In the Matter of an Adjudication
Respecting the *Framework Agreement — Treaty Land Entitlement*
("MFA")
Implementation Monitoring Committee Referral File 2007-TLEC-005
Bunibonibee Cree Nation
Trout Falls and Wipanipanis Portage Selections

BETWEEN:

Treaty Land Entitlement Committee of Manitoba Inc.
("TLEC")

—and—

Her Majesty the Queen in right of the Province of Manitoba
("Manitoba")

Adjudicator's Decision

Appearances:

For TLEC:

Harley Schachter, Legal Counsel
Kaitlyn Lewis, Legal Counsel

For Manitoba:

Gordon E. Hannon, Legal Counsel
Iris C. Allen, Legal Counsel
Dave Hicks, Director, Agreements, Management and Aboriginal Consultation Branch, Manitoba

Introduction:

On September 11, 2013, I was appointed as an Adjudicator by the Implementation Monitoring Committee ("IMC") to deal with a dispute between the TLEC and Manitoba respecting two portages on the Hayes River System. The parties agreed to my jurisdiction.[1]

Following an exchange of documents and briefs between the parties, a hearing was held on March 27, 2014, in Winnipeg at which submissions were made on the factual and legal issues raised by this dispute. I want to thank legal counsel for the thoroughness of their submissions, both written and oral, for their diligence in reaching consensus on documentary evidence, and for the collegial way in which they conducted themselves.

The MFA is a tri-partite agreement between the parties herein and Her Majesty the Queen in Right of Canada. Canada was given notice of the hearing and sent an observer, but declined to participate.

The MFA is a complex agreement, over 250 pages long, entered into as of May 29, 1997. It provides processes by which First Nations, represented by the TLEC and entitled to lands under various treaties entered into between Canada and the First Nations, can acquire lands in Manitoba in partial or full fulfilment of the treaty obligations. One of the First Nations represented by the TLEC is the Bunibonibee Cree Nation ("BCN").

Pursuant to the MFA, on October 7, 2002, BCN passed a Band Council Resolution selecting certain parcels of land. On October 15, 2002, BCN provided notice to Manitoba of its selections.

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[1]By agreement between the parties, the very strict timelines set out in the *Arbitration Agreement* of September 11, 2013, were eased. Some time was spent in discussion between the parties.

Among those selections were 600 acres around Trout Falls and 319 acres around the Wipanipanis Portage. On December 23, 2002, Manitoba expressed its concerns to BCN about, among other sites, these two selections, using identical wording: "Manitoba has identified another competing interest which we choose to protect, namely a portage and the right of public use of this portage." Manitoba did not have concerns about the selections themselves; it was concerned only about the public use of the two portages.[2]

There is a lengthy history of discussion about these portages among the parties. The history is well-known to the parties. It is documented in the December 29, 2011, report by the then-Chair of the IMC, Lloyd Grahame, and in Appendix A to that document. Ultimately the issue of the two portages, in accordance with the process for final adjudication in the MFA, was referred by the IMC to me as the agreed-upon adjudicator.

The relevant facts:

Thanks to the cooperation of legal counsel and the intensive research by the then-chair of the IMC, I was provided with a number of documents which established the facts. Although they differ as to which facts are relevant and what weight to place upon them, the parties do not dispute the following facts:

- The two portages in question are along the Hayes River in Northern Manitoba. Through the cooperation of Manitoba, Canada, and First Nations, including the BCN, The Hayes River has been designated as a Canadian Heritage River System. It has historical significance to both

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[2]There were other issues between Manitoba and BCN with respect to the selection of sites. These issues were not referred to me and I do not deal with them in this Award.

Each of the two portages has two routes — a shorter one used by canoeists, and a longer one used by larger boats. These two routes within each portage are connected, and I therefore treat them as one for the purposes of this Decision.

First Nations people and early settlers in Canada. It is a navigable waterway at common law and thus as defined in the MFA, which uses the common law definition. The photographs provided to me show that the terrain and the river are beautiful.

- The Hayes River System should only be used by "experienced canoeists familiar with the demands of the northern wilderness. Over its course, the route flows over more than 80 sets of rapids, many of which require considerable boating skills or portages."[3]

- The Trout Falls portage allows for land transportation to avoid going through a waterfall which is not navigable by boats. The Wipanipanis portage allows for land transportation to avoid going through rapids which are not navigable by boats.[4]

- The best information available — and it is not necessarily accurate information and is certainly not up-to-date — is that non-First Nations use of the Hayes River, and presumably these portages, has historically been three to ten (or perhaps fifteen) canoe parties a year, with the number increasing to 30 parties in 2003 because of a documentary involving the Hayes River. There is apparently no information about the use of the portages by boaters. There is probably other non-documented use by tourists staying at tourist lodges on the Hayes River.

- The lands selected by BCN at both portages include the land on either side of the portages. Therefore any alternatives to these two portages that would not trespass on BCN land would require significantly longer (at least more than one mile) portages.

- BCN has indicated that it has no intention of placing restrictions on the use of the portages. It has never placed restrictions in over 40 years on an airport on its land.

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[3]Graham Dodds, *The Hayes River: Canadian Heritage Rivers System Background Study,*November 1987; part of the submission to have the Hayes River declared a Heritage River. The assessment is confirmed by other sources provided to me.

[4]Early on there was concern about a winter road close to the site of this portage, but that issue was resolved.

Questions to be answered and summary of the parties' positions on those questions:

The issue ultimately revolves around whether or not the MFA allows for some form of reservation of the portages for public use that would be binding on BCN.

Manitoba submits that subsections 3.01(4) and (5) (reproduced in full below) provide it with the right to raise the issue of a "compelling public interest" to protect the portages in question. Those subsections provide for resolution (ultimately through an adjudicator) of "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*" (italics mine). "The Principles" are specifically set out in sections 3.02 to 3.10.

TLEC submits that section 3.01(4) and (5) do not apply and that once Manitoba has accepted the lands selected as eligible to become part of the BCN reserve in partial fulfilment of the treaty obligations and the MFA, it cannot put conditions on that process.

As part of the referral to adjudication, I was provided by the Implementation Monitoring Committee with a series of questions. The parties both suggested how I should answer the specific questions set out by the IMC. These are the questions and a summary of the parties' positions on the questions:[5]

- 1. Has Manitoba established the existence of "a public right of passage over a portage", which is a Crown Reservation under Article 1.01(21), in the following Selections? a. Site: 15-02 Trout Falls; b. Site: 20-02 Wipanipanis Portage.
    - TLEC agrees "that at the time the selections were made by BCN in 2002, there were in fact portages in existence on the two selections."

[5]As well, I was given the responsibility "[t]o answer any other question that the Arbitrator deems necessary to resolve the issue(s) in dispute, including procedural matters."

- Manitoba submits "that there is a compelling public interest in providing for a continued right of access over a portage trail around the rapids or falls on the two sites as related to the safe navigation of the Hayes River."

- 2. If the answer is yes to question 1, is the protection of that "public right of passage over a portage" located in the listed Selections an appropriate basis for determining that that portion of the Selection is not eligible to be set apart as Reserve, except under some form of access agreement that guarantees the continued "public right of passage over a portage"?

  - TLEC submits that "[n]either the existence of a portage, nor the desire to protect it in the future, could or should be an appropriate basis to determine that a Selection is not eligible to be set apart as reserve."

  - Manitoba submits that in some way there should be a guaranteed protection of the public right of passage.

- 3. Can Manitoba assert an additional consideration (in this case, a "compelling public interest") not expressly contemplated by the terms of the MFA in determining eligibility of a Selection? Specifically, is the MFA subject to consideration and application by Manitoba of a "compelling public interest" in maintaining a "right of public access over a portage" as asserted by Manitoba? a. If so, what is the definition, criteria for determining, and information that must be provided by Manitoba when asserting a "compelling public interest" in these circumstances?

  - TLEC responded to this in detail, but says generally that "Manitoba may not assert any additional consideration not expressly identified by the express terms of the MFA in determining eligibility of a 'Selection'", saying further that Manitoba's role is solely to deal with eligibility of a particular Selection to be set apart as a Reserve, and once having done so, it cannot assert other restrictions on the eligibility of that Selection.

  - Manitoba submits that the test of "compelling public interest" can be used in this case in determining eligibility of a Selection.

- 4. If the answer is yes to questions 2 or 3, what legal instrument and what content in that legal instrument is appropriate to guarantee the "public right of passage over a portage" after the Selected lands have been set apart as Reserve?

- TLEC submits that there would be no guarantee of the public right of passage even if Manitoba had jurisdiction over the land if there were a more compelling public interest that outweighed that right. TLEC further submits that a Band Council Resolution — even though it can be changed later on — would be sufficient to protect any interests.

- Manitoba submits that it is open to a number of ways of doing this, but suggests that an easement agreement would be one appropriate instrument.

- 5. Is the "Honour of the Crown" at risk where additional considerations not expressly contemplated by the MFA (such as the existence of a "compelling public interest" regarding a "public right of passage over a portage) are being asserted by a Party?

    - TLEC submits that the Honour of the Crown is at risk.

    - Manitoba says that it is not.

The parties made overall submissions, both oral and written, that did not necessarily follow the order of the questions originally submitted to me. Accordingly I set out a summary of the positions of the parties on the legal issues derived from the written and oral submissions, including the responses of one party to another party's position. I stress that the following is a *summary*; in this decision I cannot do justice to the quality of the detailed and nuanced submissions made other than to acknowledge them and thank legal counsel for them. I wish to assure the parties that I have studied their complete submissions, both oral and written, in depth.

Summary of TLEC's position on the legal issues:

TLEC submits that subsection 3.01(5) cannot be used to create a further restriction on or narrowing of the right of BCN to select land, so long as the selection meets the Principles set out in the MFA. Therefore, TLEC submits, there is no issue that is properly before me since Manitoba has already accepted the eligibility of the lands selected, subject only to what is a non-enforceable, therefore non-existent, concern. Once having accepted the selection of the lands, TLEC says that Manitoba is therefore obligated to transfer them to Canada for the benefit of BCN.

TLEC makes the following points respecting the interpretation of subsections 3.01(4) and (5):

- The "Honour of the Crown" requires me to interpret these subsections in a way that facilitates the acquisition of land pursuant to the original treaties and to the MFA.

  TLEC cited the following cases:

  - *Reference re Secession of Quebec*, [1988] 2 S.C.R. 217.
  - *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
  - *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, [2013] S.C.J. No. 14.
  - *Keewatin* et al. v. *Ontario (Minister of Natural Resources)* et al, 114 O.R. (3d) 401 (Ont. C.A., 2013).

- Subsections 3.01(4) and (5) are not part of the Principles and cannot be used to produce an additional limitation on the right of selection of lands by an eligible First Nation. These subsections are designed to provide benefit to First Nations, not to allow either Manitoba or Canada to put an obstacle to the selection of lands. TLEC cited, as an example of a selection of land which did *not* meet the Principles, *Long Plain First Nation* v. *Canada (Attorney General),* [2013] 1 C.N.L.R. 184 (F.C.T.D., 2012).

- Portages are part of the definition of "Crown Reservation" in subsection 1.01(21)(b)(ii); thus the issue of portages cannot be considered to be an issue "not addressed by the Principles". On interpretative principles TLEC cited *Eli Lilly & Co.* v. *Novopharm Ltd.*, [1998] 2 S.C.R. 129.

- To allow Manitoba to introduce any issue it wants that is not specifically mentioned in the Principles and thus to hold up the acquisition of land by an eligible First Nation would be to introduce "unwarranted and unacceptable uncertainty to the MFA . . . [that] would effectively eviscerate the Bands' selection 'right' that was negotiated as part of the MFA in 1997."

- If Manitoba had wanted to reserve a right to deal with "compelling public interests", it could have negotiated such a right in the MFA, and implying such a right into the MFA would effectively rewrite the terms of the MFA.

In the alternative, if subsections 3.01(4) and (5) permit Manitoba to have the issue of the portages raised as a compelling public interest, TLEC submits that the issue of the portages is not a compelling public interest that should override the right of BCN to land that it has otherwise properly selected

- The portages are put to limited use and as such there is no compelling public interest.

- In the balance between the limited use to which the portages are put and the right of BCN to select land pursuant to its treat rights and the MFA, the balance should go to the right of BCN.

- There are alternatives to the portages; even though they may be arduous alternatives, the river system itself should only be travelled by experienced boaters who should be prepared for such long portages.

- The public has a right to navigate navigable waterways only insofar as they are navigable. When parts of them are non-navigable, the public has no right to portage through private land between the navigable portions of the waterways. TLEC cited:

    - Hogg, *Constitutional Law of Canada*, 5th ed. (Carswell, n.d.).

    - Laskin and Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Carswell, 1986).

- *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.
- *Canoe Ontario* v. *Reed*, [1989] O.J. No. 1293 (Ont. H.C.J.).
- *Simpson* v. *Ontario (Ministry of Natural Resources)*, 2011 ONSC 1168 (Ont. S.C.J.).

- BCN is a government and can be trusted to make as appropriate land use decisions as Manitoba would make.
- Sections 28(2) and 35(1) of the *Indian Act* provide a method by which Canada could deal with the protection of portages, if they need protection, after the land is acquired. TLEC cited:
  - *Osoyoos Indian Band* v. *Oliver (Town)*, [2001] 3 S.C.R. 746.
  - *Fairford First Nation* v. *Canada (Attorney General)*, [1999] 2 C.N.L.R. 60 (F.C.T.D., 1998).
  - *Opetchesaht Indian Band* v. *Canada* [1997] 2 S.C.R. 119.

Summary of Manitoba's position on the legal issues:

Manitoba summarized its basic position as follows:

> Manitoba submits that the issue in question to be considered in answering the formal questions posed by the IMC Chair is whether measures to ensure that members of the public may continue to use a portage around the falls or rapids as necessary for navigation on the river in respect of the two Sites is a matter not addressed by the Principles of Land Selection and Acquisition and, if that is the case, determining how that issue would best be addressed in a manner consistent with the Principles set out in the MFA.
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> Manitoba submits that a right of use of the portages is a compelling public interest that is reasonable to address as part of the determination of eligibility of Selections to be set apart as reserve.
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> Manitoba submits that it is appropriate for the sites to be considered to be eligible to be set apart as reserve in accordance with the Principles, subject only to such interests as is necessary to ensure that public right of use for a passage around the falls or rapids is assured.

Manitoba submits that subsections 3.01(4) and (5) allow it to take this position on the basis that the issue of the portages "are not addressed by the Principles" and therefore the issue can be dealt with through the dispute resolution process which has given rise to this adjudication.[6]

If it is accepted that the issue of the portages is "not addressed by the Principles" and can therefore be adjudicated upon, then Manitoba submits that the criterion (at least in this case) that should be applied in resolving an issue which is not addressed by the Principles is whether there are what it calls "compelling public interests" at stake. Manitoba uses the phrase "compelling public interests" but accepts that the phrase is not a "term of art" interpreted or given meaning to by courts or statutes, and thus has no specific legal meaning to it. Manitoba uses the phrase purely as a descriptive concept. The interests must be "public" and must be "compelling" if they are to be addressed by me.

Manitoba makes the following submissions on the issue of "compelling public interests":

- The "[r]ight of the public to access portages on navigable waterways is a compelling public interest" (Manitoba brief, page 12). In support Manitoba cited:
  - *Wood* v. *Esson,* 9 S.C.R. 239 (1884).
  - *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* [1992] 1 S.C.R. 3.

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[6]Manitoba first suggested on December 23, 2002, that the use of these portages was a "competing interest", which was interpreted by all parties as invoking "reasonable competing considerations" under subsection 3.02(6) of the MFA, which allows Manitoba to identify those considerations and commits the parties to attempt to address those considerations and, failing a resolution, to refer the matter to the IMC. On February 27, 2007, however, Manitoba sent a letter respecting, among other things, the two portages, which did *not* use the words "competing interest" as used previously. On August 8, 2007, in response to a question from the IMC, Manitoba sent an e-mail pointing out that in that February 27, 2007, letter "[T]he reference to a portage as a competing interest (consideration) per Subsection 3.02(6) has been excluded." This made clear that Manitoba no longer relied on subsection 3.02(6).

- MFA Principle 3.02(12) recognizes the importance of not depriving access to land, and this "should be understood to apply to ensure that a portage on a navigable waterway remains available for use" (Manitoba brief, page 14). Manitoba submitted that the alternative longer routes that would not trespass on BCN lands would simply encourage canoeists and boaters to try to navigate the dangerous waterfall and rapids, and that the safety issues are therefore significant.

- Manitoba wants to ensure public access to the portage in the most minimal way possible. Manitoba suggested an easement and cited:

  - Gaunt and Morgan, *Gale on Easements*, eighteenth edition (London: Sweet & Maxwell, 2008), section 1-01.

  - Manitoba Law Reform Commission, *Report on Prescriptive Easements and* Profits-á-Prendre, January 18, 1982.

  - As examples, a redacted list of easements which Manitoba has negotiated with other First Nations and examples of how that can be accomplished.

- The definition of "Crown Reservation" in subsection 1.01(21)(b)(ii) is taken almost word-for-word from the description of what is reserved to the Crown in section 4(1) of *The Crown Lands Act* of Manitoba. Thus the inclusion of "portage" in that definition should not be taken as showing that the parties had completely dealt with the issues of portages and compelling public interest.

- On whether the Honour of the Crown applies, Manitoba submitted that it had fulfilled the requirements of the Honour of the Crown first, by entering into the MFA, and secondly with respect to this particular case, by being clear about its concerns and using the dispute resolution process set out in the MFA. Manitoba cited *Eastman Band* v. *Canada (Federal Administrator)*, [1992] F.C.J. No. 1041 (F.C.A.).

- On interpretative principles, Manitoba submitted that the MFA should be interpreted as a whole, and cited:

  - *Hnatiuk* v. *Court*, [2010] M.J. (Man. C.A.).

  - Hall, *Canadian Contractual Interpretation Law*, 2d ed. (LexisNexis, 2012)

  - *Hillis Oil & Sales Ltd.*, v. *Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57.

- With respect to the use of section 28(2) of the *Indian Act* to allow Manitoba to ask Canada to reserve the portages after the transfer, Manitoba submitted that Canada's policy on the use of this right would make it difficult if not impossible to do this.

Interpretation of the MFA:

The MFA is a very carefully-written, detailed, and complex document. It is divided into seven parts and includes eight appendices. One hundred seven words are specifically defined in the sixteen pages of the definitions section (1.01). The section on Land provides ten Principles over twenty-five pages relating to the selection and acquisition of land. Third party interests are considered for over twenty pages. The agreement is a testament to a good-faith process coupled with diligence and creativity.

Because of its complexity, the MFA is not an easy agreement to interpret. I am informed that this is the first adjudication under the MFA; accordingly I will try to set out basic principles that might help the parties in the future.

Contract interpretation begins with an assumption that the parties intended every word in the order in which the words appear — that there is no excess verbiage and that the contract has been carefully written. This is not always the factual experience, but it is the basic assumption behind contract interpretation. It is clear that in this case the assumption is factually true. The parties have devoted great care to the words in this agreement. I therefore start with the assumption that every word in the MFA is to be given a meaning.

The MFA's purpose:

Preamble: The Preamble ("Whereas" section) that begins the MFA acknowledges that the signatory First Nations to the MFA, as represented by the TLEC, did not receive "land of sufficient area to fulfill the requirements" set out in the treaties that the First Nations entered into at various times in the early history of this country. BCN is represented by the TLEC and was party to Treaty 5, which promised 160 acres for each family of five (and proportionately larger or smaller amount for different sizes of families). BCN is therefore an "Entitlement First Nation" — entitled to select and acquire land subject to the provisions of the MFA.

The Preamble goes on to describe the obligations of Canada to fulfill its treaty obligations that have been enshrined in various pieces of legislation. In 1930, *The Manitoba Natural Resources Transfer Agreement* (MNRTA) was entered into between Canada and Manitoba which transferred the interests of Canada to Manitoba subject to whatever was necessary to allow Canada to fulfill its treaty obligations. Manitoba's title to Canada's land was thus made subject to Canada's treaty obligations.

The Preamble goes on to indicate that there is a difference between Canada and the Entitlement First Nations as to how to calculate the amount of land owing to each First Nation to fulfill the treaty obligations, and ends with the following:

> Y. Despite their respective positions [on calculation], 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.

Manitoba's role is to satisfy its obligations under the MNRTA to allow Canada to fulfill its treaty obligations in the manner set out by the MFA.

Section 1: Section 1 defines a number of words; words that are capitalized in the MFA are defined in Section 1. One significant phrase that is defined is "Crown Reservation":

> (21) "Crown Reservations" means all interests which are reserved to Manitoba in or out of any disposition of Crown Land under *The Crown Lands Act* or under any other act of the Legislature of Manitoba, whether enacted before or after the Date of Execution, which interests may include:
>
> (a) in the case of land extending to the shores of any navigable water or inlet thereof:
>
> (i) a strip of land one and one-half chains (being 99 feet) in width, measured from the Ordinary High Water Mark; and
>
> (ii) the public right of landing from, and mooring, boats and vessels so far as is reasonably necessary;
>
> (b) in the case of land bordering a body of water:
>
> (i) the bed of the body of water below the Ordinary High Water Mark; and
>
> (ii) the public right of passage over a portage, road or trail in existence at the date of disposition;
>
> (c) Mines and Minerals, together with the right to enter, locate prospect, mine for and remove minerals;
>
> (d) the right to, and use of, land necessary for the protection and development of adjacent water power; and
>
> (e) the right to raise or lower the levels of a body of water adjacent to the land, regardless of the effect upon the land.

The reference in subparagraph 1.01(21)(b)(ii) to "the public right of passage over a portage, road or trail in existence at the date of disposition" is the only reference in the MFA to that concept. The word "portage" occurs only in this subparagraph and is not found anywhere else in the MFA. The only uses of the phrase "public right" are found in paragraph 1.01(21)(a) and 1.01(21)(b) and nowhere else in the MFA.[7]

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[7]In addition, section 1 sets out some rudimentary rules of interpretation (definitions apply with grammatical variations; acts of Canada or Manitoba are defined so that their names can be used without citation; names are given to identify parts, articles, sections, etc., of the MFA. None of these rules is applicable in this case and I do not reproduce them.

Section 2: Subsection 2.01 sets out how much land each Entitlement First Nation is entitled to by incorporating by reference two Schedules to the MFA.

Section 2.02 then sets out the basic purpose of the MFA.

> 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.

"Selection" is the identification of Crown Land by an Entitlement First Nation that that First Nation wishes to be set apart as a Reserve. "Acquisition", which is not in issue here, is the acquiring of land that is not what is defined as "Crown Land" — generally other lands owned by Manitoba and third-party lands.

Within a set period of time ("the Period of Selection and Period of Acquisition"), the right is given to an Entitlement First Nation — in this case the BCN — to select and acquire land if it conforms with the Principles. If that land is selected in accordance with the Principles, it "shall be eligible to be set apart as Reserve land". There is a mandatory aspect to this.

Purpose: It is therefore clear that the purpose of the MFA is to define a process to facilitate the selection or acquisition of land by an Entitlement First Nation which will become part of its reserve in fulfilment of the treaty obligations that Canada undertook over a century ago. The purpose of the MFA can be used to facilitate the interpretation of the MFA.

Subsections 3.01(4) and (5):

Section 3.01 generally: Manitoba's position rests on whether or not subsections 3.01(4) and (5) provide it with the right to ask me to "resolve" its issues by finding a way to protect a right of access to the portages.

Section 3.01 reads:

> 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.

Clearly the Principles set out in sections 3.02 to 3.10 inclusive must be considered paramount.

> (4) The Principles may not address all of the issues or circumstances to be encountered and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation.
>
> (5) Any issues or circumstances encountered in and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation which are not addressed by the Principles shall be addressed by the parties and the Entitlement First Nation to the extent that they are able, and if they are unable to resolve any issues or circumstances encountered in or considerations affecting a Selection or Acquisition to the satisfaction of any party or the Entitlement First Nation, Section 3.11 [*the resolution section, ultimately leading to adjudication*] shall apply.

Interpretation of the words of subsections 3.01(4) and (5): Both parties take for granted that the question was simply whether the issue of the portages had been considered in the MFA. I will call that the "standard" interpretation of the subsections. TLEC says the issue has been considered; Manitoba says it has not been. Since one of the questions asked of me requires it, I interpret subsections 3.01(4) and (5) very closely in order to see whether the question is as clear as that.

Subsection (4) provides for the possibility that "all of the issues or circumstances to be encountered and considerations affecting the Selection or Acquisition of land by an Entitlement First Nation" "may not" be addressed by the Principles set out in 3.02-3.10.

Subsection (5) provides for the resolution of "[a]ny 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". Save for the grammatical changes, the language is identical and obviously carefully written.

Clearly a distinction is made among "issues", "circumstances" — both of which can be "encountered" — and "considerations" — which "affect" either selection or acquisition. Relevant definitions of these words are as follows:

- *Issue*:

  "A point in question; an important subject of debate or litigation" (*The Canadian Oxford Dictionary*).

  "A point on the decision of which something depends or is made to rest; a point or matter in contention between two parties; the point at which a matter becomes ripe for decision. . . . A matter or point which remains to be decided; a matter the decision of which involves important consequences. . . . A choice between alternatives, a dilemma" (*Oxford English Dictionary*).

  "A matter of which the result is to be decided; that which is to be determined by trial or contention; a conclusion held in abeyance for consideration or debate; a choice between alternatives . . . " (*The Century Dictionary and Cyclopedia*).

- *Circumstance:*

  "A fact, occurrence, or condition, esp[ecially] (in *pl[ural]*) the time, place, manner, cause, occasion etc., or surroundings of an act or event. . . . (in *pl*) the external conditions that affect or might affect an occasion. . . . (*The Canadian Oxford Dictionary*).

> "[A] condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant. . . . [A] subordinate or accessory fact or detail. . . . [S]tate of affairs" (*Merriam-Webster Dictionary*).[8]

- *Consideration:*

  > "[A] fact or a thing taken into account in deciding or judging something" (*The Canadian Oxford Dictionary*).
  >
  > "That which is or should be considered; a subject of reflection or deliberation; a matter of import or consequence; something taken or to be taken into account . . . . " (*The Century Dictionary and Cyclopedia*).

The use of all of the three nouns is intentional; a standard interpretation tool (*noscitur a sociis* — words are known by the company they keep) would therefore require that each of the nouns be read as being different from each of the other nouns, because if that were not the case then all three words would not have been used.

I therefore interpret "issue" as being some important idea or concept that is in contention between parties; and "circumstance" as being a fact that has a significant effect on something to be done. Both of these must be "encountered" in the Selection of land by BCN.

I interpret a "consideration" as being an important fact or idea which reasonably ought to be taken into account in making a decision. A consideration must "affect" the selection of land by BCN.

Relevant definitions of the two verbs are as follows:

- Encounter:

  > "[M]eet, come across, esp. by chance or unexpectedly. . . . meet as an adversary" (*The Canadian Oxford Dictionary*).

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[8]The original and older *Oxford English Dictionary* and the relative contemporary of the OED, *The Century Dictionary and Cyclopedia*, both treat "circumstance" as being something secondary, or a matter of small consequence. I take it that the meaning of the word has changed from the early 1900s, when those dictionaries were published, and that "circumstances" is now a word that can describe significant occurrences or conditions.

> "[T]o meet as an adversary or enemy . . . To engage in conflict with . . . To come upon face-to-face . . . To come upon or experience especially unexpectedly" (*Merriam-Webster Dictionary*).
>
> The older dictionaries are to the same effect. S.I. Hayakawa's *Choose the Right Word: A Modern Guide to Synonyms* (Harper & Row, 1968) contrasts "meet" with "encounter", saying that *encounter* "strongly implies a casual or unexpected meeting."

- *Affect:*

  > "[P]roduce an effect on; influence" (*The Canadian Oxford Dictionary*).
  >
  > "To make a material impression on; to act upon, influence, move, touch, or have an effect on" (*The Oxford English Dictionary*).

I therefore interpret "encounter" as meaning to come across by chance or meet in an adverse way. There must be something objective about what is encountered, and that something must have import. It is also something that was neither already considered nor reasonably foreseeable at the time that the MFA was entered into. I note that the words "to be encountered" in subsection 3.01(4) are future-oriented, and emphasize that same concept.

I interpret "affect" as meaning to have a significant influence or have a material effect on something.

In addition, any of these issues or circumstances encountered, and any consideration affecting the selection or acquisition of land by an Entitlement First Nation must also not have been "addressed" in the Principles. The only applicable meaning for "address" as a verb from any of the standard dictionaries is "to direct attention to". Since the present tense of "address" is used in the subsections, I interpret the verb as referring to matters to which attention was directed at the time of the signing of the MFA, *or* matters that were reasonably foreseeable at the time of the signing of the MFA.

Recasting 3.01(4) using the meanings I've given to the words in the context of this case provides the following:

> The Principles may not have directed attention to points in contention, or facts that have arisen, after the time of entering into the MFA, or that the Parties did not deal with, or that were not reasonably foreseeable, at the time of entering into the MFA, or may not have directed attention to matters which are significant and which have a material effect on the selection or acquisition of land by an Entitlement First Nation, if such matters were not considered or could reasonably have been considered, at the time of entering the MFA.

Thus my interpretation of the subsections goes beyond the standard interpretation. I will, however, provide my decision using both the standard interpretation and my interpretation.

Under Section 3.01(5) the dispute resolution process that has culminated in this adjudication allows me to consider *only* matters that meet the description in 3.01(4).

Sections 3.02 to 3.10 — The Principles:

The Principles referred to are found in sections 3.02 to 3.10 of the MFA.

The Principles in sections 3.04 (Wapusk National Park), 3.05 (Acquisition of Other Land), 3.06 (Land in an Urban Area), 3.07 (Land in a Municipality), 3.08 (Land in a Northern Community), 3.09 (Surplus Provincial Land), and 3.10 (Surplus Federal Land), are not relevant to the case at hand.

Part of TLEC's submission — and the submission went into some detail on this issue — is that the detail into which the parties went to write the Principles, including the ones that are not relevant, and the fact that portages are not specifically mentioned in the Principles, should be taken as an indication that the parties decided that portages were not significant enough to allow any limitation to the eligibility of lands for selection on the basis of retaining public access to portages. Manitoba, on the other hand, submits that the fact that portages are not

specifically dealt with in the Principles allows it to raise the issue pursuant to subsections 3.01(4) and (5).

The relevant portions of the remaining Principles (3.02 and 3.03) are as follows:

> 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;
> >
> > *[Subsection (b) provides for selecting land from outside the Treaty Area, which is not applicable in this case]* . . .
>
> *[Subsection (2) deals with acquisition of Other Land, not applicable in this case.]*
>
> (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. . . .

[Subsection (8) deals with competing interests with other First Nations. Subsection (9) deals with the ability to make adjustments to the boundaries. Subsection (10) allows two or more First Nations to agree on land. None of these subsections applies in this case.]

(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.

3.03 Specific Principles for Selection of Crown Land

Specific Principles part of Principles:

(1) Subsections (2) to (38) inclusive set out specific Principles for the Selection of various categories of Crown Land.

Land not affected by a Third Party Interest:

(2) An Entitlement First Nation may Select land not affected by a Third Party Interest.

[Subsections (3) through (12) deal with selection of land in situations that are not applicable in this case.]

Crown Land Bordering upon Navigable Waterways, Non-navigable Waterways or Developed Waterways:

(13) An Entitlement First Nation may Select land bordering upon a Navigable Waterway, a Non-navigable Waterway or a Developed Waterway in accordance with Article 12. . . .

Article 12 referred to in subsection 3.03(13) is entitled "Water Interests". Relevant sections from that Article are:

12.02 Reserve Boundaries on Navigable Waterways

Where land Selected or Acquired by an Entitlement First Nation is adjacent to a Navigable Waterway:

(a) the water boundaries of the Reserve shall be the Ordinary High Water Mark for that body of water; and

> (b) the Reserve shall not include within its boundaries any portion of the bed or the banks of the body of water below the Ordinary High Water Mark.
>
> 12.09 Land Physically Required by Manitoba Hydro
>
> (3) Land consisting of the specific geographic sites reasonably required by Manitoba or Manitoba Hydro for potential hydro-electric development identified as "1" to "16" inclusive on the map attached as Schedule "E" may not be Selected by an Entitlement First Nation except with the agreement of Manitoba Hydro. . . .[9]

Schedule E lists "Potential Water Power Sites" where hydroelectric dams may be built; among those sites (14, 15, 16) are places on the Hayes River, but not the sites of the portages in issue in this Adjudication.

The facts applied to the Principles:

In the case before me BCN requested some parcels of land, including the two parcels of land which contain the portages at issue, each of which has an area of fewer than 1000 acres. BCN's selections therefore fell under subsection 3.02(5), giving Manitoba the right to ask for "a written statement outlining the reasons for the Selection of less than 1,000 acres in area."

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[9]As I was writing this award, I noticed that subsection 12.09(7) might be applicable because it mentions "or any other reservations", and I wrote to Messrs. Schachter and Hannon to ask them if they had anything to say about the applicability of this subsection. Both responded.

Mr. Hannon submitted that section 12.09 deals only with hydro-electric development and that "The purpose of subsection 12.09(7) is to say that 12.09(5) and (7) entirely address the principles relating to hydro-electric development on the Fox River, Hayes River and God's River systems. . . . The 'other reservation' suggests that the parties acknowledge that no other restriction relating to hydro-electric development would apply."

Mr. Schacter accepted that section 12.09 deals only with hydro-electric development, but he submitted that subsection 12.09(7) only reinforces TLEC's submission that the parties took care "to expressly identify situations where Manitoba required a continuing interest post-selection and post-Reserve creation." He submitted that if public access to portages, which are Crown Reservations, "were intended not to be transferred to Canada, there would be paragraphs in the agreement making sure that this happened."

Given these submissions, and also invoking the principle of interpretation known as *ejusdem generis* (the general is limited by specifics), I find that the specific mention in subsection 12.09(7) of "Hydro Easement" limits the meaning of the general phrase "or any other reservations to Manitoba" in that same subsection to reservations dealing with hydro-electric development and therefore does not apply in this case. Accordingly I have not reproduced that subsection in this decision.

Manitoba did make such a request, and BCN responded with a written statement giving reasons for selecting, among others, these two areas of fewer than 1,000 acres.

On February 27, 2007, Manitoba wrote to BCN and said:

> Manitoba has further reviewed its position with respect to Treaty Land Entitlement (TLE) Land Selections of less than 1000 acres currently on record and is of the opinion that if there are no overriding Framework Agreement principles and/or competing interests associated with a given TLE land Selection they shall be deemed eligible. . . .
>
> Therefore further to our response letter of December 23, 2002 the following TLE land Selection is now deemed eligible, subject to any previous or current conditions noted that still apply.

The land selections deemed eligible included the two sites containing the two portages. With respect to each of these two sites Manitoba wrote the same words in that letter:

> There is a portage affecting this Selection and Manitoba would like to meet with Bunibonibee Cree Nation to discuss the retention of the right of public access to this portage either by way of an access easement or possibly exclusion in accordance with Subsection 3.02(12) of the Framework Agreement.[10]

TLEC submits that once Manitoba deems the land selections to be eligible, its role ceases and it cannot raise other issues, such as "the retention of the right of public access to this portage", which stand in the way of BCN's right to have the land declared part of the Reserve once eligibility is accepted. Manitoba clearly disagrees.

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[10]This letter was the first indication that Manitoba had dropped the concept of "competing interests", or as the words are used in paragraph 3.02(6), "reasonable competing considerations". See footnote 6 on page 11.

MFA provisions respecting the transfer of Manitoba's land:

The following are the relevant portions of the MFA respecting the transfer of land by Manitoba to Canada to be set apart as Reserve.

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.

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.

TLEC submits that these provisions show that Manitoba's role is a secondary one. Once the land has been selected, and once it has been deemed eligible for selection in accordance with the Principles, TLEC submits that Manitoba's role is then relegated to transferring to Canada, as set out in subsection 7.01(2), "administration and control of all interests of Manitoba in that land, including any Crown Reservations and Residual Crown Interests."[11]

Manitoba's right to rely on subsections 3.01(4) and (5):

I find that the inclusion of public access to portages in the definition of "Crown Reservations" shows that the parties were aware of the issue of the right of public access to portages when they entered into the MFA. This is the case whether the standard interpretation or my interpretation of subsections 3.01(4) and (5) is used.

Manitoba's submission that, because the wording in that definition mirrors the wording in *The Crown Lands Act*, I should infer that the parties had not addressed the issue of portages, cannot stand in the face of how carefully-worded and complex the MFA is; it is an agreement in which clearly every word was scrutinized carefully.

The initial assumption that every word in the document is intended to be there leads inexorably to another major principle of interpretation: words that are *not* in an agreement

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[11]As noted earlier, TLEC submits that the inclusion of "Crown Reservations", which is defined in subsection 1.01(21) as including "the public right of passage over a portage", in this subsection shows that the parties have already dealt with the issue of portages and thus that subsections 3.01(4) & (5) cannot be invoked by Manitoba. Manitoba responds that the definition of Crown Reservations is not in the Principles and that the issue of portages is therefore something not addressed by the Principles.

are intended *not* to be there — the legal maxim of *expressio unius est exclusio alte*rius (the expression of one concept means the exclusion of another). Portages are mentioned in the MFA; they are excluded in the Principles; they were intended to be excluded.

Given that the parties were conscious of the right of public access to portages, what decision did the parties make about that right?

Section 7.01 sets that out. First, subsection 7.01(1) sets out Canada's obligations. When land is selected and Canada and Manitoba confirm that that land "is eligible to be set apart as Reserve in accordance with the Principles", then Canada has a specific role to play as set out in paragraphs 7.01(1) (a) through (d). When those obligations are met, and Manitoba has been provided with the legal description of the land (paragraph 7.01(1)(d)), then, second, under subsection 7.01(2) Manitoba is obligated to transfer to Canada "all interests of Manitoba in that land, *including any Crown Reservations*" — which Crown Reservations include the right of public access to portages.

Given that the parties decided what would happen to the right of public access to portages, can Manitoba rely on the wording of subsections 3.01(4) and (5)? Is it the case that Manitoba could simply come up with any apparently significant issue and say that it has the right to raise it as an exception "not addressed by the Principles"? It is clear that "portages" are mentioned neither in the Principles nor in any sections that are referred to in the Principles,

The TLEC submits that these subsections are available only for the benefit of an Entitlement First Nation, to deal with situations that don't fall under the Principles, and that neither Manitoba nor Canada was intended to be given the right to invoke these subparagraphs in a way that would prevent an Entitlement First Nation from acquiring land. TLEC points to many clauses in the MFA, some of which I have cited above, which show, as I have found, that the

MFA is intended to give rights to Entitlement First Nations to select or acquire land in order for Canada's treaty obligations to be fulfilled.[12] Given that that is the purpose of the MFA, TLEC submits, Manitoba should not be able to put impediments in fulfilling that purpose other than those specifically set out. In addition, TLEC submits, the Honour of the Crown should be used as a further interpretative tool to the same effect.

While I understand the tenor of that submission and am sympathetic to it, the wording of subsections 3.01(4) and (5) do not explicitly limit the right to raise issues to an Entitlement First Nation. Nor have I been presented with any case authority to show that the Honour of the Crown provides in this case a tool of contract interpretation that would allow me to override the clear wording of subsections 3.01(4) and (5).

It is true that the Honour of the Crown may be used as a principle of contract interpretation (see *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)* [2013] S.C.J. No. 14, at ¶68, 76-77, for instance); in this case, however, the clear wording of subsections 3.01(4) and (5), coupled with the clear admonition in subparagraphs 40.09, 40.10, and 40.11, to the effect that the MFA should be interpreted as conferring no new rights other than those found in the MFA, does not allow me, in my opinion, to impose the Honour of the Crown to interpret subsections 3.01(4) and (5). On the other hand, the purpose of the MFA, as I have found, does inform the interpretation of those subsections; and the Honour of the Crown was in fact fulfilled by entering into the MFA for the purposes I have described.[13] Those purposes, however, influence my interpretation of subsections 3.01(4) and (5).

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[12]TLEC also cited sections 31.01 (obligation of all the parties "that they will, in good faith, use their best efforts to fulfill the terms of this Agreement"); 31.04 (Manitoba's obligations, which do *not* refer to any right to impose conditions on the selection of lands other than as set out in the Principles); 40.11 (MFA does not abrogate any aboriginal or treaty rights); 40.13 (obligation "to carry out and implement the terms of this Agreement").

[13]See page 34.

To use TLEC's submissions concerning the mention of portages, if the parties had wanted to limit the right to raise issues or circumstances or considerations to an Entitlement First Nation, they would have written subsections 3.01(4) and (5) to do that.

Accordingly I find that any party to the MFA can raise an issue or circumstance or consideration under subsections 3.01(4) and (5), and that Manitoba's role cannot be strictly restricted solely to determining issues of eligibility.

The purpose of the MFA, however, is to facilitate the selection or acquisition of land by an Entitlement First Nation. Subsections 3.01(4) and (5) should be read in light of that purpose.

If raising such a matter would facilitate the selection or acquisition of land by an Entitlement First Nation, then any party could raise the matter.

Such right to raise the issue is, however, as I read these subsections in light of the purpose of the MFA, circumscribed when raising the issue would hinder or delay the selection or acquisition of land by an Entitlement First Nation. Since the purpose of the MFA is to facilitate the selection or acquisition of land, there is a burden of proof on the party raising a matter if the raising of such matter would act contrary to that purpose.

As I interpret those subsections, if raising these matters would hinder the selection or acquisition of land by an Entitlement First Nation, the matters would certainly have to be, at the least, a matter that is important and significant — what the Manitoba has termed "of compelling public interest" — but they would also have to fit another criterion.

The issue or circumstance or consideration must in addition be something not contemplated by the parties or reasonably foreseeable when they entered into the MFA. As such it should be something which has arisen, in a sense, afresh.

Given how carefully the MFA is written, and the words used in these two subsections, there is an evidentiary burden on any party who raises an issue or circumstance or consideration to prove that the parties did not contemplate that issue or circumstance or consideration at the time of entering into the MFA, or that such issue or circumstance or consideration was not reasonably foreseeable at that time.

Practically speaking, because the purpose of the MFA is to facilitate the selection and acquisition of land for the benefit of an Entitlement First Nation, the burden would be lighter on an Entitlement First Nation and quite a bit heavier on Canada or Manitoba because it is probable that anything an Entitlement First Nation would raise would be to facilitate the selection and acquisition of land, and it is probable that anything Canada or Manitoba raised would hinder or delay the selection and acquisition of land.

In the case at hand, I find that Manitoba has not met the required evidentiary burden. In fact, I find that the parties were aware of the issue of public access to portages and chose not to put anything in the Principles relating to that. I find that Manitoba has not provided a basis to invoke any right under subsections 3.01(4) and (5) that would give me jurisdiction to place any restrictions on the transfer of the land by Manitoba.

I point out that even on the standard interpretation of subsections 3.01(4) and (5) — one that the parties themselves put forward that does not invoke the purpose of the MFA or include the notion of "reasonable foreseeability" — Manitoba has not been able to show that the parties did not address the issue of public access to portages. The definition of "Crown Reservations" shows that the parties did address that issue. I therefore find that the MFA does in fact address the issue of public access to portages and that the parties intended to omit this issue from the Principles.

Manitoba therefore has a duty to transfer to Canada the eligible lands in question, including the public access to portages (one of the Crown Reservations to be transferred), for the benefit of the BCN.

Alternative finding on "compelling public interest":

In the alternative, if I am wrong in my interpretation of subsections 3.01(4) and (5), or if I am wrong that even the standard interpretation of subsections 3.01(4) and (5) shows that the parties contemplated the issue of portages, and if in fact a "compelling public interest" is not only necessary but also sufficient to invoke subsections 3.01(4) and (5), I find that Manitoba has not established that the issue of public access to the two portages is a compelling public interest that is an issue or circumstance or consideration not addressed by the Principles.

Manitoba agrees that not every difference deserves to be considered as that kind of an issue, circumstance, or consideration. Manitoba's use of the concept of "compelling public interest" shows that the difference must be compelling, and the interest must be a public one. Although the interest with respect to public access to portages is certainly a public one, I find that access to recreational portages, and in particular these portages, is not sufficiently compelling or significant so as to become an issue, circumstance, or consideration not addressed by the Principles.

I am strengthened in that finding by the court decisions which find that the right of public access to a navigable waterway does not extend to the right to trespass in order to portage between sections of that navigable waterway. Manitoba's submission that the right to navigate navigable waterways somehow can be extended to the *right* to portage land not owned by the Crown does not appear to have a basis in law. Certainly Manitoba provided no

statute or case-law to that effect, and TLEC's case-law, although stemming from lower non-Manitoba courts, contains strong reasoning.

I agree with TLEC's submission that when it comes to balancing, on the one hand, the right of an Entitlement First Nation to the fulfilment of Canada's treaty obligations with, on the other hand, the convenience of a select and historically small group of highly-experienced boaters to have a short rather than a long portage, the right of the Entitlement First Nation overwhelmingly defeats the convenience of the select group. There are alternative routes, and though they may be much more arduous and significantly longer than the simple portages currently available, they are available. Thus it is merely a matter of convenience. I do not accept Manitoba's submission that safety is an issue. Experienced canoeists and boaters should not be presumed to take unreasonable risks.

Therefore, in the alternative, if "compelling public interests" provide a method of invoking subsections 3.01(4) and (5), Manitoba has not proved that the public access to the portages in question consist of a compelling public interest. Having declared that the sites in question are eligible, and having no other basis for objecting to the sites, Manitoba must fulfill its obligations under the MFA and transfer to Canada the eligible lands in question, including the public access to portages (one of the Crown Reservations to be transferred), for the benefit of the BCN.

Other issues raised in this adjudication:

Although my decision is in favour of the TLEC's ultimate position, I think it is important, because they were argued at length, and because some of them inform my answers to the specific questions asked by the IMC, to provide my opinion on various other submissions.

The Honour of the Crown:

I do not agree with the TLEC's submission that the Honour of the Crown is at risk in this situation. I have studied the court decisions. They are clear that the Honour of the Crown requires consultation and an obligation to act reasonably and promptly. I accept Manitoba's position that in agreeing to the MFA and in providing its position, it has generally consulted and acted reasonably and promptly.[14]

I cannot extend the concept of the Honour of the Crown to the point of saying that the Crown cannot raise a legal issue which may have merit. Even though I have ruled against Manitoba on the issue it raised, Manitoba's position is not vexatious or abusive, and it was grounded on an interpretation of the MFA which was neither absurd nor deliberately done to delay matters. I cannot say that Manitoba's raising of the issue of the portages is an affront to the Honour of the Crown.

It is because I have found that the purpose of the MFA is to facilitate the transfer of lands for the benefit of Entitlement First Nations that I find that the Honour of the Crown has, in the entering into of the MFA, been fulfilled. The purpose of the MFA significantly influences the interpretation of subsections 3.01(4) and (5), as I have held above.

BCN as a government equal to Manitoba:

I accept the concept that BCN is a nation and that it can be trusted to make decisions as a government. The Chief of the BCN, in his opening and closing prayers, eloquently, movingly, and sincerely, spoke of the BCN's interest in preserving the land and of inviting anyone to

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[14]The issue of the delays between the date that the BCN informed Canada and Manitoba of its selection and the date this matter was submitted to adjudication is not the issue. It is open to TLEC to prove that Manitoba breached the Honour of the Crown with respect to these delays, although the chronology reveals that much of the delay was caused by problems relating to the composition of the IMC. If necessary I can deal with the issue of delays on a basis of costs if the parties cannot agree on costs.

enter BCN's lands and partake of their beauty. I do not question the sincerity of what he said, nor do I question the BCN's current approach to non-First Nation persons' accessibility to BCN's lands. From a legal point of view, however, I cannot agree with TLEC's submission that the BCN, as another government, can be trusted to make as appropriate land use decisions as Manitoba would make.

At the moment the BCN has made clear that it views itself as the trustee of the lands and is happy to invite recreational tourists to visit the lands, and that is commendable. But BCN is a local government. It has the right to make decisions in its own best interests, and those are local and not public interests. Nothing would or should stop BCN, once it has the right to treat these portages as Reserve land, from deciding in the future to restrict access to the portages in question either completely or by charging fees.

Manitoba, on the other hand, represents a larger constituency, including those who would use the publicly-navigable river system which the land in question will surround. Thus it would be more reasonable to entrust public access to Manitoba rather than to the BCN.

Even so, as pointed out by TLEC, any public access to portages protected by Manitoba are subject to Manitoba's decisions about the Hayes River in general that might affect those portages. In addition, as TLEC pointed out, Canada also has the duty to act in the interest of a larger public than even Manitoba does, and it has the right of expropriation if there were a compelling public interest.

Could sections 28(2) and 35(1) of the Indian Act *allow for protection if needed?*:

TLEC submitted that sections 28(2) and 35(1) of the *Indian Act* provide a method by which Canada could deal with the protection of portages, if they need protection, after the land is

acquired by BCN. Manitoba submitted that Canada's policies would make that highly unlikely, given that Canada provides for only short-term and not long-term uses.

Opetchesaht Indian Band v. *Canada*, [1997] 2 S.C.R. 119 makes clear that the use of section 28(2) to create an easement should only be done in situations where there is a end point, either by date (short-term) or by the occurrence of a specific event; there cannot be a grant in perpetuity. For an easement that guarantees public access to a portage, it is difficult for me to imagine what specific event could end an easement.

Section 35 provides the ability of Canada to agree to the expropriation of land by a province. There is no guarantee that Canada would ever agree.

TLEC's submission on this point certainly does not provide a guaranteed method by which a public right of access to a portage could be enforced *after* the transfer of Manitoba's lands to Canada under the MFA.

Answers to the questions submitted by the IMC:

My answers to the questions submitted to me by the IMC are as follows:

- 1. Has Manitoba established the existence of "a public right of passage over a portage", which is a Crown Reservation under Article 1.01(21), in the following Selections? a. Site: 15-02 Trout Falls; b. Site: 20-02 Wipanipanis Portage.
    - Yes, there has been a public right of passage over a portage on those two sites.
- 2. If the answer is yes to question 1, is the protection of that "public right of passage over a portage" located in the listed Selections an appropriate basis for determining that that portion of the Selection is not eligible to be set apart as Reserve, except under some form of

access agreement that guarantees the continued "public right of passage over a portage"?

- No, the protection of that public right of passage is not an appropriate basis for determining that that portion of the Selection is not eligible to be set apart as Reserve on any terms, including a form of access agreement.

- 3. Can Manitoba assert an additional consideration (in this case, a "compelling public interest") not expressly contemplated by the terms of the MFA in determining eligibility of a Selection? Specifically, is the MFA subject to consideration and application by Manitoba of a "compelling public interest" in maintaining a "right of public access over a portage" as asserted by Manitoba? a. If so, what is the definition, criteria for determining, and information that must be provided by Manitoba when asserting a "compelling public interest" in these circumstances?

  - No, The MFA is not subject to consideration and application by Manitoba of a compelling public interest in maintaining a right of public access over a portage.

  - In addition, the public interest in maintaining a right of public access over a portage is not a compelling public interest.

  - Although the concept of a "compelling public interest" may be necessary, it is not in and of itself sufficient to allow a matter to be dealt with under subsections 3.01(4) and (5).

  - Under subsections 3.01(4) and (5) to the MFA any issues or circumstances or considerations which will facilitate the selection or acquisition of land by an Entitlement First Nation and which do not appear to have been addressed in the MFA may be raised.

  - Under subsections 3.01(4) and (5) to the MFA any issues or circumstances or considerations which will hinder or delay the selection or acquisition of land by an Entitlement First Nation may be raised only if

    - Such matters are compelling or significant and are in the public interest, *and*

- Such matters were not considered by the parties or were not reasonably foreseeable at the time the MFA was entered into. The burden of proof is on the party raising such matters.

- 4. If the answer is yes to questions 2 or 3, what legal instrument and what content in that legal instrument is appropriate to guarantee the "public right of passage over a portage" after the Selected lands have been set apart as Reserve?

    - The answers to questions 2 and 3 are no. Therefore no legal instrument is appropriate. If the BCN wished to pass a Band Council Resolution providing public access, that might be a gracious thing to do, but it is not required to do so.

- 5. Is the "Honour of the Crown" at risk where additional considerations not expressly contemplated by the MFA (such as the existence of a "compelling public interest" regarding a "public right of passage over a portage) are being asserted by a Party?

    - No, the Honour of the Crown is not at risk in this particular case, subject to any issue as to costs.

The parties agreed that they would discuss the issue of costs. I therefore reserve jurisdiction to resolve any issue concerning costs.

I want to thank the parties for entrusting me with this issue.

DATED this 16th day of April, 2014, in Winnipeg, Manitoba

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