

COMPARATIVE ANALYSIS

COMPARATIVE ANALYSIS OF TLE IMPLEMENTATION IN
MANITOBA AND SASKATCHEWAN
WITH FOCUS ON SOLUTIONS FOR MANITOBA FIRST NATIONS



PREPARED FOR THE SOUTHERN CHIEFS' ORGANIZATION INC.

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MARCH 2005



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1.0 Executive Summary

The results of this comparative analysis of the Treaty Land Entitlement (TLE) Implementation process for Manitoba and Saskatchewan with particular reference to Additions to Reserve (ATR) process indicate that there are significant differences between the provinces. Since each First Nation TLE request has unique circumstances, the amount of time that a TLE request is completed (i.e. the time it takes for land to become Reserve) must be looked at on a case-by-case basis. However, based on the results of the research undertaken in this study, it is evident that the TLE implementation in Saskatchewan, on balance, is much more efficient than the Manitoba process. In a number of cases in Saskatchewan, the TLE implementation process has taken less than two years.

TLE implementation in Saskatchewan is assisted by the following key practices, deemed to be beneficial to expedient implementation:

- Enhanced tax loss compensation triggering greater cooperation by municipalities affected by land selection
- Less punitive interim property tax payment structure that encourages Canada to speed up the process of Reserve creation.
- Streamlined environmental assessment/audit process
- A proactive approach including more prominent government involvement and a commitment to mutual accessibility

In order to facilitate the Manitoba TLE implementation process, the following general recommendations have been identified (section 7.0 provides the recommendations in specific form):

- 1) A lack of mutual understanding between First Nations and municipalities is a significant issue. It is recommended that First Nations pursue a Memorandum of Understanding (MOU) with municipalities.
- 2) There is a lack of clarity surrounding the definition of the term “reasonable” with regard to assessing whether a municipality is sufficiently responding to a First Nation TLE request. It is recommended that clarity be established in order to create a timelier basis upon which First Nations can obtain support when dealing with an unreasonable municipality.
- 3) The disparity between the tax loss compensation given to rural municipalities in Manitoba and Saskatchewan has contributed to a lack of cooperation in TLE implementation. It is recommended that appropriate mechanisms be put in place to ensure more timely cooperation by rural municipalities.
- 4) The fact that First Nations are required to incur annual property taxes on purchased land (fee simple) places an unfair burden on First Nations when

the process is being slowed by the actions and/or inactions by other parties. It is recommended that appropriate mechanisms be put in place to reduce this burden in such circumstances.

- 5) There is a recognized need for greater resources to be placed in environmental assessment and land surveys in the TLE implementation process. It is recommended that the federal and provincial government be pressured to comply with their TLE commitments to provide sufficient resources to implement the process in a timely manner.
- 6) There seems to be a general lack of urgency on behalf of the federal and provincial government to implement their constitutional obligations concerning TLE. It is recommended that creative efforts be undertaken to ensure that both levels of government are held accountable to their respective constitutional obligations.

2.0 Introduction and Background

In Manitoba, several First Nations have Treaty Land Entitlement (TLE) agreements that entitle them to acquire outstanding lands owed to them pursuant to Treaties. A number of other First Nations have TLE claims that are yet to be recognized and validated by the federal government. Unfortunately, lands that are purchased by First Nations on a willing buyer/willing seller basis under their TLE agreements have experienced difficulties in having these lands set aside as Reserve by the federal government.

In responding to these continued difficulties, the Southern Chiefs' Organization (SCO) Inc. passed Resolution #19 at its Chiefs-in-Summit meeting in Waywayseecappo First Nation on September 30th, 2004. Resolution #19 states:

“that the Southern Chiefs-in-Summit direct SCO Grand Chief to research the options and opportunities for First Nations communities, either individually and/or collectively, to speed up the process of getting land bought and transferred to reserve status so as to benefit the communities now and for future generations.”

As one action item under this direction, SCO contracted Paskanake Project Management (PPM) to undertake a comparative analysis with respect to the TLE implementation process in Manitoba and Saskatchewan with particular attention to the application of the Additions to Reserve (ATR) framework process in both provinces. Although the ATR framework is based on a federal policy, different INAC regions can have slightly different requirements and procedures within ATR application. The comparison is intended to identify best practices of both the Saskatchewan and Manitoba processes in order to identify best practices and improve the process as it occurs in Manitoba.

An overall issue for Manitoba TLE First Nations regarding the selection and conversion of reserve land has been the length of time the process has taken. The consequences are seen to be significant as plans for economic development and community enhancement can be held up considerably. It is clear that each case has unique characteristics and results in different stages at which problems may occur. Therefore the focus of this report is to highlight those areas the particular stages in the process where there is greatest potential for a delay. In essence, such stages in the TLE process can be seen as presenting a higher risk of incurring delays than other stages, even though such problems may not occur in every situation. Where there is an apparent difference between Manitoba and Saskatchewan that may lessen a “higher risk” stage, it will be highlighted.

2.1 Methodology

Information used in this report was collected through an analysis of relevant policies, framework agreements, and existing relevant reports and documents. Where a series of information is drawn directly from one particular source, that source is noted. Finally, information was collected through telephone interview discussions with representatives of various key stakeholders. Represented in these interviews are:

- Indian and Northern Affairs Canada, Saskatchewan Region
- Indian and Northern Affairs Canada, Manitoba Region
- Manitoba Lands and Resources
- Saskatchewan Director of Lands
- Manitoba Treaty Land Entitlement Committee (TLEC)
- Manitoba Director of Lands
- Deputy Minister's Office, Manitoba Aboriginal and Northern Affairs
- Manitoba Conservation
- Manitoba TLE Framework Agreement holders: Rolling River First Nation, Buffalo Point First Nation, and Brokenhead First Nation
- Independent TLE claim holders: Long Plain First Nation, Roseau River First Nation, and Swan Lake First Nation¹
- Manitoba Hydro

3.0 Overview of Additions to Reserves (ATR)

The federal government's Additions to Reserve (ATR) policy identifies the circumstances under which land may be granted Reserve status and sets out the steps to be followed by the Government of Canada in assessing a First Nation's request.

Main criteria for land to be granted reserve status are:²

1. There are no important environmental concerns;
2. Reasonable attempts have been made to address concerns of municipal or provincial governments;
3. Funding needed by INAC has been obtained
4. Third party interests are addressed; and
5. Provisions for assuring necessary public access to the land and public utilities have been agreed upon.

Each ATR proposal is considered individually. Generally, the process, as outlined in the federal Additions to Reserves Framework Agreement, involves several main steps.³

Step 1: A First Nation submits a Band Council Resolution (BCR), which includes a formal proposal seeking the addition to Reserve or new Reserve. Pieces of information that must go with the BCR are, for example, a community plan showing the demographic need for the land addition and evidence that the cost of any proposed development can be met within the First Nation's existing regional budget allocation.

Step 2: INAC staff will inform the First Nation of all documentation that will be required. Together, INAC and the First Nation will determine their respective roles and responsibilities within the process.

Step 3: The First Nation must then contact the province, the municipality or other federal government departments/agencies to resolve any areas of concern.

Step 4: The regional ATR Committee then reviews the proposal to make sure that the requirements of the ATR policy have been met and will then recommend the proposal to the Regional Director General (RDG).

Step 5: The RDG (or the Deputy Minister of INAC) will either grant an Agreement in Principle (AIP) or reject the proposal. The proposal can be accepted with conditions, and any conditions attached must be satisfied before the proposal can move to the next step. The First Nation will be advised by letter if the proposal has been approved and whether there are any conditions.

Step 6: After the conditions have been met, the process of acquiring the land can begin. Regional INAC staff prepare the Order in Council (OIC) recommendation requesting that the lands be granted Reserve status

The ATR process, as laid out in the federal Framework Agreement outlined above requires a partnership between the Government of Canada (mainly INAC), the Government of Manitoba, the First Nation, the Municipality, and any other existing parties that have an interest in the selected land (“third parties”).

4.0 Overview of Treaty Land Entitlement (TLE)

Treaty Land Entitlement (TLE) claims are claims First Nations make in an effort to acquire land promised to them in Treaties. Although the federal Additions to Reserves (ATR) Framework Agreement sets out a step-by-step process for converting land to Reserve, First Nations in Saskatchewan and Manitoba each have a unique framework agreement outlining how the federal policy will be implemented.

First Nations in Manitoba and Saskatchewan each have separate TLE Framework Agreements in place. In Saskatchewan, 26 First Nations signed a TLE Framework Agreement in September 1992. Four other Saskatchewan First Nations signed independent TLE agreements after 1992. In Manitoba, 19 First Nations signed a TLE Framework Agreement in May 1997. Seven other Manitoba First Nations signed independent TLE agreements before 1997.

First Nations in either province that hold an independent TLE agreement are not bound by the specific process outlined in the shared TLEFAs. Therefore, emphasis in this cross-provincial analysis is on the larger, more universal agreement within each province. However, the independent land entitlement agreements still address common issues (for example, addressing third party interests). Therefore, many of the issues faced by independent agreement holders are similar to issues faced by TLEFA holders.

Appendix A shows the specific obligations for EFNs as laid out in each province's TLEFA.

4.1 Manitoba⁴

On May 29, 1997, nineteen (19) First Nations, Canada and Manitoba signed the Manitoba Treaty Land Entitlement Framework Agreement (MTLEFA). The agreement provides land to the 19 First Nations, fulfilling a long-standing commitment arising from treaties signed by Canada and the First Nations between 1871 and 1910.

Under the Framework Agreement, about 450,000 hectares of land will be given to the 19 First Nations and converted to Reserves to make up for shortfalls that occurred at the time the Reserves were created. The Province of Manitoba will provide these First Nations with about 400,000 hectares of Crown land. For those First Nations who do not have a sufficient amount of Crown land in their vicinity for transfer to the First Nation's Reserve, Canada will contribute \$76 million, partly for the purchase of up to 46,444 hectares of land from private owners.

Any time a First Nation buys land from a private landowner, it must be done in a willing buyer/willing seller capacity. In addition, each of the 19 First Nation communities must engage in a community approval process that will ratify their Treaty Land Entitlement Agreement (TLEA). The Framework Agreement settles the land debt that is owed to these 19 First Nations because they did not receive all the land to which they were entitled under Treaties 1, 2, 3, 4, 5, 6 and 10.

In 1930, through the Manitoba *Natural Resources Transfer Act* (MNRTA), all Crown lands were transferred to Manitoba from Canada under the legal requirement that the province provide unoccupied Crown lands to Canada when it is needed in order to help in meeting Canada's obligations under the treaties with First Nations.⁵ This act, now part of the Canadian Constitution, helped to initiate the Province of Manitoba's involvement in the TLE process.

4.2 Saskatchewan

In September 1992, after lengthy negotiations regarding obligations not met under Treaties 4 (1874), 6 (1876) and 10 (1906) to set aside land as Reserves, the *Saskatchewan Treaty Land Entitlement Framework Agreement* was signed by the Province of Saskatchewan, Canada and 26 First Nations.

Some First Nation land claims have been outstanding dating back to 1874 when Treaty No. Four was initially signed. Seven of the 26 Entitlement Bands are adherents to Treaty No. Four, 17 are signatories to Treaty No. Six (signed in 1876), while the remaining two Entitlement Bands are adherents to Treaty No. Ten (signed in 1906).

Similarly to the Manitoba experience, the Province of Saskatchewan's involvement in the TLE process arises from the 1930 *Natural Resources Transfer Act* (NRTA), under which Canada transferred most federal Crown land and minerals in the province to Saskatchewan in return for the latter's commitment to make unoccupied Crown lands available to be set aside as Reserves in fulfillment of Canada's treaty obligations.

5.0 Overview of ATR/TLE Process in Manitoba

Since the process of acquiring and converting land to reserve within any region is based generally on the federal ATR policy, most of the steps in the process actually represent ways of implementing the federal framework. Following is an overview of the TLE implementation process with a focus on the Manitoba Treaty Land Entitlement Framework Agreement (MTLEFA) process.

5.1 Selection and Acquisition of Land

An Entitlement First Nation (EFN) can select Crown land under several laid out guidelines (Section 3.02 to 3.10). The land selected can be part of that EFN's treaty area or traditional territory in Manitoba. The EFN can select land outside its treaty area or traditional territory where they can establish a reasonable social or economic development objective for the land selection, and where Manitoba agrees with the selection. Agreement from the province cannot reasonably be withheld. What is or is not "reasonable" is not specifically defined.

Manitoba EFNs each get an amount of the TLE settlement fund. Each EFN has access to a portion of the fund that corresponds to the size of their land shortfall. An EFN can only access these funds for the purpose of acquiring land amounts equal to the shortfall. After the EFN has acquired and converted all shortfall amounts to Reserve, the EFN can then use the remaining funds with more flexibility. The remaining funds can be transferred into a "Capital Fund", which can be used at the discretion of the EFN to invest in social or economic development.

Generally, an EFN must select an area of land greater than 1,000 acres. If the land selected is in reasonable proximity to a Reserve already held by that EFN, however, a smaller amount of land can be selected. The EFN is also required to provide to Manitoba a written statement giving the reasons for selecting a parcel of land smaller than 1,000 acres.

The EFN is required to begin a Community Approval Process, which includes a vote within the EFN community to determine whether the community approves of seeking an Addition to Reserve. The Community Approval Process, if the community decides to go ahead, will result in a Band Council Resolution (BCR). Also, the EFN must ensure that a Land Selection Study is performed.⁶ The EFN then submits the Band Council Resolution (BCR) to Indian and Northern Affairs Canada (INAC), and INAC has 45 to 60 days to provide a written reply to Manitoba and the EFN.

Once INAC and Manitoba confirm that the land selected is eligible to be set apart as Reserve, Manitoba will provide the EFN with a Crown Land Use permit. This permit grants the EFN exclusive right to occupy and use the land. This permit

remains in effect until Manitoba has completed the process of transferring the land to Canada.⁷

Once Canada has taken administration and control of the land from Manitoba, the permit terminates and Canada will issue to the EFN a license to occupy the land on the same terms that were laid out in the permit. This license remains in effect until the land is set aside as Reserve.

If the land to be acquired is privately owned, the EFN must purchase the land on a “willing seller – willing buyer” basis. In some ways, the owner of the land to be acquired is functionally treated as a third party.

5.2 Resolving Third Party Interests

One or more third party interests may encumber some of the land selected by an EFN. Before land can be transferred from Manitoba to Canada, all third party interests must be resolved to the satisfaction of Canada, Manitoba, the EFN, and the third party.

The main ways in which third party Interests may be resolved are:

- The EFN buys the interest;
- The third party consents to the cancellation of the interest;
- The third party maintains the interest until it expires;
- The interest is replaced with another interest by Canada;
- If the third party is not using the land for the purpose intended in any license or permit from Manitoba, the license or permit may be cancelled or not renewed;
- Third party interests can be resolved in any other way if agreed upon by the EFN, Manitoba, Canada, and the third party.

If mines or minerals exist within the land and the land selected is Crown land, the mine and mineral interests will be transferred to the EFN. If the mine and mineral interests are owned privately, then the interest must either be bought or a replacement interest must be given to the interest holder by Canada. The third party may also maintain the mine and mineral interest as long as surface access can be negotiated between the third party and the EFN.

Land physically required by Manitoba Hydro is not eligible to be selected unless Manitoba Hydro agrees. Any land under license to Manitoba Hydro but that is not physically required by Hydro is eligible to be selected.⁸ In these cases, the land not physically required by Manitoba Hydro will be removed from the area under license and be available for selection. The EFN can work with Manitoba Hydro toward an agreement regarding the provision of hydro service to the First

Nation as well as surface access that may be required by Manitoba Hydro if lines or water projects exist on the selected land.

Land that is typically excluded from a land selection includes provincial and municipal roads and highways, ferry landings, and airports operated by Manitoba. In some cases, the Manitoba Department of Highways and Transportation has agreed to give up land that has been set aside for potential road widening when widening that road in the future is very unlikely.

5.3 Negotiating Municipal Service Agreements

If the EFN will require services provided by the municipality, it must negotiate with the municipality a deal regarding the provision of municipal services to the reserve community. If the municipality has the ability to provide the services to the Reserve, the Reserve can negotiate to purchase service on an ongoing basis. There are many possible service arrangements, from the EFN paying the municipality for service, to a mutual exchange of services. Many different types of arrangements have been negotiated and agreed upon.

The ATR Policy suggests that a municipality may be concerned about:⁹

- How to compensate for its loss in taxation revenue after the land is set apart as Reserve (tax loss may include the loss of property taxes, loss of grants in lieu of taxes from senior government agencies, and loss of license and permit fees which will no longer be collected by the municipality on the new Reserve lands);
- Arrangements for the provision of municipal services
- By-law application and enforcement on the Reserve; and
- Meeting with the First Nation about mutual concerns, like land use planning, and a dispute resolution process, where possible (Additions to Reserves Policy, s. 9.3.2.2, para.1).

The ATR Policy stipulates that the municipality must address any reasonable concerns with respect to these issues. The process of developing a written agreement between a municipality and the Entitlement First Nation may begin with either the municipality or the First Nation approaching the other. The ATR policy provides that if municipality asks the EFN to enter into a service agreement and an agreement is not concluded, a Reserve will normally not be established.

In Manitoba, there is a *Manual for Municipal Development and Service Agreements*, which has been provided by Manitoba Aboriginal and Northern Affairs. This manual clarifies the roles of the EFN and the municipality in this process. The manual also recommends and describes actions that may improve the negotiation process, like:

- Developing and nurturing a good-neighbour relationship;
- Emphasizing the importance of the municipality learning about Aboriginal ways;
- General outlining of what will be required of both parties in order to prepare, and;
- Clarifying the resources available to both parties for clarification and support.

5.4 Tax Loss Compensation for Affected Municipalities

When a municipality's taxation revenue has been decreased by the creation of a new Reserve under the Manitoba Treaty Land Entitlement Framework Agreement, the municipality may apply to the Province of Manitoba for funding support and it must demonstrate the amount of tax loss that will be incurred. Compensation will be paid by the province to those municipalities that demonstrate a net loss in municipal tax revenues as a result of conversion of land to Reserve status.

According to the Manual for Municipal Development and Service Agreements, Municipalities in Manitoba are eligible for tax loss compensation if they meet the following conditions: ¹⁰

1. TLE sites have converted to Reserve;
2. TLE sites were converted as part of the Manitoba Treaty Land Entitlement Framework Agreement;
3. TLE sites are situated within municipal boundaries;
4. TLE sites were subject to municipal property tax or grant-in-lieu prior to Reserve status;
5. A net loss in municipal tax revenue has occurred as a result of transfer to Reserve status.

A net loss in municipal tax revenue is said to occur when fees and charges payable by a First Nation as part of a service agreement do not completely offset the annual municipal taxes that would normally have been collected on a property. The amount of compensation given in Manitoba is equivalent to five times (5x) the annual net tax loss at the time of conversion. The amount of tax revenue deemed to be "annual" is equivalent to the annual taxation revenue collected by the municipality in the year immediately preceding the acquisition and conversion of the land. In the case of independent Land Entitlement agreement holders, the money to compensate municipalities for tax loss has been given to the First Nations as part of the initial settlement fund.

5.5 Payment of Interim Property Tax

In Manitoba, once an EFN purchases Entitlement land, it is obligated to pay the property taxes on that land to the municipality until the negotiations with the municipality are complete. Once there is a Provision of Services Agreement in place as well as a general agreement between the municipality and the EFN, the terms of that agreement take effect and the EFN no longer has to pay property taxes. This is usually when the municipality applies for tax loss compensation from the Province of Manitoba (or received compensation from the EFN, where the EFN is an independent agreement holder).

5.6 Environmental Assessment and Land Survey

The federal ATR policy stipulates that there must be an environmental impact assessment completed before land can be transferred to Reserve status. In addition, the land must be surveyed in order to confirm boundaries. The survey can be a time consuming process, especially since boundaries to selected land are generally not straight lines, and often go through difficult landscape that may be hard to access.

The environmental assessment process can also be time consuming. Assessments are subject, for example, to seasonal limitations as well as the availability of qualified assessors. Further, the federal ATR policy requires that environmental impact assessments be repeated after two years (after two years the results of an assessment are seen to be “stale dated”). In many cases, selected land has not been transferred to Reserve within two years, and assessments occur several times throughout the process. In Manitoba, there has recently been consideration for allowing the assessor to suggest a reasonable stale-date time period based on the characteristics of that particular piece of land. Alternatively, there has been discussion about whether the universal stale-date time period could be extended. At the present time, however, it is likely that an environmental impact assessment will be done more than once within the process of each claim.

5.7 Involvement and Action Required of the Key Parties

The successful enactment of the Manitoba Treaty Land Entitlement Framework Agreement, as mentioned earlier, requires a partnership relationship between Canada, Manitoba, First Nations, affected municipalities, and affected third party interest holders. Of primary importance is the co-work between Canada, Manitoba and the First Nations, because those groups are signatory to the MTLEFA and define the process; municipalities and third parties are “invited” into the process where appropriate by the three TLE signatory parties. In Manitoba, an additional party is the Treaty Land Entitlement Committee (TLEC), established

to help the process along and to represent EFNs. Following is an outline of the main ongoing undertakings and commitments of these main parties within the TLE process in Manitoba. In each case, the MTLEFA states that not only are these undertakings required by the parties, but that the undertakings will be done in timely, expedient fashion.

Treaty Land Entitlement Committee (TLEC) of Manitoba

First Nations that have outstanding TLE in Manitoba established the Manitoba Treaty Land Entitlement Committee (MTLEC) in 1977. The main role of the MTLEC is to work toward the settlement of the TLE issue in Manitoba. The MTLEC has several central commitments within the process, all of which are directed at supporting the EFNs in enacting the process. MTLEC must provide technical assistance to any EFN with regard to undertaking a Community Approval Process,¹¹ selecting land, establishing a local system of implementation for the TLE process, and/or resolving disputes.¹²

In addition, MTLEC oversees and facilitates the management of related financial procedures and expenditure of appropriate funds administered under the MTLEFA. Finally, MTLEFA specifies that MTLEC should emphasize communication with Canada and Manitoba.

Government of Canada

The federal government (typically through Indian and Northern Affairs Canada) undertakes the necessary environmental assessments and land surveys. Canada also executes Orders in Council (OIC) and ministerial approvals required to accept the administration and control of Manitoba lands in order to set them aside as Reserves. Finally, MTLEFA specifies that Canada should emphasize communication and a productive working relationship between itself, Manitoba, MTLEC, and First Nations.

Government of Manitoba

The MTLEFA specifies that the Government of Manitoba must expedite in a “timely manner” the preparation of any OIC’s and Ministerial Approvals required for resolution of third party Interests or the transfer of administration and control of relevant lands to Canada. Manitoba is also responsible for assisting the EFN and the affected municipalities in negotiating issues relating to municipal services and development. As is the case for TLEC and Canada, the Framework Agreement stipulates that Manitoba foster a productive working relationship and good communication between itself, Canada, MTLEC, and First Nations.

Entitlement First Nation

Responsibilities of the EFN within the process include

1. Physically inspecting the land to be selected;
2. Acquiring the land (through the process described earlier in this report);
3. Identifying and resolving third party Interests;
4. Negotiating a Municipal Development and Services Agreement with affected municipalities;
5. Establishing and maintaining a working relationship with the appropriate personnel of Canada and Manitoba;
6. Participating in dispute resolution where appropriate.

Overall, the TLE process, as laid out in the Manitoba TLE Framework Agreement, is based on the action of the EFN and the appropriate response by federal and provincial government authorities at each stage of the process.

6.0 Overview of the Process in Saskatchewan

As is the case in Manitoba, the STLEFA is, in functional terms, a method for applying the federal Additions to Reserves (ATR) policy.

6.1 Selection and Acquisition of Land

The Saskatchewan Treaty Land Entitlement Framework Agreement (STLEFA) specifies a total settlement amount (Entitlement Fund) of \$446 million to be used by EFNs for purchasing land and implementing the TLE Additions to Reserves policy. It is important to note that the relatively large settlement amount given in Saskatchewan compared to that in Manitoba results from the fact that in Saskatchewan, EFNs must purchase Crown land; in Manitoba, EFNs do not have to buy Crown lands when they select it. Moreover, in Saskatchewan, only about half of reserve lands were originally Crown lands. This may result from the fact that Saskatchewan EFNs must buy their land regardless of whether it is Crown land; in that case there is no benefit to necessarily selecting Crown land over privately owned land.

EFNs are specified to receive their respective portions of this fund over a 12-year period (commencing at the signing of the STLEFA in 1992). In addition, EFNs in Saskatchewan were encouraged to work to achieve their shortfall land amount within this 12-year period. To date (12 years after the signing of the agreement), 16 original TLE agreement holders in Saskatchewan have achieved this.

As is the case in Manitoba, EFNs must use their allotment of the funds to purchase and convert at least the amount of land equaling their shortfall. After the shortfall acres have been acquired and converted, the EFN gains more flexibility regarding how it can use its remaining settlement funds.

An EFN must purchase Crown land under a “willing seller/willing buyer” basis. If Canada and Saskatchewan agree to sell the selected land to the EFN, then there is an 18-month period where the land is available to the EFN to purchase. During this period, Canada and/or Saskatchewan cannot grant any third party interests to the land without the consent of the EFN. Public utility easements are excluded from this (see third party interests below for how such interests are addressed in Saskatchewan).

Land is purchased at fair market value. The STLEFA stipulates that if the two parties cannot agree on a price, the value will be determined by an independent appraisal, the cost of which is borne by each party equally (Canada and the EFN). The market value of the land, as determined by the independent appraiser, is then binding. Also, the purchase transaction must be concluded within 60 days of the appraisal’s completion. If the EFN then decides not to buy the land, it must pay bear the full cost of the appraisal.

Once the land has been purchased by the EFN, but is still awaiting conversion to reserve, the EFN must pay the property taxes for the land. However, if the conversion to Reserve has not completed within 75 days, the Federal government will take over payment of the property taxes and will continue paying until the land has been converted. This policy likely helps to motivate Canada toward expedient conversion to Reserve.

Environmental assessments must be done every two years until the land is converted to Reserve (this is a federal requirement – an ATR policy). In Saskatchewan, however, there has been a greater tendency to focus on the question of whether something on the land has changed. For example, if it was wheat field in the previous assessment, and it still is, likely nothing has changed. In these cases, the second and subsequent required assessments may be done without actually going out to the site. This speeds the process considerably, especially considering that it reduces the weather/seasonal concerns about going to the site to do an assessment that can cause delays.

6.2 Third Party Interests

As is the case in Manitoba, when mineral interest or a mine exist on Crown land that is selected by an EFN as part of its shortfall land amount, Saskatchewan and Canada will transfer all Crown owned minerals underlying land purchased by the Bands. This resource will be transferred to the EFN without compensation.

Section 5.08 of the SFLEFA marked an important improvement toward the rapid Entitlement Reserve creation in Saskatchewan.¹³ In this section it is stated that Saskatchewan will assist Canada and the EFN in promptly obtaining clear title to land in return for an agreement on the part of Canada to collect provincial mineral revenues on behalf of the province.

If the mineral interest is owned privately, the issue can be resolved in similar fashion to that in Manitoba:

- The interest can be bought by the EFN;
- Canada can provide a replacement interest to the third party;
- The third party can consent to the cancellation of the interest;
- The third party may maintain the interest until it expires;
- The issue can be worked out in any other way provided the EFN, the third party, Canada, and Manitoba agree.

The STLEFA notes that if such underground interests are to remain under the ownership of a third party, the land will not be converted to Reserve status until the EFN has consented to an agreement that includes surface access to the third party.

If the EFN acquires land adjacent to or including water that is being used for any water project (utility or otherwise) in Saskatchewan, the EFN will have full common law rights with respect to the use and occupation of land along the water, as well as use of the water. Future water projects planned by Saskatchewan involving that body of water can still be implemented as long as the EFN is given at least six months advance notice and have been actively included in the decision-making process pertaining to the project.

If an EFN feels that a water project might have a negative effect, it can work with Canada and/or Saskatchewan to conduct an environmental impact assessment to identify any potential detrimental effects of the project. There is no provision in STLEFA that prevents an EFN from receiving monetary compensation for any damage caused by the water after the water project is complete.

If any specific provisions in the STLEFA regarding the use of water conflict with any Treaty rights, the Treaty rights take priority and the STLEFA provisions become void.

Currently, Saskatchewan is working toward developing legislation that would universally address some of the “gray area” regarding surface access to reach underground resources, as well as other land access issues. They are inviting Manitoba and Alberta to join and work toward a federal policy that will fill in some of the less specific areas in ATR application in these areas.

6.3 Negotiating Municipal Service Agreements

The STLEFA has a specific clause stating that a municipality does not have the power to veto the Reserve creation process by simply refusing to negotiate or stalling the process. The STLEFA states that if a provision of services agreement is not made between the municipality and the EFN within five months after a request from the EFN, Canada can set the Entitlement Land apart as a Reserve. This can occur where it has been determined through arbitration that the EFN is prepared to enter into a reasonable and adequate agreement with the municipality and has made efforts to do so. This applies to urban as well as rural and northern municipalities.

EFNs in Saskatchewan can negotiate with the affected municipality any agreement regarding exchange of services. This may involve payment by the EFN for municipal services, or it may involve an exchange of services. Any arrangement can be implemented as long as both parties agree, and Canada and Manitoba concur.

Closer government involvement may also allow for a better identification of when a municipality is stalling the process. Typically in Manitoba, INAC or the province

will step in when there is an identified problem in the process (for example, the municipality is identified as being “unreasonable” in its negotiations with the First Nation). The relatively sudden entrance of a new authority into the process can have a detrimental effect on the progress that is being made by the groups. In the Saskatchewan experience, earlier government involvement in the process is seen as a positive proactive measure addressing the potential for disagreement rather than a reactive approach.

In Saskatchewan, there is a regulated emphasis on having the First Nation and municipality consult through the provincial government, at least at the start. Typically, the municipality sends a letter stating their concerns about converting the land, and then the band replies and addresses those concerns. This is done through the provincial government in Saskatchewan – the government requires these letters. Often, an exchange of letters is enough to settle the negotiations between the groups. In Manitoba, the main requirement of the province is a letter from the EFN indicating that negotiations have begun. Beyond this, the EFN must contact the municipality to begin the discussion.

One of the main factors that have an impact on the discussions between the EFN and the affected municipality is that in many cases, the EFN does not have the resources needed to maintain the technical expertise required to optimally apply the Framework Agreement. At the same time, rural municipalities often also do not have an abundance of resources that can be committed.

In Manitoba, bands often do not have the resources to retain a project manager, and the work falls to an existing land manager within the band. This strains the person to find time to do all the necessary work along with their pre-existing job requirements.

In Saskatchewan, a government representative (from INAC Saskatchewan Region) is assigned to First Nations within this process. Typically, each representative serves about five First Nations. This person keeps the First Nation informed about where things are at with the process, and also keeps INAC and other relevant government agencies/departments informed of where things are with the First Nation. There is also a file manager that helps clarify requirements and maintain the overall files for each ongoing process. This is intended to help provide some of the technical organization to the project and to share some of the technical obligations of the First Nation and the municipality within this process.

6.4 Tax Loss Compensation for Affected Municipalities

Two separate tax loss funds have been created in Saskatchewan. For rural municipalities (RMs), within 90 days of the conversion of the selected land to Reserve, Canada and Saskatchewan pay to the municipality an amount totaling the equivalent of 90% of 25 times the municipal taxes that had been levied on the taxable land in the previous calendar year. The maximum payable to a municipality is \$25 million. The main purpose of this is so that the municipality can maintain its services, most notably road maintenance.

A second tax loss compensation fund in Saskatchewan addresses losses incurred in school taxes. Canada and Saskatchewan will pay an amount equivalent to 70% of 25 times the school taxes that had been levied in the previous calendar year (Canada pays 70% and Saskatchewan pays 30%). As is the case for property taxes, the maximum payable to a municipality is \$25 million. The Province of Saskatchewan administers this fund.

In the case of urban municipalities, tax compensation is equivalent to what the municipality has always been getting through tax from the land. The intent is that municipalities have no real fiscal reasons to stall or refuse the conversion of Entitlement Land.

6.5 Payment of Interim Property Taxes

In Saskatchewan, once the EFN has purchased Entitlement land, it is obligated to pay to the municipality the property taxes on that land. However, the EFN is only required to pay the property taxes for a maximum of 75 days after the initiation of the conversion to Reserve process. In this regard, the initiation of the conversion process is defined as occurring when:

1. The Entitlement land has been deemed eligible to be transferred from Manitoba to Canada;
2. The EFN has requested in writing that the land be transferred to and accepted by Canada;
3. Canada has received all documents, in registerable form, that are necessary to affect the transfer of the land to Canada.

Typically, these criteria are met fairly soon after the EFN purchases the land. Therefore the EFN usually pays property taxes for 75 days or less. After this date, Canada is obligated to pay property taxes to the municipality from day 76 onward. This provides an incentive for the EFN to submit the necessary documents, and also an incentive for Canada to quickly complete the transfer of the land. For the municipality, there is no loss in tax revenue for this time period, and the relatively large tax loss compensation offered to rural municipalities in

Saskatchewan (detailed in the previous section) provides incentive for an expedient negotiation regarding a service provision agreement with the EFN.

6.6 Expedient Transfer of Selected Land to Canada

Section 5.08 of the STLEFA has been highlighted as being instrumental in creating incentive for all parties to expediently transform selected land from Saskatchewan to Canada. This section stipulates that when an EFN chooses to purchase mineral interests that exist on selected land, they can pay for the interest with future revenue generated from those interests.

A specified agreement between Saskatchewan and Canada helps to speed the transfer of the land to Canada. Where applicable, Canada will find and offer a replacement interest to any existing interest holder. If that interest holder agrees to surrender the existing interests for a replacement interest, Saskatchewan will expediently transfer the interest, unencumbered, to Canada. In exchange, Canada will pay to Saskatchewan an amount equivalent to the revenue that Saskatchewan would receive from the interest if it had never been transferred to Canada in the first place.

Because Saskatchewan therefore does not lose revenue generated from the interest, and because Canada hereby collects the revenue generated for the province, there is some incentive for Saskatchewan to speed the transfer of the mineral interest to Canada.

6.7 Involvement and Action Required of the Key Parties

Settlement Board

In Saskatchewan, a Settlement Board has been established (the establishment of which is stipulated in the STLEFA) to help facilitate the implementation of the Framework Agreement. This board is intended to be an informal, non-binding forum. The intention of this board is to be proactive by encouraging and facilitating innovative and practical solutions to problems before they become disputes. Any parties negotiating an agreement regarding any stage of the STLEFA process may use this service.

Saskatchewan also has established (again, as specified in the Framework Agreement) an Arbitration Board. This board is chaired by an independent person, and mediates binding agreements between negotiating parties where necessary.

Canada's Roles and Responsibilities

According to the STLEFA, Canada is responsible to perform or cause to perform all surveys and assessments required. Canada's stipulated role includes providing personnel to help resolve disputes that may occur between parties throughout the process. It is stipulated that Canada must facilitate good communication between itself and the other involved parties.

Saskatchewan's Roles and Responsibilities

It is stipulated that Saskatchewan must provide all information regarding all third party interests relating to the selected land to the EFN. It is stipulated that Saskatchewan must also provide personnel to assist in resolving disputes that may occur between parties throughout the process.

Entitlement First Nation's Roles and Responsibilities

In the STLEFA, the obligations of the EFN relate greatly to the expedient transfer of necessary information to Canada, Saskatchewan, and any other party. It is also stipulated that the EFN work to acquire their shortfall acres as soon as possible, ideally within the 12 years after the execution of this Agreement in 1992. In the STLEFA, there is much less focus on the EFN's obligation to negotiate the municipal service agreement, physically inspect the land to be selected, identify and resolve third party interests, and so on. The STLEFA stipulates that the EFN provide necessary information about these things to Canada and Saskatchewan, but there is less emphasis on the EFN doing these things autonomously. Included is the stipulation that the EFN must respond to "reasonable" requests for detailed information about these things to Canada and Saskatchewan.

Overall, the STLEFA stipulates the responsibilities of each main interest group, but there is slightly less emphasis on the need for the EFN to do each step autonomously. This indicates an emphasis on sharing responsibility throughout the process.

7.0 Issues and Recommendations

A main overall issue for TLE First Nations in Manitoba regarding the selection and conversion of land to reserve is the length of time the process takes. Plans for economic development and community improvement can be held up considerable. At the same time, however, it must be understood that making blanket assessments and comparisons of how long the process takes can lead to inaccurate conclusions.

Within each case there are unique characteristics. Different parts of the process need addressing in each case (for example, there may be a third party interest, or there may not; land may or may not need to be purchased by the EFN). In addition, the personal ideologies of individuals involved vary considerably from case to case (for example, different municipalities will have different views of First Nations and vice versa).

Therefore, the focus here is to highlight areas in the process where there is greatest potential for a delay or hindrance, even though in each case, not all of these areas will present problems. Where there is an apparent difference between Saskatchewan and Manitoba that is likely to affect the potential for delays at any given stage, it is noted.

7.1 Dealing with Municipalities

Education and Awareness

There can be serious misunderstandings between First Nations and municipalities about each other's needs, wants, and methods. In some cases, the municipality has an uninformed view of First Nations and specifically their right to Reserve land. That is, there can be a lack of knowledge regarding the basis for the land claim, and this can set the stage for a more difficult negotiation process.

A lack of knowledge between the First Nation and the municipality is one of the key causes of lengthy negotiations between the two groups. It is possible in some cases that parties bringing information to each group may not be in contact with one another, and information given to the First Nation or municipality may conflict. If each group gets slightly different information about an aspect of the process, the negotiation process may be lengthened.

Recognizing that fundamental views held by each group about the other will not change significantly over the next 10 to 15 years, gaining a greater awareness of each other's ways and methods as well as the historical and legal importance of the TLE process should be a goal for First Nations and municipalities. Since

specific problems and delays vary from case to case, this should be emphasized during the process as well as beforehand.

One area of important misunderstanding is regarding how First Nation will pay for services as negotiated in the service provision agreement. In some cases, municipalities have inaccurate expectations that the First Nation will receive outside funds to pay for the services. This is not the case in either province.

Another issue is that municipalities are often not informed about the impact of having a Reserve near them. There is rarely a focus on emphasizing what life will be like after the selected land has been converted to Reserve. Discussing this may help to put some emphasis on the future relationship between the parties as well as create a greater understanding of the real impact of having a Reserve nearby.

Where the municipality has been relatively well informed about the process and its importance, it has often been very accommodating. In a lot of these cases, First Nations have had to assume the role of 'educator' with respect to the importance of and reasons for TLE land claims. Some First Nations have felt that this "teaching" was left entirely to them with little government involvement. Having more government involvement in the educating process is likely to help in situations where the municipality may be less open to learning from the First Nation. At the same time, specific reasons for why existing "bureaucratic" procedures exist should be given to the municipalities as well as to First Nations, who have often had less experience with such processes than municipalities have.

It has been suggested that all parties can work to go a little further than what the written word requires. Any group can be unreasonable. Increased communication between groups as well as more informal communication can encourage this.

Some First Nations feel that the municipality has "too much say" in the process. Awareness about the process and the roles and authority of the First Nation and the municipality would help each group understand the specific authority they do and do not have. In Saskatchewan, the STLEFA has an actual clause addressing the fact that in no case does a municipality have "veto" power when choosing not to negotiate or consent to the conversion of land. There, if the EFN has made "reasonable" efforts to negotiate a services agreement with a municipality that does not respond, the land may be converted to reserve. In Manitoba, land will typically not be converted until an agreement has been made.

Municipal Tax Loss Compensation

In Manitoba, rural municipalities incur greater burden in terms of tax loss than their counterparts in Saskatchewan. In Manitoba, the tax loss compensation paid to rural municipalities (RMs) is equal to five times the annual tax loss on the selected land. This compensation is paid entirely by the province. In Saskatchewan, both the federal and provincial governments pay the tax loss compensation, with the federal government paying 70% and the Government of Saskatchewan paying 30%. In Saskatchewan, tax loss compensation for RMs is 90% of 25 times the annual property tax loss and 70% of 25 times the annual school tax loss. In absolute terms, the 70% paid by Canada is equal to 15.75 times annual loss in property taxes and 12.25 times annual loss in school taxes. Even if the federal government were to pay that amount to RMs in Manitoba, the compensation would be enough to provide serious incentive for municipalities to expediently work toward the conversion of selected Entitlement land.

Most Manitoba RMs are aware that their Saskatchewan counterparts receive much larger tax loss compensation. This is likely to affect municipalities' willingness to go ahead as well as the priority it places on the process. Therefore, given its impact, this is an issue that needs to be addressed head-on. Since each province bases its compensation amount on what is deemed to be fair or appropriate, it would be helpful to work toward a full and more universal definition of what is indeed fair and appropriate.

Determining When a Municipality is Being Unreasonable

In the federal ATR policy, as well as in the framework agreements in each province, an important point in TLE implementation process is determining whether a municipality is being 'reasonable' in responding to the TLE claim by the First Nation. In Manitoba, the federal and provincial governments typically do not become involved until a municipality is deemed to be 'unreasonable' in its contact and response to the EFN. However, the term "reasonable" is not clearly defined. In many instances, a municipality may be very slow to respond but yet not be deemed unreasonable even though the First Nation may believe otherwise. Since the tax loss compensation for RMs in Manitoba is very small relative to that in Saskatchewan, the likelihood of this becoming an issue is greater in Manitoba.

Therefore, while in most cases municipalities are very accommodating, in Manitoba it is more likely that a municipality may be unreasonable. This highlights the importance of generating a clearer definition of what 'reasonable' means. If municipalities are not encouraged through incentives to respond in a reasonable and timely way, unilateral enforcement by government may be the only way to ensure timely municipal compliance. Even in that case, a clearer definition of the term would be necessary.

Recommendation: The Province of Manitoba must become more involved in the discussions and negotiations between EFNs and affected municipalities, pursuant to section 31.04 (f) of the MTLEFA.

Recommendation: Pursue the development of a Memorandum of Understanding (MOU) between EFNs and the Association of Manitoba Municipalities (AMM) that facilitates a partnered approach to enhancing understanding and exchange of information. This may involve the Manitoba TLE Committee, insofar as it plays a role in supporting all TLE First Nations.

Recommendation: Work to further define the term “unreasonable” as it appears within the federal ATR policy and each province’s respective TLE Framework Agreement as well as independent TLE agreements. Having a more defined understanding of this term will create greater levels of accountability in the TLE process. Having clearer guidelines may also help municipalities understand exactly how to NOT be unreasonable. Finally, a clearer definition will give EFNs a greater basis for requesting support when a negotiation with a municipality becomes difficult.

Recommendation: There is a need for the province and the federal government to address “unreasonable” municipalities by either creating an enhanced tax compensation scheme (in a proactive manner in order to achieve greater cooperation) or by enforcing their compliance in a timelier manner (i.e. enforcement within the existing tax loss compensation regime).

7.2 Dealing with Third Party Interests

In both provinces, the EFN is obligated to negotiate with third parties regarding interests held in the land. In Saskatchewan, the STLEFA stipulates that the province is obligated to identify all third party interests regarding the selected land so that the EFN knows exactly who needs to be addressed. The STLEFA has a clearer clause stating that this is a responsibility of the province (21.03, c, d). The involvement of Saskatchewan and Canada in negotiations with third parties is more prominent. In Manitoba, government authorities usually step in only when there is a problem.

The MTLEFA specifies that Canada will make a contribution toward the cost of discharging, replacing or accommodating third party interests affecting land selected or acquired by the EFN (detailed throughout section 20 of the MTLEFA). Canada's contributions are forwarded to the Manitoba TLE Committee, which manages and maintains the account. It has been suggested that this account has been underused by Manitoba EFNs. Greater emphasis may need to be placed on ensuring that there is a general awareness of the existence of this account as well as the process for accessing it.

Public utilities are significant third party interests in both provinces. In Manitoba, an issue can arise over Manitoba Hydro Permit 28-2 entitling Manitoba Hydro to use the land for its purposes for an indefinite period of time without being levied a tax or charge. Private users of reserve land are subject to user fees and/or taxes levied by the First Nation.

Some First Nations are now in contact with a Manitoba Hydro representative to negotiate a modified permit agreement seeking such things as a clause stating that the agreement can be reviewed (and potentially re-negotiated) by the First Nation every two years or so. It can cause a major delay when the First Nation seeks to negotiate the terms of the permit.

Another issue with Manitoba Hydro permits has been that on the one hand, Manitoba Hydro charges the First Nation for electricity, but receives free access to the land. Some First Nations feel that there should be some user/access fees for Manitoba Hydro if the lines remain on their land.

Manitoba Hydro, being a relatively large organization, can lengthen the process of reserve creation considerably. Structurally, any adjustments to the conditions of land use by Manitoba Hydro must be circulated to the relevant departments within Hydro and the type of service access that would be required must be identified. Some practical delays occur when access to the easements is physically difficult. Though relatively rare, in some cases environmental groups have slowed the process by resisting the clearing of trees around an easement. To a great extent, the issue is not the personal feelings of Manitoba Hydro employees but the bureaucratic structure of the organization.

It is important to recognize that Manitoba Hydro is a provincial Crown Corporation, and is essentially under the legislative jurisdiction of the provincial government. Therefore, even though Manitoba Hydro is a non-signatory in the MTLEFA, the Province of Manitoba, which is a signatory, has ultimate authority to discharge its constitutional obligations where Manitoba Hydro is involved.

As noted earlier, Saskatchewan is currently working toward developing legislation that would universally address some of the "gray area" regarding surface access to reach underground resources, as well as other land access

issues. This would include access to private resource owners as well as hydro/electricity services. They are inviting Manitoba and Alberta to join and work toward a federal policy that will fill in some of the less specific areas in ATR application in these areas

Recommendation: The provincial government must ensure that it discharges its constitutional obligations in implementing TLE provisions pursuant to section 31.04 (e) of the MTLEFA and parallel clauses in independent TLE agreements, including taking appropriate action to ensure expedient compliance by third parties under its legislative jurisdiction, including Manitoba Hydro.

Recommendation: Pursue cooperation with Saskatchewan and Alberta in working toward clarifying some of the unclear areas regarding surface access issues. This will be facilitated by the fact that Saskatchewan is already preparing to propose the idea.

7.3 Payment of Interim Property Tax on Purchased Entitlement Land

In Manitoba, once an EFN purchases Entitlement land, it is obligated to pay the property taxes on that land until the negotiations with the municipality are complete. Once there is a Provision of Services Agreement in place as well as a general agreement between the municipality and the EFN, the terms of that agreement take effect and the EFN no longer has to pay property taxes. This is usually when the municipality applies for tax loss compensation from the Province of Manitoba. Because of the relatively low tax loss compensation for the municipality, there is no incentive for urgency from their side. Although a general guideline for negotiating a Municipal Service Provision Agreement is about 90 days, it often takes longer. Therefore, it is possible for an EFN to pay property taxes on the land for some time before the land becomes Reserve.

Additionally, land will normally not be converted to reserve in Manitoba until an agreement has been made between the First Nation and the municipality. Because the First Nation must pay property taxes on the land until the agreement is finished, the First Nation will be financially penalized especially in cases where municipality slows the process down. It would seem that this is an unintended outcome of the TLE implementation process.

Given this, there is a need to do one or both of these two things. (1) Achieve measurably shorter implementation periods. (2) Address this inequity through a compensation scheme targeted to First Nations after a specific number of days have passed.

In Saskatchewan, the EFN is only required to pay the property taxes for a maximum of 75 days after the initiation of the conversion to Reserve process. Therefore the EFN pays property taxes for no more than 75 days. This provides an incentive for the EFN to quickly submit the necessary documents (to initiate the process as soon after purchase as possible) and also an incentive for Canada to quickly complete the transfer of the land (because Canada must take over the payment of municipal property taxes after the 75-day period and until the Reserve is created). For the municipality, there is no loss in tax revenue for this time period, and the relatively large tax loss compensation offered in Saskatchewan (detailed in the previous section above) provides incentive for an expedient negotiation regarding a Service Provision agreement with the EFN.

If an EFN in Saskatchewan has made “reasonable” efforts to negotiate a services agreement with a municipality that does not respond, the land may be converted to reserve. This serves to encourage municipalities to address First Nation requests on a timelier basis.

Recommendation: Federal and provincial governments must work to relieve First Nations of the financial burden that is incurred when they must pay property taxes on the land when TLE implementation has been slowed for reasons beyond the control of the First Nation. It would be beneficial to look to Saskatchewan’s policy as a guide.

7.4 Environmental Assessment and Land Survey

As noted earlier, the federal ATR policy requires that environmental impact assessments be repeated after two years (after two years the results of an assessment are seen to be “stale dated”). In many cases, selected land has not been converted to Reserve within two years, and assessments occur several times throughout the process. In Manitoba, there has recently been consideration for allowing the assessor to suggest a reasonable stale-date time period based on the characteristics of that particular piece of land. Alternatively, there has been discussion about whether the universal stale-date time period could be extended. At the present time, however, it is likely that an environmental impact assessment will be done more than once within the process of each claim.

Some First Nations are not fully aware of the reasons for why an environmental assessment and land survey are required. The feeling of First Nations is sometimes that since an assessment was not needed in 1871, it shouldn’t be necessary now, and/or that since it is already the band’s land (Treaty

Entitlement), environmental impact assessment results should never prevent its conversion to Reserve.

The process of communication emphasized in Saskatchewan helps the groups work together to do parts of the process that can be done “parallel” to the environmental assessment. That is, the assessment need not hold up the process if the requirements are carefully planned. For example, the assessment may be intentionally planned at a time where it is anticipated that other parts of the process (that don’t depend on the assessment) will be occurring. Such scheduling and operational arrangements are facilitated by Saskatchewan’s emphasis on partnership and open communication/accessibility. They are achievable in Manitoba as well.

On the other hand, some First Nations are concerned that if they purchase land prior to an environmental assessment they may be responsible for clean-up if the assessment reveals a problem. A problem with this is that not only does doing the assessment take time, but purchasing land “subject to environmental assessment” can make a seller less likely to sell, especially if they are trying to sell the land generally (that is, make the seller “less willing”). This may be the case where the land is being purchased from a private owner. This is an issue in both provinces.

The land survey process has been identified as a time-consuming issue. The federal government undertakes Land surveys, and there is some concern that INAC does not have enough resources to ensure that surveys are done in the appropriate timely manner.

Recommendation: The federal government must comply with its obligation to undertake the provision of environmental audits and land surveys (pursuant to 31.03 (a) and 31.03 (c)) and pursuant to the parallel clauses in the independent TLE agreements. This should include ways of addressing issues regarding the availability (or lack thereof) of qualified surveyors and resources.

Recommendation: Support the proposed effort to allow for more flexibility regarding how an environmental assessment must be repeated after the two-year stale date stipulated in the federal ATR policy. This may involve responding to the uniqueness of each case by allowing assessors to recommend an appropriate stale-date period for each particular parcel of land. It may be possible that such a process could involve a revisiting of that stale-date recommendation after two years.

7.5 Lack of Urgency from Federal and Provincial Governments

A number of First Nations have indicated that INAC lacks a sense of urgency in facilitating TLE implementation. Some First Nations are concerned that INAC may be understaffed and therefore under resourced to address TLE issues in the required timely manner. A contributing factor may be that INAC periodically changes its structure and personnel. Employee turnover is more likely when the process takes many years and can make the process even longer because new people always need to learn about the project and get to know other groups and individuals that are involved. In the last while, INAC has attempted to improve the potential for communication between parties by developing a “Communications Toolkit” for EFNs. The intention of this kit is to help EFNs understand what is required and to guide them in organizing their efforts.¹⁴

A number of First Nations have indicated that the provincial government also lacks a sense of urgency especially in its dealings with municipalities and third parties.

An increased sense of urgency to implement TLE in Manitoba must be generated for the federal and provincial governments on these issues. There are several ways to do this.

Recommendation: There is a need for INAC to provide an annual report to EFNs regarding the progress that has occurred in each case over the year. It should include an outlining of specific achievements and shortcomings that have occurred. This report should be distributed to all TLE agreement holders in Manitoba, whether they hold a MTLEFA or an independent agreement. Such a report will increase accountability on the part of INAC as well as keep First Nations informed of the cases where progress is being made.

Recommendation: Undertake legal action against public officials within federal and provincial governments who are not adequately discharging the Crown’s constitutional and fiduciary obligations. Such a legal process, where applicable, will help to fairly assess where accountability for more serious problems should be.

7.6 General Economic Development Issues Concerning Use of Land

Reserve creation is a fundamental part of a larger issue that is central to the development of First Nations communities. While First Nations have a claim to TLE land as a result of the treaties, the intention is to use additional land for additional community and economic development; generally, this is also the reason for why treaties were signed in the first place.

In the federal ATR policy as well as in the TLEFA in each province, the term “reasonable” is used in various places. Typically, policies and agreements use the term wherever there is a need for flexibility to respond to the uniqueness of individual cases. Several key places within the MTLEFA where this occurs are with regard to whether a municipality is being “reasonable” in its response to an EFN (discussed earlier), whether Manitoba can refuse to allow the selection of particular land, and whether an EFN’s land selection is close enough to an existing reserve that the selected land can be fewer than 1,000 acres. Each of these areas have significant impact on the ability of First Nations to acquire land for development.

The MTLEFA also states that when an EFN selects land as part of its shortfall TLE, the eligibility of that land for conversion to reserve is subject to Manitoba’s agreement. It is stated that Manitoba cannot “reasonably” withhold permission. (MTLEFA section 3.02 (1) (b) (ii)). Defining “reasonable” in this instance may be crucial to an EFN’s ability to defend a land selection. It is likely that ideal economic development for First Nations is to use land in close proximity to a larger urban center. But it is the most populated areas that are often the most difficult to acquire and convert to Reserve. For this reason, a clause giving flexibility to the province regarding whether or not to grant permission to convert certain land can become an issue. For this reason, clear definition must be pursued regarding exactly what it means to “unreasonably” withhold permission to acquire and convert land. It is most important to pursue this where the land desired by the First Nation is near a larger urban center.

The MTLEFA also states that an EFN may only select a land smaller than 1,000 acres if that land is within “reasonable” proximity to an existing reserve held by that EFN (MTLEFA section 3.02 (7)). Clearly understanding the term in this regard can have a big impact on the ability of EFNs to select land near larger urban centers, where acquiring an area greater than 1,000 acres is generally very difficult. In order for EFNs to acquire land closer to larger cities, then, it will be important to be able to make good arguments for why a selection of land smaller than 1,000 acres is, indeed, in “reasonable proximity” to an existing reserve.

Any time a First Nation wishes to acquire land smaller than 1,000 acres, the First Nation must write to Manitoba a letter giving the reasons for selecting that land. If the land is not within “reasonable” proximity to a Reserve already held by that

First Nation, the selection may be ineligible. For this reason, it can be important in many cases to work for a clear understanding of what it means to be within “reasonable” proximity. It may be possible to give reasons for selecting the land that include an argument about how the selected land is indeed within “reasonable” proximity to an existing Reserve.

Finally, when a First Nation requires land for economic development and it is deemed that land near a larger urban center would be ideal, it may be beneficial to consider buying the land and not necessarily converting it to Reserve status. When an EFN has achieved its shortfall land amount, there is more flexibility in how it can spend remaining settlement money. Buying small parcels of land in or near a city may be a good way to create economic development. This can also be considered when an economic development opportunity needs to be pursued quickly.

A main issue connected to the acquisition of entitlement lands is the fact that First Nations depend on access to and control of lands in order to expand their economic development. It will be important to work toward consensus regarding such issues as the need to clarify the role of the City of Winnipeg regarding Aboriginal economic development. This may include things like engaging the Aboriginal business community to discuss access to City of Winnipeg Economic Development Services and identifying partnerships between First Nations, government, academia and mainstream business that will support urban aboriginal economic development.

Recommendation: Work to develop a clearer definition of the term “reasonable” as it pertains to whether land is or is not eligible for selection. In individual cases, it may be helpful to address this in the letter that is required by Manitoba when a First Nation selects land that is smaller than 1,000 acres.

Recommendation: In certain situations, First Nations should consider pursuing the acquisition of land near larger urban centers even if in some cases it is easier to use the land without converting it to Reserve. This may make it easier to acquire smaller parcels of land and the land would be immediately usable for economic development purposes.

Recommendation: Work toward identifying and addressing specific questions surrounding the role of the province and major municipalities in how First Nations can best use acquired land for optimal economic development outcomes.

Appendix A: Overview of TLEFA Responsibilities (MB & SK)

(21.04 STLEFA):

SPECIFIC UNDERTAKINGS OF ENTITLEMENT BANDS:

In particular, each of the Entitlement Bands agrees:

- a) to proceed as soon as reasonably possible to negotiate and conclude their Band Specific Agreement;
- b) to promptly and accurately supply any information, Band Council Resolutions and other documentation or information required to be supplied by the Entitlement Band to Canada or Saskatchewan pursuant to this Agreement;
- c) to promptly comply with any reasonable requests made by Canada and Saskatchewan for more accurate or complete information relating to Lands, Minerals or Improvements or otherwise affecting Entitlement Land or a proposed Entitlement Reserve;
- d) to use all reasonable efforts to reach their Shortfall Acres Acquisition Date as promptly as is reasonable in the circumstances prior to the expiration of twelve (12) years from the Execution Date; and
- e) To take appropriate steps to ensure compliance by their Trustees and other Entitlement Band representatives with the spirit and intent of this Agreement, and their Band Specific Agreement and Trust Agreement.

(32.02 MTLEFA):

BEST EFFORTS OF ENTITLEMENT FIRST NATIONS IN IMPLEMENTATION

During the course of performing its obligations under its Treaty Entitlement Agreement, and Entitlement First Nation will, where necessary, use its best efforts to:

- a) Undertake or cause to be undertaken a Land Selection Study;
- b) Physically inspect land to be Selected or Acquired;
- c) Select or Acquire land in accordance with the Principles;
- d) Negotiate and conclude legal arrangements for the purchase of Other Land to be Acquired (if applicable);
- e) Identify and resolve Third Party Interest;
- f) Negotiate a Municipal Development and Services Agreement with a Municipality where land has been Selected or Acquired in a Municipality;
- g) Establish and maintain a working relationship with the appropriate personnel of Canada and Manitoba involved in the implementation process;
- h) Ensure the timely provision of information to the TLE Committee, Canada and Manitoba;

- i) Participate in the implementation Monitoring Committee and dispute resolution process as required; and
- j) Request the technical support of the TLE Committee, and the Entitlement First Nation deems necessary to ensure the achievement of its responsibilities under its Treaty Entitlement Agreement.

(21.02 STLEFA):

SPECIFIC UNDERTAKINGS OF CANADA:

In particular, Canada agrees:

- a) To expedite the preparation and passage of all Orders in Council and Ministerial approvals required for the establishment of an Entitlement Reserve;
- b) To perform or cause to be performed all surveys and assessments required to be performed by Canada for the establishment of an Entitlement Reserve as contemplated herein;
- c) To promptly provide Saskatchewan with all information required by Saskatchewan to fulfill its obligations to Canada to transfer land for the establishment of an Entitlement Reserve;
- d) To comply, on a priority basis, with the requirements of all laws, policies, procedures and requirements for the establishment of an Entitlement Reserve;
- e) To commit sufficient personnel. to promptly and efficiently co-ordinate and facilitate the compliance by Canada with its obligations hereunder (including the creation of Entitlement Reserves) and to satisfy and resolve disputes respecting this Agreement;
- f) As soon as reasonably possible, to recommend to the Parliament of Canada that the legislation contemplated in subsection 20.19(b) be enacted;
- g) To facilitate the establishment of Entitlement Reserves in Northern Municipalities without delay and, in all cases, to use its best efforts to promptly and efficiently satisfy all of its obligations hereunder in order that such Entitlement Reserves may be established within two (2) years after an Entitlement Band has indicated in writing its interest in acquiring Entitlement Land within such a Northern Municipality for the purpose of establishing an Entitlement Reserve;
- h) To give favourable consideration to assisting Entitlement Bands with financial arrangements for the purpose of acquiring federal Crown assets located in Northern Municipalities including, where applicable and without limitation, arrangements for payment for such assets over time; and
- i) To take reasonable steps to ensure that the anticipated transfer dates to Entitlement Reserve Status in respect of all or a significant portion of

those Northern Municipalities referred to in subsection 3.1.1(k) of the Amended Cost Sharing Agreement are attained.

(31.03 MTLEFA):

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 fulfillment 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 survey 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 the 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.

(21.03 STLEFA):

SPECIFIC UNDERTAKINGS OF SASKATCHEWAN:

In particular, Saskatchewan agrees:

- a) to provide timely responses to the Entitlement Bands to any inquiries concerning the availability for sale of any provincial Crown Land, Minerals or Improvements;
- b) to expedite the process required to secure all necessary departmental approval for the sale of provincial Crown Land;
- c) to provide information within the knowledge of Saskatchewan to the Entitlement Bands with respect to all Third Party Interest Holders and Mineral Disposition Holders, that have interests in any provincial Crown Land that Saskatchewan has agreed to sell as soon as practically possible;

- d) to prepare on an expedited basis any release documentation required by Saskatchewan from any Third Party Interest Holder or Mineral Disposition Holder that has an interest in any provincial Crown Land that Saskatchewan has-agreed to sell;
- e) to expedite the preparation and passage of all Orders in Council required to transfer provincial Crown Lands, provincial Crown Minerals, the water, beds or shores of any Waterbody, or any other interest in Land, Minerals or Improvements which Saskatchewan has agreed to transfer hereunder to Canada in order that the Entitlement Land may be promptly set apart as an Entitlement Reserve;
- f) to provide, on a priority basis, all other information within the control of Saskatchewan that is reasonably required by Canada or an Entitlement Band with respect to the acquisition of lands pursuant to this Agreement;
- g) to provide all possible priority with respect to the registration of any documents under provincial laws that are necessary for the establishment of an Entitlement Reserve;
- h) to commit sufficient personnel to promptly and efficiently co-ordinate and facilitate the compliance by Saskatchewan with its obligations hereunder and to satisfy and resolve disputes respecting this Agreement;
- i) as soon as reasonably possible, to recommend to the Legislative Assembly of Saskatchewan that the legislation contemplated in subsection 20.19(a) be enacted;
- j) to negotiate promptly and in good faith, and to not unreasonably withhold, the sale to Entitlement Bands of provincial Crown Lands and Improvements located within Northern Municipalities and to base the proposed selling price of any such Crown Land and Improvements upon the criteria set forth in section 4.10 hereof;
- k) in all cases, to use its best efforts to promptly and efficiently satisfy all of its obligations hereunder in order that Entitlement Reserves may be established within Northern Municipalities within two (2) years after an Entitlement Band has indicated in writing its interest in acquiring Entitlement Land within such a Northern Municipality for the purpose of establishing an Entitlement Reserve;
- l) to actively encourage Northern Municipalities and the board of any relevant School Division operating within Northern Municipalities to give favourable consideration to the sale of their respective assets within such Northern Municipalities to Entitlement Bands promptly and at a reasonable price determined in accordance with the criteria set forth in section 4.10 hereof;
- m) to give favourable consideration to assisting Entitlement Bands with financial arrangements for the purpose of acquiring provincial Crown assets located in Northern Municipalities including, where applicable and without limitation, arrangements for payment for such assets over time; and
- n) to take reasonable steps to ensure that the anticipated transfer dates to Entitlement Reserve status in respect of all or a significant portion of those

Northern Municipalities referred to in subsection 3.1.1(k) of the Amended Cost Sharing Agreement are attained.

(31.04 MTLEFA):

BEST EFFORTS OF MANITOBA

Manitoba will use its best efforts:

- a) to ensure that appropriate personnel are assigned to fully and effectively discharge Manitoba's obligations under the Agreement and any Treaty Entitlement Agreements;
- b) To provide promptly to Canada and the TLE Committee relevant information and materials required to facilitate the fulfillment of the terms of this Agreement, the release of which is not otherwise prohibited by law;
- c) To provide timely notice of proposed Dispositions in Community Interest Zones;
- d) To provide information in a timely manner concerning Crown interests in land Selected or Acquired by and Entitlement First Nation;
- e) To expedite the timely preparation of any orders in council, departmental or ministerial approvals required for the resolution of Third Party Interests or the transfer to Canada of administration and control of Crown Land or interests;
- f) To assist the Entitlement First Nations and Municipalities in the negotiation of issues relating to Municipal Services and Development Agreements;
- g) To review and revise any departmental policy, systems and practices as required to facilitate and enable the timely achievement of the implementation of the Agreement; and
- h) To provide ongoing orientation of departmental personnel to the requirements of their Agreements to encourage and foster a positive and productive working relationship between and among its personnel, the TLE Committee, Canada and the Entitlement First Nations.

References

Manitoba Natural Resources Transfer Act (1930).

Manitoba Treaty Land Entitlement Framework Agreement (May 1997).

Saskatchewan Natural Resources Transfer Act (1930).

Saskatchewan Treaty Land Entitlement Framework Agreement (September 1992).

Notes

¹ In some cases, the land manager or chief was not available, but a representative was interviewed.

² This is based on general information given by Indian and Northern Affairs Canada: http://www.ainc-inac.gc.ca/on/i26_e.html

³ As part of the Federal Government's Gathering Strength response to the Royal Commission on Aboriginal Peoples (RCAP), the Lands and Trust Services (LTS) sector of Indian and Northern Affairs Canada (INAC) is working with the Assembly of First Nations (AFN) to review its business lines under the AFN/INAC Joint Initiative for Policy Development. The Joint Initiative identified the 1991 Additions to Reserves/New Reserves (ATR) policy as an early priority under its work plan. The overview of the ATR process provided here is drawn from directive 10-1 of their report (published in October 2003).

⁴ Information for this general overview of the MTLEFA is drawn from a summary released by INAC. See INAC information sheets: http://www.ainc-inac.gc.ca/on/stee_e.html

⁵ The Manitoba TLE framework agreement sets out the process and the mechanism agreed to by the federal and provincial governments and the following First Nations: Barren Lands, Buffalo Point, Brokenhead, Fox Lake, God's Lake, God's River, Mathias Colomb Cree, Nisichawayasihk Cree, Oxford House, Norway House, Northlands, Opaskwayak Cree, Rolling River, Sapotawayak Cree, Sayisi Dene, Shamattawa, War Lake, Wuskwi Sipiik and York Factory

⁶ A Land Selection Study essentially involves the EFN working through the detailed principles outlined in the MTLEFA for selecting and acquiring lands. Principles include such things as the types of areas eligible to request, how to apply for parkland, and so on.

⁷ That Manitoba must transfer the land to Canada for these purposes was laid out in the Manitoba Natural Resources Transfer Agreement (MNRTA) signed in 1930 by Manitoba and Canada. This agreement was discussed briefly earlier in this report.

⁸ Whether or not land licensed for use by Hydro is "physically required" is determined in consultation between the EFN, Manitoba Hydro, and Manitoba.

⁹ The following information regarding Municipal Service Agreements is structured based on a good description made by the *Reference Manual for Municipal Development and Service Agreements* <http://www.gov.mb.ca/ana/manual.html>

¹⁰ The following list is taken from *Opportunities and Challenges for First Nations – Municipal Government Relations*, developed by Land Management Project and Federation of Canadian Municipalities. This is available through the Government of Manitoba, Manitoba Treaty Land Entitlement Framework Agreement, at www.gov.mb.ca/ana/mtlc_guidelines.html

¹¹ The Community Approval Process is a detailed and technical undertaking. It includes, among other things, the distribution of detailed information to the community members about the implications of entering the TLE process. This process eventually includes a community vote to

determine whether or not to proceed. Given the technical implications underlying a binding vote and the fact that the decision is so important, EFN often require some formal support in doing this.

¹² General information about the Treaty Land Entitlement Committee of Manitoba can be found at <http://www.tlec.ca>

¹³ The Saskatchewan TLE Specific Claim Unit, in their synopsis of the STLEFA, highlighted this section as a “breakthrough” in terms of speeding the land conversion process.

¹⁴ Detailed information about this toolkit can be found within an outline of INAC's Communications Strategy at http://www.ainc-inac.gc.ca/pr/pub/atr/index_e.html

