

## Legal Options for On-reserve Resource Development Projects

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Canada's First Nations' reserve lands are located in some of the most resource rich areas of Canada. However, First Nations and their industry partners can encounter difficulties effectively developing these areas, in large part due to the unique legal status of reserve lands and challenges associated with a lack of adequate regulations for resource development on reserve lands.<sup>1</sup>

### Current Challenges to On-reserve Resource Development Projects

A central challenge to developing reserve lands relates to mortgaging interests on reserve land and associated security of investment concerns. For example, while the law regarding the acquisition and enforcement of mortgage interests is relatively clear on non-reserve lands, such issues remain unclear when it applied to reserve lands, resulting in uncertainty.

The *Indian Act* defines reserves as lands which have been set apart by the Crown for the use and benefit of a First Nation or an Indian Band.<sup>2</sup> Ultimately, the Crown holds the title to reserve lands, and these lands are subject to federal administration and come within the exclusive jurisdiction of Parliament, under s 91(24), *Constitution Act, 1867*.<sup>3</sup> First Nations, and in some instances individuals Indians registered under the *Indian Act*, can hold an interest in reserve land and be granted an allotment therein.

First Nations under the *Indian Act* can use certificates of possession (the mechanism by which Indians can be allotted reserve land) as collateral if attempting to access secure credit. However, a certificate of possession is not equivalent to a fee simple interest in land and is not considered interests in real property. As such, a lender cannot look to the property of a debtor using a certificate of possession as collateral to obtain payment if the debtor is unable to pay a loan. In such a situation, a creditor has no legal ability to enforce a debt obligation other than beginning an action in the courts. This places businesses located on reserve lands at a disadvantage due to the inability of the businesses to access secured funding.

Another characteristic of Indian reserve land that can be a challenge for resource development is its communal nature. In order for a non-Indian to obtain the right to use or occupy reserve land, an individual or company must enter into a lease or acquire a permit or license for use of the land. Leases, permits, and licences for use of reserve land must be approved by the band council and the Minister, unless the First Nation at issue is one of the exceptions as noted below. These factors can lead to delay and regulatory uncertainty that can discourage investment in large projects and hinder economic development on reserve.

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However, as demonstrated below, some on-reserve projects have found solutions to the issues listed above using statutory mechanisms outside of the *Indian Act*.

## **1. First Nation Land Management Act Land Codes**

The *First Nations Land Management Act*<sup>4</sup> (the FNLMA) is a federal law that allows First Nations to develop their own laws about land use, the environment, and natural resources in order to take advantage of economic development opportunities.

The FNLMA ratifies the Framework Agreement on First Nations Land Management (the Framework Agreement), an agreement negotiated between 14 First Nations and Canada in 1996. As of March 2017, the Framework Agreement has grown exponentially, with over 125 First Nations signed on to it.<sup>5</sup>

The Framework Agreement is designed to assist the First Nation signatories to opt out of 32 land management sections of the *Indian Act* and to allow the First Nation signatories to develop their own laws regarding land use on their reserve. Under the FNLMA, land administration is transferred to First Nations once their land codes come into effect. However, oil and gas, fisheries, and migratory birds are not included in the resources to be managed under the Framework Agreement.

Henvey Inlet First Nation (HIFN) is an example of a First Nation that has joined the land management regime under the FNLMA and developed its own land code. HIFN, an Anishinabek community in Ontario comprised of three separate reserve properties, ratified a land code under the Framework Agreement in 2009.<sup>6</sup> The HIFN land code gives HIFN control over land administration and interests and licenses on its reserve land. In addition, HIFN's land code grants the band authority to issue Environmental Assessment Permits.

HIFN, through its subsidiary Nigig Power Corporation, entered into a joint venture partnership with Pattern Development, a developer of renewable energy and transmission assets in 2014, to jointly develop, own, and operate the Henvey Inlet Wind Project (the Project), a 300MW wind project and associated transmission line. The Project has obtained an Environmental Assessment Permit from HIFN for the on-reserve portions of the proposed transmission facilities and began construction in 2017.<sup>7</sup>

## **2. First Nations Commercial and Industrial Development Act**

The *First Nations Commercial and Industrial Development Act*<sup>8</sup> (the FNCIDA) is legislation designed to incorporate provincial legislation as federal law through the construction of regulations that close regulatory gaps on reserves which may exist where an existing provincial regulatory regime, with no federal equivalent, applies to a resource development activity off-reserve but not on-reserve. Regulations under the FNCIDA allow for complex commercial and industrial projects to occur through a tripartite agreement between the federal government, the First Nation, and the province in question. FNCIDA also allows the federal

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government to delegate monitoring and enforcement of a regulatory regime to the province. The project-specific regulations under the FNCIDA are only made at the request of participating First Nations and are limited to the specific lands described in the project.

An example of FNCIDA regulations are the *Muskowekwan First Nation Solution Potash Mining Regulations*<sup>9</sup> (the Regulations). The Regulations consist of provisions relating to the exploration and development of potash on the Muskowekwan Indian Reserve, which is situated in southeast Saskatchewan approximately 100 kilometers northeast of Regina. The Regulations address the construction, modification, operation, decommissioning, reclamation, and abandonment of a solution potash mine on the Muskowekwan Reserve, specifically with regard to a project with Encanto Potash Corporation. The project area includes 16,831 acres of land that belongs to the Muskowekwan First Nations.

In 2010, Encanto Potash Corporation (Encanto) formed a formal Joint Venture Agreement with the Muskowekwan First Nations and Muskowekwan Resources Limited Partnership,<sup>10</sup> the purpose of which is to progressively develop plans to establish a potash resource on the Muskowekwan First Nations' land. Encanto agreed to construct and operate the project. MRL will receive shares as well as royalty payments upon production, while the Muskowekwan First Nations will receive milestone payments. Encanto is currently exploring partnerships to advance the financing and development of the Muskowekwan project.

### **3. On-reserve Projects Using the Provincial Regulatory Regime**

Depending on the needs of the project proponent and First Nation, some on-reserve resource development have proceeded under the existing provincial regulatory regime. An example of such a project is the Chiniki First Nation Solar Project (the Solar Project), an on-reserve solar electricity project located in Alberta that is using the Alberta Utilities Commission (the AUC) process to apply for project licensing and permitting that applies to off-reserve projects.<sup>11</sup>

The owner of the Solar Project is the Chiniki Trico Limited Partnership (the Partnership), which is a partnership between the Chiniki First Nation and the Trico Group. The Partnership will own, develop, and operate the Solar Project. The Solar Project is proposed to be located on approximately 54.5 hectare of First Nation Reserve land near the town of Morley, Alberta.

The Solar Project is currently in the AUC review process. In a May 9, 2018 information request letter, the AUC asked the Partnership to clarify any federal approvals the Solar Project may need and specifically address if “..the lands upon which the project is to be sited have been designated for development under the *Indian Act and the Indian Referendum Regulations*.”<sup>12</sup> In the event the lands are not, the Partnership was asked to “...describe the status of this approval and explain when Chiniki expects to receive land designation.” The Partnership responded to the AUC on May 28, 2018 stating that “[i]n regards to federal approvals, [the Partnership is] unaware of any specific approvals required by the Project at this time based on [its] discussions with [its] advisors and the corresponding federal entities.” The Partnership further stated

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that the land that the Solar Project is sited to be on requires a properly approved Band Council Resolution in order for the Solar Project to proceed, per consultation with the Chiniki First Nation and subject to third party financing requirements.<sup>13</sup> The final federal requirements for the Solar Project will be of interest to renewable energy developers.

## Implications for Resource Developers

The above projects demonstrate that there are unique challenges and solutions in relation to the development of resource projects on reserve. In many resource-rich areas, reserve lands may be an untapped opportunity for project development in partnership with First Nations. The legal tools used depend on the needs of the project, First Nation, and proponent.

A land code under the FNLMA grants a First Nation broad powers over their reserve lands in perpetuity. However, these powers cannot apply to resources such as oil and gas and fisheries. In addition, the FNLMA land code process can take many years to put in place and is driven entirely by the First Nation. FNCIDA regulations provide the most robust regime for resource development, given that regulations on and off reserve would be consistent. In our experience FNCIDA regulations take years to develop and require significant collaboration between Federal and Provincial governments and the First Nation. Finally, proponents and First Nations may attempt to obtain approvals by applying under provincial laws applicable to off-reserve projects. The Solar Project demonstrates that provincial regulators will seek clarification from the proponent regarding applicable federal requirements.

In summary, on-reserve resource development presents an opportunity for First Nations and proponents to unlock untapped resources. While there may be important legal considerations for doing business on-reserve, these impediments can typically be addressed with innovative and practical legal solutions resulting in greater certainty for all parties involved: First Nations, government regulators and investors.

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<sup>1</sup> Government of Canada, "First Nations Commercial and Industrial Development Act" (March 29, 2012), online: *Indigenous and Northern Affairs Canada* < <https://www.aadnc-aandc.gc.ca/eng/1100100033561/1100100033562> >

<sup>2</sup> *Indian Act*, RSC 1985, c I-5 at s. 2(1).

<sup>3</sup> *Constitution Act, 1867*, (UK) 30 & 31, c 3.

<sup>4</sup> *First Nations Land Management Act* SC 1999, c. 24

<sup>5</sup> The First Nations Lands Advisory Board, "Framework Agreement" online: <https://labrc.com/faqs/framework-agreement-faq/>

<sup>6</sup> Henvey Inlet First Nation, "Land Code" (September 9, 2009) online: *henveyinletwind* < <http://s98611120.onlinehome.us/hifn2011/wp-content/uploads/2011/08/FINAL-LAND-CODE-hifn-land-code-sept-9-09-sa-rev.pdf>>

<sup>7</sup> Henvey Inlet First Nation, "Partnership" online: *henveyinletwind*

& nbsp; <<https://henveyinletwind.com/partnership/>>

<sup>8</sup> *First Nations Commercial and Industrial Development Act* SC 2005, c 53.

<sup>9</sup> *Muskowekwan First Nation Solution Potash Mining Regulations* SOR/2017-47.

<sup>10</sup> Encanto Potash Corp "Technical Report Summarizing the Preliminary Feasibility Study for the Muskowekwan First nations Home Reserve Project in South Eastern Saskatchewan, Canada" (February, 28, 2013) online: *encantopotash* <<http://www.encantopotash.com/Repository/Home/technical-summary-feb-2013.pdf>>

<sup>11</sup> Chiniki Trico Limited Partnership, "AUC Rule 007 Facility Application for the Chiniki Nation Solar Project (March 13, 2018).

<sup>12</sup> Alberta Utilities Commission, "Letter regarding Chiniki Nation Solar Project Response to Information Request Date May 9, 2018" (May 28, 2018).

<sup>13</sup> Alberta Utilities Commission, "Letter to Chiniki Trico Limited Partnership"

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