DEVLIN GAILUS WATSON
BARRISTERS & SOLICITORS

2ND FLOOR, 736 BROUGHTON STREET
VICTORIA, BC, CANADA V8W 1E1

T: 250.361.9469
F: 250.361.9429

DGWLAW.CA

Osgoode Certificate in Fundamentals of Indigenous Peoples and Canadian Law

Land Management under the *First Nations Land Management Act*

John W. Gailus

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Introduction

Since the *Royal Proclamation, 1763*, the Crown has assumed administration and control over indigenous lands. Federal responsibility for "Indians and lands reserved for the Indians" has continued, pursuant to section 91(24) of the *Constitution Act, 1867.* Since 1876, the *Indian Act* has been the principal piece of legislation through which federal jurisdiction over "lands reserved for Indians" is exercised.

The vast majority of First Nations in Canada still administer their reserve lands according to the *Indian Act*. Under the *Indian Act*, the Department of Indigenous Affairs and Northern Development Canada ("INAC") plays a major role. In fact, 25 of the 35 land management provisions in the *Indian Act* require a decision from the Minister of Indigenous Affairs and Northern Development (the "Minister") or Governor in Council.[1] Even simple land transactions may require multiple approvals, hindering economic investment and activity on-reserve. In some cases, the approval process can take up to five years, during which time a First Nation may lose out on valuable economic opportunities.[2]

In 1991, a group of 13 First Nations approached the Government of Canada ("Canada") with a proposal to opt-out of the land management sections of the *Indian Act* and take over responsibility for the management and control of their reserve lands and resources. As a result of this proposal, the *Framework Agreement on First Nation Land Management* (the "*Framework Agreement*") was negotiated and later ratified in 1999 by the *First Nations Land Management Act* ("FNLMA"). As of January 2016, there are 95

[1] Office of the Auditor General of Canada, Report of the Auditor General of Canada to the House of Commons, "Chapter 6: Land Management and Environmental Protection on Reserves" (Fall 2009), online: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_06_e_33207.html ["OAG Report"] at para. 6.9.
[2] Report of the Standing Committee on Aboriginal Affairs and Northern Development Canada, "Study of Land Management and Sustainable Economic Development on First Nations Reserve Lands" (March 2014, 41st Parliament, Second Session) online: http://www.parl.gc.ca/content/hoc/Committee/412/AANO/Reports/RP6482573/AANOrp04/aanorp04-e.pdf.

First Nations that have entered the FNLMA regime and are either operating or developing land codes.[3]

Overview of the *First Nations Land Management Act*

The FNLMA provides signatory First Nations with the authority to make laws in relation to reserve lands, resources and the environment under a land code. While First Nations can design land codes to reflect their unique cultures, traditions, and decision-making processes, section 6 of the FNLMA sets out the requirements for a First Nation wishing to adopt a land code:

> **6** (1) A First Nation that wishes to establish a land management regime in accordance with the Framework Agreement and this Act shall adopt a land code applicable to all land in a reserve of the First Nation, which land code must include the following matters:
>
> (a) a description of the land that is to be subject to the land code that the Surveyor General may prepare or cause to be prepared or any other description that is, in the Surveyor General's opinion, sufficient to identify those lands;
>
> (b) the general rules and procedures applicable to the use and occupancy of First Nation land, including use and occupancy under
>
> (i) licences and leases, and
>
> (ii) interests or rights in First Nation land held pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the First Nation;
>
> (c) the procedures that apply to the transfer, by testamentary disposition or succession, of any interest or right in First Nation land;
>
> (d) the general rules and procedures respecting revenues from natural resources obtained from First Nation land;
>
> (e) the requirements for accountability to First Nation members for the management of First Nation land and moneys derived from First Nation land;

[3] Indigenous and Northern Affairs Canada, "First Nations Land Management Regime" online: https://www.aadnc-INAC.gc.ca/eng/1327090675492/1327090738973.

> (f) a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of First Nation land and the division of interests or rights in First Nation land;
>
> (g) the rules that apply to the enactment and publication of First Nation laws;
>
> (h) the rules that apply to conflicts of interest in the management of First Nation land;
>
> (i) the establishment or identification of a forum for the resolution of disputes in relation to interests or rights in First Nation land;
>
> (j) the general rules and procedures that apply in respect of the granting or expropriation by the First Nation of interests or rights in First Nation land;
>
> (k) the general rules and procedures for the delegation, by the council of the First Nation, of its authority to manage First Nation land;
>
> (l) the procedures that apply to an approval of an exchange of First Nation land; and
>
> (m) the procedures for amending the land code.

If a First Nation has more than one reserve, the land code may apply to any or all of its reserves.[4] Certain parts of the reserve may be exempted, for instance if there is known environmental contamination. Interests in reserve lands under the FNLMA are registered through the First Nations Land Register ("FNLR"). Unlike the Indian Lands Registry, the FNLR assigns priority of interest based on the time and date of registration as well as registered interests taking priority over unregistered interests.[5]

Once a First Nation has ratified its land code, the majority of *Indian Act* provisions relating to land management no longer apply.[6] After a land code is enacted, the First Nation "steps into the shoes" of the Minister. This has the effect of relieving Canada

[4] Section 6(2), FNLMA.
[5] Section 28 and 29 of FNLR Regulations.
[6] Specifically, sections 18 to 20, 22 to 28, 30 to 35, 37 to 41 and 49 and subsections 50(4) and sections 53 to 60, 66, 69, 71 and 93 and regulations made pursuant to section 57 of the *Indian Act*. See also Section 8(3), FNLMA.

from its fiduciary responsibilities associated with the administration and management of reserve lands going forward.

The FNLMA provides that the First Nation is not responsible for anything done or omitted to be done by Canada prior to the coming into force of the land code;[7] the First Nation becomes liable for the management and administration of its reserve lands going forward. Notwithstanding the transfer of administration of reserve lands under the FNLMA, the lands remain reserve lands.

First Nations operating under the FNLMA have the power to manage their reserve lands and natural resources, exercise power, rights and privileges as if they were an owner and receive all moneys acquired by the First Nation under its land code.[8] First Nations operating under the FNLMA have the legal capacity to acquire and hold property, enter into contracts, borrow, invest or expend money, and be a party to legal proceedings.[9]

First Nations also have the power to enact land laws respecting rights and licences, zoning and land use plans as well as the provision of local services and service charges. Section 20 of the FNLMA provides:

> 20 (1) The council of a First Nation has, in accordance with its land code, the power to enact laws respecting
>
> (a) interests or rights in and licences in relation to First Nation land;
>
> (b) the development, conservation, protection, management, use and possession of First Nation land; and
>
> (c) any matter arising out of or ancillary to the exercise of that power.
>
> (2) Without restricting the generality of subsection (1), First Nation laws may include laws respecting

[7] Section 34.
[8] Section 18(1).
[9] Section 18(2).

> (a) the regulation, control or prohibition of land use and development including zoning and subdivision control;
>
> (b) subject to section 5, the creation, acquisition and granting of interests or rights in and licences in relation to First Nation land and prohibitions in relation thereto;
>
> (c) environmental assessment and environmental protection;
>
> (d) the provision of local services in relation to First Nation land and the imposition of equitable user charges for those services; and
>
> (e) the provision of services for the resolution of disputes in relation to First Nation land.
>
> (3) A First Nation law may provide for enforcement measures, consistent with federal laws, such as the power to inspect, search and seize and to order compulsory sampling, testing and the production of information.

This section provides First Nations with greatly expanded powers from those under the *Indian Act*.

In particular, the enactment of laws in relation to environmental protection and environmental assessment are a significant step forward. The environmental protection regime developed by the First Nation must be at least equivalent to the standards imposed by the laws of the province in which the First Nation is located.[10] Additionally, the Framework Agreement requires an environmental assessment regime that is applicable to all projects carried out on First Nation land that are approved, funded or undertaken by the First Nation.[11]

Although land code laws trump any First Nation by-laws created under the *Indian Act*, federal laws on environmental protection prevail in the case of conflict with a First Nation land code law. Other federal laws regarding fish, migratory birds, endangered

[10] Section 21.
[11] Section 21(3).

species, oil and gas resources and uranium and radioactive materials continue to apply despite the enactment of a land code.[12]

Joining the *First Nations Land Management Act*

A First Nation may apply to join the FNLMA regime by submitting a Band Council Resolution ("BCR") to INAC or to the Lands Advisory Board and Resource Centre ("LABRC"). The First Nation must also complete a self-assessment questionnaire which is used by INAC to determine a First Nation's readiness to enter into the FNLMA.[13]

INAC assesses a First Nation's eligibility by reviewing its history of fiscal management, governance and communication, existing land management experience, current economic development activities, capacity and potential and any existing land-related issues on reserve.[14] First Nations are then ranked in one of five tiers - tier one being the lowest and tier five being the highest and most ideal for acceptance into the FNLMA. First Nations in the lower tiers can work with INAC to identify the areas that need to be strengthened prior to resubmitting an application to enter the FNLMA.[15] Acceptance into the FNLMA regime, however, not only requires 'readiness' on the part of the First Nation, but the availability of federal funding. As a result, there is currently a significant waiting list to join the FNLMA. Once a First Nation is accepted into the FNLMA, they receive written confirmation from the Minister.

Upon entry to the FNLMA, First Nations must sign onto the *Framework Agreement*. During the developmental phase, a First Nation has 24 months to develop a land code and negotiate a funding agreement with INAC (referred to as an "Individual

[12] Sections 39-44.
[13] A sample self-assessment questionnaire can be found in the Government of Canada, "First Nations Land Management Readiness Guide: A Guide for First Nations Interested in the First Nations Land Management Regime" (2013) online: http://www.aadnc-aandc.gc.ca/eng/1367432545445/1367432634043#chp8 ["Readiness Guide"] at Annex C.
[14] Readiness Guide.
[15] Ibid.

Agreement").[16] First Nations in the developmental phase of the FNLMA receive up to $150,000 towards the costs of developing a land code and Individual Agreement.[17] Section 6(3) sets out the requirements for the Individual Agreement:

> 6 (3) A First Nation that wishes to establish a land management regime shall, in accordance with the Framework Agreement, enter into an individual agreement with the Minister describing the land that will be subject to the land code and providing for
>
> (a) the terms of the transfer of administration of that land;
>
> (b) a description of the interests or rights and licences that have been granted by Her Majesty in or in relation to that land, and the date and other terms of the transfer to the First Nation of Her Majesty's rights and obligations as grantor of those interests or rights and licences;
>
> (c) the environmental assessment process that will apply to projects on that land until the enactment of First Nation laws in relation to that subject; and
>
> (d) any other relevant matter.

Once drafted, the FNLMA requires that the Minister and First Nation appoint a verifier to ensure that the land code conforms with the *Framework Agreement* and to certify that the land code was properly approved by its members through a ratification vote.[18] Once a First Nation has ratified its land code, control over the management and administration of reserve lands is transferred from Canada to the First Nation and they are considered operational.[19] Section 16 of the FNLMA provides:

> 16 (1) After the coming into force of a land code, no interest or right in or licence in relation to First Nation land may be acquired or granted except in accordance with the land code of the First Nation.

[16] Readiness Guide, Phase 1.
[17] If the development phase takes longer than 24 months, no additional funding is provided. See Readiness Guide.
[18] Section 8(1), FNLMA.
[19] Specifically, sections 18 to 20, 22 to 28, 30 to 35, 37 to 41 and 49 and subsections 50(4) and sections 53 to 60, 66, 69, 71 and 93 and regulations made pursuant to section 57 of the *Indian Act*. See also Section 8(3), FNLMA.

> (2) Subject to subsections (3) and (4), interests or rights in and licences in relation to First Nation land that exist on the coming into force of a land code continue in accordance with their terms and conditions.
>
> (3) On the coming into force of the land code of a First Nation, the rights and obligations of Her Majesty as grantor in respect of the interests or rights and the licences described in the First Nation's individual agreement are transferred to the First Nation in accordance with that agreement.
>
> (4) Interests or rights in First Nation land held on the coming into force of a land code by First Nation members pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the First Nation are subject to the provisions of the land code governing the transfer and lease of interests or rights in First Nation land and sharing in natural resource revenues.

Once a First Nation becomes operational under a land code, they must begin to develop land laws. First Nations have 12 months from the effective date of the land code to enact a law dealing with the division of interests in reserve land upon breakdown of a marriage.[20] Operational First Nations are provided with funding to help them develop and enforce land laws, and to establish and maintain environmental assessment and protection regimes. Funding levels are set in three tiers based on historical averages of funding for land related activities. Tier 1 First Nations are provided with $204,536 each year for 4 years, Tier 2 First Nations are provided with $251,636 each year for 4 years and Tier 3 First Nations are provided funding of $317,386 each year for 4 years.[21]

Models, Templates, and Resources

Under the *Framework Agreement*, the LABRC is responsible for developing model land codes, laws, and training programs, courses and materials relevant to land codes. At the request of a First Nation, the LABRC can also assist First Nations in developing their individual land codes, land management systems, environmental assessment and other protection regimes.[22]

[20] Government of Canada, "First Nations Land Management Act" (2013) online: https://www.aadnc-aandc.gc.ca/eng/1317228777116/1317228814521.
[21] Readiness Guide.
[22] Readiness Guide.

The LABRC's website has a number of resources to assist First Nations in the developmental and operational stages of the FNLMA including: a model land code, sample land laws, human resource tools (such as sample job descriptions and qualification checklists), communication tools for member outreach, courselets, and workplans, amongst others. The website also posts land codes, land laws, and family property laws that have been enacted by other First Nations operating under the FNLMA. Resources can be found online at https://labrc.com/resources/framework-agreement/. Many First Nations also post their land codes and laws online so there are a wealth of resources available. Nonetheless, it behoves any First Nation who is considering entering the FNLMA to ensure that they have experienced advisors in place to assist them in navigating the entry and implementation of their land management regime.

Benefits and Drawbacks to the *First Nations Land Management Act*

Most First Nations view the FNLMA as an important step towards self-governance. In this regard, land codes and land laws provide First Nations with the ability to administer lands and draft laws in a manner that reflects a First Nations' culture, traditions and better reflects the needs and priorities of community members. Increased control and autonomy can reduce the time and costs of land transactions, thereby creating increased competitiveness and opportunities for economic development. INAC is also happy to shed its fiduciary duty and liabilities in regards to land management.

The legal capacity to hold land, borrow and contract also increases certainty for investors. Direct control over the collection and expenditure of land revenues means that First Nations can invest in soft and hard infrastructure for the benefit of their members without the necessity of first seeking approval from INAC.

The law-making authority of First Nations is also expanded, particularly in the area of environmental protection and assessment. First Nations have opportunities to truly implement self-government regimes on the ground.

Transition to the FNLMA, however, can be slow and expensive. The benefits of the regime seem to accrue to more prosperous First Nations with the human resources and financial capacity to deal with the increased liability and costs associated with the FNLMA.

For some First Nations, the FNLMA has proven to be an example of the old adage "if something sounds too good to be true it probably is." The formula-based funding under the FNLMA is inadequate and leaves many First Nations operating at a deficit. Some First Nations continue to struggle with long outstanding land issues that they have inherited from INAC. Funding is not provided to address these outstanding issues, which can be incredibly burdensome for land staff. It can take as long as 10 years for participating First Nations to indicate they are fully operational under their land codes.[23] Operating First Nations must also have lands staff with the knowledge and technical expertise required to carry out their duties under the land code effectively.

With the withdrawal of INAC it becomes the responsibility of the First Nation to manage the existing leases and permits on the reserve. Many of these leases contain rent review provisions that must be strictly followed otherwise potential rental income may be lost and in the case of Certificate of Possession holders, the First Nation may be liable in negligence or breach of fiduciary duty if a rent review is missed. This is probably the most common claim that INAC faces - the failure to complete a rent review in accordance with the lease terms. This liability now falls on the First Nation who needs to

[23] KPMG, "Framework Agreement on First Nation Land Management: Update Assessment of Socio/Economic Development Benefits, (February 2014) online: https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report_Feb-27-2014.pdf at p. 3.

have appropriate systems in place to ensure that appraisals are done in time and notice to tenants provided in accordance with the lease provisions.

Certain sections that impact upon lands are not part of the FNLMA, in particular sections 42-50 of the *Indian Act*, which deal with Indian estates. Prior to enacting the FNLMA, INAC did not turn its mind to how the FNLMA interacts with these sections, causing certain legislative gaps. These sections become particularly difficult when dealing with estates that have reserve land holdings that may be leased to third parties. For instance, if a Certificate of Possession holder dies and her heir is not a band member, the property must be sold to a member or the Band pursuant to section 50, which requires INAC to become involved. The situation becomes particularly complicated if INAC refuses to take jurisdiction over the Estate creating confusion regarding which regime, if any applies.

Once a First Nation enters into the FNLMA, there is no way to opt-out and the First Nation must be diligent in managing reserve lands in accordance with their land codes. Failure to abide by the processes set out in the land code has resulted in legal action against at least one First Nation.[24]

Two of the factors that drove First Nations to embrace the FNLMA were the cumbersome designation procedures under the *Indian Act* and the requirement for an environmental assessment of every project, regardless of scope under the *Canadian Environmental Assessment Act* ("CEAA"). However, recent changes to the *Indian Act* [25] and the wholesale overhaul of the *Canadian Environmental Assessment Act, 2012* ("CEAA, 2012") in the Harper Government omnibus bills likely will speed up the approval process for development on reserve.

[24] *Lafond v. Ledoux*, 2009 FC 919.
[25] *Jobs & Growth Act, 2012* (Bill C-45).

The double-majority rule under the *Indian Act* has been removed and a simple majority is now required. That is, there is no longer a quorum or minimum number of band members required to vote on a designation for it to be considered valid.[26] Land codes often have a 25% threshold requirement for community votes. In the context of environmental assessments, the focus of CEAA, 2012 is now on major projects. Environmental screenings are no longer a requirement although INAC has developed an environmental review process to guide the review of on-reserve projects not subject to CEAA, 2012. The irony of these changes is that it may be that the FNLMA processes for community approval of a proposal as well as the First Nation's environmental assessment process are now more cumbersome than the federal processes.

On balance, the FNLMA is an important tool for First Nations' self-governance. However, First Nations interested in taking back land management should go in with their eyes open, aware of the need for appropriate levels of financial and human resources to ensure successful implementation and operation of their land code.

[26] *Indian Act,* s. 39.1