

First Nation Legislation Update

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Introduction

- Large number of federal legislative developments affecting First Nations
- Some minor changes and some major ones
- Areas affected include:
 - Reserve land designations
 - Matrimonial property rights
 - Financial disclosure
 - Drinking water

Land Designations

- Since 1763, the alienation of the aboriginal interest in land has required votes
- Treaty making process has required such votes
- Requirement was introduced into the Indian Act
- Votes required for the surrender of reserve land
- First Nations could surrender their interest in reserve lands “unconditionally” or “conditionally”
- This process was not conducive to accommodating developments on reserve lands and resulted in surrendered lands ceasing to be part of the reserve

Land Designations

- In 1988, the Indian Act was amended to allow First Nations to “designate” all or part of a reserve for leasing purposes or for a right or interest to be granted (ss. 38(2))
- Commonly called the Kamloops Amendment
- Designated lands remain part of the reserve and the First Nation interest in the land remains
- However, the designated land can be leased or an interest such as an easement can be granted

Land Designations

- The designation of reserve land had to follow a process set out in s. 39 of Indian Act and the Indian Referendum Regulations
- This process had three conditions:
 - The designation was made to Her Majesty
 - A positive vote of members in accordance with the Indian Referendum Regulations
 - The designation was accepted by the Governor in Council

Land Designations

- Two major delays in the designation process
- Community vote required a “majority of a majority” in a first vote
- If a positive vote received, but the necessary quorum not reached, a second vote could be held – only a simple majority needed on the second vote
- Process was very time-consuming – a minimum of 49 days required for 1st vote – all members have to be provided with information packages
- If a second vote required because of lack of quorum, a slightly shorter process required
- Designation votes could easily take 3 months to complete

Land Designations

- Second major delay was obtaining approval of Governor in Council
- No timelines for this approval to issue
- Competing with all other business of government which required Governor in Council approvals

Land Designations

- Amendments to the designation process came into effect on March 31, 2013
- New s. 39.1 proclaimed along with amendments to Indian Referendum Regulations
- Designations no longer require “double majority”
- Only require “simple majority” approval
- Votes will either be yes or no – no need for second vote
- Also now need Chief and Council to accept designation and only need Minister to accept the designation – Governor in Council approval removed
- Impacted other legislation such as Manitoba Claims Settlement Implementation Act which allow for designation of land before land obtains reserve status

First Nations Fiscal Management Act

- In 2006, the First Nations Fiscal and Statistical Management Act was proclaimed in force
- The FNFSMA increased First Nation tax and borrowing powers and established 4 different entities, including the First Nations Statistical Institute
- In 2012, the FNFSMA was amended to remove the First Nations Statistical Institute, whose duties were transferred to Statistics Canada
- The statute is now called the First Nations Fiscal Management Act (FNFMA)

First Nations Financial Transparency Act (FNFTA)

- On March 27, 2013, the First Nations Financial Transparency Act came into force
- This new Act imposed financial reporting requirements on over 580 First Nations by legislation – First Nations which are parties to comprehensive land claim agreements are generally exempt
- A specific schedule setting out the remuneration and reimbursement of expenses of chiefs and councillors will be required

FNFTA

- The purpose of the Act – “to enhance the financial accountability and transparency of First Nations” (s. 3)
- Leaves out the fact that First Nations have already been conducting and disclosing annual audited statements for years by virtue of funding agreements with different governments
- The first financial year that this new Act will apply to is the April 1, 2013 – March 31, 2014 year (s. 4)

FNFTA

- Accounts, consolidated financial statements and audits of such statements must follow the GAAP of the Canadian Institute of Chartered Accountants (s. 5)
- Audits must be done by an independent auditor (ss. 5(2))
- A separate schedule must set out the remuneration and the reimbursement of expenses for each member of Council (ss. 6(1)) – remuneration and reimbursement of expenses must be separated
- The schedule is to be a distinct document from the statements and must include an auditor's report or review engagement letter (ss. 6(2) and (3))

FNFTA

- Copies of the financial statements, schedule, auditor's written reports concerning the statements and the schedule are to be made available to any member (s. 7(1))
- Must be provided no later than 120 days after end of financial year (s. 7(2))
- Can only charge fee for cost of copying (s. 7(3))
- Requirement to post documents on Internet for 10 years (ss. 8(1) and (2))
- AANDC must post documents on AANDC website upon receipt (s. 9)

FNFTA

- Members may apply to a superior court for order requiring First Nation to provide copies of documents (s. 10)
- Any person may apply to a superior court for order requiring First Nation to post documents on Internet (s. 11)
- Can only do so after 120 days after March 31 (s. 12)
- Minister can make orders for breaches
 - Require First Nation council to develop action plan;
 - Withhold moneys payable under grant or contribution agreement; or
 - Terminate contribution agreement

FNFTA

- While FNFTA is now in force, the effects of the Act will not be felt until after March 31, 2014
- Some First Nations have already stated that they will not comply
- Disclosure to non-members is problematic
- Disclosure of financial information for other entities in consolidated financial statements also a concern
- This could include corporations which the First Nation own shares, a partnership or joint venture which the First Nation is part of or any other association or organization
- Concern that it may lead to potential partnership or joint venture parties being reluctant to entering into such relationships with First Nations if their financial information may become public

Safe Drinking Water for First Nations Act (SDWFN)

- Enacted on June 19, 2013 – in force on November 1, 2013
- Preamble states that the Act to create effective regulatory regimes to ensure access to safe drinking water
- Preamble also states that the Ministers of AANDC and Health are committed to working with First Nations over development of regulations
- Aboriginal or treaty rights may be abrogated or derogated to the “extent necessary to ensure the safety of drinking water on First Nation lands” (s. 3) – this is a very unique feature of this Act

SDWFN

- Regulations recommended by AANDC Minister may be made for a variety of matters under ss. 4(1) of the Act, including:
 - Training and certification of operators
 - Water source protection
 - Drinking water and waste water system requirements – location, design, maintenance, operation, etc.
 - Truck delivery of drinking water
 - Collection and treatment of waste water
 - Monitoring, sampling, testing and reporting of testing of waste water
 - Handling, use and disposal of waste water and waste water products

SDWFN

- Regulations recommended by Health Minister may be made for standards for the quality of drinking water (ss. 4(2))
- Regulations recommended by AANDC Minister and Health Minister may be made for:
 - Monitoring, sampling, testing and reporting of testing of drinking water
 - Making of remediation orders
 - Emergency measures in response to contamination of drinking water (ss. 4(3))

SDWFN

- Under s. 5 of the Act, regulations created under s. 4 may include a wide variety of powers, including the ability to:
 - Specify classes of drinking water and waste water systems
 - Confer powers to regulate drinking water and waste water systems
 - Make orders, perform work or appoint independent operators
 - Establish fees and rates of interest
 - Establish offences and penalties (ss. 5(1)(f))
 - And many more..... (22 in total)

SDWFN

- With regard to the establishment of offences, the penalties must correspond with similar penalties for such offences under provincial law in the province it occurred (ss. 5(2))
- Regulations may incorporate provincial laws by reference, with necessary adaptations (ss. 5(3))
- Such regulations may by necessity vary from province to province (ss. 5(4))
- Regulations cannot be made with regard to the allocation of water supplies or the issue of permits for the use of water for non-drinking purposes (ss. 5(5))

SDW/FN

- Ministers of AANDC and Health may enter into agreements with a province, corporation or other body for the administration and enforcement of regulations made under the Act (s. 6)
- Regulations under the Act prevail over First Nation laws or by-laws (s. 7)
- Instruments made by provincial officials or bodies under a provincial act incorporated by reference in a regulation are not subject to the Statutory Instruments Act (s. 8)
- A provincial official or body that exercises a power or duty under the regulations is not a federal board, commission or other tribunal – no judicial review by the Federal Court – must look to the superior courts of the province (s. 9)

SDWFN

- Limitations on liability, defences and immunities to a variety of parties, including federal and provincial ministers and employees and others exercising powers and duties under the regulations are set out in s. 11
- The imitations on liability, defences and immunities are to be the same as provided for under provincial law
- No civil proceeding may be brought, no order made nor any fine or monetary penalty may be imposed on the federal government under any regulation under the Act (s. 13)

SDW/FN

- No regulations in force as of the preparation of this presentation
- Must wait and see what the various regulations will say as standards between provinces are different
- Power of federal government to appoint a province or any corporation to enforce regulations may become a point of contention with First Nations
- Many First Nations critical as what is really needed is more resources to build and operate systems, rather than efforts only to create standards – most First Nations following relevant provincial standards

Family Homes on Reserves and Matrimonial Interests or Rights Act (Family Homes Act)

- Received Royal Assent on June 19, 2013 – not yet proclaimed in force
- Provincial laws regarding matrimonial property division don't apply on reserve
- Indian Act has no provisions
- Development of this legislation took a very long time
- Numerous studies
- First introduced into Parliament in March 2008

Family Homes Act

- Preamble of Act makes some important statements
- Recognition of non-application of provincial and territorial laws
- Recognition of lack of provisions in Indian Act
- Act to deal with use/occupation/possession of family homes after relationship breakdown or death of spouse
- Decision makers must be guided by best interest of children and connection to First Nation
- Decision makers can be informed by First Nation with respect to cultural/social/legal aspects of First Nation
- Act not to define the nature and scope of self-government

Family Homes Act

- Interpretation section (s. 2) sets out some important definitions:
 - “court” - both Provincial Court and Queen’s Bench
 - “family home” – doesn’t have to be affixed to reserve, just located on it
 - “interest or right” – includes right of possession (includes CPs and COs), permits, leases, land code interest, First Nation recognized right or interest
 - “matrimonial interests or rights” – interests or rights other than interests or rights in or to family home
 - “spouse” – would appear to include same-sex marriages

Family Homes Act

- Act is binding on the federal government and on the provinces (s. 3)
- Purpose of Act set out in s. 4:
 - Provide for enactment of First Nation laws
 - Establishment of provisional rules and procedures
 - Apply during conjugal relationship
 - Upon relationship breakdown
 - Death of spouse or common-law partner
 - Use/occupation/possession of family homes on reserve
 - Division of value of any interests/rights in or to structures or lands on reserve

Family Homes Act

- Act specifically does not change land tenure system under the Indian Act (s. 5)
- Title to reserve land not changed
- Reserve land still set apart for use and benefit of First Nation
- Reserve land continues to fall under s. 91(24) of the Constitution Act, 1867
- In order for Act to apply, at least one spouse or common-law partner must be a First Nation member or an Indian

Family Homes Act

- First Nations will have the power to enact laws dealing with the matters set out in s. 4 of the Act (s. 7)
- First Nations will be able to develop provisions for enforcing these laws despite s. 89(1) of the Indian Act
- Notice of the development of such laws must be provided to the Attorney-General for the province (ss. 7(3))
- Membership approval by way of a vote is required and all members must be able to vote (s. 8)
- At least 25% of all eligible voters must cast ballots and a majority of those must vote to approve (s. 9) – Council can increase percentage if they wish

Family Homes Act

- Once a law is approved it must be:
 - Sent to Minister
 - Sent to the Centre of Excellence for Matrimonial Real Property
 - Sent to the Attorney General of the province in which the First Nation has a reserve

Family Homes Act

- Sections 13-52 of the Act are provisional rules
- Apply so long as a First Nation has not enacted laws under s. 7 (ss. 12(1))
- First Nations who have adopted matrimonial real property laws under their land code as provided for under the First Nations Land Management Act are exempt from ss. 13-52 (ss. 12(2))

Family Homes Act

- Each spouse or common-law partner may occupy the family home during the conjugal relationship, whether or not the person is a member or an Indian (s. 13)
- Upon death of a spouse or common-law partner, a survivor who does not hold an interest or right in or to the family home, can continue to reside in it for 180 days (s. 14)
- The consent of the spouse or common-law partner who does not hold an interest or right must be obtained before any disposition or encumbrance is granted – courts can set aside any transaction and impose conditions (s. 15)
- However, if contracting party obtained for value and in good faith, court cannot set aside transaction – remedy for other spouse or common-law partner is damages

Family Homes Act

- Spouse/common-law partner with interest holds onus to show that consent was obtained
- Spouse/common-law partner with interest can apply to court (subject to Indian Act) for an order granting disposition or encumbrance if:
 - Other spouse/common-law partner cannot be found
 - Other spouse/common-law partner is not capable of giving consent
 - Other spouse/common-law partner is unreasonably withholding consent

Family Homes Act

- Act allows for emergency protection orders (ss. 16-18)
- Act allows for exclusive occupation orders, including orders after the death of a spouse or common-law partner (ss. 20 and 21)
- Judges can make findings of family violence, whether or not a criminal charge has been laid, dismissed or withdrawn or a conviction has been or could be obtained (s. 22)
- Orders under ss. 16-18 and 20-21 does not change who holds the interest or right – nor does it prevent an executor or administrator from transferring to a beneficiary

Family Homes Act

- Act contains detailed rules on the division of the value of matrimonial interests or rights (ss. 28-30)
- Courts may, in certain circumstances, order the transfer of interests or rights (s. 31)
- Courts can also make order to restrain the improvident depletion of the interest or right (s. 32)
- Courts can enforce separation agreements (s. 33)
- Act contains detailed rules on the entitlement of survivors (ss. 34-40)
- With certain exceptions, notice must be provided to the Council of the First Nation
- Court must allow First Nation to make representations with respect to cultural/social/legal context and to present views on granting of order (s. 41)

Family Homes Act

- Jurisdiction of courts set out in ss. 43-46
- Rules of practice and procedure may be developed for courts in regulating the practice and procedure of the Act in that court (s. 47)
- Other general provisions contained in ss. 48-52:
 - Court can determine interest or right
 - Ability of executors/administrators to continue on with applications for orders
 - Notice of orders to Minister and Council of First Nation
 - Provincial laws of evidence to be followed
 - Enforcement of orders, including enforcement by the Council of a First Nation

Upcoming Legislation

- Bill C-9 – First Nations Election Act
- 1st Reading in the Senate on December 10, 2013
- Opt-in legislation which will replace process in Indian Act for election of Chief and Councillors
- Some key provisions include:
 - Greater powers for electoral officers
 - More provisions on election offences
 - 4 year terms
 - No more involvement of AANDC in election appeals – courts only – choice between Federal Court or Queen's Bench

Upcoming Legislation

- Bill C-16 – Sioux Valley Dakota Nation Governance Act
- Sioux Valley Dakota Nation, Canada and Manitoba signed self-government agreements on August 20, 2013
- Federal and provincial legislation needed to give effect
- Indian Act will cease to apply to Sioux Valley
- Chief and Council will also cease to be a “federal board, commission or tribunal” under the Federal Courts Act

Upcoming Legislation

- There is an ongoing consultation process regarding a legislative proposal regarding First Nations Education – called Working Together for First Nation Students
- A draft form of legislation has been put together
- Some of the key provisions include:
 - Canada's commitment to s. 35 of the Constitution Act, 1982
 - Exclusion of self-governing First Nations
 - Provision of access to education to students between 6 and 21 years
 - Mandatory school attendance between 6 and 16 years
 - Governance of education program
 - School operations and funding
 - Development of First Nation by-laws

Upcoming Policy Change

- Currently there is a consultation process going on with regard to proposed changes to the Additions To Reserve Policy of AANDC (also known as Ch. 10 of the Land Management Manual)
- Purpose of proposed changes to streamline ATR proposals and remove duplicative provisions
- Clarify roles and responsibilities
- Facilitate economic development
- Public input was due by October 31, 2013
- CBA National Aboriginal Law Section made a submission in October 2013 – available on CBA website

Conclusion

- Numerous legislative changes have occurred or are on the horizon
- Affect those who practice commercial law, family law, real property law, wills and estates law and who provide advice to First Nation governments
- Practitioners should be aware of changes and adapt advice where necessary – interaction of different pieces of legislation