

LAKE MANITOBA 2011 FLOOD CLASS ACTION  
SETTLEMENT AGREEMENT

Made as of this 16<sup>th</sup> day of November, 2021

File No. CI13-01-82597

**THE COURT OF QUEEN'S BENCH**  
**Winnipeg Centre**

**BETWEEN:**

**JOHN HOWDEN, STEPHEN MORAN, SHAUN MORAN, 5904511 MANITOBA LTD.,  
KEITH MCDERMID, and SUNSHINE RESORT LTD.,**

Plaintiffs,

- and -

**THE GOVERNMENT OF MANITOBA,**

Defendant.

Proceeding under

*The Class Proceedings Act, C.C.S.M. c. C130*

DD WEST LLP  
Barristers and Solicitors  
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SETTLEMENT AGREEMENT TABLE OF CONTENTS

ARTICLES:

1. Definitions
2. Conditions Precedent, Court Approval
3. Settlement Benefits
4. Releases and Dismissals
5. Distribution of Settlement Amount and Accrued Interest
6. Legal Fees and Disbursements
7. Administration and Implementation
8. No admission of liability
9. Non-Approval of Settlement Agreement
10. Miscellaneous

SCHEDULES:

- A. Claims Administration Procedure
- B. Claims Administrator Engagement Letter
- C. Claims Option Form
- D. Claims Registration Form
- E. Pre-Approval Notice Dissemination Plan
- F. Pre-Approval Notice (Short Form)
- G. Pre-Approval Notice (Long Form)
- H. Pre-Approval Order
- I. Settlement Approval Order
- J. Settlement Approval Notice Dissemination Plan
- K. Settlement Approval Notice (Short Form)
- L. Settlement Approval Notice (Long Form)

## RECITALS

**WHEREAS** the Plaintiffs Fred Piscelevich, John Howden, Stephen Moran, Shaun Moran, 5904511 Manitoba Ltd., Alex McDermid, Keith McDermid and Sunshine Resort Ltd., commenced a proceeding in the Manitoba Court of Queen's Bench under *The Class Proceedings Act*, C.C.S.M. c. C130 under Court File No. CI13-01-82597 against the Defendant, the Government of Manitoba;

**AND WHEREAS** the Plaintiffs' claim alleged that the Defendant's actions caused a legal nuisance by contributing to or exacerbating flooding on off-reserve areas around Lake Manitoba during the 2011 flood event;

**AND WHEREAS** the Plaintiffs' claim asserted claims on behalf of the Class Members, consisting of all individuals, corporations, partnerships or other legal entities that own real property and/or have an interest in real property situated within 30 kilometers of Lake Manitoba:

- i) whose property, real or personal, was flooded in 2011 by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding emanating from any of the above; and
- ii) who suffered damages, including loss of income, as a result of the said flooding in 2011, including the estates of any persons who have died since March 1, 2011 who meet the preceding criteria.

**AND WHEREAS** a trial proceeded from February 22, 2021 to March 12, 2021, and April 1, 2021 in respect of the following common issues:

- (1) Did the Defendant, the Government of Manitoba, by its actions cause flooding to occur on off-reserve areas surrounding Lake Manitoba?
- (2) If the Government of Manitoba, by its actions, caused flooding to occur on off-reserve areas surrounding Lake Manitoba, did that flooding substantially interfere with the use and enjoyment of the real property interests of the Class?

**AND WHEREAS** on June 11, 2021 the Manitoba Court of Queen's Bench issued reasons for decision that answered the common issues in the affirmative;

**AND WHEREAS** the Parties recognize and acknowledge that the Defendant has a right of appeal to the Manitoba Court of Appeal under s. 36(1)(a) of *The Class Proceedings Act* and that the Defendant has not conceded or admitted any liability or acknowledged that any damages are payable;

**AND WHEREAS** despite its belief that it is not liable in respect of the allegations made in the Class Action and has good defences thereto, the Defendant is entering into this Settlement Agreement in order to achieve a final resolution of all current and potential claims asserted against it by the Plaintiffs on behalf of the Class Members and to avoid further expense, inconvenience, and the distraction of burdensome and protracted

litigation, and it is acknowledged that the Defendant would not have entered into this Settlement Agreement were it not for the foregoing;

**AND WHEREAS** the Parties intend by this Settlement Agreement to resolve all past, present, and future claims of Class Members in any way arising from or relating to the 2011 Flood, known or unknown;

**AND WHEREAS** the Parties have engaged in extensive, arms-length negotiations through counsel that have resulted in this Settlement Agreement;

**AND WHEREAS** the Plaintiffs and Class Counsel, namely DD West LLP, have reviewed and fully understand the terms of this Settlement Agreement and based on their analysis of the facts and law applicable to the Plaintiffs' Claims, and having regard to the burden and expense of prosecuting the Class Action on the issue of damages, including the risks and uncertainties associated with further trials and appeals, have concluded that this Settlement Agreement is fair and reasonable, and in the best interests of the Class Members they represent;

**AND WHEREAS** the Plaintiffs and Class Counsel have determined what they believe is the most fair, reasonable and appropriate manner in which to distribute the amount payable by the Defendant under this Settlement Agreement among Class Members;

**AND WHEREAS** the Parties therefore wish to, and hereby do, fully and finally resolve the Class Action without admission of liability on the part of the Defendant;

**AND WHEREAS** the Defendant, in entering into the Settlement Agreement, intends to resolve all claims arising from or relating to the events which are the subject the Class Action;

**NOW THEREFORE** in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is hereby agreed by the Parties that the Class Action be settled and that the Parties shall consent to the Court Order approving the Settlement Agreement on the following terms and conditions:

## **ARTICLE 1: DEFINITIONS**

### **1.1 For the purpose of this Settlement Agreement only, including the Recitals and Schedules hereto:**

- a) *"2011 Flood"* means the flooding of Lake Manitoba in 2011 as particularized in the Class Action;

- b) “*Administrator’s Eligibility Notice*” is the notice sent by the Claims Administrator to a Claimant in response to a Claims Registration Form submitted by a Claimant;
- c) “*Administration Expenses*” means all fees, disbursements, expenses, costs, taxes, and any other amounts incurred or payable by Class Counsel, or otherwise for the approval, implementation and operation of this Settlement Agreement, including the Notice Expenses and the fees and expenses of the Claims Administrator but excluding Class Counsel Fees;
- d) “*Claim*” means a claim for benefits under the Settlement Agreement that is submitted by or on behalf of a Class Member pursuant to a Claim Registration Form;
- e) “*Claims Administration Expenses*” means the reasonable costs incurred by the Claims Administrator to administer the Claims Program, including but not limited to the Claims Administrator’s fees and disbursements, the costs to administer the Settlement Website and the Settlement Phone Number, and any related administrative costs;
- f) “*Claims Administration Procedure*” means the procedure for Class Members to submit their claims, attached hereto as **Schedule “A”**;
- g) “*Claims Administrator*” means the Third Party agent agreed to by the parties and appointed by the Court to administer the Claims Program pursuant to the duties and terms outlined in the proposal letter, attached as **Schedule “B”** hereto. The Parties have agreed that Exchange Solutions Inc. shall serve as Claims Administrator, subject to approval by the Court;
- h) “*Claims Option Form*” means the form a Class Member can use to choose their payment option, attached hereto as **Schedule “C”**;
- i) “*Claims Option Deadline*” means ninety (90) days from the mailing of the Administrator’s Eligibility Notice;
- j) “*Claims Program*” means the program through which Class Members may file Claims and, if eligible, receive a Distribution Payment under the Settlement Agreement;
- k) “*Claims Program Account*” means an interest-bearing trust account under the control of the Claims Administrator at a Manitoba credit union from which Distribution Payments under the Claims Program will be paid;

- l) “*Claims Registration Deadline*” means ninety (90) days from the date of first publication of the Settlement Approval Notice;
- m) “*Claims Registration Form*” means the document used to submit a Claim as attached hereto as **Schedule “D”**;
- n) “*Claims Registration Period*” means the time period during which Class Members may submit a Claim for review by the Claims Administrator, lasting ninety (90) days from the date of first publication of the Settlement Approval Notice;
- o) “*Class*” means all persons whose off reserve property in 2011 was within a thirty (30) kilometre radius of Lake Manitoba, and whose off reserve real or personal property suffered damage by flooding as a result of the 2011 Flood;
- p) “*Class Action*” means *Pisclevich et al v. The Government of Manitoba* (Manitoba Court of Queen’s Bench File No. CI13-01-82597);
- q) “*Class Counsel*” means DD West LLP;
- r) “*Class Counsel Fees*” means the fees, disbursements, including disbursements related to the Pre-Approval Notice Dissemination Plan, costs, Goods and Services Tax, Retail Sales Tax, and/or other applicable taxes or charges of Class Counsel;
- s) “*Class Member*” means a member of the Class;
- t) “*Class Release*” means the release and waiver by Class Members;
- u) “*Comment Period*” means the thirty (30) day period from the posting of the Pre-Approval Order on the Class Counsel website within which the Class Members may submit comments on the proposed Settlement;
- v) “*Compensation Fund*” means the portion of the Settlement Amount less Administration Expenses, Notice Expenses, Claims Administration Expenses, Honoraria, and Class Counsel Fees to be used for payment of Eligible Claims, and, for certainty, includes the Special Circumstances Fund;
- w) “*Court*” means the Court of Queen’s Bench of Manitoba;
- x) “*Defendant*” means the Government of Manitoba;

- y) “*Distribution Payment*” means a payment to an Eligible Claimant as determined by the Claims Administrator pursuant to this Settlement Agreement;
- z) “*Effective Date*” means either thirty (30) days after the Settlement Approval Date, unless any appeals are taken from the Settlement Approval Order, in which case it is the date upon which all appeals have been fully disposed of on the merits in a manner that affirms the Settlement Approval Order, or any date that is agreed to in writing by Class Counsel and the Defendant;
- aa) “*Eligible Claim*” means a claim determined by the Claims Administrator to be eligible to receive a Distribution Payment under the Settlement Agreement;
- bb) “*Eligible Claimant*” means a Class Member who has submitted a Claim in accordance with the Settlement Agreement and the Claims Administration Procedure, and whose Claim is determined by the Claims Administrator to be eligible for a Distribution Payment;
- cc) “*Honoraria*” means payments to be paid out of the Settlement Amount to the Representative Plaintiffs, or to their executor or administrator if deceased, to compensate them for time and out-of-pocket expenses incurred;
- dd) “*Notice Expenses*” means all reasonable costs and expenses incurred by the Claims Administrator in implementing the Settlement Approval Notice Dissemination Plan including, but not limited to: (1) preparing, disseminating, posting, promoting, internet housing, and publishing of the Settlement Approval Notices; and (2) any other necessary notice or notice-related activities to implement the Settlement Approval Notice Dissemination Plan;
- ee) “*Option One*” means the option designated as Option One in the Claims Administration Procedure;
- ff) “*Option Two*” means the option set out as Option Two in the Claims Administration Procedure;
- gg) “*Parties*” means the Plaintiffs, Class Members, and the Defendant;
- hh) “*Payment Calculation Report*” means the report prepared by the Claims Administrator pursuant to Article 3.6;
- ii) “*Plaintiffs*” means John Howden, Stephen Moran, Shaun Moran, 5904511 Manitoba Ltd., Keith McDermid, and Sunshine Resort Ltd.;

- jj) “*Pre-Approval Hearing*” means the hearing before the Court seeking Court approval of the Pre-Approval Notices and the Pre-Approval Notice Dissemination Plan;
- kk) “*Pre-Approval Notices*” means the notices that advise Class Members of the Comment Period and the date of the Settlement Approval Hearing, substantially in the form approved by the Court and attached hereto as **Schedules “F” and Schedule “G”**;
- ll) “*Pre-Approval Notice Date*” means the date on which the Pre-Approval Notice is first published on the Settlement Website;
- mm) “*Pre-Approval Notice Dissemination Plan*” means the plan for dissemination of the Pre-Approval Notices, as attached hereto as **Schedule “E”** and approved by the Court;
- nn) “*Pre-Approval Order*” means the Court Order approving the Pre-Approval Notice Dissemination Plan and the Pre-Approval Notices, as attached hereto as **Schedule “H”**;
- oo) “*Released Claims*” means any and all manner of claims, demands, actions, suits, and causes of action alleged or which could have been asserted in the Class Action, whether direct or indirect, class, individual, or otherwise in nature, whether personal or subrogated, including for damages whenever incurred and liability of any nature whatsoever, including interest, costs, expenses, penalties, and lawyer fees that the Releasors, or any one of them, whether directly, indirectly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall or may have against the Releasee, whether known or unknown, relating in any way to any act or omission by the Releasee prior to the execution of this Settlement Agreement concerning the 2011 Flood;
- pp) “*Releasee*” means the Defendant and its employees, officials, agents and assigns;
- qq) “*Releasors*” means jointly and severally, individually and collectively, the Plaintiffs and Class Members and their Representative Claimants;
- rr) “*Representative Claimants*” means personal representatives, heirs, assigns, and trustees of Class Members and/or executors, administrators, and personal representatives of Class Members;



- ss) “*Settlement Agreement*” or “*Settlement*” means this agreement, including the Recitals and Schedules hereto;
- tt) “*Settlement Amount*” means \$85,500,000.00, which includes all amounts to be paid by the Defendant under this Agreement, and is inclusive of:
- a. the Compensation Fund;
  - b. a contribution made by the Defendant towards Administration Expenses, Notice Expenses, Claims Administration Expenses, Class Counsel Fees and Manitoba Retail Sales Tax;
  - c. any and all Administration Expenses, Notice Expenses, Claims Administration Expenses, Class Counsel Fees, taxes and disbursements in excess of the contribution made by the Defendant;
  - d. any Honoraria approved by the Court.
- uu) “*Settlement Approval Date*” means the date on which the Settlement Approval Order is issued;
- vv) “*Settlement Approval Hearing*” means the hearing of the motion to be brought by the Plaintiffs seeking Court approval of the Settlement Agreement;
- ww) “*Settlement Approval Notices*” means the notices that advise Class Members of the Settlement Approval Order, substantially in the form approved by the Court and attached hereto as **Schedules “K” and “L”**.
- xx) “*Settlement Approval Notice Dissemination Plan*” means the plan for disseminating the Settlement Approval Notice as attached hereto as **Schedule “J”** and approved by this Court.
- yy) “*Settlement Approval Order*” means the final order or judgment entered by the Court in respect of approving the Settlement Agreement and the expiration of the time to appeal or to seek permission to appeal such final judgment or approval, without any appeal being taken, or if an appeal from any of the above is taken, the affirmation of such final order or judgment in its entirety, without modification, by the Manitoba Court of Appeal in the form attached hereto as **Schedule “I”**;
- zz) “*Settlement Phone Number*” means the toll-free telephone number that Class Members can call to receive information about the Settlement Agreement and the Claims Program;
- aaa) “*Settlement Website*” means the public website of DD West LLP that provides information about the Settlement Agreement;

- bbb) “*Special Circumstances Fund*” means the portion of the Compensation Fund of up to \$1,000,000 set aside for payments under Section G of the Claims Administration Procedure.

## ARTICLE 2: CONDITIONS PRECEDENT, COURT APPROVAL

### 2.1 Subject to Article 6, this Settlement Agreement shall be of no force or effect unless:

- a) The Court approves this Settlement Agreement;
- b) The Settlement Approval Order has become a Final Order; and
- c) The Effective Date has occurred.

### 2.2 Motions for Approval

#### Pre-Approval Hearing

- a) The Plaintiffs shall file a motion for the Pre-Approval Hearing in order to seek the Pre-Approval Order to approve the Pre-Approval Notice Dissemination Plan and the Pre-Approval Notices, the publication of which will trigger the commencement of the Comment Period.
- b) The Pre-Approval Order referred to in Article 2.2(a) shall be in a form substantially similar to the order attached hereto as **Schedule “H”** and as agreed upon by Class Counsel and the Defendant and approved by the Court.

#### Settlement Approval Hearing

- c) Following the expiry of the Comment Period, the Plaintiffs shall file a motion for the Settlement Approval Hearing, seeking the Settlement Approval Order for the approval of this Settlement Agreement;
- d) The hearing date for the Settlement Approval Hearing will be set by the Court at the Pre-Approval Hearing; and
- e) The Settlement Approval Order referred to in Article 2.2(c) shall be in a form substantially similar to the order attached hereto as **Schedule “I”** and as agreed upon by Class Counsel and counsel for the Defendant and approved by the Court.

### ARTICLE 3: SETTLEMENT BENEFITS

#### 3.1 Payment of Settlement Amount

- a) Contingent on the dismissal of the claims of the Class Members as against the Defendant and on the approval of the Settlement Agreement as more particularly described in Articles 2.2(c) and (e), Manitoba has agreed to pay the Settlement Amount, inclusive of the following amounts:
  - i. a total of \$2,000,000.00 towards Administration Expenses, Notice Expenses, and Claims Administration Expenses;
  - ii. a total of \$7,500,000.00 towards Class Counsel Fees (which Class Counsel Fees, exclusive of disbursements and applicable taxes, shall not exceed 20% of the Settlement Amount), and
  - iii. a total of \$1,000,000.00 towards the Manitoba Retail Sales Tax (RST) payable on Class Counsel Fees.
  
- b) No later than the Effective Date, or such other date as the parties may agree, the Defendant shall pay in trust to Class Counsel, the Settlement Amount of \$85,500,000 on the express trust conditions that:
  - i. Class Counsel Fees exclusive of reasonable disbursements and applicable taxes shall not exceed twenty percent (20%) of the Settlement Amount, calculated by Class Counsel and represented to be no greater than \$16,700,000 plus applicable taxes and reasonable disbursements;
  - ii. Class Counsel Fees shall be deducted from the Settlement Amount by Class Counsel, in full satisfaction of Class Counsel Fees;
  - iii. Class Counsel will pay from the Settlement Amount Honoraria of \$5,000, or such other amount as may be approved by the Court, to each of the original individual Representative Plaintiffs, or their estates if now deceased;
  - iv. Class Counsel will pay \$2,000,000 from the Settlement Amount towards Administration Expenses, Notice Expenses, and Claims Administration Expenses to the Claims Administrator; and
  - v. Class Counsel will pay the balance of the Settlement Amount, including accrued interest, to the Claims Administrator, in turn to be paid to Class

Members in accordance with the Settlement Agreement and the Schedules appended thereto.

- c) The Claims Administrator will invest the monies paid to it pursuant to Article 3.1(b)(v) in the Claims Program Account. All interest accrued will be added to the Claims Program Account. The conversion rate for the Settlement Amount will be the Bank of Canada rate on the date of payment. If the monies are not paid when due, they will accrue interest until paid at the rate of 5% per annum.
- d) The Defendant shall have no obligation in any circumstance or for any reason to pay any amount in addition to the Settlement Amount of \$85.5 million pursuant to or in furtherance of this Settlement Agreement or otherwise.
- e) The Claims Administrator shall maintain the Claims Program Account as provided for in this Settlement Agreement. The Claims Administrator shall not pay out any monies from the Claims Program Account except in accordance with the provisions of this Settlement Agreement without an Order of the Court made on notice to or on consent of the Parties.
- f) The Defendant agrees to pay the Settlement Amount in accordance with the specific requirements of this Settlement Agreement in full satisfaction of the Release described in Article 4.1 below.

### **3.2 Claims Administrator**

- a) The Parties have agreed that Exchange Solutions Inc. shall be appointed as the Claims Administrator, subject to approval by the Court, for the purpose of administering the Settlement Approval Notice Dissemination Plan and the Claims Program, and paying Eligible Claimants as provided for in this Settlement Agreement.
- b) The Claims Administrator shall have the authority to perform all actions, to the extent not expressly prohibited by, or otherwise inconsistent with, any provision of this Settlement Agreement deemed by them to be reasonably necessary for the efficient and timely administration of this Settlement Agreement, including entering into such contracts and obtaining such financial, accounting, and other expert assistance as are reasonably necessary in the implementation of the Settlement Agreement.
- c) The Claims Administrator will implement and administer the Claims Administration Procedure for administration of the Settlement Agreement. Without limitation of the foregoing, the Claims Administrator shall have the authority to recommend to the Parties for their approval any modifications

and/or supplements to the Claims Administration Procedure to provide for more efficient administration of the Claims Program.

- d) The Claims Administrator shall preserve, in hard copy or electronic form as the Claims Administrator deems appropriate, the submissions relating to all Claims for at least one (1) year after the last payment is made through the Claims Program and at such time shall dispose of such submissions by shredding or other such means as will render the materials permanently illegible.
- e) Within five (5) calendar days of the end of each calendar month, or as may be otherwise agreed by the Parties, the Claims Administrator shall submit a report to the Parties itemizing and certifying the following:
  - i. all Claims Administration Expenses then due and payable or anticipated to be become due and payable during the following calendar month;
  - ii. all payments of the Settlement Amount which as of the end of such calendar month have been fully determined and otherwise are timely for payment; and
  - iii. any distributions made from, and the monies remaining in, the Claims Program Account.
- f) The Claims Administrator shall not be held liable, absent negligence or fraud, in respect of the implementation and administration of the Settlement Agreement and any related accounting.

### **3.3 Claims Program**

- a) In order to receive any payment under this Settlement Agreement, a Class Member must deliver to the Claims Administrator, no later than the Claims Registration Deadline:
  - (1) a Claim Registration Form that is properly and fully completed and properly and fully executed; and
  - (2) all records, or other documents specified in the relevant Claim Registration Form to be attached thereto or otherwise submitted therewith.

If a Class Member fails to deliver a Claim Registration Form to the Claims Administrator by the Claims Registration Deadline, such Class Member shall immediately cease to have any right to receive any payment under this Settlement Agreement. Without limitation to the preceding sentence, the

Claims Administrator shall not accept, review or consider any Claim Registration Form received by it after the Claims Registration Deadline.

The Claims Administration Procedure attached as **Schedule "A"** hereto is incorporated herein by reference.

- b) Any determination by the Claims Administrator pursuant to the Settlement Approval Notice Dissemination Plan or the Claims Administration Procedure shall be final.
- c) Nothing in the Settlement Approval Notice Dissemination Plan or the Claims Administration Procedure absolves the Class Member or their respective representative and/or lawyer from their responsibility for timely compliance with the requirements of this Settlement Agreement, and the Settlement Approval Notice Dissemination Plan and the Claims Administration Procedure in particular. Neither the Claims Administrator nor the Parties shall have any responsibility or liability whatsoever for (i) any failure of a Class Member to qualify as an Eligible Claimant or (ii) any failure of an Eligible Claimant to receive any particular benefit under this Settlement Agreement as a result of any deficiency in such Eligible Claimant's submission.
- d) All submissions by Class Members to the Claims Administrator of or relating to a Claim Registration Form shall be made (i) electronically through the Claims Portal or (ii) in paper form delivered by regular Canada Post mail, by same-day or overnight courier or in person. All submissions by mail shall be conclusively deemed to have been submitted to the Claims Administrator on the postmark date of such mail. All submissions delivered to the Claims Administrator by same-day or overnight courier shall be conclusively deemed to have been submitted to the Claims Administrator on the date the submissions were received by the Claims Administrator.

### **3.4 Eligible Claimants**

- a) Only those Class Members who are determined to be an Eligible Claimant by the Claims Administrator shall be eligible to receive Distribution Payments under this Settlement Agreement.

### **3.5 Distribution Payments**

- a) Distribution Payments shall be paid to Eligible Claimants on a *pro rata* basis.

### **3.6 Payment Calculation Report**

- a) Within 15 days after the expiry of the Claims Registration Deadline, the Claims Administrator shall prepare the Payment Calculation Report containing the following information:
  - i. a list of all Claimants.
  - ii. a summary of the information contained in Section E of the Claims Registration Forms.
- b) The Claims Administrator shall send an electronic copy of the Payment Calculation Report to Class Counsel and the Defendant.

### **3.7 Claims Administrator's Duty to Advise**

Within nine (9) months of the Claims Registration Deadline, the Claims Administrator shall provide an Administrator's Eligibility Notice to each Claimant advising as to the eligibility or ineligibility of their Claim. In the event that the Claims Administrator requires further information from the Claimant to determine eligibility, it shall so state in that notice, and the Claimant shall have a further ninety (90) days from the date of mailing or posting of the Administrator's Eligibility Notice within which to provide such information to the Claims Administrator. Failure to provide such information to the Claims Administrator within the ninety (90) days will result in the denial of the Claim. Upon receiving such further information from the Claimant, the Claims Administrator shall, as soon as reasonably practicable thereafter, make a decision as to eligibility, and that eligibility decision will be final.

### **3.8 Final Payments to Eligible Claimants**

- a) After all Claims are made and all deductions from the Settlement Amount for Administration Expenses, Notice Expenses, Claims Administration Expenses, Honoraria, and Class Counsel Fees have been calculated and accounted for, then payments will be made firstly to the Eligible Claimants under Option 1 set out in the Claims Administration Procedure, and the Claims Administrator shall pay such Claims up to a total amount of \$15,000,000.
- b) With respect to the Claims under Option 2 set out in the Claims Administration Procedure, the Claims Administrator shall assess and pay out those Claims in accordance with the Claims Administration Procedure after having assessed all of the Option 2 Claims.
- c) For greater clarity, the Claims Administrator shall continue to accrue and pay its expenses in the administration of the Claims under Option Two.

- d) All decisions of the Claims Administrator with respect to Eligibility and Distribution Payments are final, and are not subject to any appeal or review.

### **3.9 Reversion**

If, after all payments have been made pursuant to Articles 3.1 to 3.8 above, there are funds remaining in the Claims Program Account, the Claims Administrator shall return such remaining funds to the Defendant, inclusive of any interest accrued on the Claims Program Account.

### **3.10 Taxes and Interest**

- a) All interest accrued on the Claims Program Account shall become and remain part of the Claims Program Account.
- b) All funds held or administered by the Claims Administrator shall remain subject to the jurisdiction of the Court until such time as such funds shall be distributed pursuant to the Settlement Agreement and/or further order of this Court.
- c) Payment of all taxes payable with respect to any interest which accrues in the Claims Program Account shall be the sole responsibility of the Claims Administrator. The Claims Administrator in consultation with Class Counsel shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Claims Program Account, including any obligations to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the interest accrued in the Claims Program Account shall be paid from the Claims Program Account.
- d) The Defendant shall have no responsibility to make any tax filings with respect to the Claims Program Account, and shall have no responsibility to pay any tax on any interest accrued on the monies in the Claims Program Account.

## **ARTICLE 4: RELEASES AND DISMISSALS**

### **4.1 Releases**

- a) Upon the Effective Date, Class Counsel shall execute the Class Release on behalf of the Releasers.
- b) Upon the Effective Date, the Releasers forever and absolutely release, acquit, and discharge the Releasee from the Released Claims, for the consideration provided herein. The Releasers agree not to make any claim or take, commence or continue any proceeding arising out of or relating to the subject matter of the Released Claims against any other person, corporation or entity which might



claim damages and/or contribution and indemnity and/or other relief under the common law or any provincial legislation including relief of a monetary, declaratory or injunctive nature, from the Releasee.

- c) The Parties intend that the Settlement Agreement will be approved by the Court and will result in the dismissal of all claims asserted or which could have been asserted, including third party claims, by Class Members against the Releasee, on the terms set forth in this Settlement Agreement.
- d) Without limiting any other provision herein each Class Member, whether or not he/she receives a payment, will be deemed by the Settlement Agreement completely and unconditionally to have released and forever discharged the Releasee from any and all Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts and demands whatsoever, known or unknown, that were or could have been asserted in the litigation that is the subject of this Settlement Agreement.
- e) The Parties agree that each Class Member, whether or not they receive a Distribution Payment, will be forever barred and enjoined from continuing, commencing, instituting or prosecuting any action, litigation, investigation or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum or any other forum, directly, representatively or derivatively, asserting against the Releasee any claim that relates to or constitutes any of the Released Claims covered by this Settlement Agreement.

## **4.2 Dismissal of the Class Action**

The Parties shall, on consent, as part of the Settlement Approval Hearing request the Court to dismiss the Class Action, with prejudice in favour of the Defendant, without costs to any party.

## **ARTICLE 5: DISTRIBUTION OF SETTLEMENT AMOUNT AND ACCRUED INTEREST**

### **5.1 Settlement Payments**

- a) The Claims Program Account shall be held by the Claims Administrator in trust for the benefit of Class Members and, after the Effective Date, shall be paid in accordance with this Settlement Agreement and its schedules, subject to approval by the Court.
- b) The Claims Administrator shall administer payments to Eligible Claimants in accordance with Article 3.8 of this Settlement Agreement.

## 5.2 Monies in the Claims Program Account

In no event shall the Defendant have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, use or administration of monies in the Claims Program Account, including, but not limited to, the costs and expenses of such investment, distribution, use and administration. In no event shall the Defendant have any responsibility, financial obligation, or liability whatsoever with respect to Administration Expenses, Notice Expenses, Claims Administration Expenses or Class Counsel Fees except as provided for in Article 3 of this Settlement Agreement.

## ARTICLE 6: LEGAL FEES AND DISBURSEMENTS

### 6.1 Motion to Approve Class Counsel Fees

- a) Class Counsel will bring a motion to the Court for approval of Class Counsel Fees to be heard at the same time as the motion for approval of the Settlement Agreement. Class Counsel Fees shall be awarded at the discretion of the Court after hearing submissions from counsel for the Parties. The Defendant will not take any position with respect to the amount of Class Counsel Fees requested by Class Counsel.
- b) Class Counsel will seek legal fees in the amount of 20% of the Settlement Amount, plus reasonable disbursements, plus applicable taxes on fees and disbursements.
- c) Any legal fees and/or disbursements and/or taxes thereon awarded to Class Counsel as approved by the Court in excess of the amounts listed in **Articles 3.1(a)(ii) and (iii)** will be paid from the Compensation Fund and not by the Defendant.
- d) Class members who have retained or who retain lawyers or any other professionals or other persons to assist them in respect of filing claims for payments under this Settlement Agreement shall be responsible for payment of all fees and expenses of such lawyers, professionals or other persons.

## ARTICLE 7: ADMINISTRATION AND IMPLEMENTATION

### 7.1 Mechanics of Administration

- a) Pre-Approval: Class Members shall be given notice of comment rights and deadlines, and the Settlement Approval Hearing.
- b) Post-approval: Class Members shall be given notice of Court approval of the Settlement Agreement along with the manner and deadline for making

Claims, as well as contact information for both the Claims Administrator and Class Counsel from whom to obtain further information.

- c) Class Counsel acknowledge that all notices must be approved by the Court. No notices shall be disseminated in any manner until such time as they are approved by the Court.
- d) If the total of Administration Expenses, Notice Expenses, and Claims Administration Expenses exceeds the monies as set out in **Article 3.1(a)(i)**, the excess will be paid from the Compensation Fund.

## **ARTICLE 8: NO ADMISSION OF LIABILITY**

### **8.1 No Admission of Liability Generally**

- a) The Parties agree that, whether or not this Settlement Agreement is approved, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussion, and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement shall not be deemed, construed or interpreted to be an admission of any violation of any statute or law or of any wrongdoing or liability by the Releasee or of the truth of any of the allegations made in the Class Action or in any other pleading filed by the Plaintiffs.
- b) The Parties further agree that whether or not this Settlement Agreement is approved, neither this Settlement Agreement nor any document relating to it shall be offered in evidence in any action or proceeding in any court, agency, or tribunal, except to seek court approval of the Settlement Agreement or to give effect to and enforce the provisions of this Settlement Agreement.

### **8.2 Releasee has No Liability for Administration**

The Releasee has no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

## **ARTICLE 9: NON-APPROVAL OF SETTLEMENT AGREEMENT**

If this Settlement Agreement is not approved by the Court:

- a) Subject to **Article 9(c)** below, the Settlement Agreement shall be null and void and shall have no force or effect, and the Parties shall not be bound by

its terms, with the sole exception of the agreements and commitments contained in Article 8, which shall survive; and

- b) All negotiations, statements, and proceedings relating to the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties and the Parties shall be deemed to be restored to their respective positions existing immediately before it was executed.
- c) The Parties expressly reserve all of their respective rights to the extent that the Court does not approve this Settlement Agreement.
- d) The Defendant shall have no liability for any costs of implementation of the Pre-Approval Notice Dissemination Plan incurred by Class Counsel.

## **ARTICLE 10: MISCELLANEOUS**

### **10.1 Best Efforts**

The Parties shall use their best efforts to implement this Settlement Agreement.

### **10.2 Singular**

Where the singular is used, it may be read as including the plural and vice versa.

### **10.3 Motion for Directions**

- a) The Plaintiffs, Class Counsel, the Claims Administrator, or the Defendant may apply to the Court for directions in respect of the interpretation, implementation, and administration of this Settlement Agreement.
- b) All motions contemplated by this Settlement Agreement, including application to the Court for directions, shall be on notice to the Parties.

### **10.4 Timing**

Class Counsel will make their best efforts to bring the Pre-Approval Hearing and the Settlement Approval Hearing as soon after the execution of the Settlement Agreement as possible.

### **10.5 Headings, etc. in this Settlement Agreement**

- a) The division of the Settlement Agreement into Articles and the insertion of headings are for convenience of reference only, and shall not affect the construction or interpretation of this Settlement Agreement.
- b) The terms “this Settlement Agreement”, “the Settlement Agreement” “hereto”, “hereunder”, “herein”, and similar expressions refer to this

Settlement Agreement and not to any particular section or portion of this Settlement Agreement.

#### **10.6 Governing Law and Ongoing Jurisdiction**

- a) The Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Manitoba.
- b) The Court shall retain exclusive jurisdiction over all matters relating to the implementation and enforcement of this Settlement Agreement.

#### **10.7 Entire Agreement**

- a) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes any and all prior and contemporaneous understandings, undertakings, negotiations, representations, communications, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. The Parties agree that they have not received or relied on any agreements, representations or promises other than as contained in this Settlement Agreement. None of the Parties shall be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.
- b) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Court.

#### **10.8 Binding Effect**

Once the Settlement Agreement is approved by the Court, this Settlement Agreement shall be binding upon and inure to the benefit of the Plaintiffs, Class Members, the Releasers, the Defendant, the Releasee, Class Counsel and the Claims Administrator.

#### **10.9 Survival**

The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

#### **10.10 Counterparts**

This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement and an electronically scanned or facsimile signature shall be deemed to be an original signature for the purposes of executing this Settlement Agreement. This Settlement Agreement may be delivered and is fully enforceable in either original, facsimile or other electronic form provided that it is duly executed.

**10.11 Negotiated Agreement**

There shall be no presumption at law that any ambiguity in this Agreement should be interpreted in favour of or against the interests of any party.

**10.12 Dates**

Dates referred to in this Settlement Agreement may be altered with the written consent of the Parties and the approval of the Court.

**10.13 Language**

The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English.

**10.14 Confidentiality**

- a) The Parties agree that no public statements shall be made regarding the Class action or the Settlement which are in any way inconsistent with the terms of the Settlement Agreement. In particular, the Parties agree that any public statements regarding the Class Action will indicate clearly that the Settlement has been negotiated, agreed upon, and approved by the Court without any admission or finding of liability or wrongdoing and without any admissions or conclusions as to the truth of the allegations in the Class Action, all of which are specifically denied by the Defendant.
- b) Each Party agrees not to disparage any other Party or their counsel with respect to any of the matters in issue in the Class Action or the manner in which the Settlement was conducted.
- c) In order to determine the eligibility of Claims made by Class Members under Article 3 of this Settlement Agreement, Class Members will be required to authorize the Defendant and the Manitoba Agricultural Services Corporation to disclose to the Claims Administrator all documents and information submitted by them in support of claims for financial assistance under the Lake Manitoba Financial Assistance Program, the Disaster Financial Assistance Program and/or the Hoop and Holler Compensation Program. The Parties will seek a term in the Settlement Approval Order releasing the Defendant and the Manitoba Agricultural Services Corporation from any liability arising out of such disclosure of documents and information.

**10.15 Recitals**

The Recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

**10.16 Schedules**

The Schedules annexed hereto form part of this Settlement Agreement.

### **10.17 Authorized Signatures**

Each of the undersigned represents that they are fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties they represent.

### **10.18 Notice**

Where this Settlement Agreement required a Party to provide notice or any other communication or document to another, such notice, communication or documentation shall be provided by email, facsimile, or letter by overnight delivery to the representative for the Party to whom the notice is being provided, as identified below:

#### **For Plaintiffs and Class Counsel:**

Brian J. Meronek, Q.C.  
William S. Klym

DD West LLP  
300 – 305 Broadway  
Winnipeg, Manitoba R3C 3J7

Tel: 204-421-8655  
Fax: 204-421-8566

Email: [bmeronek@ddwestllp.com](mailto:bmeronek@ddwestllp.com)  
[wklym@ddwestllp.com](mailto:wklym@ddwestllp.com)

#### **For The Defendant:**

Jim Koch  
Manitoba Justice, Legal Services Branch  
Room 730 Woodsworth Building  
405 Broadway  
Winnipeg, Manitoba R3C 3L6

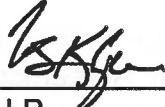
Tel: 204-945-2832  
Fax: 204-948-2826

Email: [jim.koch@gov.mb.ca](mailto:jim.koch@gov.mb.ca)

The Parties have executed this Settlement Agreement as of the date on the cover page.

JOHN HOWDEN, STEPHEN MORAN, SHAUN  
MORAN, 5904511 MANITOBA LTD., KEITH  
MCDERMID, and SUNSHINE RESORT LTD.,

Date: 16 November

Per:   
DD West LLP

THE GOVERNMENT OF MANITOBA

Date: 17 Nov 21.

Per:   
Deputy Minister of Infrastructure