

The MBA Mid-Winter Conference 2019

First Nations Sovereignty and Economic Development:
Shaping our Future

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INTRODUCTION

Focus on legal and taxation aspects:

- ▶ Land management regimes
- ▶ Head lease/sub-lease and ownership structures
- ▶ By-laws
- ▶ Real property tax regimes



What is a Reserve?

- ▶ Set out in the *Indian Act* - “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”
- ▶ Legal nature of reserve the same no matter where it is located

Land Management

- ▶ In Manitoba there are two systems of land management on reserve lands
 - ▶ *Indian Act*
 - ▶ *First Nation Land Management Act*
- ▶ Majority of First Nations still under the *Indian Act*

Land Management – Indian Act

- ▶ First Nations cannot grant fee simple interest in reserve land
- ▶ *Indian Act* has provisions on how interests can be granted in reserve land:
 - ▶ Certificates of Possession
 - ▶ Permit
 - ▶ Section 35 Takings
 - ▶ Designation
 - ▶ *Indian Timber Regulations and Indian Mining Regulations*

Certificates of Possession

- ▶ Issued by Minister to First Nation member
- ▶ Land in question must have been allotted by First Nation council
- ▶ Grants right of possession
- ▶ Can be sold or transferred to other First Nation members

Certificates of Possession

- ▶ Becomes asset of estate of deceased First Nation individual and can pass to heirs
- ▶ Interest can be expropriated by First Nation
- ▶ CPs cannot be mortgaged - rights in a CP cannot be transferred to non-members
- ▶ Member can apply to have Minister lease land under CP

Permits

- ▶ Permits issued under s. 28(2) are non-exclusive possession and only for specific permitted use
- ▶ Used for easements and utility lines



Permits

- ▶ MOUs/Letter Permits can be issued to other federal and provincial departments for limited uses
- ▶ Permits under s. 58(4) relates to disposal of wild grass, dead timber, sand, gravel, clay and other non-metallic substances

Section 35

- ▶ Historically used to expropriate reserve land for variety of public purposes
- ▶ Railways, transmission lines, roads, canals, military bases, pipelines, navigation beacons, hydro operations
- ▶ No longer commonly used
- ▶ Issues with reversionary interest of First Nation - “when no longer needed for purpose
- ▶ Many specific claims pending and filed in regard to these takings

Designations

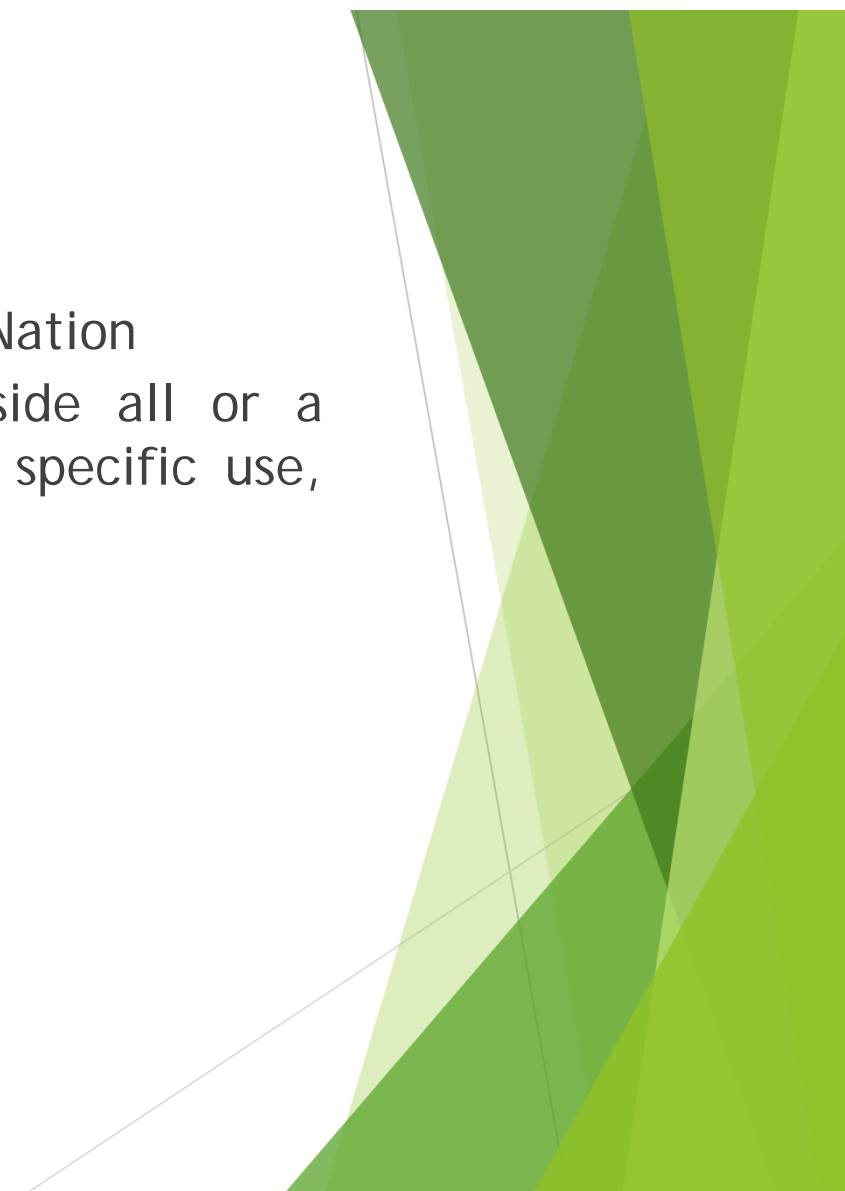
- ▶ Section 89 of the *Indian Act* restricts use of reserve lands from being used as security
- ▶ However, designations allow for the temporary surrender of reserve land for specific purpose(s)
- ▶ Allows other parties to obtain temporary interest – usually by way of sublease

Designations

- ▶ Useful for business development purposes where security for financing required
- ▶ Sections 37-41 of the *Indian Act* set out the requirements for a designation of reserve land
- ▶ Designated land is still reserve land, but it can be leased to non-members

Designations

- ▶ Requires a vote of the members of the First Nation
- ▶ Designation process identifies and sets aside all or a portion of a parcel of reserve land, for a specific use, purpose and term
- ▶ The designation must be made to Canada



Designations

- ▶ Requires consent of a simple majority of electors by referendum (majority of those who vote must vote in favour)
- ▶ Chief and Council must recommend acceptance to Minister
- ▶ Minister needs to accept

Pre Reserve Designations

- ▶ What is Pre Reserve Designation?
- ▶ When a First Nation takes the steps to designate their land even before the land becomes “reserve” land
- ▶ Primarily used in accommodating existing third party interests as part of establishing new reserves under treaty land entitlement (TLE) and other agreements

Pre Reserve Designations

- ▶ In 1999, the Manitoba Claims Settlement Implementation Act was enacted
- ▶ Allowed for pre-reserve designations specific to TLE agreements and Northern Flood Agreements
- ▶ In 2018, the Additions of Land to Reserve and Reserve Creation Act was included as part of the Budget Implementation Act, 2018

Pre Reserve Designations

- ▶ Once in force, the new Additions of Land to Reserve and Reserve Creation Act will subsume the provisions of the MCSIA dealing with pre-reserve designation
- ▶ Minister can grant interests under the Indian Act before the land is reserve
- ▶ Minister can also set land apart as reserve
- ▶ Previously Minister could only set apart under MCSIA
- ▶ No need for Governor in Council orders to set land apart

Leasing

- ▶ Leases are issued by Canada as landlord
- ▶ Most common to have a First Nation entity be the tenant
- ▶ The First Nation entity (tenant) then enters into a sublease with a developer or another entity who wants to lease land or a space in a building (subtenant)

Leasing

- ▶ Consent of Canada only required for any sublease that is not for fair market rent (i.e sublease for nominal rent) - consent not required if sublease is for fair market rent
- ▶ Leasehold interests can be mortgaged and assigned

Ownership

- ▶ Use of corporations or limited partnerships common in terms of holding head lease from Canada
- ▶ First Nation will own shares in corporation or partnership units in limited partnership
- ▶ Dual purpose - seek various tax advantages set out in *Income Tax Act* and shield First Nation from liability

By-Laws

- ▶ First Nations can enact by-laws under s. 81(1) of the *Indian Act*
- ▶ Some key areas of law-making powers include zoning, construction, water supplies and regulation of business
- ▶ Can impose fines up to \$1000 or 30 days imprisonment or both
- ▶ Can obtain orders upon conviction that contravention of by-law cease

By-Laws

- ▶ First Nations can enact anti-intoxicant by-laws under s. 85.1 of the *Indian Act*
- ▶ Requires consent of a majority of electors who vote at a special meeting of the First Nation
- ▶ The sale and manufacture of intoxicants are subject to harsher penalties than being intoxicated or possessing intoxicants
- ▶ Question has arisen over definition of “intoxicant” - does it in fact include cannabis and other drugs?

Timber/Mining/Oil & Gas

- ▶ The removal of timber from reserves must be done by permit or licence under the *Indian Timber Regulations*
- ▶ The removal of metallic substances from reserve must be done by permit or lease under the *Indian Mining Regulations*
- ▶ Also the *Indian Oil & Gas Act* which governs oil and gas development

Land Management - Indian Act

- ▶ Management of reserve land can be done a number of ways
- ▶ Management by INAC - all transactions require departmental involvement and approval
- ▶ Delegated management by First Nation - commonly called "53/60" - First Nation deals with the land management of its reserves - reduced involvement of INAC - First Nation is an agent of INAC

FNLMA

- ▶ The *Framework Agreement on First Nation Land Management* was signed in 1996 by Canada and 13 First Nations - many more First Nations have since been added
- ▶ The Framework Agreement is an initiative for participating First Nations to take over the management and control of their lands and resources
- ▶ The Framework Agreement has been ratified and implemented by Canada in the *First Nations Land Management Act (FNLMA)*

FNLMA

- ▶ Opt in legislation - First Nations take over total management of reserve lands
- ▶ First Nation ratification voting required to adopt land code before implementation can occur
- ▶ Large portions of the *Indian Act* cease to apply to the First Nation and their reserve lands - designation votes no longer required

FNLMA

- ▶ Requires First Nations to develop land codes and land laws relating to management of reserve lands
- ▶ Three First Nations in Manitoba have enacted land codes - Opaskwayak Cree Nation, Swan Lake First Nation and Chemawawin Cree Nation - OCN and Swan Lake have urban reserves
- ▶ Several other First Nations are in various stages of development

FNLMA

- ▶ First Nations have power to:
 - ▶ manage land as owner
 - ▶ grant interests, rights and licences to land
 - ▶ issue their own legal instruments
 - ▶ manage natural resources
 - ▶ enact laws dealing with interests and rights and development of land
 - ▶ develop enforcement measures
 - ▶ expropriate

FNLMA

- ▶ First Nation lands continue to be lands reserved for Indians within the meaning of s.91(24) of the *Constitution Act, 1867* (not fee simple lands)
- ▶ Special relationship to the Crown is retained and title to First Nation land is not affected by the FNLMA

FNLMA

- ▶ Third party interests are protected until interest expires
- ▶ New interests can only be granted in accordance with the First Nation's Land Code
- ▶ Individual First Nation member's interests are protected and continue

FNLMA

- ▶ Budget Implementation Act, 2018 will bring some changes
- ▶ UNDRIP and Canada's commitment to it will be referenced
- first piece of federal legislation to do this
- ▶ New provisions dealing with creating a land code for joint reserves - uniform rules and procedures for land management and dispute resolution
- ▶ Community votes can be done by electronic voting
- ▶ Approval of land codes only requires simple majority

FNLMA

- ▶ First Nations under land codes will be able to request a transfer of all monies held in their revenue and capital accounts at ISC (must inform members beforehand)
- ▶ Can create laws related to family homes
- ▶ Can create laws related to restricting liability of employees who act under land codes
- ▶ Can create laws related to enforcement similar to provincial laws
- ▶ Minister can set land apart as reserve for First Nations under land code
- ▶ First Nations can issue land code instruments prior to land being set apart as reserve

Real Property Taxation

- ▶ In Manitoba there are two systems of real property taxation on reserve lands
 - ▶ Section 83 of the *Indian Act*
 - ▶ *First Nation Fiscal Management Act* (FNFMA)
- ▶ Very few First Nations in Manitoba have created real property tax regimes under either Act
- ▶ Optional legislative power which a First Nation may choose to exercise

Section 83

- ▶ A First Nation may, for local purposes, make by-laws for the taxation of land or interests in land in a reserve.
- ▶ The concept of “interest in land” includes rights to occupy, possess or use lands in a reserve.

Section 83

- ▶ A s. 83 by-law has no effect outside reserve boundaries - it is strictly a local law
- ▶ First Nations with land codes under the FNLMA can also pass by-laws pursuant to section 83 (and ss. 81 and 85.1) of the *Indian Act*

Section 83

- ▶ Property taxation system that operates under s. 83 of the *Indian Act* must contain 4 main by-laws:
 1. **Property Taxation By-law** - establishes the basic liability to pay property taxes, deadlines for payment, etc.
 2. **Property Assessment By-law** - establishes procedures for establishing the valuation of interests in lands (leases etc.) subject to taxation, rights to appeal, etc.

Section 83

3. **Annual Rates By-law** - sets the rates to be applied to assessed value of each property.
4. **Expenditure By-law** - sets the budget for expenditure of taxation revenues.

Section 83

- ▶ In addition to these 4 by-laws, First Nations may pass other s. 83 *Indian Act* by-laws dealing with the following subject matters:
 - ▶ financial management
 - ▶ business licensing (to regulate and licence businesses, business activities and persons engaged in business on reserve)

Section 83

- ▶ By-law must set out the enforcement measures that may be taken by the First Nation to collect unpaid taxes
- ▶ Enforcement provisions must provide for reasonable notice

Section 83

- ▶ If a by-law provides for the discontinuance of a service for the non-payment of tax, the First Nation must not discontinue:
 - ▶ fire protection or police services to the taxable property that is a residential dwelling;
 - ▶ water or garbage collection services to taxable property that is a residential dwelling;
 - ▶ electrical or natural gas services to taxable property that is a residential dwelling during the period from Nov 1 - March 31

Section 83

- ▶ All s. 83 by-laws get reviewed by the First Nation Tax Commission (FNTC)
- ▶ The FNTC is responsible for providing regulatory advice with respect to s. 83 *Indian Act* property taxation, including the review and recommendation of s.83 *Indian Act* by-laws for ministerial approval.

Section 83

- ▶ FNTC looks at a by-law to ensure it:
 1. is within legal authority;
 2. has the essential elements for taxation including reasonable notice, assessment appeal, and enforcement provisions;
 3. complies with the Canadian Charter of Rights and Freedoms;

Section 83

4. is consistent with the principles of natural justice;
5. is consistent with FNTC policies; and
6. is clearly drafted.

First Nation Fiscal Management Act

- ▶ Optional legislation
- ▶ Removes application of ss. 83 and 84 of *Indian Act*
- ▶ Evolution of property tax concepts in s. 83
- ▶ FNFMA takes property taxation further
- ▶ FNTC approves laws passed under FNFMA – no longer requires ministerial approval

FNFMA

- ▶ FNFMA provides for a new and more rigorous tax regime for First Nations who opt in
- ▶ Very similar to tax systems by other local governments
- ▶ Allows for taxation on:
 - ▶ Real property interests
 - ▶ Business taxes
 - ▶ Development costs
 - ▶ Property transfer taxes
 - ▶ Service taxes

FNFMA

- ▶ First Nations can pass “local revenue laws”:
 - ▶ Taxation of lands for local purposes, including assessment, rate setting, service taxes, business taxes and development cost charges - must include appeal provisions
 - ▶ Authorizing expenditures of local revenues
 - ▶ Procedures to deal with taxpayer interests
 - ▶ Borrowing of money from Finance Authority

FNFMA

- ▶ Provisions for enforcement of laws
- ▶ Delegation of Council's law making powers
- ▶ Delegation of Council's powers to Financial Management Board - co-management or third party management

FNFMA

- ▶ First Nations must pass 4 laws:
 - ▶ Taxation Law - establishes liability to pay property taxes, deadlines for payment, etc.
 - ▶ Assessment Law - establishes procedures for valuation of interests in land subject to taxation, rights of appeal, etc.
 - ▶ Annual Rates Law - sets tax rates to be applied to assessed value of each property
 - ▶ Annual Expenditures Law - sets annual budget for expenditure of tax revenues

FNFMA

- ▶ Budget Implementation Act, 2018 will result in some changes
- ▶ Creation of regulations for taxation on joint reserves
- ▶ Allow First Nations under this regime to request funds held on their behalf from ISC
- ▶ Requires financial administration law, independent legal and financial advice, membership approval (minimum 25% of voting members must vote)

Conclusion & Questions

- ▶ Variety of land management systems and real property taxation systems can apply to reserve lands
- ▶ Both require an understanding of the processes under the Indian Act, FNLMA and FNFMA
- ▶ Questions?

Legal & Taxation Aspects of Reserve Land Development

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