chiefs supports the position that Canada must set aside funds to expedite this unfinished treaty business and that principles be developed and adhered to between Canada, Manitoba and the Entitlement Sovereign Nations to deal with these outstanding land matters. This would allow all parties to address the various issues that continue to impede this file so that we may at least compensate these First Nations who have occupied these lands for thousands of years."

74. On April 4, 2013, Nelson Genaille, President of TLEC, also wrote to Minister Valcourt, expressing the same concerns about the anticipated and significant delays in implementation that consultation would cause. He called upon Canada to continue to use its best efforts as required by the Agreement, to "prioritize the full implementation of this outstanding legal obligation despite your Department's action plan on consultation and accommodation."

75. Minister Valcourt replied to Chief Genaille on May 23, 2013 saying that the government had an obligation to consult Aboriginal groups when contemplating conduct that could adversely affect potential or established Aboriginal or treaty rights.

76. On June 13, 2013 Canada gave a PowerPoint presentation to TLEC entitled "Manitoba Framework Agreement TLE Implementation 2012/2013."

77. That presentation included the following statements:

"• *The primary reason that more lands were not set apart as Reserve in 2012/2013 is that Crown obligations with respect to the duty to consult other Aboriginal groups had not been addressed.*

- *Canada will not be requesting the transfer of any Crown lands from Manitoba until the process for the duty to consult has been agreed and implemented. Canada has received the provincial OICs for all of the Crown land identified on Schedule A.*

- *Despite the need to address consultation prior to Reserve creation, activities such as environmental site visits, surveys and other work necessary to advance parcels through the Additions to Reserves process will continue."*

78. Around the time that Canada announced its decision to consult with the Métis in respect of lands that were subject to the Agreement, it also announced that it was amending its Additions to Reserves ("ATR") policy to reflect this consultation. The ATR Policy in effect at the time the Agreement was signed, made no mention of consulting the Métis. Canada asked TLEC to agree to adopt the amended policy as the ATR Policy which would govern the MFA process.

79. TLEC did not agree to that amendment.

80. Mr. Henderson said he attended a Senior Advisory Committee meeting on October 8, 2013 where the provincial Deputy Minister Aboriginal and Northern Affairs, Harvey Bostrom, said that Manitoba did not want to consult with the Métis and did not think it was necessary to consult when satisfying a treaty right.

81. The Senior Advisory Committee is a committee comprised of senior representatives from each of the three parties to the Agreement. It is established under Section 34.10 of the Agreement, to assist in dealing with implementation issues.

82. Deputy Minister Bostrom wrote to Canada on December 9, 2013, confirming Manitoba's policy on consultation in respect of Treaty Land Entitlement ("TLE"). His letter said that Manitoba has always maintained the view that "... the TLE implementation process that was agreed by the Parties (Canada, TLEC and Manitoba) when the Manitoba Framework Agreement was signed in 1997 does not contemplate consultation with other First Nations or Aboriginal communities."

83. The letter went on to say, however, that Manitoba considers the Crown's duty of consultation on a case-by-case basis and will consider specific cases to determine whether the setting apart of lands selected under the Agreement may potentially form a significant adverse effect on the exercise of another First Nation or Aboriginal community.

84. This position was confirmed in one of the written answers which Manitoba provided to Canada in advance of these proceedings:

> ***19. Has Manitoba ever declared whether the position it asserted in its December 9, 2013 letter applies to the 35 parcels at issue in this arbitration?***
>
> ***Answer:*** *Pursuant to subsections 7.01(2) and (3) of the MFA, Manitoba has already transferred to Canada, by order in council, administration and control of Crown interests in the land selected for 14 of the 35 parcels. Accordingly for those 14 parcels Manitoba has fulfilled its obligation to provide land to Canada so Canada can fulfill its treaty promises. ...*

With respect to the 21 remaining parcels at issue in this arbitration, Manitoba's December 9, 2013 letter is to be read that "...Manitoba is prepared to transfer administration and control of Crown interests in selected land to Canada for TLE purposes without initiating a further consultation process with other First Nations or Aboriginal communities" unless Manitoba indicates otherwise. Manitoba has not indicated otherwise.

Manitoba Justice representatives have advised Justice Canada representatives specifically that with respect of the 35 parcels at issue in this arbitration Manitoba is prepared to transfer administration and control of Crown interests in selected land to Canada for TLE purposes and this remains Manitoba's position.

Moreover, Manitoba has consistently communicated to Canada in various settings that it is committed to fulfilling Manitoba's obligations under the MFA in the manner set out by the Principles of the MFA. Manitoba's position is that the Crown in right of Canada has the leading role in fulfilling treaty land entitlement and as such the Crown in right of Canada would have the leading role in fulfilling the obligations under section 35 of the Constitution Act, 1982.

85. On January 28, 2014, Canada gave another presentation to TLEC about consultation and treaty land entitlement. It asked that any information a First Nation possessed with respect to historical and current land use should be provided to the Department and to Manitoba, to form part of the consultation record. It advised TLEC that other Aboriginal groups would have 30 days to respond to consultation letters for land acquired in fee simple and 60 days for land which was Crown land.

86. Mr. Henderson testified that by this time TLEC was becoming increasingly frustrated that consultation had not yet begun, especially since over a year had passed since Canada first indicated that it would undertake consultation with other Aboriginal groups before setting apart land as Reserve.

87. Accordingly, on February 5, 2014 Chief Genaille wrote to Canada on TLEC's behalf again expressing concern. He sought to invoke Section 40.12 of the Agreement. His letter stated in part:

"At this point in the implementation of the MFA there is no denying that Canada's decision to now consult on the Reserve Creation Process is causing delays and uncertainty for TLEC's Member EFNs. We contend that the current Reserve Creation Process – which has been followed by the MFA parties (TLEC, Canada and Manitoba) for the past 17 years – is the last in a series of steps needed to implement a decision made in 1997 – that is to make lands available for Reserve creation for our Member EFNs to

satisfy their outstanding TLE claims – and therefore no new consultation obligation arises.

By now deciding to undertake Crown Aboriginal consultations, 17 years after the signing of the MFA and after converting a total of 462,727 acres to Reserve without consulting other Aboriginal groups, the Crown's conduct on this matter is jeopardizing the fulfillment of our Member EFNs validated TLE rights and calls into question the Honour of the Crown.

As a result of this dramatic alteration to the implementation of the MFA, we, on behalf of our Member EFNs, are now calling for good faith negotiations with Canada to remedy and alleviate the effects of Canada's decision to consult, and possibly accommodate, other Aboriginal groups on the TLE implementation process, in accordance with Article 40.12 Constitutional Legislative Changes [sic], of the MFA.

In keeping with TLEC's best efforts, as per the MFA, and on behalf of our Member EFNs, I am open to meeting with you and your staff as soon as possible to discuss this critical matter with a view to reaching a positive remedy and outcome for our Member EFNS."

88. Canada did not accept TLEC's request to enter into such good faith negotiations.

89. Instead, on February 21, 2014, Canada wrote back stating that it did not agree with the assertion that the duty to consult represents a constitutional or legislative change as contemplated by Section 40.12 and as a result it did "not agree to your request to enter into negotiations with a view to amending the Framework Agreement."

90. Its letter went on to say:

"Canada will be sending letters to begin the consultation process with affected First Nations and Métis communities in the coming weeks. We will ensure that the Treaty Land Entitlement Committee is copied on this correspondence."

91. Mr. Henderson testified that the statement that consultations were only going to be commencing in the future, was troublesome. Chief Ron Evans of the Norway House Cree Nation wrote to the Minister on March 5, 2014 to express his concerns over the delay and to say that in his view Canada did not have a duty to consult on lands which were covered by the provisions of the Agreement.

92. Canada responded to Chief Evans on April 14, 2014, stating that it:

> *"... has an obligation to consult Aboriginal groups when contemplating conduct that could adversely affect potential or established treaty rights and that as Reserve lands are set aside for the exclusive use and benefit of a First Nation, the government may need to consult other Aboriginal groups on the proposed Reserve creation where those lands may have previously been accessible for the exercise of Aboriginal or treaty rights."*

93. The letter went on to say that Canada believed that more could be done to implement the Agreement and that it had recently created a Director General position "to work directly with Treaty First Nations and recommend definitive and measureable steps to move us all toward Treaty Land Entitlement completion."

Consultation Efforts

94. Mr. Henderson testified that TLEC's understanding was that Canada commenced its consultation process on March 13, 2014, by sending a number of letters to the Manitoba Métis Federation ("MMF"). The letters gave the Métis 60 days to respond.

95. The 60 day deadline came and went. Mr. Henderson said that from TLEC's perspective from March 2014 to November 2014 little happened with respect to consultation with the Métis.

96. On November 5, 2014 Canada advised TLEC by letter that there were 14 parcels of land Selected or Acquired for which the Province had issued an Order in Council giving up administration and control to Canada. With respect to those parcels Canada was giving the Métis a deadline to respond. Five of those parcels are among the Lands at Issue in these proceedings.

97. The letter went on to identify 40 additional parcels where addressing the duty to consult was the last step prior to requesting the Province issue Orders in Council. It said the Manitoba Métis Federation had been given an extension of time to provide information regarding consultation in those parcels.

98. The letter ended by stating that the consultation process takes time and suggested that between the Entitlement First Nations, TLEC, Manitoba and Canada, the parties collectively look for ways to inform the consultation analysis of each parcel.

99. On November 6, 2014, Canada gave a presentation to TLEC about the status of its consultation with the Métis. It identified that the Métis were claiming that all Additions to

Reserves had the potential to adversely affect their potential or established Aboriginal rights. Canada said that from the approximate 350 Selections and Acquisitions already made by First Nations, consultation had commenced with respect to 90 parcels.

100. On March 17, 2015 Canada sent TLEC a letter, responding to TLEC's request for an update. The letter reported that there were 11 parcels in total which Canada advised would be sent to the Minister for approval prior to March 31, 2015, 4 of which are among the Lands at Issue.

101. Canada gave another presentation to TLEC on June 25, 2015, where it confirmed that: "the primary reason that more lands were not set apart as Reserve in 2013/2014 is that Crown obligations with respect to the duty to consult other Aboriginal groups had not been addressed."

102. On December 15, 2015, Chief Genaille sent a letter to the Associate Deputy Minister of Aboriginal Affairs and Northern Development Canada stating that TLEC remained disappointed by the fact that the new Federal Minister of Indigenous and Northern Affairs had not yet signed the Ministerial Orders for a number of TLE Crown land Selections and Acquisitions.

103. His letter stated in part:

> *"By unilaterally undertaking Crown-Aboriginal consultations, eighteen (18) years after the signing of the MFA and after converting a total of 462,727 acres to Reserve without consulting other Aboriginal groups, the Crown's conduct on this matter is jeopardizing the fulfillment of our member EFNs' validated TLE claims and calls into question the Honour of the Crown.*
>
> *As a result of this dramatic alteration to the implementation of the MFA, we, for the record, did call for good faith negotiations with Canada by a letter dated February 5, 2014 (* attached) to try to remedy and alleviate the effects of Canada's decision to consult, and possibly accommodate other Aboriginal groups on the TLE implementation process, in accordance with Article 40.12, Constitutional or Legislative Changes of the MFA.*
>
> *Unfortunately, this request was refused by the Manitoba Region of Aboriginal Affairs and Northern Development Canada in their letter (* attached) of response to us.*
>
> *As a result, and as conveyed to you at our meeting, we will be filing a formal allegation of material failure against Canada via written correspondence and we will copy you on this as you requested. ..."*

104. On January 5, 2016, TLEC sent a letter by fax to Canada, alleging material failure to comply with Section 40.07 of the Agreement.

105. The letter provided as follows:

> ***RE: Allegation of material failure to comply with Section 40.07 of the Manitoba Framework Agreement Treaty Land Entitlement***
>
> *On behalf of the Entitlement First Nations (EFNs) signatory on May 29, 1997 to the Manitoba Framework Agreement (MFA) Treaty Land Entitlement (TLE) and in accordance with Section 36.01, Material Failure to Comply with Fundamental Term or Condition of the MFA, the Treaty Land Entitlement Committee (TLEC) of Manitoba is hereby alleging that Canada has materially failed to comply with Section 40_07 of the MFA, which states:*
>
> ***"This Agreement shall not be varied or amended except by written agreement of the parties."***
>
> *The TLEC alleges and asserts that Canada has in fact materially varied and amended the identified provision of the MFA by its unilateral decision to consult other Aboriginal groups on the Reserve creation process. Section 40.07 is a fundamental term of the MFA, and this amendment, occurring without TLEC's agreement, is a material amendment.*
>
> *As a consequence of this amendment, the following Articles, contained within the MFA and which were agreed to by the MFA parties (TLEC, Canada and Manitoba), have also been unilaterally materially varied and amended by Canada without TLEC's written agreement:*
>
> *Article 6: Land Selection and Acquisition Process;*
>
> *Article 7: Transfer of Lands and Interests from Manitoba to Canada; and, Article 8: Setting Apart of Land as Reserve by Canada,*
>
> *As per Section 36.01 of the MFA, please be advised that Canada must within 30 days of receipt of this notice either remedy the alleged material failure or refer the matter to the Implementation Monitoring Committee.*
>
> *For the record, TLEC does not agree with Canada's unilateral decision to vary and amend the MFA in contravention of Section 40.07 and resulting in unnecessary delays of the Reserve creation process for TLEC's affected EFNs.*

In closing, I remind you of Canada's sacred obligations under all TLE agreements signed with the Treaty First Nations, as stated in the Federal Court of Appeal's decision regarding the Kapyong Barracks and Treaty One First Nations:

"Agreements such as these are not 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..."

(Paragraph 118, Federal Court of Appeal, August 14, 2015)"

106. Canada responded to this letter on February 8, 2016 saying it did not agree that the duty to consult represented a material failure to comply with Section 40.07 of the Agreement. As a result it did not agree to remedy the alleged material failure nor did it agree that the matter should be referred to the Implementation Monitoring Committee.

107. Mr. Henderson testified that in March of 2016 TLEC met with Minister Carolyn Bennett, Minister of Indian and Northern Affairs, and presented her with a Position Paper, the gist of which was to agree to a process to amend the Agreement to accommodate Canada's consultation requirements. Another meeting was held in May 2016 with the Minister.

108. On May 24, 2016, Minister Bennett sent Chief Genaille a letter in which she thanked him for the Position Paper. She stated:

"I understand the frustrations and am committed to finding solutions to the unreasonable delays in implementing treaty land entitlement agreements in Manitoba. As your letter and Position Paper point out, there are specific issues related to the agreements and the Manitoba situation that will need to be addressed. Therefore, I have asked departmental officials to work with you to review the options and bring forward a proposal for next steps, which could potentially include amendments to the Manitoba Framework Agreement, keeping in mind that this is a multi-party agreement and changes would require consent of all parties."

109. At the hearing of these proceedings Counsel for TLEC advised that the Position Paper was not put into evidence because it was part of without prejudice negotiations.

110. A working group whose members included representatives of TLEC and Canada, met in June of 2016 to consider amending the Agreement. A second meeting was held in November of 2016 but after that, Mr. Henderson testified, the delegates from TLEC's member bands became frustrated with Canada's consultation process with the Métis and no further meetings of the working group were held.

111. TLEC sent another letter to Canada on December 15, 2016, this time addressed to Minister Bennett. It reminded her of the letter it had sent on January 5, 2016 alleging a material failure to comply with Section 40.07, saying that Section 40.07 prevents any unilateral amendment of the Agreement. The December letter stated that the combined effect of Sections 2.02 [relating to Selection], 6.03 [granting an exclusive use permit], and 8.02 [relating to the ATR Policy] was that for lands that had been Selected and otherwise determined to have been eligible, and pledged to the exclusive use of the Entitlement First Nation who selected them, the Métis no longer had rights to claim over such Selections.

112. The letter went on to indicate that in addition to alleging that Canada had materially failed to comply with a fundamental term – Section 40.07, it had also failed to comply with another fundamental term - Section 31.03 which requires Canada to use its best efforts to implement the Agreement.

113. Repeatedly during his evidence, Mr. Henderson testified that because of Canada's decision to consult the Métis the land conversion process has been dramatically altered and amended without the Entitlement First Nations' consent.

Discussions between TLEC and the Métis

114. I also note Mr. Henderson's evidence that despite the fact that 1991 ATR Policy made no mention of any consultative steps and TLEC's view that consultation with the Métis was not required, TLEC did attempt, on its own initiative, on behalf of the proponent Entitlement First Nations, to engage the Métis in consultations about treaty land entitlement in Manitoba, as early as 1999.

115. He said TLEC was interested in understanding the nature of any concerns the Métis might have had with respect to treaty land entitlement issues under the Agreement.

116. His evidence was, however, that the Métis refused TLEC's invitation on at least 3 occasions including one which was made in 2015.

117. Chief Nelson Genaille was called to testify at the hearing solely with respect to evidence that was led by both parties regarding communications between TLEC and the Manitoba Métis Federation.

118. No witnesses were called on behalf of the MMF and for reasons set out later in this Award, I have not put any reliance on this line of evidence which I do not find relevant to these proceedings.

Evidence of Dianna Watson

119. Canada called Dianna Watson to testify. She is currently the manager of Capital Services in the Infrastructure and Housing Directorate but was employed with INAC from January 29, 2002 until the summer of 2015.

120. Between 2002 and 2011 she worked at what she described as "headquarters" in the treaties and aboriginal government sector. She held the position of project manager in the ATR unit in 2011 and then became manager of that unit in 2012.

121. She testified that her work in the ATR unit involved getting things ready for senior approvals for adding lands to reserves including: looking at which parcels on the work plan were requiring surveys or environmental assessment; and getting documents ready to send for approval to headquarters.

122. I found Ms. Watson to be a very knowledgeable witness who testified extensively about the process of consultation the Federal Government has utilized over the years, particularly as the law in that area has evolved.

123. She confirmed that Canada advised TLEC through various presentations that it was not going to request the transfer of administration and control of lands from the Province, until it was satisfied that the duty to consult had been addressed. She agreed, on cross-examination, that in not requesting the Province transfer the lands, Canada was holding up the transfer, despite Manitoba's wanting to give Canada administration and control.

124. She stated that the issue of consultation started to be addressed around the summer of 2012 and in December 2012 INAC met with TLEC and Manitoba for the specific purpose of discussing the Crown's duty to consult.

125. Throughout 2013, she said, she and her staff requested information or consultation records from Manitoba and sought information from TLEC and the Entitlement First Nations about the location of Métis settlements and any use by the Métis of the various parcels of land that had been chosen by the Entitlement First Nations, under the Agreement.

126. On May 23, 2013 INAC wrote to TLEC to explain its obligation to consult and to ask for any information that TLEC had regarding consultation that was conducted by First Nations.

127. Ms. Watson stated in her affidavit that alongside consultation efforts, INAC continued to engage in the implementation steps it was responsible for under the Agreement, up to the point of receiving administration and control of the lands from Manitoba.

128. She said that in March 2014 she and her staff also discussed claims that were being made by the Métis with respect to harvesting rights throughout the province of Manitoba.

129. She confirmed that starting in March 2014, Canada gave the Manitoba Métis Federation notice of its intention to consider setting apart land as Reserve. It asked for a response to be provided within 60 days.

130. The Manitoba Métis Federation requested an extension, which INAC granted. On June 30, 2014 the Manitoba Métis Federation reiterated concerns about the effect the MFA process would have on its peoples' Aboriginal rights.

131. Ms. Watson said INAC made further efforts to have the MMF provide a fact specific, parcel by parcel response about the nature of the Aboriginal rights they were claiming. It told the MMF that an immediate response was required on the 14 parcels to which INAC had received title from Manitoba.

132. She said another 40 parcels were identified to the MMF as the next priority. These were parcels where the Crown's consultation with the Métis was one of the last steps to perform before the parcel could be put before the Minister for determination to be set apart as Reserve.

133. She said the MMF's response was to reiterate its request for funding for consultation and for time to conduct community consultations.

134. Ms. Watson said that on January 12, 2015 she advised the MMF that INAC intended to move forward with putting 11 of the 14 priority parcels before the Minister for determination.

135. In February 2015, however, she was contacted by the MMF's lawyers who advised they had been retained regarding the MMF's concerns about a lack of meaningful consultation. This was followed by a 14 page letter citing case law and a legal brief regarding deficiencies in the proposed consultation process. The letter advised that the MMF would have recourse to the courts to ensure they were given an opportunity to engage in a full and meaningful opportunity to assess the lands at issue and the potential impact on their Aboriginal rights if necessary.

136. In her affidavit Ms. Watson said that by the summer of 2015, within the context of the 400 or so existing MFA land selections and hundreds more to come, Canada had two basic choices:

> *"• INAC could cease efforts towards ensuring the Métis were satisfied they had been given a reasonable period of time to determine the site specific nature of the claims they had and move forward to recommend the Minister exercise her discretion and determine whether the lands could be set apart as reserve; or*
>
> • *INAC could provide some level of process funding to the MMF to ensure a process that afforded the MMF opportunity and resources to do their assessment and provide INAC with a cite specific response on the parcels."*

137. She indicated that INAC chose the second option. Accordingly, the 11 parcels of land that were in the process of being forwarded to the Minister for her consideration to be set apart as Reserve, were returned to the region.

138. In her affidavit, Ms. Watson stated that from a review of Jonathan Arnold's affidavit it was her understanding that the MMF's assessment of the 11 priority parcels has since been concluded and those parcels have been set apart as Reserve by the Minister.

139. Ms. Watson's evidence was that from November 2012 until around the spring of 2014, she and her staff met with TLEC, the Entitlement First Nations and Manitoba on a number of occasions, to try to reach an agreement on a pathway forward to discharge the Crown's obligation to consult other Aboriginal groups – including the Métis.

140. She was clear in her evidence that Canada did not think it was necessary to get an agreement from all the parties with respect to a process of consultation; rather the reason for trying to reach an agreement was more for practical purposes.

141. She testified that they would have preferred if they could have got an agreement amongst all the parties but "we made it fairly clear from the beginning that we were going ahead, that regardless, Canada was going to consult".

142. Ms. Watson testified that by June of 2015 when she left her position, consultation was well underway in the Treaty Land Entitlement context; the Department was working on all party work plans and adjusting the process. She acknowledged that TLEC took no part in establishing that process and was not happy with it.

143. On cross-examination Ms. Watson agreed that the ATR Policy which is referred to in the Agreement is the 1991 ATR Policy and that that policy makes no mention of any consultation with any Aboriginal group.

144. She also agreed that Canada was required to use its best efforts to perform its obligations under the Agreement, in a timely fashion.

Evidence of Jonathan Arnold

145. Jonathan Arnold has been the Regional Director for Lands and Economic Development for INAC since August 2016.

146. He oversees INAC's Additions To Reserve Unit. That Unit manages the federal roles in all of the ATR processes, including ATR under the Agreement. He explained that the ATR Unit maintains relationships with TLEC and the province of Manitoba through the Implementation Monitoring Committee. Since the fall of 2016, Mr. Arnold has attended as INAC's representative at the Implementation Monitoring Committee's meetings.

147. The ATR Unit, he explained, works closely with Natural Resources Canada to manage surveys and land descriptions, and liaises with the Environmental Management Program of INAC to undertake the environmental assessments necessary for ATRs. The Unit also works closely with Entitlement First Nations in the prioritization of land parcels and implementation of the ATR process under the Agreement.

148. Mr. Arnold's evidence was that in the spring of 2015 INAC updated the work plans relating to treaty land entitlement and the parties discussed how best to prioritize parcels. By the spring of 2016, the parties had agreed to a list of 64 parcels that would be priorities for the 2016/2017 year.

149. Those parcels were targeted to move forward in the MFA process and where possible be put before the Minister for a determination as to whether they would be set apart as Reserve.

150. Mr. Arnold said that regardless of the priorities that had previously been agreed to by the parties, with the advent of this arbitration, INAC sought to prioritize all 35 of the Lands at Issue and is working to move them through the MFA process.

151. In his affidavit Mr. Arnold discussed a number of steps that Canada has taken to satisfy its obligation to consult with the Métis, including reaching a funding agreement with the MMF in in 2015/2016, an associated work plan and identification of priorities.

152. He said this approach to consultation has proved to be helpful and has resulted in the MMF providing INAC with responses for 28 Additions to Reserves parcels which were identified as priorities, 11 of which were MFA parcels. He said that the MMF specifically withdrew their claim and request for consultation regarding 7 of the MFA parcels.

153. Mr. Arnold noted that in the fall of 2016 INAC created a "TLEC Dashboard" which was distributed to all of the parties and which is now maintained by the IMC Chairperson. The Dashboard is a useful tool to keep the parties updated regarding the ATR progress under the Agreement.

154. On cross-examination Mr. Arnold very clearly indicated that Canada's understanding was that the 1991 ATR Policy is the policy that Canada had agreed would apply to the 35 Lands at Issue in these proceedings.

155. He pointed out, however, that the duty to consult is outside the ATR Policy. The Policy is simply about the process of how lands become Additions to Reserves.

156. Mr. Arnold testified that in 2013, when Canada presented TLEC with a new draft ATR Policy, TLEC expressed concern that it did not contain any "grandfather clause" to recognize the commitments made by the Crown in the MFA, to use earlier versions of the ATR Policy.

157. Canada finalized a new ATR Policy in 2016 which does contain a grandfather clause.

158. Mr. Arnold testified that this clause was put in so that any ATRs that were already in process would not be taken back to square one. In other words, he said, in the case of ATRs under the MFA where the 1991 ATR Policy was in place, those lands could continue to follow the 1991 policy, for being set apart as Reserve.

159. As I indicated above, the evidence at the hearing was that by the time of the proceedings, 6 of the Lands at Issue had been converted to Reserve.

160. Mr. Arnold confirmed that with respect to each of those 6 parcels, Canada has received a response from the Métis saying that they have no further interest in that land or no further need for consultation.

161. With respect to the other 29 parcels, Mr. Arnold testified that Canada has not made a decision regarding converting the land to Reserve because the consultation process with the Métis is still ongoing.

162. He acknowledged that there was no deadline for completing consultation on those other parcels. Rather, he said, consultation ends when the process has been legitimate and reasonable and Canada feels it can move on to the next step.

163. He said that despite its attempts, INAC has been unable to either jointly engage TLEC and the MMF in discussing consultation and accommodation, or separately engage TLEC on consultation and accommodation issues, regarding the Métis.

164. Mr. Arnold testified that sorting out Canada's obligations under Treaty Land Entitlement, with its obligations to the Métis, has been his biggest challenge.

Evidence of Dave Hicks

165. Dave Hicks is the Director and Chief Negotiation Officer for Agreements Management in the Aboriginal Consultations branch of Indigenous and Northern Relations for the Province of Manitoba. As discussed above, his evidence was led by Canada.

166. Mr. Hicks' role is to negotiate and implement various settlement agreements and to oversee Crown consultations on behalf of Manitoba.

167. He testified that with respect to implementing the MFA, once Manitoba issues a Crown Land Use Permit, the bulk of Manitoba's physical work has come to an end. In general, he said, "the ball is then in Canada's court."

168. In terms of the MFA procedure, Mr. Hicks confirmed that the Province's general practice is to wait for Canada to ask Manitoba to issue the Order in Council which transfers administration and control of lands to Canada. This is because if the Province were to transfer the land to Canada and then Canada did not set it aside as Reserve, that would pose a problem.

169. He confirmed that at Canada's request Manitoba has already transferred administration and control of 14 of the 35 parcels at issue. For the balance, he said, Manitoba has been prepared to transfer administration and control since December 9, 2013 at the very latest, as reflected in the letter sent by Deputy Minister Bostrom to Canada, on that date.

170. With respect to the remaining 21 parcels, Mr. Hicks confirmed that if Canada asked to receive administration and control of those lands, Manitoba would provide it.

171. Mr. Hicks' evidence was called as a supplement to the written answers Manitoba gave to the questions Canada had posed in advance of the hearing.

172. Those questions and answers included, in part, the following:

1. ***During the negotiation of the MFA, did Manitoba ever discuss with TLEC, or attempt to discuss with TLEC, potential Métis s. 35 Constitution Act claims?***

***Answer**: No. It would not be the role of Manitoba during the negotiation of the MFA to discuss with TLEC, or attempt to discuss with TLEC, potential Métis s. 35 Constitution Act claims.*

This is evident from The Framework Agreement — Treaty Land Entitlement dated May 29, 1997, often referred to as the Manitoba Framework Agreement ("MFA") itself. The preamble sets out the historical background of the treaties entered into between her Majesty the Queen in Right of Canada ("Canada") and the First Nations in Manitoba emphasising Canada's obligations to lay aside and reserve tracts of land for those First Nations. Preamble 0 cites Canada's recognition that the Entitlement First Nations ("EFN") have each not received land of sufficient area to fulfill the requirements of the treaties.

The MFA goes on to set out the Principles for Land Selection and Acquisition, which are designed to enable Canada to fulfill the terms of its treaties with First Nations in Manitoba, which treaty rights are protected under section 35 of the Constitution Act, 1982.

...

The Principles for Land Selection found in the MFA are also designed to assist Manitoba in meeting its constitutional obligation under paragraph 11. Preamble Z reflects Canada and Manitoba's agreement that Manitoba will satisfy its obligations to Canada under paragraph 11 of the MNRTA in the manner and to the extent provided in the MFA.

The MFA, therefore, reflects that it is the Crown in right of Canada that has the leading role in fulfilling treaty land entitlement and that Manitoba's role is to provide land to Canada to enable Canada to fulfill the terms of the treaties.

5. ***What process did Manitoba employ in issuing the 35 s. 7(1) The Crown Lands Act permits at issue in this arbitration?***

***Answer**: The statutory authority upon which Manitoba may issue Crown Land use permits is contained within s.7(1) of the Crown Lands Act. However, the Crown Land use permit for Treaty Land Entitlement purposes is issued pursuant to subsection 6.03 of the MFA. ...*

Therefore, the process under which Manitoba issues a Crown Land use permit under the MFA is the process set out in the MFA and the LTRCPM (Land Transfer and Reserve Creation Process Manual) sets out that process in steps.

8. Were the 35 permits registered anywhere after they were issued?

***Answer**: All CLUPs are recorded in the Manitoba Crown Land Registry System. In addition, the issuance of a CLUP is a tracked step within Manitoba's Treaty Land Entitlement Management System referred to as TRELES that will change the status of a selection in the database that is attached to digital mapping created for each selection. On a monthly basis Manitoba generates and distributes to EFNs, TLEC and Canada Treaty Land Entitlement status reports and summaries of selections. Therefore, all parties to the MFA are made aware on a monthly basis of the status of tracked steps for TLE Land Selections. ..."*

ANALYSIS

173. I now turn to the questions which are set out in the Terms of Reference.

Question 1

Does the Adjudicator have jurisdiction to issue an award regarding an issue or matter in dispute under the MFA that has arisen from a failure by Canada to implement the MFA related to its legal or constitutional obligation to consult the Métis regarding the Lands at Issue?

174. The reason the issue of jurisdiction is an important question is because the starting point for TLEC's allegation that Canada has failed to comply with its obligations under the MFA is that Canada had no duty to consult any group, including the Métis, prior to recommending to the Minister that the Lands at Issue be set apart as Reserve.

175. TLEC's position is based on the fact that for each of the Lands at Issue:

- both Crowns have determined their eligibility to be set apart as Reserve, in accordance with the terms of the Agreement; and
- Crown Land Use Permits have been issued accordingly.

176. Counsel for TLEC submitted, therefore, that I ought to make a determination that under the terms of the Agreement, those lands no longer reside within the inventory of land over which other Indigenous groups might claim an interest and, therefore, a duty to consult no longer exists.

177. In making this argument, he submitted that this does not mean that competing Indigenous groups should be left without a remedy if they had rights in respect of such lands. He said that such groups may have a claim against Canada for losses caused to them by Canada's past failure to consult prior to agreeing to eligibility and the granting of a Crown Land Use Permit – actions which, he submitted, have forever put those lands beyond the reach of those Indigenous groups.

178. Counsel for TLEC pointed out that none of the provisions in the MFA specifically refer to Indigenous or treaty rights of anyone other than Entitlement First Nations or members of other First Nations.

179. For example, he cited Section 40.11 :

> *40.11 No Effect on Existing Aboriginal or Treaty Rights*
>
> *(1) Except as to matters dealt with in Section X.01 of the Release, neither this Agreement nor any Treaty Entitlement Agreement shall be construed so as to abrogate or derogate from any existing aboriginal or treaty right of an Entitlement First Nation or any Member of an Entitlement First Nation.*
>
> *(2) Except as to matters dealt with in Section X.01 of the Release, neither this Agreement nor any Treaty Entitlement Agreement shall be construed so as to abrogate or derogate from the application of subsection 35(1) of the Constitution Act, 1982 to any aboriginal or treaty right of an Entitlement First Nation or any Member of an Entitlement First Nation that may accrue after the Date of Execution.*
>
> *(3) Any provision of this Agreement or a Treaty Entitlement Agreement which is found by a court of competent jurisdiction to be invalid or void as being inconsistent with the recognition and affirmation of any existing aboriginal or treaty right within the meaning of subsection 35(1) of the Constitution Act, 1982 or any such right that may accrue after the Date of Execution to any Entitlement First Nation or its Members shall, to the extent of that inconsistency, be dealt with in accordance with Section 40.02.*
>
> (emphasis added)

180. He also cited Subsection 3.02(8) which is the only section in the Agreement that addresses competing interests from Indigenous groups with respect to land Selection. That subsection only refers to the interests of Entitlement First Nations and other First Nations.

181. Canada submitted, however, that its compliance with the Agreement has to be assessed in the context of the legal and constitutional obligations it owes to other Indigenous groups, including the Métis, even though those exist outside the four corners of the Agreement.

182. It said that Canada cannot interpret the Agreement as meaning it has contracted out of its constitutional obligations to other Indigenous groups who are not a party to the Agreement.

183. With respect to the issue of jurisdiction Canada's position was that any issues that concern the Section 35 *Constitution Act* claims of other Indigenous groups are outside of the Adjudicator's jurisdiction in this arbitration.

184. Specifically on the issue of the Adjudicator's jurisdiction, Canada submitted that I do not have jurisdiction to determine:

a. Whether Canada owes a duty to consult the Métis or whether the Métis are entitled to be consulted;

b. The approach Canada should take to consultation or the approach the Métis are entitled to receive;

c. The constitutional and aboriginal rights of the Métis under section 35 of the Constitution Act, 1982 or otherwise – including the strength of the Métis' claim to the Lands at Issue; or

d. The weight to be assigned to competing claims asserted by Entitlement First Nations and the Métis.

185. Counsel for Canada also pointed out that the Métis and the MMF are not parties to these proceedings.

186. She submitted that what can be decided in these proceedings is whether or not Canada is fulfilling its obligations under the MFA. This can include a decision about whether Canada's consultation with the MMF has somehow caused it to be in default under the Agreement.

187. I agree with Canada's submissions on this question.

188. I find I do not have the jurisdiction to make a determination as to whether Canada has a duty to consult the Métis regarding the Lands at Issue nor, assuming that such a duty exists, what that consultation should look like.

189. While I agree with counsel for TLEC that the Crown's determination of eligibility is a significant step in the implementation of the MFA, I do not have the jurisdiction to determine the impact of that determination on an Indigenous group who is not a party to the Agreement and who is not before me in these proceedings.

190. I am not, therefore, prepared to make nor do I find I have the jurisdiction to make a determination as to whether, with respect to the Lands at Issue:

(a) the Métis have a right to assert a claim;

(b) Canada has a constitutional or legal duty to consult with the Métis; or

(c) the consultation process entered into by Canada with the Métis was appropriate.

191. I do, however, have the jurisdiction to determine whether any of Canada's actions, regardless of the reason for those actions, including where they are based on extra-contractual constitutional obligations, constitute a failure to comply with the obligations Canada owes to the Entitlement First Nations, under the MFA.

192. I have focused my consideration of the evidence adduced in these proceedings on whether Canada has complied with its obligations under the MFA.

193. To the extent that evidence was adduced and arguments made about the nature of the consultation Canada has conducted with the Métis or discussions between TLEC and the Métis I have found that evidence to be of limited relevance to my determination of the matters at issue.

194. I will address Question No. 2 of the Terms of Reference which also deals with jurisdiction, but relating to the nature of what I can award, later in these reasons when I deal with Question No. 5 relating to the specific Award that I have made.

Question 3

Is Canada's decision to consult with the Métis or the process that Canada has employed in consulting the Métis in respect of the Lands at Issue contrary to Canada's obligations under:

a. section 8.02 of the MFA?
b. section 31.03 of the MFA?
c. section 40.07 of the MFA?
d. Any other provision of the MFA?

Principles of Contractual Interpretation

195. In interpreting this Agreement, I am guided by the statement of Justice Rothstein in *Sattva Corporation v Creston Molley Corporation* 2014 SCC 53 that:

> *"... 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' ... 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 the formation of the contract."*

Sattva, supra, para.47

196. 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.

Sattva, supra, para.48

197. Following these principles, I have considered the purpose of the MFA, the nature of the relationship between the parties to that Agreement and the surrounding circumstances which existed at the time the parties entered into the Agreement.

Purpose of the Agreement

198. During her oral submissions, Counsel for Canada stated that "the goal of the MFA is to create Reserves."

199. I agree.

200. The MFA sets out the process by which Treaty Land Entitlement rights will be implemented, having regard to the rights and obligations of each party to the Agreement.

201. The MFA is an agreement which implements substantive, constitutional rights.

202. As the Federal Court of Appeal in *Canada* v *Long Plain First Nation*, 2015 FCA 177 confirmed, when interpreting Treaty Land Entitlement agreements it is important to remember that the purpose of those agreements is to redress Canada's broken promises under the treaties.

Long Plain First Nation, supra, para.117

203. The court in that case also pointed out:

> *"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

204. This Agreement must also be interpreted through the lens of the Honour of the Crown.

205. The Supreme Court of Canada in *Manitoba Métis Federation Inc. v Canada*, 2013, FCC, 14 identified that the Honour of the Crown governs both treaty making and implementation and requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.

Manitoba Métis Federation, supra, para.73

206. The court described the obligations required by the Honour of the Crown as follows:

> *"By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the Honour of the Crown requires that the Crown:*
>
> *1. takes a broad purposive approach to the interpretation of the promise; and*
>
> *2. acts diligently to fulfill it.*
>
> *The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the Honour of the Crown. ... a purposive approach to interpretation informed by the Honour of the Crown applies no less to treaty obligations."*

Manitoba Métis Federation, supra, paras.75 & 76

207. I have interpreted Canada's obligations under the MFA, therefore, in a broad purposive manner having regard to the Honour of the Crown and the recognition that when the parties signed this Agreement in 1997 they were committing to honour two sets of promises: the original promises that were made in the Treaties; and the promise that those commitments would finally be implemented according to the agreed upon terms set out in the Agreement.

Key Themes

208. This Agreement is an elaborate and carefully crafted document. In reaching it the parties went to great lengths to ensure that they had a clear process – a roadmap - that would allow them to satisfy the treaty promises in a timely and diligent manner.

209. I have identified the following key themes which reflect the parties' intentions in making this Agreement.

No Amendment without Agreement

210. First, the Agreement contains a number of provisions that stipulate that if the parties wish to amend the process which is set out in the Agreement, they must do so by agreement.

211. I find that these provisions reflect an expectation by the parties that because the Agreement would be implemented over a period of time, circumstances might occur which could affect its implementation. To address that possibility the parties deliberately included provisions in the Agreement which require them to reach an agreement to amend it so as to preserve their rights under the Agreement notwithstanding the change in circumstances, to the extent possible.

212. In my view, these provisions demonstrate the parties' intention that in this tripartite agreement, each party was to have an equal voice in how the Agreement would be implemented. No party was to be able to unilaterally change or affect the implementation of the Agreement - particularly not in a way that was contrary to its purpose.

213. See, for example, the following provisions:

- *8.02(3) the Additions to Reserves Policy may be amended by Canada after the Date of Execution but any amendment to that policy will apply to land to be set apart as Reserve in accordance with this agreement only with the written agreement of the parties;*
- *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;

- *40.07 This Agreement shall not be varied or amended except by written agreement of the parties.*

- *40.12 Constitutional or Legislative Changes*

  Where any amendment not contemplated by this Agreement is enacted to the Constitution Act, 1982, the Indian Act or to any other legislation, the result of which amendment is inconsistent with the legal rights or obligations of the parties under this Agreement and which, in turn, materially affects the implementation, operation or effect of this Agreement, the parties agree to enter into good faith negotiations designed to determine and implement any necessary amendments to this Agreement required to remedy or alleviate the effect of such constitutional or legislative changes.

(emphasis added)

214. What is significant about this last provision – Section 40.12 – is that it shows that even changes to the *Constitution*, insofar as they are inconsistent with the legal rights or obligations of the parties under the Agreement and materially affect the implementation, operation or effect of the Agreement, require the parties to enter into good faith negotiations which are designed to reach an agreement to "remedy or alleviate" the effect of such changes.

215. All of these provisions, in my view, demonstrate that when the parties signed the MFA, they made a strong and unequivocal commitment to each other to implement their respective obligations under the Agreement no matter what the future might hold, While they recognized that the steps taken to implement the Agreement might have to change from time to time, that would only be done by way of negotiated agreement reached between all three of them and not at the instance of one party alone.

Timely Dispute resolution by referral to the IMC

216. Next, consistent with the parties' intention that no party may act unilaterally to alter the process set out in the Agreement, the Agreement repeatedly requires the parties to resolve

disputes by referring the issues when they arise, to the Implementation Monitoring Committee, which is made up of representatives of all three parties.

217. See for example, Subsection 3.01(5) and Section 3.11 which stipulate that if the parties are unable to resolve any issues or circumstances encountered in considerations affecting the Selection or Acquisition of land which are not addressed by the Principles, those issues must be referred to the Implementation Monitoring Committee.

218. Issues relating to the Crown's determination as to the eligibility of a Selection or Acquisition may be referred to the Implementation Monitoring Committee (Subsection 6.02(8)).

219. When one party alleges that another has materially failed to comply with a fundamental term of the Agreement the matter must be referred to the IMC or its Chairperson if it is not remedied by the parties (Subsections 36.01(1)-(5)).

220. A matter must also be referred to the IMC where Canada has accepted administration and control of land but does not set it apart as Reserve (Section 8.06). More will be said about this section later.

Due diligence and best efforts

221. Another theme which appears throughout the Agreement is the requirement for all parties to use due diligence and best efforts in implementing their respective obligations under Agreement. See, for example:

> *8.01 Canada to Set Apart Land as Reserve*
>
> *(1) Where:*
>
> *(a) in the case of Crown Land:*
>
> *(i) Manitoba has transferred to Canada administration and control of the interests of Manitoba in the Selection in accordance with Subsection 7.01(2) or (3); and*
>
> *(ii) Canada has accepted administration and control of the interests transferred to it by Manitoba in accordance with Subsection 7.01(4); or ...*

Canada undertakes to proceed with due diligence and to use its best efforts to set apart that land as Reserve for the Entitlement First Nation which has Selected or Acquired that land.

8.05 No Representation or Warranty by Canada that a Particular Parcel of Land will be Set Apart as Reserve

(1) Nothing in this Agreement constitutes any representation or warranty of any kind or nature whatsoever by Canada that any particular parcel of land Selected or Acquired by an Entitlement First Nation will, with certainty, be set apart as Reserve for the Entitlement First Nation, and Canada shall not be liable for any losses, damages or expenses of any kind or nature (direct or indirect) howsoever incurred by the Entitlement First Nation as a result of or in any way arising from Canada not setting a particular parcel of land apart as Reserve for the Entitlement First Nation, except as provided in Section 8.06.

(2) Nothing in Subsection (1) shall in any manner diminish, absolve or otherwise affect:

(a) Canada's undertaking in Section 8.01 to proceed with due diligence and to use its best efforts to set apart as Reserve land Selected or Acquired by an Entitlement First Nation; and

(b) any other obligation or undertaking of Canada under this Agreement.

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.

(emphasis added)

Note, as well

31.02 Best Efforts of TLE Committee ...

31.03 Best Efforts of Canada ...

31.04 Best Efforts of Manitoba ...

222. Sections 31.02, 31.03 and 31.04 cited above, each go on to articulate the specific steps to which each party agrees it will apply its best efforts, in order to implement the Agreement;

223. Finally, towards the end of the Agreement, the parties once more confirm their commitment to each other to implement the terms of the Agreement:

> *40.13 Further Assurances*
>
> *The parties covenant each with the other to do such things and to execute such further documents and take all necessary measures to carry out and implement the terms of this Agreement.*

224. Even the Section relating to the Release which Entitlement First Nations provide to Canada when they sign on to the Agreement confirms that no circumstances can ever relieve Canada from its obligation to proceed with "due diligence" and use its "best efforts" to set apart land as Reserve: See, for example:

> *25.01 Form of General Release*
>
> *I.*
>
> *Each Treaty Entitlement Agreement shall contain a Release in the following form, provided that the provisions of the Release set out within square brackets shall appear in the Treaty Entitlement Agreement of only the Entitlement First Nations identified in Schedule "B":*
>
> *"X.01 Release to Canada*
>
> *In consideration of this Treaty Entitlement Agreement, the Entitlement First Nation, on its own behalf, and on behalf of all past, present and future Members of the Entitlement First Nation, any Predecessor Band, all past, present and future Members of any Predecessor Band and on behalf of their respective heirs, successors, administrators and assigns does hereby:*
>
> *(b) release and forever discharge Canada, Her servants, agents and successors from:*
>
> *(x) all claims of any kind or nature whatsoever in respect of any losses, damages or expenses of any kind or nature (direct or indirect) howsoever incurred by the Entitlement First Nation or the Trustees as a result of or in any way arising from any delay or failure by Canada to set a particular parcel of land apart as Reserve for the Entitlement First Nation either within any certain period of time or at all, except as provided in Section 8.06 of the*

> *Framework Agreement, provided that nothing in this Subparagraph shall in any manner diminish, absolve or otherwise affect:*
>
> *A. Canada's undertaking in Section 8.01 of the Framework Agreement to proceed with due diligence and use its best efforts to set apart as Reserve land Selected [or Acquired] by the Entitlement First Nation; or*
>
> *B. any other obligation or undertaking of Canada under this Treaty Entitlement Agreement*
>
> *unless and until those undertakings and obligations have been fulfilled and those liabilities have been discharged;*
>
> (emphasis added)

The Agreement must be implemented in a timely manner

225. With respect to the Agreement's implementation generally, I agree with the characterization by counsel for TLEC that the steps which are set out in the MFA represent a cascading dynamic which is intended to take place without interruption or delay.

226. In my view, the numerous provisions in the Agreement which articulate the parties' obligations to use due diligence and best efforts demonstrate the parties' intention to implement the Agreement in a timely manner.

227. In addition to the overall commitment by the parties to implement the Agreement in a timely manner, there are also a number of provisions in the Agreement which prescribe specific timelines. Most notably, specific timelines appear in the sections where the Crown determines the eligibility of a given Selection or Acquisition:

> *6.02 Process for Land Selection and Acquisition*
>
> *(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).*

> *(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).*
>
> (emphasis added)

228. There are two other Subsections which I find noteworthy in this regard: 3.02(8) and 8.02(4).

229. Subsection 3.02(8) addresses how any competing interests between First Nations should be dealt with, once an Entitlement First Nation makes a Selection:

> *(8) Where an Entitlement First Nation Selects land and there are competing interests in that Selection resulting from:*
>
> *(a) another Entitlement First Nation Selecting all or a portion of the same parcel of land; ...*
>
> *(d) the Selection will not be proceeded with further under this Agreement until the First Nations resolve their competing interests in the Selection; and*
>
> *(e) Manitoba may make a Disposition of the land if the First Nations have not resolved their competing interests within one year of the last Date of Selection relating to that Selection.*
>
> (emphasis added)

230. This was the only reference I could find in the Agreement where the parties specifically articulate that a step in the implementation process will not be proceeded with until something else has taken place.

231. In Subsection 8.02(4) the parties agree that Canada:

> *"may not delay a determination of whether a Selection or Acquisition satisfies the Additions to Reserves Policy pending the written agreement of the parties to the amendment of the Additions to Reserves Policy in accordance with Subsection (3)."*
>
> *(emphasis added)*

232. These Subsections, in my view, further reflect the parties' intention that each step of the Agreement was to be performed without delay and in a timely manner.

233. Having identified the purpose of the Agreement – to satisfy the treaty promises and set land apart as Reserve – and the relevant key themes of the Agreement, I now turn to answer the question as to whether Canada has failed to comply with specific obligations under the Agreement.

Canada's failure to comply with specific provisions– Sections 40.07, 8.02, 31.01, 31.03 and 6.02

Section 40.07

> *40.07 Amendment*
>
> *This Agreement shall not be varied or amended except by written agreement of the parties.*

234. In its Points of Defence, Canada admitted that around December of 2012 it advised TLEC that with respect to lands which included the Lands at Issue:

> *"a. It was working towards developing a consultation process that would have the Crown consulting with other aboriginal groups (including the Métis) over lands considered for ATR [Additions to Reserve], including lands considered under the MFA; and*
>
> *b. Canada would not accept "title" to lands chosen by EFNs under the MFA until a process of consultation with aboriginal groups had been completed."*

235. Manitoba's evidence was that it was ready to transfer administration and control of all the Lands at Issue to Canada. Canada's evidence was that the reason for the delay and failure to proceed was that it was waiting for a response from the Métis as to whether they had any interest in the land.

236. At the hearing, in answer to my question, Counsel for Canada acknowledged that a consultation process with other Indigenous groups is not set out in the MFA.

237. A plain reading of the MFA shows that the parties had only agreed on what would happen with respect to consultation with other Entitlement First Nations or First Nations (Subsection 3.02(8)).

238. The evidence is clear that Canada deliberately halted its implementation of the Agreement at the point where it would have given Manitoba a legal description of the Lands at

Issue which would then have prompted Manitoba to transfer administration and control of those lands to Canada, thereby allowing Canada to put them before the Minister, to set them apart as Reserve.

239. In doing this I find that Canada has effectively amended the Agreement by inserting into the agreed upon implementation process a step which is not provided for in the Agreement and which has a significant impact on the Agreement's implementation.

240. Canada did this without seeking written agreement of the other parties, in breach of Section 40.07 which requires that the Agreement shall not be amended except by written agreement of the parties.

241. I understand the somewhat challenging position in which Canada found itself when, well into the implementation of this Agreement, it determined that because of developments in the law, it had a duty to consult the Métis with respect to the Lands at Issue, as well as other lands which may be covered by the Agreement.

242. In my view, however, the effect of this change in circumstances ought to have been addressed by Canada in accordance with the provisions of Section 40.07. This was precisely the type of matter which the parties anticipated could arise over the course of the Agreement's implementation and which would require an amendment which was achieved by negotiation and written agreement of the parties.

243. I am strengthened in this view by the provisions of Section 40.12 which provide:

> *40.12 Constitutional or Legislative Changes*
>
> *Where any amendment not contemplated by this Agreement is enacted to the Constitution Act, 1982, the Indian Act or to any other legislation, the result of which amendment is inconsistent with the legal rights or obligations of the parties under this Agreement and which, in turn, materially affects the implementation, operation or effect of this Agreement, the parties agree to enter into good faith negotiations designed to determine and implement any necessary amendments to this Agreement required to remedy or alleviate the effect of such constitutional or legislative changes.*

244. As I discussed earlier, this section clearly indicates the parties' intention that even a change to the *Constitution* could not justify an adverse impact on the implementation of this Agreement.

245. While it is true that Canada's obligation to consult with the Métis is not based on a change to the *Constitution* it is based on what Canada has identified as a change in its understanding of its constitutional obligations. In my view, this is analogous to the type of change in the law which the Agreement says requires the parties to enter into negotiations to reach agreement as to how to "remedy or alleviate the effect" the change.

246. Accordingly, when Canada decided in 2012 that it had a duty to consult with other Indigenous groups, it should have entered into negotiations with TLEC and Manitoba to reach a written agreement as to how the MFA would be implemented in light of Canada's changed extra-contractual obligations.

247. Canada did not do that. I find , therefore, that Canada has failed to comply with Section 40.07 of the Agreement.

248. Canada's position was that because it had a duty at law to consult with the Métis and because the MFA requires it to comply with the laws of Canada (Section 40.03) its consultation with the Métis was consistent with the provisions of the MFA and did not represent an amendment to the Agreement.

249. Unfortunately, in my view, Canada took much too narrow a view of its contractual obligations under the Agreement. As the court in *Long Plain* pointed out, the Honour of the Crown requires the Crown to take a broad purposive approach to interpreting its obligations under a treaty implementation agreement.

Manitoba Métis Federation, supra, paras. 75 & 76

250. Canada also argued that it was not necessary to amend the Agreement in order for it to be able or required to discharge its constitutional obligations owed to other Indigenous groups.

251. That's true, however, Canada failed to appreciate that it needed to comply with its obligations under the MFA at the same time that it complied with its obligations to the Métis.

252. Those obligations involved separate responses in accordance with separate legal requirements.

253. It must be remembered that this Agreement was intended to fix broken promises; promises whose fulfillment was long delayed in an era and context of colonialism.

254. Giving all the parties an equal voice in the implementation of the Agreement is, therefore, fundamental to its implementation and was clearly the intention of the parties when they signed this Agreement.

255. I find that by unilaterally suspending the implementation of the Agreement pending the results of consultation, Canada left the Entitlement First Nations in a position which was at odds with the parties' intentions when they reached this Agreement.

256. As I identified earlier, under the provisions of the Agreement once a Crown Land Use Permit is issued, an Entitlement First Nation is bound by its Selection for so long as that permit is in existence (Subsection 6.03(2)).

257. At the hearing, Counsel for Canada confirmed that with respect to the 35 Parcels at Issue there was nothing more the respective Entitlement First Nations could do. They were waiting for Canada to send the legal descriptions to Manitoba so it would issue the Orders in Council which would transfer administration and control of the lands. Until Canada took that step there was nothing more an Entitlement First Nation could do to move its Selection forward.

258. Counsel for TLEC described the position that the Entitlement First Nations were placed in as "purgatory".

259. However one describes it, it is clear that Canada left the Entitlement First Nations in a position of uncertainty - and powerless with respect to seeing the Agreement's goals fulfilled. Leaving the Entitlement First Nations in this state was clearly contrary to Canada's obligations under the Agreement.

260. In making these findings I am not in any way intending to comment on Canada's decision to consult with the Métis or on the process that it has followed in doing so, insofar as that process affects the Métis.

Section 8.02

261. TLEC argued that in consulting with the Métis, Canada amended the Additions to Reserves Policy that it was applying, contrary to Subsection 8.02(3) which requires that any amendments to that policy can only be made with the written agreement of the parties.

262. TLEC submitted that under the Agreement, the applicable Additions to Reserves Policy was the one in effect at the Date of Execution of the Agreement (Subsection 8.02(2)). That ATR

Policy, which was signed in 1991, made no mention of a duty to consult with other Indigenous groups.

263. In these proceedings Canada admitted that the 1991 ATR Policy did not contain an obligation to consult with other Indigenous groups, with respect to the Treaty Land Entitlement process. It also admitted that the 1991 ATR Policy was the applicable policy regarding the Lands at Issue.

264. Canada's position, however, was that its legal and constitutional obligations to consult the Métis prevail over what is set out in the 1991 ATR Policy.

265. I agree that Section 8.02 does not create or alter substantive rights, including any constitutional obligations that Canada may owe to groups who are not parties to the Agreement. However, the Section does set out the process which the parties to the Agreement committed to follow in setting land apart as Reserve. Pursuant to that process, it was agreed that any amendment to the ATR process could only be done with the written agreement of the parties (Subsection 8.02(3)).

266. Canada also agreed that it would not delay making a determination as to whether a Selection or Acquisition satisfied the Additions to Reserves Policy, pending such written agreement (Subsection 8.02(4)).

267. While the evidence showed that starting in 2013 Canada made a number of presentations to TLEC, in which it identified that it intended to consult with the Métis as part of the Treaty Land Entitlement, ATR process, no agreement was ever reached between the parties that the ATR process would be amended accordingly.

268. Nonetheless, from 2012 to the present, Canada has refused to set the Lands at Issue apart as Reserve pending the results of its consultation with the Métis. This amounts, in my view, to amending the ATR process on a unilateral basis, in breach of Subsection 8.02(3)).

Best Efforts – Sections 31.01 and 31.03

269. TLEC's position is that by suspending the implementation of the Agreement pending consultation with the Métis, Canada has failed to use its best efforts to fulfill the terms of the Agreement, in breach of Section 31.01 and Paragraphs 31.03(b), (d) and (e):

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.

31.03 *Best Efforts of Canada*

Canada will use its best efforts:

(b) *to provide promptly to the TLE Committee and Manitoba relevant information and materials required to facilitate the fulfilment of the terms of this Agreement, the release of which is not prohibited by law;*

(d) *to comply with the requirements of any laws, policies, procedures or other requirements to set land apart as Reserve;*

(e) *to expedite the timely preparation and execution of any instruments under the Federal Real Property Act, orders in council or departmental or ministerial approvals required for the acceptance of administration and control of land or to set land apart as Reserve;*

270. Canada's position is that what constitutes "best efforts" under the MFA is more than "reasonable efforts" but not akin to perfection. Citing the British Columbia Supreme Court's decision in *Atmospheric Diving Systems Inc. v International Hard Suits Inc.* (1994), W.W.R. 719 (BCSC), it submitted that "the best efforts" standard is to be judged objectively, is not boundless and must be approached in light of the particular contracted issue, the parties to that contract and the contract's overall purpose.

271. It cited the Court's reference in that case to defining:

> "best efforts" to mean "... taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving 'no stone unturned' ... [choosing] from among the possible and reasonable courses of action, that one which had the greatest chance of achieving the contracted result."
>
> *Atmospheric, supra*, at para.73

272. Canada submitted that its chosen course of consulting with the Métis has had the greatest chance of achieving the MFA's "contracted result" – namely, adding Lands to Reserve. It argued that to ignore Canada's asserted constitutional obligations would have been to leave "stones unturned" and, therefore, would have amounted to a failure to comply with its obligations to use best efforts to implement the Agreement.

273. Canada also pointed to Section 40.03 of the MFA which says that the Agreement *"shall be governed and construed in accordance with all applicable laws of Manitoba and Canada"*. It submitted, therefore, that because it believes it has a legal obligation to consult with the Métis about the Lands at Issue, doing so is consistent with the provisions of the Agreement.

274. It also pointed out that in requiring Canada to use "best efforts" to fulfill its obligations under the MFA, Subsection 31.03(d) requires that Canada "comply with the requirements of any laws, policies, procedures or other requirements to set land apart as Reserve".

275. In light of these arguments, it is not surprising that most of the evidence that Canada adduced in support of its position that it has used its best efforts to comply with the Agreement, related to its efforts to consult with the Métis.

276. I have not relied on this evidence to make my determination. I do not find it relevant except to show that Canada was being truthful when it said that its reason for delay in implementing the Agreement was because it was waiting for the results of consultation with the Métis and not for some other reason.

277. What I find was missing from the evidence, however, is evidence of the efforts that Canada ought to have taken to work with the other parties to the MFA to address the impact of its extra-contractual consultations with the Métis, on the implementation of the Agreement. In my view, those are the efforts which Canada needed to undertake in satisfaction of the obligations to use its best efforts to fulfill the terms of the Agreement.

278. As I said earlier, those efforts should have included reaching an agreement in compliance with the provisions of Section 40.07.

279. As part of its submission that it had satisfied its best efforts obligation, Canada also pointed to Section 8.05 of the MFA which says that Canada does not ever guarantee, promise or otherwise warrant that the lands will ultimately be set apart as Reserve. Even that section, I note, however, says:

> *8.05(2) Nothing in Subsection (1) shall in any manner diminish, absolve or otherwise affect:*
>
> *(a)* *Canada's undertaking in Section 8.01 to proceed with due diligence and to use its best efforts to set apart as Reserve land Selected or Acquired by an Entitlement First Nation; and*
>
> *(b)* *any other obligation or undertaking of Canada under this Agreement.*

(emphasis added)

280. Counsel for TLEC pointed out that although in her letter of May 24, 2016 Minister Bennett said she was confident that a process for fulfilling the Crown's duty to consult other Indigenous groups was in the final stages of development, that was 4 years after Canada had identified that it was going to be consulting with the Métis. He submitted that knowing that that process would have a significant impact on the Agreement and deliberately suspending the implementation of the MFA pending fulfillment of that consultation did not reflect Canada's best efforts.

281. I agree. I find that Canada has failed to comply with its obligations under Section 31.01 to use its best efforts to fulfill the terms of the Agreement, including failing to comply with Section 40.07.

282. I do not find it necessary to address whether Canada has complied with each of the paragraphs of Section 31.03 because I find that Canada did not comply with its overarching obligation to use its best efforts to fulfill the terms of this Agreement, in accordance with Section 31.01.

Section 6.02

283. TLEC submitted that Canada's decision to consult with the Métis is also contrary to the commitment it made when it confirmed the eligibility of the Lands at Issue to be set apart as Reserve, in accordance with Subsection 6.02(5).

284. It argued that in consulting with the Métis as a pre-condition to setting apart the Lands at Issue as Reserve, Canada has resiled from the commitment of eligibility that it made many years before. This argument was also part of TLEC's submission that Canada had no duty to consult the Métis at all, regarding the Lands at Issue.

285. As I have previously indicated, I am not prepared to consider that argument. I have no jurisdiction to determine whether Canada has a duty to consult the Métis.

286. TLEC's arguments about the significance of Canada's determination of eligibility, however, do highlight an important point about the parties' expectations insofar as the Lands at Issue are concerned.

287. Based on the steps which are set out in the MFA, the Entitlement First Nations had a reasonable expectation that having reached the step in the proceedings where their Selection or

Acquisition was determined to be eligible it was, if not inevitable, certainly likely that the Selection or Acquisition would be set apart as Reserve.

288. Here I want to address, albeit briefly, the submissions that were made by Counsel for both parties with respect to the effect of Section 8.06 of the Agreement. That Section provides in part:

> *8.06 Effect of Canada not Setting Apart Land as Reserve*
>
> *(1) In the event:*
>
> *(a) an Entitlement First Nation has Selected or Acquired land;*
>
> *(b) the administration and control of the land has been accepted by Canada or title to the land has been transferred to and accepted by Canada; and*
>
> *(c) the land is not set apart as Reserve despite a recommendation by the Minister of Indian Affairs and Northern Development of Canada to do so*
>
> *Subsections (2) to (13) inclusive shall, unless otherwise agreed between Canada and the Entitlement First Nation, apply. ...*

289. I note that this Section does not apply to the Lands at Issue because Canada has not accepted administration and control of those lands.

290. However, Canada pointed to this Section to submit that it is not inevitable that lands Selected or Acquired, will ever be set apart as Reserve.

291. Counsel for TLEC argued, however, that this Section may no longer be of any force and effect. When the Agreement was originally drafted it was theoretically possible that the Minister could make a recommendation with which Cabinet would not comply, as contemplated in Paragraph 8.06(1)(c). However, since the passing of the *Manitoba Land Claims Settlement and Implementation Act* in 2000, the Minister now has final authority to set apart land as Reserve, without seeking permission from the Governor in Council.

292. Counsel for TLEC, therefore, submitted that Canada was wrong in relying on Section 8.06 to say that the parties may not necessarily expect that land which has gone through the MFA process, will be set apart as Reserve.

293. These interesting arguments were not fully fleshed out by the parties and I do not find them necessary for the purposes of my determination especially insofar as they relate to whether the duty to consult the Métis even exists for the Lands at Issue; an issue which I am not prepared to consider.

Question 4

If Canada has not complied with its obligations under the MFA, due to either its decision or the process that Canada has employed to consult the Métis in respect of the Lands at Issue, does such non-compliance constitute an Event of Default:

a. On the basis that there is an established pattern within the meaning of subparagraph 36.02(b) of the MFA whereby Canada has materially failed to comply with its obligations under the MFA; or

b. On the basis that Canada has, within subsection 36.02(d), materially failed to comply with a fundamental term or condition of the MFA and did not remedy the failure within 30 days in accordance with subsection 36.01(2) of the MFA?

294. The Agreement defines which matters will constitute Events of Default:

> *36.02* *Matters Constituting Events of Default*
>
> *The following constitute Events of Default by a party or an Entitlement First Nation:*
>
> *(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; ... 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).*
>
> (emphasis added)

295. The Agreement does not define the phrases "material failure" or "fundamental term".

296. As the Supreme Court in *Sattva* said, 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.

Sattva, *supra*, para.47

297. In its brief Canada submitted that in the context of MFA implementation the word "material" means: "significant, essential", citing the definition in *Black's Law Dictionary*.

298. I agree with this definition and note that the online Oxford Dictionary also defines the word "material" as meaning: "Significant; important."

https://en.oxforddictionaries.com/definition/material

299. The online Oxford Dictionary defines the word "fundamental" as meaning:

> "Forming a necessary base or core; of central importance."

https://en.oxforddictionaries.com/definition/fundamental

300. TLEC's position was that the following terms or conditions of the MFA are all fundamental: 6.02(5), 8.02; 31.01; 31.03; 40.07; and 40.13 and since Canada has materially failed to comply with each of them, Canada has committed an Event of Default as defined by Paragraph 36.02(d).

301. TLEC also maintained that for the same reasons, Canada has repeatedly and in a manner which clearly establishes a pattern, materially failed to comply with its obligations under this Agreement and has, therefore, committed an Event of Default as defined by Paragraph 36.02(b).

302. Canada disagreed with the characterization of these terms of the Agreement as being fundamental. In its view the only terms which fall within the meaning of "fundamental" are Sections 8.01 and 31.01.

303. It argued that the fundamental goal of the MFA is as set out in the Preamble to the Agreement - to "provide lands of sufficient area to each Entitlement First Nation to fulfill the requirements of the *per capita* provision of each Entitlement First Nation." It submitted that Subsection 8.01(1) is the fundamental term which seeks to accomplish this fundamental goal:

8.01 Canada to Set Apart Land as Reserve

(1) Where:

(a) in the case of Crown Land:

(i) Manitoba has transferred to Canada administration and control of the interests of Manitoba in the Selection in accordance with Subsection 7.01(2) or (3); and

(ii) Canada has accepted administration and control of the interests transferred to it by Manitoba in accordance with Subsection 7.01(4); ...

Canada undertakes to proceed with due diligence and to use its best efforts to set apart that land as Reserve for the Entitlement First Nation which has Selected or Acquired that land.

304. Canada pointed out that the requirement in Subsection 8.01(1) to use "best efforts" to set apart land as Reserve is repeated in Section 31.01 which states that all of the parties will *"(i) in good faith use their best efforts to fulfill the terms of this Agreement"*. This is the standard, it said, that is to be applied in determining whether Canada has committed default.

305. Canada also submitted that the only terms of the Agreement which are fundamental are those which underly the whole of the contract such that if they are not fulfilled, the performance becomes something different from that which the contract contemplated. In support of this position it relied on the following cases:

- *Murray v Sperry Rand Corp* (1979), 5 BLR 284 (Ont.H.C.J.);
- *Allan v Bushnell TV Co.* (1969), 1 O.R. 107 (Ont.H.C.J.);
- *Unilease Inc. v Lee Mar Developments Ltd.* (1987) (ONSC);
- *St. Marie v St. Marie* (1996) 8 WWR 457 (Sask.Q.B.)

306. In *St. Marie v St Marie*, the court said:

39 In Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Central (1965), [1967] 1 A.C. 361 (H.L.), at pp. 421-422, Lord Upjohn stated:

> *There was much discussion during the argument upon the phrases "fundamental breach" and "breach of a fundamental term" and I think it is true that in some of the cases these terms have been used interchangeably; but in fact they are quite different. I believe that all of your Lordships are agreed and, indeed, it has not seriously been disputed before us that there is no magic in the words "fundamental breach"; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken.*
>
> *But the expression "fundamental term" has a different meaning. A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus is conferred on him the alternative remedies at his option that I have just mentioned.*

307. I do not find this line of cases helpful for the purpose of interpreting the word "fundamental" in this Agreement.

308. I agree with TLEC's written submissions that the phrases "material failure" and "fundamental terms or conditions" as used in the MFA are not concepts that are akin to breaches of contractual terms that go to the root of the contract and which give rise to a fundamental breach, such that an aggrieved person the right to treat the contract at an end.

309. The MFA does not contemplate a situation that would allow one party to repudiate the whole contract. Such an interpretation is completely at odds with the purpose of the Agreement to implement the long outstanding treaty promises and with the parties' intentions in reaching the Agreement.

310. As TLEC pointed out in its written submission, it is by design that words or phrases such as "impossibility", "illegality", "frustration", "breach" or "repudiation" do not appear anywhere in the Agreement.

311. I find that Section 40.07 is a fundamental term of the Agreement within the meaning of an *Event of Default* under Paragraph 36.02(d). The obligation set out in that section forms a necessary base or core of the Agreement and is of central importance to its implementation.

312. As I said earlier, the parties' intention in reaching this Agreement was that they would each have an equal voice in the implementation of the Agreement. No party was entitled to act unilaterally to interfere with that implementation. If changes were to be made it was fundamental that they be done by the parties signing a written agreement.

313. I find that Canada's failure to comply with Section 40.07 was significant and constitutes a material failure to comply with a fundamental term.

314. I also find that, despite receiving notices from TLEC, alleging a material failure to comply with Article 40.07, on January 5, 2016 and again on December 15, 2016, Canada did not remedy that material failure within 30 days of receipt of that notice.

315. Subsection 36.01(2) provides that where a party receives a notice alleging material failure to comply with a fundamental term, it may:

> *(2)* ...
>
> *(a)* *remedy the alleged material failure; or*
>
> *(b)* *refer the matter to the Implementation Monitoring Committee. ..."*

316. Here, as the evidence disclosed, Canada did not remedy the alleged material failure.

317. I find, therefore, that Canada has committed an *Event of Default* within the meaning of Paragraph 36.02(d). It has materially failed to comply with Section 40.07 which, I find is a fundamental term or condition of the Agreement and it did not remedy that material failure within 30 days of receipt of notice in writing from TLEC.

318. I also find that Canada's failure to comply with Section 40.07, once it decided in December 2012 to suspend the MFA implementation process pending the results of consultation with the Métis, has occurred repeatedly and in a manner which clearly establishes a pattern of

material failure to comply with its obligations under the Agreement. I find, therefore, that Canada has also committed an *Event of Default* within the meaning of Paragraph 36.02(b).

319. I further find that for the reasons set out earlier in this decision, Canada has materially failed to comply with its obligations to use its best efforts to fulfill the terms of the Agreement pursuant to Section 31.01 and has done so repeatedly and in a manner which clearly establishes a pattern. It has, therefore, committed an *Event of Default* on that basis as well, within the meaning of Paragraph 36.02(b).

Question 2

If it is determined that Canada has committed an Event of Default, does the Adjudicator have jurisdiction to:

a. Make an award setting damages to be paid as a result of an Event of Default before:

i. TLEC or the Entitlement First Nation refer the matter to the Implementation Monitoring Committee as an issue or matter in dispute in accordance with section 36.04 of the MFA; and

ii. Canada exercises a right of appeal in accordance with section 35.05 of the MFA?

b. Have a supervisory role in relation to Canada's determination and identification of reasonable means of remedying an Event of Default under section 36.03 of the MFA, or compel Canada to pay for any costs of any ongoing supervisory role by the Adjudicator, either as damages or as costs?

c. Make rulings or determinations other than those specified in section 35.04(3) of the MFA?"

320. TLEC's position is that each Entitlement First Nation who has had their Selection or Acquisition delayed as a result of Canada's consultation with the Métis, has suffered loss and damage. The nature and extent of that loss and damage may be unique to each Entitlement First Nation and will be a function of the length of the delay and the effect that delay has had on the interests of the Entitlement First Nation and its members.

321. Section 36.04 addresses the awarding of damages as follows:

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.*

322. The parties' dispute on this issue is whether I have the jurisdiction, once I find that Canada has committed an *Event of Default*, to go on to award damages in these proceedings or whether the parties must first be allowed to try to resolve the issue of loss or damages through other means.

323. Canada submitted that I do not have jurisdiction in these proceedings to fashion an award setting damages. Rather, it says that if I find Canada has committed an Event of Default:

a. it has 30 days to remedy that default in accordance with Section 36.03;

b. it has the right to appeal a finding of default in accordance with Section 35.05; and

c. An Entitlement First Nation has the right to refer the matter of loss or damage to the IMC as an issue or matter in dispute. The IMC is then obliged to make a ruling or refer the matter to an alternative dispute resolution process, in accordance with Subsection 36.04(1).

324. Canada said it is only after these events take place and the matter is referred back to arbitration that an Adjudicator can consider damages and only after certain assertions of fact and evidence of loss, have been made.

325. Counsel for TLEC submitted that such an interpretation would not make sense - nor would it be practical. He submitted that the parties have already put these matters in dispute before the Implementation Monitoring Committee and the Senior Advisory Committee, neither of which was able to achieve a resolution.

326. Allowing the Adjudicator to proceed with determining loss or damages upon finding an Event of Default, he submitted: follows the progressive dispute resolution process set out in the Agreement; is practical and expedient; and, is therefore, consistent with the Agreement's intention that the parties resolve matters on a timely basis.

327. While Counsel for TLEC acknowledged that the issue of awarding quantum of damages was not specifically identified in the Terms of Reference, he pointed out that these proceedings are to be held in accordance with the provisions of the *Canada Arbitration Act* which allows the parties to identify their positions in pleadings.

328. He submitted that the fact that the issue of damages was addressed in TLEC's Points of Claim is sufficient to afford me jurisdiction to address the issue in these proceedings.

329. Counsel for TLEC said that he had not adduced evidence which would support his client's claim for loss or damage, not because he did not think I had the jurisdiction to make that determination, but rather as a matter of practicality and economics to prevent his client from incurring unnecessary litigation costs.

330. Despite TLEC's submission that the issue of damages was before me in the Points of Claim I find that I do not have jurisdiction to make an award of damages. The Terms of Reference did not specifically refer the matter of loss or damage to me, in the event that I determined that an *Event of Default* had been committed.

331. I agree with counsel for TLEC that practically speaking, it can make sense to bifurcate these types of proceedings between damages and liability in much the same way as can be done in a civil trial. In this case, however, there was no agreement between the parties, nor authority in the Terms of Reference, which gives me jurisdiction to determine damages in these proceedings.

332. Even if I am wrong on this point, the wording of Subsection 36.04(2) gives an Adjudicator the discretion to make an Award setting damages. It says the Adjudicator "may" make an Award setting damages. I decline to exercise that discretion in these proceedings.

333. As I have stated earlier in these reasons, when the parties entered into the Agreement they clearly contemplated that their relationship under it would continue into the future.

334. Consistent with this understanding and as reflected in the numerous places in the Agreement where the parties agree to resolve disputes by further agreement, is the understanding that outcomes are best achieved through good faith negotiation.

335. And so, while it may seem practical to immediately proceed to make an award of damages, I find that the parties should be given an opportunity to resolve the issue on their own and if not, to proceed through the progressive dispute resolution steps set out in the Agreement.

336. Counsel for TLEC submitted that to interpret Section 36.04 and the Agreement as a whole as requiring that the parties ought to either resolve the matter amongst themselves or go back to the IMC to resolve the issue of damages, puts the "fox in charge of the hen house".

337. I understand this concern.

338. However, while it is true that the parties have not been able to reach an agreement to date as to how to resolve their dispute, their discussions as to how to remedy any loss or damage that can be established, will now be addressed by them or, if necessary, by the IMC, in the context of the findings and interpretations that I have set out in this Award. That changes the landscape significantly.

339. Once an Adjudicator determines that an Event of Default has occurred, the Agreement says:

a. The party or 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 IMC as an issue or matter in dispute (Subsection 36.04(1));

b. The party or Entitlement First Nation that has been determined to have committed the Event of Default shall determine and identify a reasonable means of remedying the Event of Default (Section 36.03); and

c. The right of Canada to rely on the Release set out in Article 25 of the Agreement is suspended (Subsection 25.01 X.05).

340. Now that I have found that Canada has committed an Event of Default, Canada is not entitled to rely on the Release and indemnity otherwise provided for in the Agreement, until either the IMC or an Adjudicator in binding arbitration has determined that it has taken reasonable steps to remedy the default (Subsection 25.01X.05(3)).

341. However, in my view an Adjudicator does not have jurisdiction to make that determination until that issue or matter is specifically referred to it in accordance with the provisions of Article 35. That has not happened in this case

342. I agree with Canada's position that the wording in Subsections 35.04(3), (4) and (5) of the MFA does not grant me the jurisdiction either to: supervise Canada's means of remedying the default in compliance with Section 36.03; or compel Canada to pay for any costs of any ongoing supervisory role. It is clear that the Terms of Reference for these proceedings have not asked me to supervise Canada's compliance with its obligations under Section 36.03.

343. I further agree with Canada's position that although the jurisdiction granted to an Adjudicator under Paragraphs 35.04(3)(a) through (d) can encompass a broad range of determinations and findings, such determinations must fall within the parameters of those subparagraphs which provide:

> *(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.*
>
> (emphasis added)

344. I find that the word "may" in the above section means that an Award does not have to include every one of the matters addressed in subparagraphs (a) through (d). It does not mean, however, as TLEC submitted, that an Adjudicator has jurisdiction to include in an Award, something which falls outside the parameters of those subparagraphs.

345. Finally, on this question, I agree with Canada that it has the right to appeal my finding of an *Event of Default* pursuant to Section 35.05, before the issue of damages or loss is addressed by an Adjudicator in binding arbitration.

Question 5

What award should the Adjudicator fashion in this case:

a. If it is determined that Canada has acted contrary to its obligations under the MFA;

b. If it is determined that Canada has committed an Event of Default;

c. To address the issues or matters in dispute even if it is determined that Canada has not acted contrary to its obligations under the MFA or committed an Event of Default?

Question 6

A determination as to the costs of the proceedings.

346. For the reasons set out above I have determined that Canada has acted contrary to its obligations under Sections 8.02, 31.01 and 40.07 of the MFA.

347. Article 35.04(3)(c) gives me the jurisdiction to determine that one or more of the parties be required to take certain action to give effect to this Agreement.

348. Pursuant to that jurisdiction I order that Canada must now do what it previously failed to do, pursuant to its obligations under 40.07.

349. It must enter into genuine negotiations with TLEC and Manitoba with the intention of reaching a written agreement to amend the MFA, to confirm the parties' rights and obligations under the Agreement, in light of Canada's consultation with other Indigenous groups, relating to the Lands at Issue.

350. It is not up to me to identify what the terms of that agreement should be. As I have said earlier, in my view, outcomes are best achieved through good faith negotiation. Having said that, I would expect that the parties will agree to:

(a) specific steps to be taken to continue the implementation process;

(b) timelines for those steps; and

(c) consequences if those timelines are not met.

There may be issues of funding to address as well.

351. These negotiations must be entered into within 30 days of the date of this Award. They should be informed by reference to Section 40.12. As I said earlier, that Section addresses an

analogous situation to the facts in this case. The negotiations should, therefore, take into consideration the need to "remedy" or "alleviate" the effect of Canada's consultation with extra-contractual parties on the implementation of this Agreement. The negotiations must also be informed by the other provisions of the MFA, including those which require the parties to use best efforts and due diligence to fulfill the terms of the Agreement.

352. I have also made a determination that Canada has committed *Events of Default.*

353. Accordingly, and pursuant to Section 36.03, Canada is now obliged to identify to TLEC reasonable means of remedying the *Events of Default*:

> *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.*

354. Canada must make this identification within 30 days of the date of this Award.

355. It is up to Canada to determine how it will remedy the *Default*, however, the means of remedying the default could include compensating the Entitlement First Nations whose lands are at issue, for loss or damage caused as the result of the actions which led to the determination of *Default*, as well as identifying how such actions will be addressed in the future.

356. There may be some overlap between the actions Canada takes to reach an agreement in accordance with the requirements of Section 40.07 and the remedy it identifies, going forward, in accordance with Section 36.03.

357. In identifying means of remedying the *Events of Default* Canada should be mindful that its failure to comply with a number of provisions of the Agreement as discussed above, including Section 36.01, has caused significant delay in the implementation of the Agreement.

358. Further, if, when Canada received the notice from TLEC in January 2016 alleging material failure to comply with a fundamental term, it had complied with its obligations under Section 36.01, it would have either remedied the failure or referred the matter to the IMC for resolution, at that time. Again this has caused delay in implementing the Agreement.

359. In my view these are all matters that could inform Canada's determination as to how to remedy *Events of Default* that have been ongoing since December 2012.

360. In light of the determinations I have already made, I do not have to address Question 5(c).

361. With respect to Question 6, dealing with the issue of costs, I note that prior to the hearing of this matter, the parties agreed that this question will be dealt with after the issuance of this Award.

CONCLUSION

362. I recognize the difficult position that Canada is sometimes required to face not only in these proceedings but generally, to discharge obligations which it owes under the *Constitution*, to groups whose interests may at times appear to be competing.

363. While Canada said in these proceedings that it had hoped that it, the Métis, and the Entitlement First Nations could all meet to discuss their respective interests, in the absence of any assurance from Canada that it was honouring its obligations under the MFA, it is easy to see why there would be reluctance on the part of the Entitlement First Nations to enter into such discussions.

364. If Canada is truly interested and thinks it would be beneficial, as it repeatedly said throughout these proceedings, to facilitate discussions with the Métis and the Entitlement First Nations then it must demonstrate to the Entitlement First Nations that in doing so it is also committed to complying with its obligations under the MFA.

365. Canada cannot create a hierarchy of rights between Indigenous groups to whom it owes equal obligations pursuant to the provisions of the *Constitution* and pursuant to the Honour of the Crown.

366. I reserve jurisdiction to deal with and determine all matters within my jurisdiction that have not been resolved by this Order. If the parties have any questions that need clarification I am pleased to make myself available for that purpose.

367. I thank the parties and their Counsel for their significant participation efforts in these proceedings.

Dated: March 19, 2018

Adjudicator

SCHEDULE "A"

EFN/PARCEL	DATE OF SELECTION OR ACQUISTION	DATE OF CONFIRMATION OF ELIGIBILITY BY CANADA	DATE OF CONFIRMATION OF ELIGIBLITY BY MANITOBA	DATE OF EXCLUSIVE USE PERMIT
Kississing (25) 1,331.57 - Mathias Colomb	September 14, 1990	February 24, 2004	December 17, 2003	July 24, 2009
Fairy Lake (2-02) 1,878.00 - Norway House	November 18, 2002	February 11, 2003	January 13, 2003	December 11, 2009
Gusdal (1.03) 41.00 - Rolling River	January 27, 2003	April 28, 2003	April 8, 2003	Acquired- no permit required
Cameron (1-01) 160.00 - Rolling River	December 22, 2000	August 21, 2001	September 26, 2001	Acquired- no permit required
Bell Lake (2-02) 201.89 - Wuskwi Sipihk	October 10, 2001	April 19, 2002	May 16, 2002	October 29, 2009
Kettle Hills Addition (1-01) 736.79 - Wuskwi Siphik	April 23, 2001	November 2, 2001	June 25, 2001	March 3, 2010
North Kettle Hills (4-02) 2,652.18 - Wuskwi Siphik	January 23, 2002	April 19, 2002	May 16, 2002	October 29, 2009
Nelson River East Channel A (33-01) 3,596.00 - Norway House	May 1, 2001	June 12, 2001	August 9, 2001	May 5, 2005
Rocky Lake Interior (1-06) 5,310 - Opaskwayak	November 28, 2005	August 16, 2006	April 7, 2006	January 15, 2008
BARREN LANDS FIRST NATION				
Paskwachi Bay (3pr) PR 394 - 80.56	October 29, 1996	September 14, 1999	September 16, 1999	January 12, 2011
MATHIAS COLOMB CREE NATION				
Granville Lake 2B - 1,770.33	May 18, 1989	February 24, 2004	December 17, 2003	September 25, 2009
Pawistik Falls (14) - 838.74	September 14, 1990	February 24, 2004	December 17, 2003	August 11, 2009
WUSKWI SIPIHK CREE NATION				
Antler Corner (1-02) - 1,463.12	October 10, 2001	April 19, 2002	May 16, 2003	November 7, 2002
Bell River PTH 10 Addition (3-01) - 3,575.31	May 1, 2001	May 17, 2001	June 25, 2001	January 29, 2002
NORWAY HOUSE CREE NATION				
Painted Stone Portage North Shore (11-02) - 399.66	November 18, 2002	February 11, 2003	January 13, 2003	December 11, 2009
Bolton Lake A (3-01A) 134.29	May 1, 2001	August 23, 2001	June 10, 2003	January 19, 2010
Bolton Lake B (3-01B) 230.90	May 1, 2001	August 23, 2001	August 9, 2001 / June 10, 2003	January 19, 2010
Gunisao Lake A (13-01A) 308.63	May 1, 2001	August 23, 2001	August 9, 2001 / June 10, 2003	January 19, 2010
Gunisao Lake B (13-01B) 2,396.30	May 1, 2001	August 23, 2001	August 9, 2001 / November 18, 2001 / June 10, 2003	January 9, 2012
Gunisao Lake C (13-01C) 722.15	May 1, 2001	August 23, 2001	August 9, 2001 / November 18, 2001 / June 10, 2003	January 9, 2012
Gunisao Lake D (13-01D) 10.05	May 1, 2001	August 23, 2001	August 9, 2001 / June 10, 2003	January 19, 2010
Little Bolton Lake B (22-01B) 25.34	May 1, 2001	August 23, 2001	August 9, 2001	January 19, 2010
Max Lake (25-01) 1,425.81	May 1, 2001	August 23, 2001	August 9, 2001	December 11, 2009
Max Lake South Shore (8-02) 1,451.82	November 18, 2002	February 11, 2003	January 23, 2003	December 11, 2009
Provincial Road 373A (42-01A) 244.55	May 1, 2001	-	August 9, 2001	December 11, 2009
Provincial Road 373C (42-01C) 1,222.71	May 1, 2001	August 23, 2001	August 9, 2001	December 11, 2009
Provincial Road 373 Parcel C Additions (12-02) 832.67	November 18, 2002	February 11, 2003	January 27, 2003	December 11, 2009
WAR LAKE FIRST NATION				
Atkinson Lake A (2-02) 1431.23	March 22, 2002	May 14, 2002	July 10, 2002	August 1, 2010
Atkinson Lake B (3-02) 768.74	March 22, 2002	May 14, 2002	July 10, 2002	August 1, 2010
Atkinson Lake C (4-02) 65.48	March 22, 2002	May 14, 2002	July 10, 2002	August 1, 2010
Akinson Lake (now Fox Lake) (1-05) 100.01	July 20, 2004	NDR	April 18, 2005	January 25, 2012
Dafoe River (8-02) 171.99	March 22, 2002	May 14, 2002	July 10, 2002	January 25, 2012
Moose Nose Lake (10-02) 34.60	March 22, 2002	May 14, 2002	July 10, 2002	August 1, 2010
Cyril Lake (7-02) 407.20	March 22, 2002	May 14, 2002	July 10, 2002	September 19, 2012
War Lake Amended 2005 P2 (13-02) 285.40	March 22, 2002	May 14, 2002	April 18, 2005	January 25, 2012

APPENDIX A

APPENDIX B

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 be

administered 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.

PART 1: DEFINITIONS AND INTERPRETATION

1. Definitions and Interpretation

1.01 Defined Words and Phrases

In this Agreement:

(1) "Acquire" means to purchase or otherwise obtain title to Other Land in accordance with this Agreement which an Entitlement First Nation wishes to be set apart as Reserve;

(2) "Acquired Property" means, for the purposes of Article 37, land or any interest in land, including any Third Party Interest and fixtures, purchased by or on behalf of an Entitlement First Nation which the Entitlement First Nation wishes to be set apart as Reserve in accordance with this Agreement;

(3) "Acquisition" means:

(a) the act of Acquiring; or

(b) Other Land which is Acquired;

(5) "Additions to Reserves Policy" means:

(a) the policy of the Department of Indian Affairs and Northern Development relating to Reserve creation and additions contained in the "Land Management Manual" of the Department of Indian Affairs and Northern Development as of the Date of Execution;

(b) the policy referred to in Paragraph (a) as amended in accordance with Subsection 8.02(3); or

(c) where this Agreement refers to the requirement of the Additions to Reserves Policy being satisfied, the policy referred to in Paragraph (a) or (b) as modified by any inconsistency between that policy and this Agreement in accordance with Subsection 8.02(5);

(6) "Adjudicator" means a person qualified in the techniques of alternate dispute resolution identified by the Implementation Monitoring Committee in accordance with Section 35.01;

(7) "Agreed Form" means a form of document which the parties agree upon as a standard form for the purposes of implementation of this Agreement;

(8) "Agreement" means this Framework Agreement and includes any amendments made in accordance with Section 40.07;

(10) "Award" means a decision of an Adjudicator in binding arbitration in accordance with Section 35.04;

(11) "Canada" means Her Majesty the Queen in right of Canada and includes all departments of the Government of Canada;

(13) "Chairperson" means the Chairperson of the Implementation Monitoring Committee appointed in accordance with Sections 34.03 and 34.05;

(22) "Date of Acquisition" means the date on which title to Other Land is registered in the name of the Entitlement First Nation or its agent or trustee;

(23) "Date of Execution" means the date on which this Agreement is executed by Canada, Manitoba and the TLE Committee;

(24) "Date of Selection" means the date on which Canada receives a Council Resolution from an Entitlement First Nation identifying a Selection in accordance with Subsection 6.02(3), and where that date is before the date the parties and the Entitlement First Nation execute a Treaty Entitlement Agreement, the Date of Selection shall be deemed to be the date that Treaty Entitlement Agreement comes into force;

(27) "Disposition" means an act by Manitoba whereby Crown Land or a right, interest or estate in Crown Land is granted or disposed of, or by which Manitoba creates a right, interest or estate in, divests itself of or permits the use of Crown Land, but does not include:

(a) a renewal of or consent to the assignment of a right, interest or estate in or permit to use Crown Land which is subject to renewal as a matter of law, established practice or the policy of Manitoba as at the Date of Execution;

(b) a Mineral Disposition; or

(c) a quarry permit issued under The Mines and Minerals Act to authorize the use of a specific volume of quarry minerals for a specific period of time from a specific quarry site for a specific project or activity for public purposes;

(33) "Environmental Audit" means an "environmental assessment and review" or "environmental audit" of land Selected or Acquired by an Entitlement First Nation as defined in the Additions to Reserves Policy;

(34) "Event of Default" means an event described in Section 36.02;

(36) "First Nation" means a "band" as defined in the Indian Act;

(42) "Implementation Monitoring Committee" means the committee established in accordance with Section 34.01;

(51) "Manitoba" means Her Majesty the Queen in right of Manitoba and includes all departments of the Government of Manitoba;

(58) "MNRTA" means "The Manitoba Natural Resources Transfer Agreement", executed by Canada and Manitoba on December 14;

(68) "*Per capita* Provision" means the term of a Treaty pursuant to which Canada undertook to lay aside and reserve tracts of land for the benefit of an Entitlement First Nation or its Predecessor Band in the amounts as written in the Treaty, being:

(a) in Treaties No. 1 and 5, 160 acres for each family of five, or in that proportion for larger or smaller families;

(b) in Treaties No. 3, 4 and 6, 640 acres for each family of five, or in that proportion for larger or smaller families; and

(c) in Treaty No. 10, 640 acres for each family of five, or in that proportion for larger or smaller families, including the alternative right of an individual Member to take land apart from the Reserves of that Member's First Nation;

as expressly set out in the Treaty Entitlement Agreement executed by the parties and that Entitlement First Nation;

(69) "Period of Acquisition" means the period of time provided in Sections 4.01 and 4.02 for Acquisition of Other Land by an Entitlement First Nation identified in Schedule "B";

(70) "Period of Selection" means the period of time provided in Sections 4.01 and 4.02 for Selection of Crown Land by an Entitlement First Nation;

(71) "Person" means any individual, corporation (including a Crown corporation), partnership, trust, joint venture, unincorporated association, Northern Community or First Nation and their respective heirs, successors, legal representatives and permitted assigns;

(73) "Principles for Land Selection and Acquisition" or "Principles" means the provisions set out in or incorporated into Sections 3.02 to 3.10 inclusive;

(77) "Release" means the release to be given by an Entitlement First Nation in favour of Canada in the Treaty Entitlement Agreement executed by the parties and that Entitlement First Nation, the form of which is set out in Article 25;

(80) "Reserve" means land which is set apart by Canada for the use and benefit of an Entitlement First Nation as a "reserve" as defined in the Indian Act;

(85) "Select" means to identify Crown Land in accordance with this Agreement that the Entitlement First Nation wishes to be set apart as Reserve;

(86) "Selection" means:

(a) the act of Selecting; or

(b) Crown Land which is Selected;

(90) "Third Party" means a Person, other than Canada, Manitoba, the TLE Committee, any Entitlement First Nation or the Trustees;

(98) "Treaty" means any of Treaties No. 1,3,4,5,6 and 10 or any adhesion thereto entered into between Her Majesty the Queen and an Entitlement First Nation or its Predecessor Band;

(100) "Treaty Entitlement Agreement" means an agreement in an Agreed Form by which an Entitlement First Nation agrees, among other things, to accept the terms of this Agreement.

1.02 Interpretation

(1) In this Agreement:

(a) words or phrases which are defined under Section 1.01 have been identified in the text by the capitalization of the first letter of the words or the first letter of each word in phrases;

PART II: LAND

2. Selection and Acquisition of Land

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.

(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.

(4) Subject to Subsections (5) and (7), an Entitlement First Nation will generally Select parcels of land of 1,000 acres or more in area except where suitable Crown Land is not available in the location preferred by the Entitlement First Nation or where the purpose of a Selection for historical, cultural, economic or social reasons necessitates the Selection of a parcel of Crown Land of a less than 1,000 acres in area.

(5) Subject to Subsection (7), where an Entitlement First Nation Selects a parcel of land of less than 1,000 acres in area, the Entitlement First Nation shall, upon receipt of a written request from Manitoba, provide to Manitoba a written statement outlining the reasons for the Selection of less than 1,000 acres in area.

(6) Where, after considering the written statement referred to in Subsection (5), Manitoba identifies other reasonable competing considerations relating to the Selection not addressed by the Principles:

(a) Manitoba shall set out those competing considerations in writing to the Entitlement First Nation;

(b) Manitoba and the Entitlement First Nation shall make a reasonable effort to address those considerations having appropriate regard to the right of the Entitlement First Nation to Select land in accordance with this Agreement; and

(c) where Manitoba and the Entitlement First Nation do not address those considerations to their satisfaction, the matter may be referred to the Implementation Monitoring Committee.

(7) An Entitlement First Nation may Select a parcel of land of less than 1,000 acres in area where the land is located in reasonable proximity to a Reserve of that Entitlement First Nation.

(8) Where an Entitlement First Nation Selects land and there are competing interests in that Selection resulting from:

(a) another Entitlement First Nation Selecting all or a portion of the same parcel of land; or

(b) another Entitlement First Nation or any other First Nation providing notice in writing to Canada stating that it claims a lawful right to have that land set apart as Reserve

then:

(c) where Canada has received notice from another Entitlement First Nation or any other First Nation in accordance with Paragraph (b), Canada will provide the Entitlement First Nation and Manitoba with written notice of the competing interests in the Selection;

(d) the Selection will not be proceeded with further under this Agreement until the First Nations resolve their competing interests in the Selection; and

(e) Manitoba may make a Disposition of the land if the First Nations have not resolved their competing interests within one year of the last Date of Selection relating to that Selection.

(9) After a Selection is made by an Entitlement First Nation but before the land is surveyed, Manitoba may, as a matter of policy, with the agreement of the Entitlement First Nation and Canada, make adjustments to the proposed boundaries of the Selection so as to straighten the proposed boundaries, and, in so doing, may take into account specific physical and geographic factors relating to the Selection, and in that event:

(a) the amount of land added to the parcel as a result of the adjustment of the boundaries will be determined by agreement; and

(b) the amount of land added to the parcel as a result of the adjustment of the boundaries will not be applied against the Crown Land Amount or Total Land Amount of that Entitlement First Nation.

(10) Two or more Entitlement First Nations may, upon those Entitlement First Nations entering into an agreement between themselves regarding the use and management of the land, Select or Acquire land to be set apart as Reserve in common for the use and benefit of each of those Entitlement First Nations, the proportionate interest of each Entitlement First Nation in the land to be set apart as Reserve in common to be determined in Council Resolutions issued by those Entitlement First Nations and applied against the Crown Land Amount or Other Land Amount and Total Land Amount of each of those Entitlement First Nations.

(11) An Entitlement First Nation may Select or Acquire land where the Selection or Acquisition does not deprive the owner or lawful user (including Canada or Manitoba) of another parcel of land which does not form part of the Selection or Acquisition of access to that other parcel of land.

(12) Where a Selection or Acquisition may deprive the owner or lawful user (including Canada or Manitoba) of another parcel of land which does not form part of the Selection or Acquisition of access to that other parcel, the Selection or Acquisition may be made where an agreement is entered into between the Entitlement First Nation and that owner or lawful user providing access to that other parcel of land.

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 Agreement relating to the Selection or Acquisition of land by that Entitlement First Nation, the Implementation Monitoring Committee:

(a) shall extend the period or periods of time referred to in Paragraph 4.01(a) or (b) or both (as the case may be) for the period of time equal to the time that the Entitlement First Nation has been or will be unable to Select or Acquire its Total Land Amount which is or has been reasonably attributable to that failure; and

(b) may, to the extent appropriate, make recommendations respecting means of addressing the inability of the Entitlement First Nation to Select or Acquire its Total Land Amount.

(3) In the event Canada or Manitoba are of the view that an Entitlement First Nation will not Select or Acquire its Total Land Amount within the periods of time set out in Section 4.01, Canada or Manitoba, as the case may be, may refer the matter to the Implementation Monitoring Committee.

(4) Subject to Subsections (1) and (2), where the Implementation Monitoring Committee determines that the Entitlement First Nation will not be able to Select its Crown Land Amount or Acquire its Minimum Entitlement Acres within the periods of time set out in Section 4.01:

(a) the Implementation Monitoring Committee shall request the Entitlement First Nation to develop a detailed plan for the Selection of its Crown Land Amount or Acquisition of its Minimum Entitlement Acres;

(b) the Entitlement First Nation shall develop a detailed plan for the completion of the Selection of its Crown Land Amount or Acquisition of its Minimum Entitlement Acres and provide the plan to the Implementation Monitoring Committee within 120 days of the date of the request; and

(c) the Implementation Monitoring Committee may, if the Entitlement First Nation provides a reasonable plan to complete the Selection of its Crown Land Amount or Acquisition of its Minimum Entitlement Acres, extend the period of time set out in Paragraph 4.01(a) or (b) or both (as the case may be) for up to two further periods of not more than one additional year each.

(5) Subject to Subsections (1) and (2), in the event either Canada or Manitoba refers a matter to the Implementation Monitoring Committee in accordance with Subsection (3) and where an Entitlement First Nation identified in Schedule "B" has Acquired its Minimum Entitlement Acres but has not Acquired its Other Land Amount:

(a) the Implementation Monitoring Committee shall request the Entitlement First Nation to advise as to whether or not it intends to Acquire its Other Land Amount; and

(b) where the Entitlement First Nation advises the Implementation Monitoring Committee that it intends to Acquire its Other Land Amount:

(i) the Entitlement First Nation shall develop a detailed plan for the completion of the Acquisition of its Other Land Amount and provide the plan to the Implementation Monitoring Committee within 120 days of the date of the request; and

(ii) the Implementation Monitoring Committee may, if the Entitlement First Nation provides a reasonable plan to complete the Acquisition of its Other Land Amount, extend the period of time set

out in Paragraph 4.01(b) for up to two further periods of not more than one additional year each.

(6) In the event that:

(a) an Entitlement First Nation has Selected land within the period of time set out in Paragraph 4.01(a) or Acquired land within the period of time set out in Paragraph 4.01(b);

(b) Canada or Manitoba have not confirmed that the land is eligible to be set apart as Reserve in accordance with the Principles or Canada has not set the land apart as Reserve; and

(c) the applicable period of time set out in Paragraph 4.01(a) or (b) has expired or is about to expire

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

(7) Where the Entitlement First Nation refers a matter to the Implementation Monitoring Committee in accordance with Subsection (6), the Implementation Monitoring Committee shall extend the period of time set out in Paragraph 4.01(a) or (b) or both (as the case may be) for a reasonable period of time for the purpose of permitting the Entitlement First Nation to Select or Acquire another parcel or parcels of land of a similar area in replacement for the land Selected or Acquired, except where Canada advises the Implementation Monitoring Committee in writing that it intends to set the Selection or Acquisition apart as Reserve.

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 to the

Entitlement First Nation a licence to occupy the land on the same terms until such time as:

(a) the land is set apart as Reserve; or

(b) Canada satisfies its obligations under Section 8.06 whichever shall first occur.

(4) A Crown Land use permit may be in an Agreed Form.

6.04 Land Transfer and Reserve Creation Process Manual

(1) The parties have, as of the Date of Execution, prepared a "Land Transfer and Reserve Creation Process Manual", which will be revised from time to time to reflect the procedure to be used in implementing the provisions of this Article and Articles 7 and 8.

(2) The "Land Transfer and Reserve Creation Process Manual" and any amendment to that manual or any similar or other manual developed by the parties do not form part of this Agreement.

7. Transfer of Lands and Interests from Manitoba to Canada

7.01 Manitoba to Transfer Crown Land and Interests to Canada

(1) Where land is Selected or Acquired by an Entitlement First Nation which Canada and Manitoba confirm is eligible to be set apart as Reserve in accordance with the Principles, Canada will:

(a) undertake or cause to be undertaken an Environmental Audit of the land in accordance with Article 23;

(b) upon Canada and the Entitlement First Nation both being satisfied with the results of that Environmental Audit, determine whether the Selection or Acquisition satisfies the requirements of the Additions to Reserves Policy;

(c) upon Canada determining the Selection or Acquisition satisfies the requirements of the Additions to Reserves Policy, undertake or cause to be undertaken a survey of the boundaries of the land in accordance with Article 23; and

(d) upon the Council of the Entitlement First Nation by Council Resolution confirming the boundaries of the Selection or Acquisition as determined by the survey, provide Manitoba with a legal description of the land based on a registered plan of survey reflecting the survey undertaken in accordance with Paragraph (c).

(2) Subject to Subsection 10.01(2), upon Manitoba receiving from Canada a legal description of land Selected or Acquired by an Entitlement First Nation in accordance with Paragraph (1)(d), Manitoba undertakes to transfer to Canada, by order in council, administration and control of all interests of Manitoba in that land, including any Crown Reservations and Residual Crown Interests.

(3) Where land is set apart as Reserve under this Agreement which is subject to a Third Party Interest at the time it is set apart, Manitoba undertakes to transfer to Canada, by order in council, administration and control of all interests of Manitoba in the Third Party Interest, including any Crown Reservations and Residual Crown Interests which:

(a) revert to Manitoba; or

(b) are purchased or otherwise obtained by the Entitlement First Nation

after the land is set apart as Reserve.

(4) Where Manitoba has transferred administration and control of the interests of Manitoba in a Selection or Acquisition in accordance with Subsection (2) or (3), Canada undertakes to accept administration and control of those interests by instrument under the Federal Real Property Act or otherwise.

(5) An order in council and an instrument under the Federal Real Property Act referred to in this Section may be in an Agreed Form.

8. Setting Apart of Land as Reserve by Canada

8.01 Canada to Set Apart Land as Reserve

(1) Where:

(a) in the case of Crown Land:

(iii) Manitoba has transferred to Canada administration and control of the interests of Manitoba in the Selection in accordance with Subsection 7.01(2) or (3); and

(iv) Canada has accepted administration and control of the interests transferred to it by Manitoba in accordance with Subsection 7.01(4); or

(b) in the case of Other Land:

(i) Canada and Manitoba have confirmed that the land is eligible to be set apart as Reserve in accordance with the Principles;

(ii) Canada and the Entitlement First Nation are both satisfied with the results of the Environmental Audit;

(iii) Canada has determined that the Acquisition satisfies the requirements of the Additions to Reserve Policy;

(iv) a survey of the boundaries of the land has been undertaken in accordance with Article 23;

(v) the Entitlement First Nation has, by Council Resolution, confirmed the boundaries of the Acquisition as determined by the survey;

(vi) subject to Subsection 10.01(2), the Entitlement First Nation or a Person on behalf of the Entitlement First Nation has provided to Canada a registerable transfer of the title and all other documents necessary to vest title to the land in Canada;

(vii) Manitoba has transferred to Canada, by order in council, administration and control of all interests of Manitoba in that land, including any Crown Reservations and Residual Crown interests in accordance with Subsection 7.01(2) or (3);

(viii) Canada has accepted the transfer of title to the land by instrument under the Federal Real Property Act; and

(ix) Canada has accepted administration and control of the interests transferred to it by Manitoba in accordance with Subparagraph (vii)

Canada undertakes to proceed with due diligence and to use its best efforts to set apart that land as Reserve for the Entitlement First Nation which has Selected or Acquired that land.

(2) Canada's undertaking in Subsection (1) to set land apart as Reserve shall be limited to setting apart:

(a) an amount of Crown Land up to the Crown Land Amount for an Entitlement First Nation to the extent that Entitlement First Nation Selects Crown Land;

(b) where an Entitlement First Nation is identified in Schedule "B", an amount of Other Land up to the Other Land Amount for that Entitlement First Nation to the extent that Entitlement First Nation Acquires Other Land; and

(c) the amount any land referred to at Subsections 3.02(9), 3.03(23), 12.07(1), 13.06(1) and 13.07(3)

provided that the amount of land set apart as Reserve for that Entitlement First Nation, not including the amount of land referred to in Paragraph (c), shall not exceed the Total Land Amount for that Entitlement First Nation.

(3) Where land is Selected or Acquired by an Entitlement First Nation in respect of which the requirements of Paragraph (1)(a) or (b) have been met and which is held by Canada or Manitoba under a certificate of title, the holder of the title shall request the District Registrar of the proper Land Titles Office to cancel the certificate of title in accordance with Section 57 of The Real Property Act.

(4) Upon the setting apart of land as Reserve under this Agreement, survey plans of the land and instruments by which the land was set apart as Reserve shall be registered by Canada in the proper Land Titles Office.

8.02 Application of Additions to Reserves Policy

(1) For the purposes of the Additions to Reserves Policy, land which an Entitlement First Nation has Selected or Acquired which Canada and Manitoba confirm is eligible to be set apart as Reserve in accordance with the Principles shall be deemed to be land Selected or Acquired by that Entitlement First Nation pursuant to a "treaty or land claims agreement" within the meaning of the Additions to Reserves Policy.

(2) Subject to Subsections (3) and (4), the Additions to Reserves Policy as at the Date of Execution shall apply to the setting apart of land as Reserve in accordance with this Agreement.

(3) The Additions to Reserves Policy may be amended by Canada after the Date of Execution, but any amendment to that policy will apply to land to be set apart as Reserve in accordance with this Agreement only with the written agreement of the parties.

(4) Where Canada proposes any amendment to the Additions to Reserves Policy after the Date of Execution, Canada may not delay a determination of whether a Selection or Acquisition satisfies the Additions to Reserves Policy pending the written agreement of the parties to the amendment of the Additions to Reserves Policy in accordance with Subsection (3).

(5) In the event of any inconsistency between the Additions to Reserves Policy and this Agreement, the Additions to Reserves Policy shall be modified to the extent of the inconsistency and the terms of this Agreement shall apply.

8.03 Authority of Minister to Set Land Apart as Reserve

The Minister of Indian Affairs and Northern Development will recommend legislation or other measures to provide that Reserves to be established in accordance with this Agreement may be set apart for an Entitlement First Nation by order, declaration or other instrument made or issued by the Minister.

8.05 No Representation or Warranty by Canada that a Particular Parcel of Land will be Set Apart as Reserve

(1) Nothing in this Agreement constitutes any representation or warranty of any kind or nature whatsoever by Canada that any particular parcel of land Selected or Acquired by an Entitlement First Nation will, with certainty, be set apart as Reserve for the Entitlement First Nation, and Canada shall not be liable for any losses, damages or expenses of any kind or nature (direct or indirect) howsoever incurred by the Entitlement First Nation as a result of or in any way arising from Canada not setting a particular parcel of land apart as Reserve for the Entitlement First Nation, except as provided in Section 8.06.

(2) Nothing in Subsection (1) shall in any manner diminish, absolve or otherwise affect:

(a) Canada's undertaking in Section 8.01 to proceed with due diligence and to use its best efforts to set apart as Reserve land Selected or Acquired by an Entitlement First Nation; and

(b) any other obligation or undertaking of Canada under this Agreement.

8.06 Effect of Canada not Setting Apart Land as Reserve

(1) In the event:

(a) an Entitlement First Nation has Selected or Acquired land;

(b) the administration and control of the land has been accepted by Canada or title to the land has been transferred to and accepted by Canada; and

(c) the land is not set apart as Reserve despite a recommendation by the Minister of Indian Affairs and Northern Development of Canada to do so

Subsections (2) to (13) inclusive shall, unless otherwise agreed between Canada and the Entitlement First Nation, apply.

(2) Canada shall provide to the Entitlement First Nation a written statement of the reasons why the land has not been and will not be set apart as Reserve and the Entitlement First Nation may refer the matter to the Implementation Monitoring Committee.

(3) Where an Entitlement First Nation has referred Canada's decision not to set land apart as Reserve to the Implementation Monitoring Committee in accordance with Subsection (2), Canada shall:

(a) consider the representations of the Entitlement First Nation at the meeting of the Implementation Monitoring Committee at which the matter is addressed; and

(b) within 30 days after the date of the meeting of the Implementation Monitoring Committee at which the matter is addressed, advise the Implementation Monitoring Committee

and the Entitlement First Nation whether it will set the land apart as Reserve.

(4) Where:

(a) Canada does not advise the Implementation Monitoring Committee and the Entitlement First Nation that it will set the land apart as Reserve within 30 days after the date of the meeting of the Implementation Monitoring Committee referred to in Subsection (3);

(b) the Entitlement First Nation is an Entitlement First Nation identified in Schedule "B"; and

(c) the land is Other Land,

the Entitlement First Nation shall advise Canada if it wishes to retain an interest in the land (whether legal or beneficial).

(5) Where an Entitlement First Nation advises Canada in accordance with Subsection (4) that it wishes to retain an interest in the land, Canada shall forthwith:

(a) return the transfer of the land provided by the Entitlement First Nation or any Person on behalf of the Entitlement First Nation; or

(b) at its cost, transfer the land to the Entitlement First Nation or any Person on behalf of the Entitlement First Nation, where title to the land is vested in Canada.

(6) Where an Entitlement First Nation advises Canada in accordance with Subsection (4) that it does not wish to retain an interest in the land:

(a) the Entitlement First Nation shall, within 60 days of receiving the advice of Canada referred to in Paragraph (3)(b), provide Canada with any invoices or receipts evidencing the purchase price of the land paid by or on behalf of the Entitlement First Nation and all other actual costs paid or payable by or on behalf of the Entitlement First Nation in respect of the Acquisition, including the resolution of any Third Party Interests;

(b) Canada shall, within 120 days of receiving the invoices and receipts referred to in Paragraph (a), reimburse the Entitlement First Nation or any Person at the direction of the Entitlement First Nation or as provided in this Section the purchase price of the land paid by or on behalf of the Entitlement First Nation and all other actual costs paid

or payable by or on behalf of the Entitlement First Nation in respect of the Acquisition, including the resolution of any Third Party Interests; and

(c) the Entitlement First Nation shall, upon Canada satisfying its obligations under Paragraph (b), provide a release in favour of Canada (which release may be in an Agreed Form) releasing Canada from any and all claims of the Entitlement First Nation arising from Canada refusing to set the land apart as Reserve (including releasing in favour of Canada any interest of the Entitlement First Nation in the land) and authorizing Canada to register the transfer of the land, where title to the land is not vested in Canada.

(7) Where:

(a) Canada does not advise the Implementation Monitoring Committee and the Entitlement First Nation that it will set the land apart as Reserve within 30 days after the date of the meeting of the Implementation Monitoring Committee referred to in Subsection (3); and

(b) the land is Crown Land

the Entitlement First Nation shall, within 60 days of receiving the advice of Canada referred to in Paragraph (a), provide Canada with any invoices or receipts evidencing all actual costs paid or payable by or on behalf of the Entitlement First Nation in respect of the Selection, including the resolution of any Third Party Interests and Canada shall:

(c) within 120 days of receiving the invoices and receipts referred to in Paragraph (a), reimburse the Entitlement First Nation or any Person at the direction of the Entitlement First Nation or as provided in this Section all actual costs paid or payable by or on behalf of the Entitlement First Nation in respect of the Selection, including the resolution of any Third Party Interests; and

(d) proceed to obtain land acceptable to the Entitlement First Nation in substitution for the Selection.

(8) All amounts to be paid in accordance with Paragraph (6)(b) in respect of the purchase price of the land shall, if not paid to any other Person, be

deposited to the Entitlement First Nation's Land Acquisition Account and shall be thereafter dealt with in the same manner as any other funds administered by the Trustees on behalf of the Entitlement First Nation in accordance with the Trust Agreement.

(9) All amounts to be paid in accordance with Paragraph (6)(b) in respect of actual costs other than the purchase price of the land or in accordance with Subsection (7) shall, if not paid to any Person other than the Entitlement First Nation or TLE Committee, be deposited to the respective accounts originally withdrawn from, and be thereafter dealt with in the same manner as any other funds administered in accordance with this Agreement.

(10) For greater certainty, any amounts paid in accordance with Paragraph (6)(b) in respect of actual costs other than the purchase price of the land or in accordance with Subsection (7) to the TLE Committee as reimbursement for the actual cost of the resolution of any Third Party Interest for and on behalf of any Entitlement First Nation shall be paid into the TPI Account.

(11) In addition to the amounts referred to in Subsections (6) and (7), Canada will pay simple interest on such amounts calculated between the date the costs were incurred until the date of payment by Canada at a rate equal to the rate paid on Canada Savings Bonds as of the last date of issue prior to the date of payment by Canada and the interest shall be deposited into the same account from which the payment was withdrawn.

(12) Upon Canada satisfying its obligations under Subsections (6) to (11) inclusive, Canada shall be entitled to deal with the land in any manner whatsoever, including selling or otherwise disposing of the land, and retaining the proceeds of any sale of the land, and the Entitlement First Nation, its Members or Trustees shall have no legal, equitable or other claim against Canada of any kind or nature.

(13) Despite the definition of "Surplus Federal Land", land that Canada sells or otherwise disposes of in accordance with Subsection (12) shall be deemed not to be Surplus Federal Land.

23. Costs of Environmental Audit and Survey of Land

23.01 Environmental Audit and Survey of Land

Canada shall undertake or cause to be undertaken at its cost:

(a) an Environmental Audit of land Selected or Acquired by an Entitlement First Nation in accordance with this Agreement that Canada and Manitoba have confirmed is eligible to be set apart as Reserve in accordance with the Principles; and

(b) subject to Section 23.02, all surveys of the boundaries of land Selected or Acquired by an Entitlement First Nation in accordance with this Agreement:

(i) that Canada and Manitoba have confirmed is eligible to be set apart as Reserve in accordance with the Principles;

(ii) with respect to which Canada and the Entitlement First Nation are both satisfied with the results of the Environmental Audit referred to in Paragraph (a); and

(iii) that Canada has determined satisfies the requirements of the Additions to Reserves Policy.

23.02 Canada not Responsible for Certain Surveys or Survey Costs

Canada shall not be responsible for the completion of any surveys or survey costs which are the responsibility of Manitoba or any Third Party in accordance with this Agreement.

23.03 Period for Completion of Survey of Land

(1) Canada shall commence the process of completing the survey of a Selection or Acquisition for which it is responsible in accordance with Paragraph 23.01(b) as soon as practicable (but in any event not later than 12 months) after the last of the following events have occurred:

(a) Canada and Manitoba have confirmed that the Selection or Acquisition is eligible to be set apart as Reserve in accordance with the Principles;

(b) Canada and the Entitlement First Nation are both satisfied with the results of the Environmental Audit of the Selection or Acquisition;

(c) Canada has determined that the Selection or Acquisition satisfies the requirements of the Additions to Reserves Policy; and

(d) in the case of Crown Land, Canada, Manitoba and the Entitlement First Nation have signed a Regional Surveyor (Manitoba) Plan of the Selection.

(2) Canada undertakes to complete the survey of a Selection or Acquisition as soon as reasonably practicable after the last of the events described in Paragraphs (1)(a) to (d) inclusive occurs in respect of the Selection or Acquisition but in any event within three years of the last of those events, having due consideration for:

(a) the location of the parcel or the location and number of other parcels of land Selected or Acquired by the Entitlement First Nation or other Entitlement First Nations;

(b) the seasonal accessibility of the parcel or other parcels of land Selected or Acquired by the Entitlement First Nation or other Entitlement First Nations;

(c) the availability of surveyors; and

(d) weather conditions.

PART V: RELEASE AND INDEMNITY

25. **Release in Favour of Canada by Entitlement First Nation**

25.01 Form of General Release

I.

Each Treaty Entitlement Agreement shall contain a Release in the following form, provided that the provisions of the Release set out within square brackets shall appear in the Treaty Entitlement Agreement of only the Entitlement First Nations identified in Schedule "B":

"X.01 Release to Canada

In consideration of this Treaty Entitlement Agreement, the Entitlement First Nation, on its own behalf, and on behalf of all past, present and future Members of the Entitlement First Nation, any Predecessor Band, all past, present and future Members of any Predecessor Band and on behalf of their respective heirs, successors, administrators and assigns does hereby:

(a) release to Canada all claims, rights, title and interest the Entitlement First Nation or any Predecessor Band ever had, now has or may hereafter have by reason of or in any way arising out of the *Per capita* Provision; and

(b) release and forever discharge Canada, Her servants, agents and successors from:

(i) all obligations imposed on, and promises and undertakings made by, Canada relating to land entitlement under the *Per capita* Provision;

(ii) without limiting the generality of Paragraph (a), all other claims of any kind or nature whatsoever against Canada under or pursuant to the *Per capita* Provision based on membership of or in any Predecessor Band, the Entitlement First Nation or any other successor to the Predecessor Band including past, present or future Members of any Predecessor Band or the Entitlement First Nation;

(iii) without limiting the generality of Paragraph (a), all other claims of any kind or nature whatsoever against Canada under or pursuant to the *Per capita* Provision based on the amount of land set apart by Canada as Reserve for any Predecessor Band or the Entitlement First Nation;

(iv) all claims of any kind or nature whatsoever related to or arising from Canada not being able, due to land becoming occupied, to request Manitoba to set aside out of the unoccupied crown lands transferred to the administration and control of Manitoba under the Manitoba Natural Resources Transfer Act such areas of land as necessary to enable Canada to fulfill its obligations under the *Per capita* Provision;

(v) all claims of any kind or nature whatsoever related to or arising from the existence of any Third Party Interest in land Selected [or Acquired] and set apart as Reserve pursuant to this Treaty Entitlement Agreement;

(vi) all claims of any kind or nature whatsoever the Entitlement First Nation or any Predecessor Band (or any Member of

the Entitlement First Nation or any Predecessor Band) has had, has now or may hereafter have relating to or arising from the fact that the Entitlement First Nation or any Predecessor Band or any Member thereof did not receive or have use and benefit of the land to which the Entitlement First Nation, the Predecessor Band or any Members thereof were entitled under the *Per capita* Provision including, without limitation, all claims for damage of any kind or nature whatsoever alleged to have been suffered by the Entitlement First Nation, any Predecessor Band or any Members thereof as a result;

(vii) all obligations or liability, whether fiduciary or otherwise, and all claims of any kind or nature whatsoever relating to or arising from:

A. Canada executing the Trust Agreement, settling the Trust for the benefit of the Entitlement First Nation and paying the Federal Payment [and the Land Acquisition Payment] to the Trust;

B. the deposit, use, management or administration of, and any other dealing with respect to the "trust property", as defined in the Trust Agreement, including without limitation the Federal Payment [and the Land Acquisition Payment];

C. the use, management, administration or operation of or any other dealing with respect to all accounts established by the Trustees;

D. any actions, inactions, malfeasance or negligence of the Trustees;

E. the deposit, use, management or administration of, or any other dealing with respect to the contributions paid or loans made by Canada to the TLE Committee for the purpose of negotiating the Framework Agreement and this Treaty Entitlement Agreement, assisting in the completion of the Community Approval Process, removing, discharging or accommodating Third Party Interests

and implementing the Framework Agreement and this Treaty Entitlement Agreement; and

F. any actions, inactions, malfeasance or negligence of the TLE Committee, its officers, employees or agents with respect to the use of the funds referred to in Clause E;

(viii) all claims for or in respect of expenses incurred by the Entitlement First Nation or the Trustees:

A. associated with the Land Selection Study undertaken by the Entitlement First Nation and the approval of a Selection [or Acquisition] by the Entitlement First Nation, the Members of the Entitlement First Nation, its Council or the Trustees;

B. in relation to or arising out of the Selection [or Acquisition] of land by the Entitlement First Nation including, without limitation, [the purchase price paid or payable to the vendor of land, real estate agent or broker commissions,] legal fees and disbursements, applicable taxes and land search and transfer costs;

C. associated with discharging, replacing or accommodating Third Party Interests;

D. associated with the implementation of this Treaty Entitlement Agreement including all costs incurred by the Entitlement First Nation in completing the Community Approval Process, in executing and delivering this Treaty Entitlement Agreement and carrying out its obligations under this Treaty Entitlement Agreement; and

E. except as otherwise expressly provided for in Subsection 35.05(2) and Section 35.07 of the Framework Agreement, associated with the resolution of any issue or matter in dispute under this Treaty Entitlement Agreement;

(ix) all claims of any kind or nature whatsoever in the event:

[A. the Land Acquisition Payment does not provide the Entitlement First Nation with sufficient funds to Acquire its Other Land Amount and for the costs associated with the Acquisition of that amount of land;]

B. the amount contributed by Canada towards the satisfaction of Third Party Interests does not prove sufficient to discharge, replace or accommodate any or all Third Party Interests that may affect land the Entitlement First Nation Selects [or Acquires]; or

C. the amount contributed by Canada towards the satisfaction of costs associated with the implementation of this Treaty Entitlement Agreement or the Framework Agreement does not prove sufficient for that purpose;

(x) all claims of any kind or nature whatsoever in respect of any losses, damages or expenses of any kind or nature (direct or indirect) howsoever incurred by the Entitlement First Nation or the Trustees as a result of or in any way arising from any delay or failure by Canada to set a particular parcel of land apart as Reserve for the Entitlement First Nation either within any certain period of time or at all, except as provided in Section 8.06 of the Framework Agreement, provided that nothing in this Subparagraph shall in any manner diminish, absolve or otherwise affect:

A. Canada's undertaking in Section 8.01 of the Framework Agreement to proceed with due diligence and use its best efforts to set apart as Reserve land Selected [or Acquired] by the Entitlement First Nation; or

B. any other obligation or undertaking of Canada under this Treaty Entitlement Agreement

unless and until those undertakings and obligations have been fulfilled and those liabilities have been discharged;

[(xi) all claims of any kind or nature whatsoever in the event the Entitlement First Nation desires to Acquire land under the administration and control of Canada and:

A. Canada declines to make that land available to the Entitlement First Nation, provided, in the case of Surplus Federal Land, Canada meets its obligations under Section 3.10 of the Framework Agreement;

B. Canada agrees to make that land available but the Entitlement First Nation and Canada cannot or do not agree on the fair market value of that land; or

C. in the case of Surplus Federal Land, the Entitlement First Nation, any Person on behalf of the Entitlement First Nation (including the Trustees) or the TLE Committee fail to meet their respective obligations with respect to pursuing the Acquisition of such land provided Canada has met its obligations under Section 3.10 of the Framework Agreement;]

(xii) all claims for or in respect of all costs, legal fees and disbursements, travel and expenses expended or incurred by the Entitlement First Nation, the Trustees or their representatives (including the TLE Committee) in relation to the negotiation, approval, execution and implementation of the Framework Agreement, this Treaty Entitlement Agreement and the Trust Agreement;

(xiii) all obligations or liability, whether fiduciary or otherwise, and all claims of any kind or nature whatsoever relating to or arising from the Community Approval Process; and

(xiv) all claims of any kind or nature whatsoever arising out of or relating to any letter or letters or written or oral statements made by Canada to the Entitlement First Nation or its agents validating, accepting or acknowledging any claim of the Entitlement First Nation to land entitlement under the *Per capita* Provision to the extent such claims are expressly released in this Article.

X.02 Other Matters Unaffected

(1) For greater certainty, Section X.01 shall not release or waive, nor be construed as releasing or in any way waiving or otherwise affecting, any rights, actions, causes of action, claims, demands, damages, costs, expenses, liability, or entitlement, promises, undertakings or grievances of any nature or kind whatsoever the Entitlement First Nation, any Predecessor Band or any past, present or future Member of the Entitlement First Nation or any Predecessor Band may have against Canada arising from any oral promises, assurances, undertakings, explanations, representations or inducements of any kind or nature whatsoever made or offered by Canada, its agents, servants or representatives to the Entitlement First Nation or any Predecessor Band to enter into Treaty, and without limiting the generality of the foregoing, includes:

(a) variations in the amount of land entitlement provided under Treaties No. 1, 3, 4, 5, 6 and 10; and

(b) additional land entitlement based upon a growth of population of the Entitlement First Nation, as evidenced by, but not limited to, the record of a verbal exchange between the Lieutenant Governor of Manitoba, Adams Archibald, and an individual named Wa-sus-koo-koon during the negotiations leading up to the signing of Treaty No. 1, reported in The Manitoban on August 5, 1871, as follows:

Wa-sus-koo-koon -

"I understand thoroughly that every 20 people get a mile square; but if an Indian with a family of five, settles down, he may have more children. Where is their land?"

His Excellency -

"Whenever his children get more numerous than they are now, they will be provided for further West. Whenever the reserves are found too small the Government will sell the land, and give the Indians land elsewhere."

(2) Canada expressly denies the existence of or validity of any of the rights, claims, grievances or other legal rights of the Entitlement First Nation described in Subsection (1).

X.03 Right of Setoff by Canada Regarding Other Matters Unaffected

In the event the Entitlement First Nation advances any claim based on any matter described in Subsection X.02(1), Canada shall be entitled to set off from any amount which may be agreed, determined or adjudged to be owing or payable to the Entitlement First Nation in respect of that matter (whether expressed as entitlement to land or money in lieu of or in addition to entitlement to land):

(a) the amount of land set apart as Reserve by Canada for the Entitlement First Nation prior to the date this Treaty Entitlement Agreement comes into force;

(b) the amount of the Federal Payment [and the Land Acquisition Payment, to the extent the Entitlement First Nation has not used the Land Acquisition Payment to Acquire Other Land]; and

(c) the Crown Land Amount [and the Other Land Amount] to the extent the Entitlement First Nation has Selected Crown Land [and Acquired Other Land] and that land has been set apart as Reserve by Canada

to the extent only that it is agreed, determined or adjudged that the claim would otherwise result in the Entitlement First Nation being compensated for the claim (or any portion thereof) more than once having regard to this Treaty Entitlement Agreement.

X.04 Effective Date of Release

The Release becomes fully effective and may be relied upon by Canada immediately upon the date of payment in full by Canada of the Federal Payment to the Trust.

X.05 Suspension of Release

(1) Subject to Subsections (2) and (3), the right of Canada to rely on the Release and Indemnity shall be suspended in the event Canada has committed an Event of Default.

(2) Upon Canada remedying an Event of Default referred to in Subsection (1), Canada shall again be entitled to rely upon the Release and Indemnity, subject to Subsection (4).

(3) For the purposes of Subsection (2), where the Event of Default is as described in Paragraph 36.02(b) of the Framework Agreement, Canada shall be deemed not to have remedied that Event of Default unless and until the Implementation Monitoring Committee or an Adjudicator in binding arbitration has determined that Canada has taken reasonable steps to remedy the default.

(4) In the event Canada has committed an Event of Default and that Event of Default continues for a period of 180 days, the Entitlement First Nation shall be entitled to request a declaration before a court of competent jurisdiction that the Release and Indemnity is void or ineffective in whole or in part and that Canada is barred from relying on the Release and Indemnity.

(5) In the event Canada breaches any of its obligations under this Treaty Entitlement Agreement, other than its obligation to make any payment or contribution under Part IV of the Framework Agreement when due (except as provided in that Part), the Entitlement First Nation:

(a) may refer the issue or matter in dispute to the Implementation Monitoring Committee; and

(b) subject to Subsection (4), shall have no right to and shall not assert in any manner or in any forum (including, without limitation, seeking a declaration before any court of competent jurisdiction) that the Release and Indemnity are void or ineffective, whether in whole or in part, or that Canada is in any way barred from relying upon the Release and Indemnity.

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;

(e) to provide promptly to Canada and Manitoba information and materials required to facilitate the fulfilment of the terms of this Agreement;

(f) to provide technical support and assistance to its representatives on the Implementation Monitoring Committee and to the Entitlement First Nations as appropriate in the process of dispute resolution by the Implementation Monitoring Committee;

(g) to establish appropriate accounting, financial administration and audit procedures for the due and proper management and expenditure of the funds to be administered by it under this Agreement; and

(h) to provide ongoing orientation of its personnel and the personnel and Council of any Entitlement First Nation as requested to the requirements of this Agreement to encourage and foster a positive and productive working relationship between and among its personnel, Canada, Manitoba and the Entitlement First Nations.

31.03 Best Efforts of Canada

Canada will use its best efforts:

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

(b) to provide promptly to the TLE Committee and Manitoba relevant information and materials required to facilitate the fulfilment of the terms of this Agreement, the release of which is not prohibited by law;

(c) to undertake or cause to be undertaken Environmental Audits and surveys in accordance with Article 23;

(d) to comply with the requirements of any laws, policies, procedures or other requirements to set land apart as Reserve;

(e) to expedite the timely preparation and execution of any instruments under the Federal Real Property Act, orders in council or departmental or ministerial approvals required for the acceptance of administration and control of land or to set land apart as Reserve; and

(f) to provide ongoing orientation of departmental personnel to the requirements of this Agreement to encourage and foster a positive and productive working relationship between and among its personnel, the TLE Committee, Manitoba and the Entitlement First Nations.

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.

34.06 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.

34.09 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).

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).

36. **Material Failure and Events of Default**

36.01 Material Failure to Comply with Fundamental Term or Condition 5

(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.

40. Miscellaneous Provisions

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.

40.07 Amendment

This Agreement shall not be varied or amended except by written agreement of the parties.

40.11 No Effect on Existing Aboriginal or Treaty Rights

(1) Except as to matters dealt with in Section X.01 of the Release, neither this Agreement nor any Treaty Entitlement Agreement shall be construed so as to abrogate or derogate from any existing aboriginal or treaty right of an Entitlement First Nation or any Member of an Entitlement First Nation.

(2) Except as to matters dealt with in Section X.01 of the Release, neither this Agreement nor any Treaty Entitlement Agreement shall be construed so as to abrogate or derogate from the application of subsection 35(1) of the Constitution Act, 1982 to any aboriginal or treaty right of an Entitlement First Nation or any Member of an Entitlement First Nation that may accrue after the Date of Execution.

(3) Any provision of this Agreement or a Treaty Entitlement Agreement which is found by a court of competent jurisdiction to be invalid or void as being inconsistent with the recognition and affirmation of any existing aboriginal or treaty right within the meaning of subsection 35(1) of the Constitution Act, 1982 or any such right that may accrue after the Date of Execution to any Entitlement First Nation or its Members shall, to the extent of that inconsistency, be dealt with in accordance with Section 40.02.

40.12 Constitutional or Legislative Changes

Where any amendment not contemplated by this Agreement is enacted to the Constitution Act, 1982, the Indian Act or to any other legislation, the result of which amendment is inconsistent with the legal rights or obligations of the parties under this Agreement and which, in turn, materially affects the implementation, operation or effect of this Agreement, the parties agree to enter into good faith negotiations designed to determine and implement any necessary amendments to

this Agreement required to remedy or alleviate the effect of such constitutional or legislative changes.

40.13 Further Assurances

The parties covenant each with the other to do such things and to execute such further documents and take all necessary measures to carry out and implement the terms of this Agreement.