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Recent Changes to First Nations Land Management in Canada

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With the passage of the *Fall Economic Statement Implementation Act, 2022* in December 2022,[1] the Government of Canada repealed and replaced the *First Nations Land Management Act* (FNLMA),[2] the Act which brought the government-to-government *Framework Agreement on First Nation Land Management* (Framework Agreement) into Canadian law.[3]

The FNLMA has been replaced with the *Framework Agreement on First Nation Land Management Act* (FAFNLMA).[4] The FAFNLMA is meant to ratify the Framework Agreement while removing some of the concerns that signatory First Nations expressed with the FNLMA. It has the support of the Land Advisory Board (LAB), the entity tasked with providing support to signatories of the Framework Agreement.

While the law governing First Nations land management may have changed, it does not appear that third party interests on reserve are at risk. This legal update provides an overview of the previous First Nations land management regime and the new system which replaces it.

The Old Regime: Framework Agreement and the FNLMA

In 1991, a group of First Nation Chiefs approached the Government of Canada with a proposal to opt-out of 40 provisions of the *Indian Act* on land, environment, and resources. As a result of this proposal, the Framework Agreement was negotiated by 14 First Nations and Canada in 1996 and came into effect in 1999 through the FNLMA.

According to the Government of Canada, the Framework Agreement recognized First Nations' inherent right of self-government by creating an option for participating First Nations to manage and govern their land, environment, and resources using a community-approved Land Code rather than the land related provisions of the *Indian Act*.

The FNLMA was federal legislation that brought the Framework Agreement into Canadian law, allowing First Nations to develop their own laws about land use, the environment, and natural resources on reserve. Any First Nation with lands “reserved for Indians” within the meaning of section 91(24) of the *Constitution Act, 1867* or with lands set aside in Yukon could opt-in to the FNLMA system. The FNLMA process involved the creation of a Land Code that was approved by Indigenous Services Canada (ISC) and the First Nation.

FNLMA lands remained reserve lands under the *Indian Act*, but the First Nation was granted the right to administer the land and regulate its use and development.

Until they enacted a Land Code under the FNLMA, First Nations were forced to govern their reserve lands in accordance with the *Indian Act* which could be cumbersome and time consuming. When a First Nation chose to enact a Land Code under the FNLMA, roughly one third of the *Indian Act* ceased to apply. Under the FNLMA, First Nations could develop their own laws about land use, the environment and natural resources and take advantage of economic development opportunities with their new land management authorities.

There were several mandatory provisions in the FNLMA. Every Land Code was to contain certain clauses, which addressed, among other things, the following areas:

- Identifying exactly what lands were subject to the Land Code;
- Setting out the rules and procedures for First Nation members and others to use and occupy the First Nation land;
- Setting out the procedure for making and publishing First Nation land laws;
- Setting out conflict of interest standards and procedures;
- Setting out a process for resolving disputes that occurred under the Land Code;
- Setting out procedures by which the First Nation could grant interests in land or acquire lands for community purposes; and
- Setting out the procedure for amending the Land Code.[5]

A Land Code enabled a First Nation to enact laws regarding interests, rights, or licences in relation to reserve land, as well as the development, conservation, protection, management, and use and possession of reserve land. These include laws respecting:

- Regulation, control, or prohibition of land use and development, including zoning and subdivision control;
- Creation, acquisition and granting of interests, rights or licences and prohibitions in relation thereto;
- Environmental assessment and environmental protection;
- Provision of local services and the imposition of user charges for those services; and
- Provision of services for the resolution of disputes in relation to First Nation land.[6]

The New Regime: the FAFNLMA

The repeal of the FNLMA and replacement with the FAFNLMA is intended to fully defer to the Framework Agreement. The repeal was initiated by signatory First Nations to the Framework Agreement, many of whom came to feel that the FNLMA was inconsistent with the Framework Agreement.

The FAFNLMA contains only thirteen provisions. It entirely adopts the Framework Agreement and the rights and obligations it contains.[7] The new statute also emphasizes the central importance of the Framework Agreement, stating that the Framework Agreement will prevail over any inconsistency between the FAFNLMA and the Framework Agreement, and that the FAFNLMA will prevail over any other conflicting federal laws.[8]

The FAFNLMA does not expressly address the opting-in process, as described in the FNLMA, but this is addressed independently under the Framework Agreement.[9] The opt-in procedure under the Framework Agreement provides that to opt-in, a First Nation must develop its own Land Code.

Given the lack of mandatory requirements for the content of Land Codes in the FAFNLMA, the Framework Agreement now contains the only applicable guidance. The Framework Agreement contains articles dictating the necessary and possible contents of Land Codes, which appear largely consistent with the former requirements of the FNLMA.[10]

The Framework Agreement also provides all signatory First Nations with land management and law-making powers.[11] First Nations have the authority to grant interests in reserve land, manage natural resources on reserve, and make laws in accordance with their Land Code respecting the development, conservation, protection, management, and use and possession of First Nation land, and interests or land rights and licences in relation to that land.[12]

Existing Land Codes

The FAFNLMA includes transition provisions following the repeal of the FNLMA. These provisions address Land Codes established under the FNLMA. Any actions or decisions made, or Land Codes, individual agreements, First Nation laws or documents that were established under the former regime, remain in effect and are to be unaffected but the enactment of the FAFNLMA.[13]

Third Party Interests

Article 16 of the Framework Agreement provides a concise set of provisions dictating the status of third-party interests in reserve lands under the First Nation land management system. These provisions appear consistent with the former FNLMA.

The Framework Agreement provides that any third-party interests which exist upon the creation of a new Land Code remain in force according to their original terms and conditions when a Land Code comes into force.14 Further, once a Land Code comes into force, no interest, land right or licence in relation to First Nation land may be acquired or granted except in accordance with the Land Code.[15]

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Conclusion

The intention of these recent changes appears to be to streamline and improve the First Nation land management process in Canada. The most substantive change in the regime is the inclusion of section 6 of the new FAFNLMA which states that the articles of the Framework Agreement must prevail over the ratifying legislation.

Those with third party interests can be assured that their interests on reserve remain in force according to their original terms and conditions when a First Nation opts-in to this new land management system and that mandatory publication of First Nation laws and dispute resolution mechanisms previously in force under the FNLMA remain in force under the new regime.

The Cassels team of Aboriginal law practitioners has significant experience assisting clients in negotiating permits under the *Indian Act* for use and occupation of reserve lands and navigating the complex area of First Nations land management.

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[1] *Fall Economic Statement Implementation Act,* 2022, S.C. 2022, c. 19.

[2] *First Nations Land Management Act,* S.C. 1999, c. 24.

[3] A copy of the Framework Agreement can be found here.

[4] *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121; a copy of the FAFNLMA can be found here.

[5] See FNLMA, s. 6.

[6] See FNLMA, s. 20.

[7] See FAFNLMA, s. 5.

[8] See FAFNLMA, s. 6.

[9] See Framework Agreement, Part II.

[10] See Framework Agreement, Article 5.2, 5.3.

[11] See Framework Agreement, Parts III and IV.

[12] See Framework Agreement, Article 18.

[13] See FAFNLMA, s. 123.

[14] See Framework Agreement, Article 16.1.

[15] See Framework Agreement, Article 16.4.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.