

Development on First Nations Lands

Laws of General Application

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Table of Contents

Introduction	1
The Legislative Framework	2
Federal Laws Specific to First Nations	4
Indian Act	4
Indian Act Regulations	6
First Nations Land Management Act.....	6
Family Homes on Reserves and Matrimonial Interests or Rights Act (“FHRMIRA”).....	8
First Nations Fiscal Management Act (“FNFMA”)	8
Federal Laws of General Application	8
The Fisheries Act.....	9
The Canadian Environmental Protection Act.....	10
The Canadian Environmental Assessment Act 2012	10
Species at Risk Act	10
The Protection of Navigable Waters Act.....	11
Provincial and Municipal Laws of General Application	11
Intersecting Jurisdictions and First Nation Analogues	12
Land Tenure.....	13
<i>Tenure type</i>	13
<i>Registration of Tenure</i>	16
Zoning and Land Use	17
The Development Permitting Process	18
Building and Construction Requirements.....	20
Regulation through Contract	21
Conclusion	22

Introduction

A law of general application is a law that applies so long as another law does not expressly exclude its operation. Many federal, provincial and municipal land laws fit within this description and they apply to most real estate developments located on non-First Nation lands. Locating a real estate development on First Nation lands means working within a very different regulatory regime that may not be familiar to many developers and their advisors. There are very few laws of general application specifically related to land development on reserve because of the unique nature of First Nations lands pursuant to the *Constitution Act, 1867*¹ as “[l]ands reserved for . . . Indians”². To make matters more challenging, there may be not just one, but several different regulatory regimes that concurrently govern a development, and it is not always clear which jurisdiction applies. Therefore, any person or entity looking to develop on First Nations lands first needs to be aware of what jurisdiction, or jurisdictions, will govern the development, before looking to the applicable laws.

In this paper, I start by setting out the legislative framework that governs the jurisdictional issue. I then provide summaries of federal laws specific to First Nations, including laws made by First Nations themselves, which are in this context the primary “laws of general application” of which a developer must be aware. This is followed by summaries of some federal laws of general application that are commonly relevant to development on reserve. Lastly, I will identify some key issues in real estate development that are typically addressed through provincial and municipal regulation and demonstrate how the three main land management regimes for First Nations lands can operate to provide similar regulation on reserve. The goal is to provide the reader with a sense of the types of regulations that can be encountered at particular stages of the development process under each of the key land management regimes, along with some tools to assist with determining which laws will apply.

¹ *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*].

² *Ibid* at s 91(24). The original text of s 91(24) reads “Indians and Lands reserved for the Indians“, which will be shortened through this paper for readability to “lands reserved for Indians“.

The Legislative Framework

The Canadian legislative framework is structured around a hierarchy of laws with constitutional laws sitting at the top, followed by quasi-constitutional laws and then laws of general application. The doctrine of federal paramountcy gives priority to federal legislation over provincial. At the top of the framework, section 91(24) of the *Constitution Act, 1867* grants exclusive jurisdiction to the federal Crown over “lands reserved for Indians,”³ while section 92(13) grants the provinces exclusive jurisdiction over “Property and Civil Rights.”⁴ It is important to keep in mind that this jurisdiction is not absolute because there is always some overlap between the heads of power. Further, the Supreme Court of Canada (“SCC”) has held that reserves are not “enclaves” of federal jurisdiction.⁵

Federal jurisdiction over reserve lands means that federal laws of general application will apply to reserve lands regardless of the applicable administrative regime unless another piece of federal legislation expressly excludes them. There are no federal laws dealing with local land matters, such as zoning, land use, and building codes because these are “property and civil rights” matters under the exclusive jurisdiction of the province. Federal laws of general application that apply to, or affect, real estate development are predominantly laws related to environmental protection, such as the *Canadian Environmental Assessment Act*⁶, the *Fisheries Act*⁷, the *Species at Risk Act*⁸, and the *Canadian Environmental Protection Act*⁹. These and other relevant federal laws are discussed in more detail in the following section.

The primary legislation through which the federal Crown exercises its jurisdiction over “lands reserved for Indians” is the *Indian Act*.¹⁰ However, not all reserve lands are administered under the *Indian Act*. Many First Nations have entered into agreements with the federal Crown

³ The term “Indian” is used throughout this paper strictly in its legal sense in order to reflect the terminology used in relevant legislation.

⁴ *Constitution Act, 1867*, *supra* note 1 at s 92(13).

⁵ *Cardinal v Attorney General of Alberta* [1974] SCR 695 (SCC) at 702.

⁶ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 [CEAA 2012].

⁷ *Fisheries Act*, RSC 1985, c F-14 [Fisheries Act].

⁸ *Species at Risk Act*, SC 2002, c 29 [SARA].

⁹ *Canadian Environmental Protection Act*, SC 1999, c 33 [CEPA].

¹⁰ *Indian Act*, RSC 1985, c I-5 [Indian Act].

pursuant to the *Framework Agreement*¹¹ and the *First Nations Land Management Act*¹² (“*FNLMA*”) to take over the administration of their reserve lands under their own Land Codes. Other First Nations have reached self-government agreements with the federal Crown and exert independent administrative control over their lands. These agreements may include language that specifies rules of priority for conflicts between the First Nation’s own laws and federal or provincial laws of national or provincial importance.¹³

Pursuant to section 88 of the *Indian Act* all provincial laws of general application “are applicable to and in respect of Indians” except to the extent that they conflict with any treaties or federal laws or with any laws made by a First Nation under the *Indian Act* or the *First Nations Fiscal Management Act*.¹⁴ Significantly, section 88 includes no reference to Indian lands. While the SCC has not ruled decisively on whether section 88 invigorates provincial laws affecting Indian lands, the consensus in the lower courts is that it does not.¹⁵ This means that provincial acts which play a central role in land development, such as the *Land Title Act*¹⁶, the *Local Government Act*¹⁷, the *Strata Property Act*¹⁸, and the *Builders Lien Act*¹⁹, do not apply to real estate development on reserve lands except in certain, rare circumstances.²⁰ For example, the *First Nations Commercial and Industrial Development Act*²¹ (“*FNCIDA*”) provides for harmonization of the off-reserve regulatory regime with that on-reserve through regulation. However, this process requires the consent and cooperation of provincial and local governments and is time consuming and costly. As such, INAC’s policy is only to consider regulations under *FNCIDA* for projects of significant scope, such as oil and gas developments.²²

¹¹ *Framework Agreement on First Nation Land Management*, 1996 [Framework Agreement].

¹² *First Nations Land Management Act*, SC 1999, c 24 [FNLMA].

¹³ For more on this, see *The Government of Canada’s Approach to the Implementation of the Inherent Right and the Negotiation of Self-Government* at: < <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> >.

¹⁴ *First Nations Fiscal Management Act*, SC 2005, c 9.

¹⁵ Jack Woodward, Q.C. *Native Law* (Carswell, 1989) 3:400.

¹⁶ *Land Title Act*, RSBC 1996, c 250.

¹⁷ *Local Government Act*, RSBC 2015, c 1.

¹⁸ *Strata Property Act*, SBC 1998, c 43.

¹⁹ *Builders Lien Act*, SBC 1997, c 45.

²⁰ Interestingly, in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, at paras 101 – 106, the SCC declared that Aboriginal Title lands may be subject to certain provincial laws of general application. The practical outcomes of this ruling have yet to play out, however, and it would be unwise to assume every provincial law would apply.

²¹ *First Nations Commercial and Industrial Development Act*, SC 2005, c 53.

²² For example, only three *FNCIDA* regulations have been made to date: *Fort McKay First Nation Oil Sands Regulations*, SOR/2007-79; *Fort William First Nation Sawmill Regulations*, SOR/2011-86; *Haisla Nation Liquefied Natural Gas Facility Regulations*, SOR/2012-293.

For the most part, real estate development is a local government matter. In British Columbia, municipal governments exercise delegated authority from the province to regulate land development within their jurisdictions under the *Local Government Act* and the *Community Charter*²³, consistent with provincial laws affecting lands, such as the *Land Title Act*. Because provincial and municipal laws do not apply to reserve land, this can result in a regulatory void regarding these matters on reserve lands. Many First Nations have sought to resolve this issue by developing their own local land laws under Land Code, self-government agreements or pursuant to their by-law making authority under the *Indian Act*. These First Nation laws constitute federal laws applicable to the reserves belonging to the First Nation that enacts them. They are not quite laws of general application in the sense that they are unique to the individual First Nation, but they can be treated by a developer as laws of general application in relation to development on that First Nation's lands.

Federal Laws Specific to First Nations

There are several federal statutes and regulations that apply specifically to reserve lands and that can impact real estate development on reserve. In addition, many of these statutes grant law-making authority to First Nations governments in various capacities. This means that the regulatory regime varies from First Nation to First Nation. Many First Nations have published their laws on the *First Nations Gazette*, an online service that provides public notice of by-laws, laws, Land Codes, and other legislation enacted by First Nations.²⁴ In addition to checking the First Nations Gazette, land developers should confirm existing laws with the First Nation itself.

Indian Act

As noted above, the *Indian Act* is the primary mechanism through which the federal Crown exercises its jurisdiction over reserve lands. In addition to the land management regime under the *Indian Act*, which is discussed in detail throughout this paper, it also grants certain bylaw making authority to band Councils that may impact real estate development on reserve:

- under section 81, for the regulation of activities on reserve lands; and
- under section 83(1)(a), for taxation of land.

²³ *Community Charter*, SBC 2003, c 26.

²⁴ www.fng.ca. The First Nations Gazette is not a comprehensive service as not all First Nation laws are required to be published.

Section 83 bylaws are now fairly uncommon since the *First Nations Fiscal Management Act*, below, provides a more robust scheme. Section 81 bylaws, however, are very common and can play an important role in governing reserve land development.

Section 81(1) of the *Indian Act* sets out the purposes for which band Councils may make bylaws “not inconsistent with” the *Indian Act* or any federal regulation. These powers are analogous to the powers granted to councils of municipal corporations.²⁵ Notably, environmental management matters are not enumerated powers under section 81(1). Bylaws enacted under this section are statutory instruments for the purpose of the *Statutory Instruments Act*, but are not published in the Gazette.²⁶ Any person looking to develop on reserve must enquire of the individual First Nation to ensure full knowledge of applicable bylaws.

Bylaws enacted under section 81(1) that may impact development include: zoning²⁷, prevention of nuisances²⁸, regulation of traffic²⁹, regulation of the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works³⁰, the control of noxious weeds³¹, regulation of water supplies³², and the preservation, protection and management of animals on reserve³³.

The extent of the powers granted under section 81(1) is not always clear. For example, there is no express bylaw power to address requests to subdivide land so this remains an open question. INAC policy has been that the power to establish zones under section 81(1)(g) at least includes the power to establish standards for construction and development.³⁴ This is an important power

²⁵ *R v Stacey*, [1982] 3 CNLR 158.

²⁶ *R v Bear*, [1982] 3 CNLR 78 (NBQB).

²⁷ The zoning authority granted under section 81(1)(g) allows for a First Nation to establish blanket limitations on development within a reserve: *Joe v Findlay Jr.* [1980] BCJ no 1530.

²⁸ *Indian Act*, *supra* note 10 at s 81(1)(d).

²⁹ *Indian Act*, *supra* note 10 at s 81(1)(b).

³⁰ *Indian Act*, *supra* note 10 at s 81(1)(f).

³¹ *Indian Act*, *supra* note 10 at s 81(1)(j).

³² *Indian Act*, *supra* note 10 at s 81(1)(l).

³³ *Indian Act*, *supra* note 10 at s 81(1)(p.1).

³⁴ Indigenous and Northern Affairs Canada, *Governance By-law Workshop: Session 3* (Ottawa: INAC, 2012) Online: <http://www.aadnc-aandc.gc.ca/eng/1100100013962/1100100013963>.

because there is no federal act analogous to the provincial *Building Act*³⁵ for regulating construction design.

Prior to the 2014 amendments to the *Indian Act*,³⁶ Ministerial approval was required before a section 81(1) bylaw would be valid. At times, this has been a bar to First Nations effectively regulating their lands and may even have discouraged band Councils from making the attempt. Ministerial approval is no longer required for bylaw enactment. As such, developers may see First Nations engaging more actively in regulating reserve land management through section 81(1) bylaws.

Indian Act Regulations

Regulations made under the *Indian Act* that can impact real estate development on reserve include:

- *Indian Reserve Waste Disposal Regulations*³⁷ (“*IRWDR*”);
- *Indian Mining Regulations*;³⁸ and
- *Indian Timber Regulations*.³⁹

All three of these regulations are administered by INAC and licenses or permits granted pursuant to the regulations are subject to the approval of the Minister. The *IRWDR* regulates the disposal and management of waste on reserve. A real estate development that contemplates the construction of any kind of waste or sewage facility would be subject to these regulations. Under the *Indian Timber Regulations*, no timber can be harvested on reserve without a licence, which impacts land-clearing for construction. The *Indian Mining Regulations* are less likely to impact real estate development, unless the development is geared toward resource development.

First Nations Land Management Act

Under the *Framework Agreement*, Canada has agreed to transfer land management to signatory First Nations. Canada enacted the *FNLMA* to ratify the *Framework Agreement* and to implement

³⁵ *Building Act*, SBC 2014, c 2.

³⁶ *Indian Act Amendment and Replacement Act*, SC 2014, c 38.

³⁷ *Indian Reserve Waste Disposal Regulations*, CRC 1978, c 960 [*IRWDR*].

³⁸ *Indian Mining Regulations*, CRC 1978, c 956, as am. SOR/90-468.

³⁹ *Indian Timber Regulations*, CRC 1978, c 961, as am. SOR/93-244; SOR/94-690; SOR/95-531; SOR/2002-246, c 1.

clauses in the *Framework Agreement* that impact third parties or other federal laws or that are of key importance.

First Nations who are signatories to the *Framework Agreement*, and who have enacted their own Land Codes in accordance with the *Framework Agreement* and the *FNLMA* have day-to-day administrative authority over their reserve lands and resources (excluding oil and gas, fisheries, and migratory birds), though the federal Crown retains underlying title to the lands.

Land Codes provide for a comprehensive land management regime, including rules and procedures for the granting and transfer of interests in First Nation lands. They also include broad authority for the First Nation council to make laws respecting the First Nation's lands. Laws regarding environmental protection and matrimonial real property are required to be made following ratification of a Land Code.⁴⁰ In addition, many Land Code First Nations have developed laws that are explicitly designed to regulate real estate development, such as laws addressing:

- land use/community planning/zoning;
- subdivision, development and servicing;⁴¹
- land allotment/interests;
- land instruments and registration;
- building;
- soil deposit/removal/transport; and
- business licensing.

Land Code First Nations have a broader authority to govern land use in a way that is more similar to the authority granted to municipalities. Additionally, in contrast to First Nations who are subject to the *Indian Act*, Land Code First Nations have the express ability to establish environmental regulation over their lands. The result is that Land Code First Nations have the potential to administer their lands under a more comprehensive and autonomous regime than do First Nations operating under the *Indian Act*. However, many First Nations are still in the developmental stage, and even those that are operational may not have completed the full suite of laws necessary to administer land use and development in their jurisdiction. The best way to find out which laws a Land Code First Nation has enacted is to ask them.

⁴⁰ *FNLMA*, *supra* note 12 at ss 17(1) & 21(1).

⁴¹ See for example Tsawout First Nation, Subdivision, Development and Servicing law, no 02-2012.

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

This statute was developed in response to the regulatory gap created by the inapplicability of provincial laws dealing with matrimonial real property on reserve. It largely mirrors the provincial regime and also grants law-making authority to First Nations so that they can create their own laws addressing matrimonial real property on reserve.⁴² Where a First Nation has created its own law, the *FHRMIRA* no longer applies. Developers should be aware of what laws apply on a reserve respecting matrimonial real property, and should ensure that:

- any lands being considered for development are not subject to an application made under the *FHRMIRA* or the First Nation’s own law; and
- any instruments conveying an interest in the lands to the developer for the purpose of development include provisions dealing with the application of the *FHRMIRA* or First Nation law.

First Nations Fiscal Management Act (“FNFMA”)⁴³

The *FNFMA* grants authority to First Nations to collect property tax. Although this authority also exists under section 83(1)(a) of the *Indian Act*, the *FNFMA* is a more comprehensive and rigorous authority and is preferred by most First Nations who administer a property tax regime. The program is optional but participation has been fairly broad. Legislation enacted under the *FNFMA* can be found on the *First Nations Gazette*. The First Nations Tax Commission (“FNTC”) provides comprehensive information on their website: <http://fntc.ca/>. Any developer looking to work on First Nations lands is well advised to spend some time reviewing the information available through the FNTC in conjunction with the relevant property tax laws enacted by the First Nation itself.

Federal Laws of General Application

In this section, I set out some of the federal statutes of general application that may impact real estate development on reserve. This is by no means a complete list and any person looking to develop reserve lands should carefully consider which federal legislation may apply to a particular project based on the proposed land uses and impacts.

⁴² First Nations operating under Land Code enact matrimonial real property laws under the *FNLMA*, not the *FHRMIRA*.

⁴³ *First Nations Fiscal Management Act*, SC 2005, c 9.

The Fisheries Act

The Federal *Fisheries Act*⁴⁴ and regulations apply generally to development on First Nation lands. The *Fisheries Act* is particularly relevant to on-reserve real estate development in British Columbia because many reserves were allotted expressly for fishing purposes and are located at or around traditional fisheries.⁴⁵ The most relevant provision of the *Fisheries Act* for development purposes is section 35(1) which prohibits the carrying on of any work or activity that “results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.” This broad provision has been applied to include destruction of fish bearing habitat.⁴⁶

There are at least two circumstances where developers are most likely to run into trouble with this provision. The first is if a development results in the unauthorized release of a deleterious substance into water frequented by fish. Causing damage to a fish habitat or a fishery by the release of pollutants or contaminants is a strict liability offence; meaning that the Crown does not need to prove that a person was negligent to impose penalties or recover damages.⁴⁷

The second circumstance where a developer may be liable under section 35 is in the case of direct damage to a fishery or fish habitat through a work or activity, which could include any number of possible disruptions to fish bearing habitat. For example, a property developer could be charged under the *Fisheries Act* for work or activities related to the construction of docks or other structures on shorelines. In ecologically sensitive areas, or in other circumstances that the Department of Fisheries and Oceans (“DFO”) believe presents a risk of harm to fish, the DFO may require a developer to provide plans and studies to assess the potential impact of a proposed activity.⁴⁸ Moreover, developers have a duty to notify fisheries officers if they have reason to believe that a work or activity for which they are responsible poses a risk of harm to fish.⁴⁹

⁴⁴ *Fisheries Act*, *supra* note 7.

⁴⁵ Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia 1849-1925*, (Vancouver: UBC Press, 2008).

⁴⁶ *Fisheries Act*, *supra* note 7 at s 2.

⁴⁷ *Fisheries Act*, *supra* note 7 at s 42(6).

⁴⁸ *Fisheries Act*, *supra* note 7 at s 37(1).

⁴⁹ *Fisheries Act*, *supra* note 7 at s 38(4).

The Canadian Environmental Protection Act

The *Canadian Environmental Protection Act*⁵⁰ (“*CEPA*”) is a comprehensive piece of federal legislation targeted at preventing pollution in the environment through the regulation of particular toxins and pollutants. *CEPA* contains enabling provisions granting the federal Minister of the Environment to enter into agreements with First Nation governments for the administration of the Act⁵¹, and to designate enforcement officers⁵². Although *CEPA* establishes the potential for significant environmental regulation of First Nation lands under Part 9 of the Act,⁵³ no such regulations currently exist. *CEPA* is primarily relevant where developers propose to install fuel storage tanks or otherwise work with or store hazardous materials on First Nation lands. For example, Part 7 of *CEPA* imposes restrictions on disposing and moving hazardous waste including recycled materials. These provisions are relevant to developers seeking to transport fill or other potentially toxic materials onto or off of First Nation lands.

The Canadian Environmental Assessment Act 2012

The *Canadian Environmental Assessment Act 2012*⁵⁴ sets out the conditions and criteria for when projects require environmental impact assessments. The *Regulations Designating Physical Activities* (Project List) sets out the types of projects that may require environmental assessments under the Act and includes those projects that have the greatest potential for significant adverse environmental effects in areas of federal jurisdiction. For the most part, this means large scale resource development projects. Most real estate developments are highly unlikely to meet the threshold to trigger a requirement for an environmental assessment under *CEAA 2012*.

Species at Risk Act

The *Species at Risk Act*⁵⁵ applies to all federal lands including First Nation lands. Its key relevance to real estate development is section 58, which sets out provisions guarding against the destruction of critical habitat and includes a blanket prohibition on the destruction “of any part of

⁵⁰ *CEPA*, *supra* note 9.

⁵¹ *CEPA*, *supra* note 9 at s 9.

⁵² *CEPA*, *supra* note 9 at s 217.

⁵³ See the very wide regulation-making powers in section 209.

⁵⁴ *CEAA 2012*, *supra* note 6.

⁵⁵ *SARA*, *supra* note 8.

the critical habitat of any listed endangered species or of any listed threatened species.” This includes habitat located on both provincial and federal lands.⁵⁶ This prohibition also extends to the habitat of species that are designated as threatened by provincial authorities.⁵⁷

Proponents of any project or development that attracts an environmental assessment under *CEAA 2012* or under any other federal act must notify the Minister of Environment as to whether the development is likely to affect a listed species or its critical habitat.⁵⁸ If there is a likelihood of adverse effects to identified species at risk or to provincially protected species, the proponent must identify the adverse effects as well as any mitigation and monitoring plans.⁵⁹

The Protection of Navigable Waters Act

Section 3 of the *Protection of Navigable Waters Act*⁶⁰ prohibits the construction of any type of work over navigable waters unless it is done in accordance with the approvals required under the Act. Developers using foreshore parcels must be alert to this prohibition and its associated requirements.

Provincial and Municipal Laws of General Application

As discussed above, most provincial and municipal laws of general application do not apply to reserves. Nevertheless, there are cases in which it has been argued that certain aspects of provincial land rules do apply on reserve. For example, in *Park Mobile Home Sales Ltd v. Le Greely*⁶¹, the judge ruled that a section of provincial tenancy legislation related to rent increases applied to a situation where property was located on reserve but both the landlord and tenant were non-Indians. This case is an outlier, however, and the more usual finding is that provincial residential tenancy laws do not apply on reserve.⁶²

⁵⁶ *SARA*, *supra* note 8 at s 61(1).

⁵⁷ *SARA*, *supra* note 8 at s 60(1).

⁵⁸ *SARA*, *supra* note 8 at s 79(1).

⁵⁹ *SARA*, *supra* note 8 at s 79(2).

⁶⁰ *Protection of Navigable Waters Act*, RSC 1985, c N-22.

⁶¹ *Park Mobile Home Sales Ltd v Le Greely* (1976), 1967 CarswellBC 408, 9 CNLC 278 (BC Co Ct); *aff'd Park Mobile Home Sales Ltd v Le Greely* (1978), 85 DLR (3d) 618, 1978 CarswellBC 601, 9 CNLC 283 (BCCA).

⁶² See, for example: *Morin v R* (2000) FCJ No 1074; *Sechelt Indian Band v British Columbia (Dispute Resolution Officer)*, 2013 BCCA 262; *Matsqui Indian Band v Bird* (1992), [1993] 3 CNLR 80 (BCSC); *Anderson v Triple Creek Estates* (1990), [1990]

More recently, in *Atlantic Waste Systems Ltd v Canada (Attorney General)*,⁶³ Canada attempted to rely on the B.C. *Environmental Management Act*⁶⁴ and the *Contaminated Sites Regulation*⁶⁵ to argue for cost recovery against a company that had been operating a landfill on reserve and had allowed significant contamination to occur. The B.C. Supreme Court declined to rule on the constitutional question on summary trial in part because Canada could still succeed on a breach of contract claim or other cause of action. As such, the question of whether the current section 47 of the *EMA* could apply to impose cost recovery for remediation on reserve remains an open question.

Other exceptions to the general rule include regulations made under *FNCIDA*, which are rare, the terms of some self-government agreements, and agreements between a First Nation and a municipal authority for provision of services. Most First Nations rely on agreements with neighbouring local governments for the provision of services, such as water, sewer, and fire protection. It is common for these agreements to require that the First Nation comply with relevant local government bylaws in order to ensure harmonization of service provision and enforcement requirements between the two jurisdictions. These provisions are frequently necessary to allow the municipal authority to provide the services without incurring liability (for example, by allowing municipal inspectors to enter the reserve for monitoring and maintenance). Because servicing is such an important part of real estate development, developers should make sure they are aware of the terms of any servicing agreements between a First Nation and local government that are implicated in developments on the First Nation's reserve lands.

Intersecting Jurisdictions and First Nation Analogues

As discussed in the introduction to this paper, the legislative regime governing land development on First Nation regimes varies from Nation to Nation. In this section, I look at some common development considerations and requirements that are found in the provincial context and set out

BCJ No 1754 (BCSC); *Millbrook Indian Band v Nova Scotia (Northern Counties Residential Tenancies Board)* (1978), 1978 CarswellNS 82 (NSTD).

⁶³ *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2015 BCSC 1998.

⁶⁴ *Environmental Management Act*, SBC 2003, c 53 [EMA].

⁶⁵ *Contaminated Sites Regulation*, BC Reg 375/96.

some of the analogues that can be found under federal legislation and under different First Nation land management regimes. Again, any person looking to develop land on reserve should enquire with the First Nation and check the First Nations Gazette to know which First Nation laws will apply.

Land Tenure

Land tenure is one of the most fundamental concerns in any real estate transaction or development. Determining the type of interests that can be held in the land, who can hold those interests, and how those interests are evidenced is a critical early stage of the development process.

Tenure type

On non-First Nation lands, real estate developers can obtain legal possession to lands directly through *fee simple*, or indirectly via a long-term lease. *Fee simple* title is the highest possible ownership interest that can be held at law and grants the owner permanent unrestricted rights to possession and alienation of the land. Leasehold interests are temporary rights of use and occupation which are registrable against title and which can be mortgaged. In contrast, underlying title to reserve lands is held by the federal Crown as a fiduciary on behalf of all members of the First Nation, who are the beneficial owners of the land.⁶⁶ The *Indian Act* maintains the significant restrictions on possession and alienation of reserve lands established by the *Royal Proclamation of 1763*. People who are not members of the First Nation cannot hold a legal right to possession of reserve lands.⁶⁷ In addition, while an individual member of the First Nation can obtain a legal right to possession of lands within the reserve, that right always remains subject to the collective interest of the entire Nation and the underlying title of the Crown.⁶⁸ Lastly, section 89 of the *Indian Act* exempts all reserve lands except leasehold interests in designated lands from seizure and mortgages. Designation is discussed further below. These restrictions make it impossible to obtain a *fee simple* interest in reserve lands, and loans and leases will be subject to an unusual array of complex provisions.

⁶⁶ *Guerin v R* [1984] 2 SCR 335 (SCC) at 376.

⁶⁷ *Indian Act*, *supra* note 10 at s 28(2).

⁶⁸ *R v Devereux* (1964), 51 DLR (2d) 546.

There are two ways in which a non-member person or corporation may obtain an interest in reserve lands for development purposes: by purchase or by lease. The sale of reserve lands is a rare and difficult process. This is necessarily so because it permanently diminishes the land base available to the First Nation's members. The First Nation must surrender the lands absolutely to the federal Crown which removes the lands from the reserve and makes it possible for the Crown to transfer a *fee simple* interest in those lands. Given the gravity of this transfer, a surrender must be approved by the band Council, by the Minister and by the electorate of the First Nation, usually by way of a referendum.⁶⁹

Leasehold interests are the more common form of interest granted to non-members. The *Indian Act* contemplates the lease of lands by the First Nation itself, and the lease of lands held by individual members of the First Nation. If reserve lands have not been allotted by Council to an individual member of the First Nation, they are "band lands". The First Nation can designate band lands for lease by way of a surrender that is not absolute pursuant to section 38(2) of the Act. As with an absolute surrender, a designation requires the consent of the First Nation's Council, the Minister, and the First Nation's electorate. Although a lease by designation is formally administered by the Federal Crown under the *Indian Act*, negotiations around the business terms of the lease are typically carried out between the developer and the First Nation. Designation can be a complex and time-consuming process but once the designation has been made, the designated lands can be leased under section 53 of the *Indian Act* and mortgaged, subject to approval by the Minister.

Lands held by individual members of a First Nation pursuant to section 20 of the *Indian Act* ("CP Lands") can be leased without first being designated.⁷⁰ The Minister can lease CP Lands on behalf of the individual member for the benefit of that member, provided the Minister has also considered the impact of the lease on the collective interest of the First Nation.⁷¹ This requirement does not amount to a power of veto for the band Council, though any lease would

⁶⁹ *Indian Act*, *supra* note 10 at s 39.

⁷⁰ *Indian Act*, *supra* note 10 at s 58(3).

⁷¹ *Indian Act*, *supra* note 10 at s 58(3); *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 3 CNLR 386 (FCA) at para 57.

have to comply with the First Nation's own laws.⁷² In practice, it means that it is prudent to obtain Council's consent for leases of CP Lands. Federal policy also currently requires community approval for lease terms in excess of 49 years.⁷³ Significantly, the express power under section 89(1.1) to mortgage a leasehold interest on designated lands does not appear to apply to a lease of CP Lands.

On occasion, people may circumvent the requirements of the *Indian Act* by entering into informal lease agreements known as "buckshee leases". These are agreements for use and occupation of the lands that have not been made in accordance with the Act and which have not been approved by the Minister. Although it may be attractive to avoid the bureaucratic hurdles of the *Indian Act*, parties to these leases need to be aware that they are not legally binding and likely will not be enforced by courts.⁷⁴

Under the *FNLMA*, the transfer of administration of reserve lands from the Crown to the First Nation means that Ministerial consent is no longer required for certain lands transactions. In most cases, leases of band lands to non-members can be granted directly by Council pursuant to the First Nation's Land Code and any other laws of the Nation made under it. Members who hold individual interests in reserve lands may also grant leases directly to non-members, though typically this also requires the consent of the Council. People engaging in real estate development with a Land Code First Nation should make themselves familiar with the Nation's Land Code and any laws made under the Land Code. *Indian Act* provisions with respect to mortgaging of First Nation lands continue to apply.

First Nations who operate their lands subject to a final agreement will have much greater latitude in how their lands are sold and leased to non-members for development purposes. However, the existing final agreement First Nations in British Columbia maintain restrictions on alienation of First Nation lands to non-members and establish limits on the length of a lease that a member may grant to a non-member in First Nation lands.⁷⁵

⁷² *Boyer v Canada* [1986] FC 393 (CA).

⁷³ Indigenous and Northern Development Canada, *Land Management Manual* (Ottawa: INAC, 2002) at section 6.

⁷⁴ *Upper Nicola Band et al v Trans-Can Displays et al*, 2000 BCSC 1209.

⁷⁵ See for example: *Tsawwassen First Nation Land Act*, 2009, s 13.

Registration of Tenure

In British Columbia the Land Title Office (“LTO”) administers provincial land using the Torrens land title system and entitlement to an interest in land is perfected by registration with the LTO. An interest that is not registered is not enforceable. This provides certainty to interest holders and allows transferees of interests to know of any competing interests in that land. These safeguards are not available for most interests in First Nations lands because, except for some lands subject to final agreements, they are not administered under the Torrens system and are not registerable in the LTO.

There are two main registries for recording interests in reserve lands: under the *Indian Act*, land interests can be registered in the Indian Lands Registry System (“ILRS”); and under the *FNLMA*, they can be registered in the First Nations Land Registry System (“FNLRS”). Some Land Code First Nations also operate their own sub-registries under the umbrella of the FNLRS. In that case, interests are registered locally in the Nation’s own registry, but may also be searchable in the FNLRS (provided the interest has been registered in both places). Both the ILRS and the FNLRS are merely notice registries and provide no guarantee as to the validity or existence of interests. Persons seeking to obtain an interest in reserve land must trace the ownership of an interest to ascertain whether there are other interests that may affect their ability to obtain a lease or to mortgage a lease. In some cases, it is not possible to confirm ownership with certainty.

A number of final agreements in British Columbia provide for member and non-member interests in final agreement lands to be registerable in the LTO. This is possible because final agreement lands are no longer strictly federal lands and provincial laws of general application are applicable on those lands. However, not all final agreement lands will necessarily be registerable in the LTO so it is important to confirm what regime or system the First Nation is operating under. For example, some final agreement First Nations maintain an internal land registry in which certain interests may be registered. A key step in the due diligence process for any real

estate development should be confirming what the First Nation's land laws are and how they will impact the development.

Zoning and Land Use

Zoning and permitted land uses are a chief concern in selecting land for development. In the provincial context a developer must look at applicable provincial and municipal/regional legislation to assess whether a proposed development has a reasonable chance of success on the subject lands. Some key provincial statutes include the *Agricultural Land Commission Act*,⁷⁶ which protects against the subdivision of farmland, the *Riparian Areas Regulation*⁷⁷, which governs the use of water access, the *Heritage Conservation Act*⁷⁸, which prevents the destruction or alteration of heritage and archaeological sites, and the *Transportation Act*⁷⁹, which governs highway access for developments.

The nuts and bolts of land use planning occur at the local government level where municipalities exercise their delegated authority from the province to create laws specific to their area. Developers need to look at official community plans and municipal bylaws to identify zoning and permitted uses for lands. These can cover a wide range of topics, such as density requirements, commercial use, subdivision of lands, tree cutting requirements, and connection to services (sewerage and water etc.). In addition, many local governments have established environmental protection areas to ensure responsible ecosystem management and development permit areas to encourage certain types of industry.

The situation on First Nation reserve lands is structurally analogous. Federal laws of general application establish broad legal requirements applicable to reserve lands while First Nation councils create laws and regulations that shape land use on a local level. However, in most cases regulation of development on reserve lands is far more limited than on provincial lands. The federal Crown has not created laws analogous to provincial regimes governing land use on reserve, and where federal laws overlap with provincial ones, they tend to lack the requisite level

⁷⁶ *Agricultural Land Commission Act*, SBC 2002, c 36.

⁷⁷ *Riparian Areas Regulation*, BC Reg 41/2016.

⁷⁸ *Heritage Conservation Act*, RSBC 1996, c 187.

⁷⁹ *Transportation Act*, SBC 2004, c 44.

of specificity. For example, federal legislation dealing with historic sites and monuments does not have the same protective provisions that equivalent provincial legislation has.⁸⁰ More significantly, federal environmental laws applying to reserve lands lack the land management features that are seen in the provincial *Environmental Management Act*.⁸¹ Further, federal legislation that delegates law-making authority to First Nations is not as comprehensive as the *Local Government Act* or *Community Charter*. For example, the analogue to almost all of the content of Part 2 (Municipal Purposes and Powers) and Part 8 (Bylaw Enforcement and Related Matters) of the *Community Charter*, and Part 14 (Planning and Land Use Management) of the *Local Government Act* is section 81 of the *Indian Act*, which comes nowhere near to the same level of complexity and detail.

First Nations operating under the *FNLMA* have a broader power to regulate land use under Land Code than is granted under the *Indian Act* but, again, the federal statute does not approach the level of specificity of analogous provincial legislation. The lack of detail in the federal legislation means that if the First Nation has not created its own laws, then there may be no applicable law governing the issue.

The Development Permitting Process

In the provincial context applications to develop will flow largely through the relevant municipal or regional government. Development permits, building permits, electrical permits etc., are obtained from a municipality. The province may become involved under the *Environmental Management Act*⁸² in circumstances where an environmental site profile is required. Permitting for development on First Nation lands will similarly generally flow through the local First Nation government.

For First Nations operating under the *Indian Act* land provisions the requirements and process for obtaining a building permit may be established through a council bylaw under section 81(1)(h) of the *Indian Act*, which allows for the regulation of buildings. Section 83 the *Indian Act* empowers

⁸⁰ Federal *recognition* powers of historic sites and monuments is provided but is non-protective: *Historic Sites and Monuments Act*, RSC 1985, c H-4. Only railway stations and lighthouses have federal protection through legislation: *Heritage Railway Stations Protection Act*, RSC 1985, c 52 (4th supp)., *Heritage Lighthouse Protection Act*, SC 2008, c 16.

⁸¹ *EMA*, *supra* note 64.

⁸² *EMA*, *supra* note 64.

a band to make money bylaws for the purposes of property and land use taxation as well as to defray band expenses. Through these provisions a First Nation is able to require development fees for the issuing of permits. Where the bylaws of a First Nation are silent a lease agreement may also stipulate a development process before a lessee may commence certain developments on those leased lands.

The West Bank First Nation, under their self-government agreement, has a comprehensive development process which includes a formula for assessing development fees for building permits based on the value of the proposed development. West Bank reports that between January 2006 and July 2012, the First Nation issued more than \$335 million in building permits, \$202 million which was for residential development.⁸³

Land Code First Nations can set out development permitting processes and requirements in a law enacted under the Land Code. The Tzeachten First Nation, for example, requires that all development on their lands be done under permit. Applicants must pay an application fee and submit their proposed development to an approval process. The stages and considerations of the approval process are set out in the law. This includes a list of principles and factors that the lands committee takes into account in granting or withholding approvals.⁸⁴

First Nations operating under a final agreement may also have a comprehensive development application process. The Tsawwassen First Nation, for instance, has a series of regulations addressing applications for development permits, subdivisions, land use variance applications, and amendments to neighbourhood plans. The Tsawwassen First Nation also has a comprehensive list of land use planning documents that include neighbourhood plans, water and sewerage plans, road plans, design and construction guidelines and specifications, and a land use plan.⁸⁵

⁸³ West Bank First Nation, "Planning and Development," Online: <http://www.wfn.ca/bitterroot/planning-development.htm>.

⁸⁴ Tzeachten First Nation, "Subdivision, Development and Servicing Law 2010", No 10-02 at s 7.8.

⁸⁵ Tsawwassen First Nation, "Laws" and "Regulations", Online: <http://tsawwassenfirstnation.com/laws-regulations-and-policies/laws/> and <http://tsawwassenfirstnation.com/laws-regulations-and-policies/regulations/>

Building and Construction Requirements

Municipalities have fairly broad discretion to regulate the design of structures. However, provincial building codes, such as the *BC Building Code*⁸⁶, impose limitations on municipal discretion through minimum requirements for safety, health, accessibility, and fire and structural protection of buildings. The *BC Building Code* applies to all new construction as well as major alterations, repairs, and demolitions. Demonstrating conformity with *BC Building Code* requirements is often a precondition to municipal approval of a development permit.

Although the general rule is that provincial laws of general application do not apply to the management of reserve lands, there is some case law to suggest that provincial building codes do.⁸⁷ This is something that developers should be mindful of, especially where a First Nation does not have their own building code in force. A First Nation might approve a building permit without requiring the developer to show compliance with the *BC Building Code*, but the developer may still be subject to provincial sanction under the *BC Building Code*.

First Nations operating under the *Indian Act* have authority to create their own building code under section 81(1)(h). INAC policy is that building codes passed subject to this bylaw making power must conform to the *National Building Code*.⁸⁸ The *National Building Code* is a model code which many jurisdictions use as a template; however, it has no legal status unless it is expressly adopted. In effect, INAC's policy results in First Nations giving legal effect to an otherwise unbinding code.

Land Code First Nations also have the ability to develop their own building codes. However, thus far it appears that Land Code First Nations have opted to referentially incorporate building codes from other jurisdictions. The Tzeachten First Nation referentially incorporates the *National Building Code* requirements in their *Subdivision, Development and Servicing Law*.⁸⁹ The

⁸⁶ BC Reg, 264/2002

⁸⁷ *Corporation of the Township of Brantford v Doctor* [1996] 1CNLR 49 (Ont Ct J – Gen Div).

⁸⁸ National Research Council Canada, *National Building Code of Canada 2015 (NBC)*

⁸⁹ See s 7.1(e).

Tsawout First Nation referentially incorporates the *BC Building Code*.⁹⁰ Although national and provincial building codes are frequently similar, it is important for developers operating on Land Code First Nation lands to be aware of which building code is being incorporated to ensure compliance with the correct code.

It is important to note that for final agreement First Nations, whose lands are no longer federal lands, provincial laws impacting development may apply where the First Nation's laws are silent. The result can be a patchwork of legislative requirements which require a project proponent to exercise diligence in understanding applicable laws. In practice, most final agreements take a hybrid approach by referentially incorporating the provincial *Building Code* in the First Nation's own building regulation. This is the case with the Tsawwassen First Nations building regulation enacted under their *Land Use Planning and Development Act*.⁹¹ The Tsawwassen First Nation regulation incorporates many of the standards and even some of the prescribed forms used in the *BC Building Code* while also providing many unique standards and processes that comprehensively address construction on Tsawwassen First Nation lands.

Regulation through Contract

There continue to be issues with regulatory gaps between federal and provincial land management regimes that in most cases can only partially be addressed by First Nation or other federal laws. One way the federal Crown and First Nations commonly seek to address this issue is by including certain equivalent requirements in the contractual obligations in leases and permits. That is to say, land regulation occurs through contract on a case by case basis.

For developments on reserves administered under the *Indian Act* or First Nation Land Code, a leasehold interest is almost always necessary in order to obtain certainty of the possessory rights and to obtain financing. The instruments granting such leases can be extremely lengthy and detailed as First Nations and INAC officials seek to address through contract those regulatory issues that are not addressed by statute. For example, in the absence of zoning regulations, a lease agreement may set out in detail the permissible types of land use associated with the lease.

⁹⁰ Tsawout First Nation, Subdivision, Development and Servicing law, No 02-2012.

⁹¹ Tsawwassen First Nation, Building Regulation, N. O.064-2015

Leases, licenses and permits typically include comprehensive environmental protection, monitoring and enforcement provisions, post-use remediation of a site, access for members, limitations on occupancy, or any variable number of possible provisions. The language may mirror, or even referentially incorporate, the provincial legislation that would apply off reserve, such as requiring compliance with the terms of the BC *Spill Regulation*, or in the case of an easement granted under Land Code, mirroring those provisions in the *Property Law Act* that allow for application to be made to the court to cancel the easement.⁹² In addition, the instruments may reference any applicable laws and bylaws of the First Nation.

These lengthy contracts can be cumbersome and time consuming to negotiate. However, in the absence of a comprehensive land management regime, they provide the highest degree of certainty and the best route to transparency and accountability for both the First Nation and the developer.

Conclusion

Identifying laws of general application that apply to First Nation lands is not a straightforward task. The simple answer is that only federal laws of general application can reliably be assumed to apply. But even that answer is not simplistic, given that most First Nation laws are also federal laws. The constitutional question is further muddled by the complexity that exists in the various land management regimes operating across Canada. In the last section of this paper, I have provided some examples of how First Nation laws, bylaws and agreements can interact with federal legislation, or referentially incorporate provincial and municipal laws, to create somewhat analogous regulatory regimes on reserve to that which exists off reserve. This same pattern can be applied in respect of almost any matter affecting real estate development on reserve at every stage of development, including:

- access and rights of way;
- residential tenancy laws;
- services;
- building phase; and
- operating phase.

⁹² *Property Law Act*, RSBC 1996, c 377 at s 35(1)(a).

Regardless of the subject matter, the basic due diligence steps for any developer working on reserve should be:

- identify which federal statute applies to land management matters on a particular First Nation's reserves;
- request from the First Nation copies of their laws or bylaws relevant to real estate development;
- search the First Nations Gazette;
- search the ILRS or FNLRS;
- seek advice from knowledgeable legal and tax advisors.

The unfamiliarity and site-specific applicability of the varying regulatory regimes means that experience in real estate development is not a sufficient substitute for undertaking the due diligence recommendations set out above. While regulation of development can vary in off-reserve jurisdictions as well, local governments regulate under the umbrella of the provincial regime, creating consistency in key areas. Differences between federal and provincial legislation, and among First Nations in how they approach regulation of real estate development mean that case-by-case assessments are necessary. The tools given in this paper can assist developers to understand the types of regulations and laws that may apply in a particular case and can be incorporated into the developer's own processes to assist with streamlining development approval. Nevertheless, anyone new to on-reserve land management and real estate development is encouraged to consult with experienced advisors to avoid potential pitfalls or liability.