FIRST NATIONS LAND MANAGEMENT ACT AND THIRD PARTY INTERESTS

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In 1999 the Government of Canada enacted the First Nations Land Management Act, *which is designed to provide First Nations with increased control and authority over land management on Indian reserve land and to replace related provisions in the* Indian Act. *This article addresses concerns regarding third party interests and licences under this new* Act, *in that such interests may be less secure than under the old land management regime. The author then outlines some potential remedies to the existing ambiguities found in the new land management regime as a way to provide practical suggestions for First Nations to fully develop and utilize their First Nation land.*

En 1999, le Gouvernement du Canada a adopté la Loi sur la gestion des terres des premières nations, *dont le but consiste à fournir aux Premières nations un plus grand contrôle et une plus grande autorité sur la gestion des terres des réserves indiennes et à remplacer les dispositions afférentes de la* Loi sur les Indiens. *Cet article aborde les préoccupations relatives aux intérêts de tiers et des permis accordés en vertu de la nouvelle loi, en ce sens que lesdits intérêts peuvent être moins sûrs que sous l'ancien régime de gestion. L'auteur énonce ensuite certains remèdes éventuels aux ambiguïtés existantes trouvées dans le nouveau régime pour donner des suggestions pratiques aux Premières nations, à savoir de pleinement développer et utiliser leurs terres.*

TABLE OF CONTENTS

I. INTRODUCTION

Ambiguity has always surrounded the ability of third parties[1] to be granted interests in Indian reserve land ("First Nation land")[2] and the security that could attach to such interests

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1 The term "third party" is used to represent all those interests that are not "First Nation" seeking the use and enjoyment of Indian reserve lands, including utility companies (*e.g.* telephone, electric, pipeline), highway departments and private developers.

2 The phrase "First Nation land," as used in this article, refers to "First Nation land" as defined in s. 2(1) of the *FNLMA*, *infra* note 4, and means Indian reserve land to which a land code applies.

under the *Indian Act*.[3] Indeed, many developments have been frustrated by the inability of lenders and project developers, for example, to obtain adequate security of tenure or security of assets on First Nation land. Additionally, many First Nations have been frustrated by their inability to provide adequate security of tenure to non-First Nation entities seeking to use or develop First Nation land. In 1999, Parliament enacted the *First Nations Land Management Act*,[4] which is designed to provide First Nations with increased control and authority over land management on their Indian reserve land and to replace related provisions of the *Indian Act*.

The ambiguity that existed under the *Indian Act* land management regime appears to have been carried forward and even exasperated under the *FNLMA* regime due to a lack of adequate safeguards for third party interests (existing and future) and by not providing First Nations with clearly set out mechanisms by which such certainty and stability can be secured. For third parties, such as utility companies seeking access to, or interests in, First Nation land, the *FNLMA* represents a significant and fundamental change with respect to the legal nature of tenures traditionally relied upon by such third parties on First Nation land, such that the tenures issued under the *FNLMA* regime may be considerably less secure and stable than those issued under the former *Indian Act* regime. While the *FNLMA* presently only applies to a relatively small number of First Nations,[5] its broader application is likely to be inevitable as more First Nations are added to those able to come under the *FNLMA* umbrella.

This article discusses the *FNLMA* and third party interests, how such third party interests, such as highway, utility and pipeline rights-of-way and easements and project developers generally, may be less secure under the *FNLMA* regime and how such interests may, with the appropriate amendments made to the *FNLMA*, be protected under this new legal regime. Additionally, by outlining potential remedies to some of the ambiguities in the *FNLMA*, the article seeks to provide practical suggestions to First Nations so as to allow them, where they desire, to fully develop and utilize their First Nation land.

II. *FIRST NATIONS LAND MANAGEMENT ACT*

A. BACKGROUND

The *FNLMA* ratified and brought into effect the *Framework Agreement on First Nations Land Management*.[6] The *Framework Agreement*, signed by the Government of Canada (Canada) and 14 First Nations in 1996, allows First Nations to opt out of the land administration sections of the *Indian Act* and establish their own land management regimes through the enactment of a land code. The *FNLMA* was required under the *Framework Agreement* for two purposes: (a) to ratify the *Framework Agreement*, and (b) to implement those clauses of the *Framework Agreement* that affect third parties or other federal laws, or

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3 R.S.C. 1985, c. I-5.

4 S.C. 1999, c. 24 [*FNLMA*].

5 As of writing, 36 First Nations are listed in the *FNLMA*'s schedule that lists those First Nations eligible to take advantage of the *FNLMA* regime.

6 Online: Framework Agreement on First Nations Land Management <www.fafnlm.com/LAB.NSF/39e36a26f6235821852568c3005dc7af/c367db5e6523f586852568e7006ed01b?OpenDocument> [*Framework Agreement*].

that are considered important enough to be repeated in the legislation.[7] In March 2002, the *FNLMA* regime was opened up to other First Nations.[8]

Much of the *FNLMA* relates to the process by which First Nations can establish a land code and thereby remove their reserve lands from the control of the Minister of Indian Affairs and Northern Development (Minister), under the authority of the *Indian Act*. The *FNLMA* does not affect the title to First Nation land, with such lands continuing to be held by the federal Crown and "reserved" for the use and benefit of First Nations.

A land code, duly enacted by a First Nation pursuant to the *FNLMA*, will have the force of law and be recognized by the courts.[9] Under the *FNLMA* and pursuant to its land code, a First Nation has the authority to manage First Nation land and may exercise the rights and privileges held by other land owners. Such First Nations are also granted the capacity necessary to exercise powers such as: acquiring and holding real and personal property; entering into contracts; borrowing money; expending and investing money; and becoming a party to legal proceedings. With the enactment of a land code, revenue moneys of a First Nation will no longer be transferred through Canada but will flow directly to the First Nation. First Nations under the *FNLMA* also have law-making powers covering a broad array of matters related to First Nation land, including the granting of interests in land, land use, environmental protection and the possession of matrimonial property. The power to enforce, and prosecute under, First Nation laws is also included in the *FNLMA*, and a separate register is authorized to record interests granted by First Nations under their respective land codes.

Under the *FNLMA*, First Nations possess the authority to expropriate certain interests in land for community works or other First Nation community purposes. The right of Canada to expropriate First Nation land is limited to justifiable circumstances and necessary for a federal public purpose that serves the national interest. As a result, under the *FNLMA*, First Nation land is immune from provincial expropriation.

B. THE PROCESS

In order to establish a land management regime and be removed from the land provisions of the *Indian Act*, a First Nation must adopt a land code applicable to all First Nation land. The land code will set out rules and procedures for:

(a) the use and occupancy of First Nation's land, including licences, leases and allotments under s. 20(1) of the *Indian Act*;[10]
(b) the transfer of land interests and the revenues from natural resources obtained from reserve land;

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7 Indian and Northern Affairs Canada, *First Nations Land Management Initiative — An Important Step Towards Self-Governance for First Nations* (20 March 2002), online: Indian and Northern Affairs Canada <www.ainc-inac.gc.ca/nr/prs/j-a2002/2-02125_e.html>.

8 *Ibid.*

9 *FNLMA*, *supra* note 4, s. 15(1).

10 Subsection 20(1) of the *Indian Act*, *supra* note 3, states that "No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."

(c) requirements for accountability to First Nation members for land management and moneys derived from reserve land;
(d) community consultation processes for the development of rules respecting matrimonial property issues, use, occupation and possession of First Nation land and the division of interests in First Nation land;
(e) publication of First Nation laws;
(f) conflicts of interest in the management of First Nation land;
(g) the establishment of a forum for the resolution of disputes in relation to interests in First Nation land;
(h) granting or expropriating interests in First Nation land;
(i) delegation by the council of its authority to manage land;
(j) approvals of an exchange of First Nation land; and
(k) amending the land code.[11]

The adoption of a land code involves four steps: an individual agreement, verification, community approval and certification. First, the First Nation must enter into an individual agreement with the Minister describing: the land; the terms of the transfer of administration of the land; the interests and licenses operating on the land at the date of transfer; and the environmental assessment process that will apply to projects on that land until the First Nation enacts its own assessment bylaws.[12] The First Nation then must submit the proposed land code to a "verifier" who is jointly appointed by the First Nation and the Minister. The verifier will determine whether the proposed land code, the proposed approval process and the individual agreement are in accordance with both the *Framework Agreement* and the *FNLMA*.[13] Upon verification of the proposed code, the First Nation's council may submit the proposed land code and individual agreement to its members for approval. The council is required to notify third parties who have an interest in the land subject to the proposed land code within a reasonable time before the vote.[14] If a First Nation approves the land code and individual agreement, the verifier must certify the validity of the code. Once a land code is certified by the verifier, it comes into force on the day of certification, or an alternate date specified in the land code.[15]

On the coming into force of the land code, a First Nation will have the power to enact laws with respect to interests in, and in relation to, First Nation land. The First Nation will exercise the rights, powers and privileges of an owner in relation to the land including granting interests and licences relating to, and receiving all moneys acquired from, such land. The First Nation also becomes responsible for managing the lands, including all natural resources, development, conservation, protection and use and possession of the land. They will also possess the power to control or prohibit land use and development through zoning and subdivision control. The First Nation will be responsible for the provision of local services and the imposition of equitable user charges for such services. They will also be responsible for

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11 *FNLMA*, *supra* note 4, s. 6(1).
12 *Ibid.*, s.6(3).
13 *Ibid.*, s. 8(1)(a).
14 *Ibid.*, ss. 10-12.
15 *Ibid.*, ss. 14-16.

environmental assessment and protection and be empowered to enact laws on any matter arising out of, or ancillary to, such powers.[16]

C. KEY PROVISIONS

Upon coming into force, a land code has the force of law and the following provisions of the *FNLMA* become relevant:

(a) No interest in, or license in relation to, the First Nation land may be granted or acquired except in accordance with the land code.[17]
(b) Revenues from an interest in the First Nation land are transferred to the First Nation.[18]
(c) The council of the First Nation has legislative powers in relation to the First Nation land.[19]
(d) Canada will not be liable for the acts or omissions by the First Nation in relation to the First Nation land after the land code comes into effect.[20]
(e) The land management provisions of the *Indian Act* cease to apply to the First Nation land.[21]

A First Nation's laws must be consistent with the land code and in the case of conflict between a First Nation law and the land code, the land code will prevail.[22] In addition, the power of a First Nation to enact laws for environmental protection are restricted in that the enacted laws and penalties must be at least equivalent to applicable provincial legislation.[23]

The *FNLMA* provides that a First Nation may create enforcement measures consistent with federal laws, including search and seizure, inspection and the power to order compulsory sampling and production of information.[24] Under the *FNLMA*, First Nations may enact laws that "create offences punishable on summary conviction and provide for the imposition of fines, imprisonment, restitution, community service and any other means for achieving compliance."[25] A First Nation may retain its own prosecutors or enter into agreements with federal and provincial governments to use provincial prosecutors.[26]

D. CASE LAW

To date, with little judicial interpretation of the *FNLMA*, there is no *substantive* case law available on the meaning and effect of the *FNLMA* generally and its application and effect, in

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16 *Ibid.*, ss. 18-20.
17 *Ibid.*, s. 16(1).
18 *Ibid.*, s. 19.
19 *Ibid.*, s. 20.
20 *Ibid.*, s. 34(1).
21 *Ibid.*, s. 38.
22 *Ibid.*, s. 20(4).
23 *Ibid.*, s. 21(2).
24 *Ibid.*, s. 20(3).
25 *Ibid.*, s. 22(1).
26 *Ibid.*, s. 22(3).

particular, to third parties. The bulk of the case law referencing the *FNLMA* deals with its enactment and not necessarily its content.[27]

In *B.C. Native Women's Society v. Canada*,[28] the BCNWS challenged the negotiations leading to the *Framework Agreement* on the basis that Canada had breached the *Canadian Charter of Rights and Freedoms*[29] rights of First Nations' women by not including the protection of matrimonial property for married Indian women on First Nation land in the Framework Agreement. The Court dismissed the Crown's motion to strike the claim as the portions of the claim concerning the *Framework Agreement* were not pleadings that could not possibly succeed. The *FNLMA* has provisions dealing with matrimonial property.[30]

In *Chapman v. Canada*,[31] a leaseholder on the Musqueam Indian reserve, who had contested a rent increase to the Supreme Court of Canada,[32] claimed that the Crown, by enacting the *FNLMA*, breached the leases by delegating the power to expropriate lands, zoning autonomy and other land use powers in a manner not contemplated by the leases. The Court held that the *FNLMA* would only be enabling. It provides that a land code is a condition precedent to the transfer of powers. Further steps are required before the transfer of powers can be said to cause damage to any leasehold interest. The transfer of powers was, at the stage of the hearings, speculative. It is not possible to establish damages until, and if, the powers that may pass to the Musqueam Band under the *FNLMA* actually pass.

III. THE *FNLMA* AND ITS POTENTIAL EFFECT ON THIRD PARTY INTERESTS

A. EXISTING INTERESTS AND LICENCES

The *FNLMA* attempts to provide express comfort to those existing licences and interests in First Nation land. For example, s. 16(2) of the *FNLMA* states that "Subject to subsections (3) and (4), interests in and licences in relation to first nation land that exist on the coming into force of a land code continue in accordance with their terms and conditions." Thus, interests and licences in relation to First Nation land subject to a land code continue in accordance with their terms and conditions. However, as s. 16(2) refers, it is subject to s. 16(3), which provides that once a land code comes into effect, the rights and obligations of the Crown as grantor in respect of the interests and licences referenced in s. 16(2) are *transferred* to the First Nation.[33] The effect of s. 16(3) is that the Crown no longer has a direct relationship with the third party

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27 However, ss. 34 and 16 of the *FNLMA* (exemption from liability and continuance of interests in land held pursuant to First Nation custom) were briefly considered in *Many Guns v. Sisika Nation Tribal Administration* (2003), 341 A.R. 140 (Prov. Ct.).

28 [2000] 1 F.C. 304 (F.C.T.D.).

29 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

30 Section 17 of the *FNLMA*, *supra* note 4, requires the First Nation to establish general rules and procedures in the cases of the breakdown of a marriage, respecting the use, occupation and possession of First Nation land, and the division of interests in that land.

31 [2001] 4 C.N.L.R. 70 (B.C.S.C.); see also *Canada (A.G.) v. Wang* (2001), 89 B.C.L.R. (3d) 168 (S.C.).

32 *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633.

33 Section 16(3) of the *FNLMA*, *supra* note 4, states: "On the coming into force of the land code of a first nation, the rights and obligations of Her Majesty as grantor in respect of the interests and licences described in the first nation's individual agreement are transferred to the first nation in accordance with that agreement."

with respect to interests in and licences in relation to First Nation land, and this relationship changes to one between the First Nation and the third party directly. The First Nation effectively steps into the shoes of the Crown with respect to interests on the reserve lands. Third party interests will then become subject to the land code and any laws enacted by the First Nation.[34]

Any rights held by the Crown in relation to interests or licences in relation to First Nation land that relate to terminating, amending or materially altering the interest of licences or interests are granted to the First Nation. By removing the Crown from the grantor-grantee relationship, the third party loses whatever comfort that may have existed that broader public policy concerns would dictate the use of whatever Crown discretionary authority exists under any given licences or interest in First Nation land. This is not to suggest that First Nations will automatically not consider broader public policy objectives. However, it is fair to assume that the interests of a First Nation will be likely more focused on the needs and desires of that First Nation, rather than on broader public policy objectives such as the provision of rights-of-way for public utilities that may not, in some instances, provide any direct benefit to the First Nation concerned.

The removal of the Crown in the First Nation-third party relationship, by itself, may be a positive step in allowing First Nations to deal directly with *their* land. The challenge is that First Nations also need to be able to provide the necessary certainty to licences or interests granted in First Nation land. This is where the *FNLMA* raises concerns.

Also important to note is that the "existing terms and conditions," prior to the *FNLMA* taking effect, operate in a legal and regulatory environment of federal and provincial laws. As discussed below, First Nations may now impose a new regulatory and legal regime (by way of their law-making authority under the *FNLMA*) that may have a dramatic effect on the licences and interests held by third parties on First Nation land, without ever touching the "existing terms and conditions." Thus, while the "existing terms and conditions" may remain intact, additional terms and conditions could be imposed on a third party licence or interest in First Nation land, either directly (where permitted by the licence or interest) or indirectly by imposing new legal or regulatory requirements on the third party. Additionally, it is unclear whether First Nations have the authority to grant full "administration and control" over First Nations lands, such as was formerly granted by the federal Crown over Indian reserve land.

B. EXPROPRIATION

The *FNLMA* permits a First Nation to expropriate any interest in First Nation land. If provided in its land code, a First Nation may "expropriate *any* interest in first nation land that, in the opinion of its council, is necessary for community works or other first nation community purposes."[35] A First Nation is required to pay fair compensation for an expropriated interest in First Nation land and apply the rules set out in the *Expropriation Act*.[36] The key issue is the change of governing authority from the Crown to a First Nation. While with the Crown there

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[34] *Ibid.*, s. 16(4).

[35] *Ibid.*, s. 28(1) [emphasis added].

[36] R.S.C. 1985, c. E-21; see *FNLMA*, *supra* note 4, s. 28(5).

may be a certain degree of comfort on its willingness, or lack thereof, to use its expropriation authority, it is fair to suggest that the same level of comfort does not exist respecting First Nations, primarily because this authority is so new and because most First Nations do not necessarily have the same public policy objectives as do public governments. The imposition of a requirement of paying fair compensation should place some measure of restraint on the use of such expropriation authority.

The *FNLMA* provides an important exception to a First Nation's expropriation authority in that interests in land obtained under s. 35 of the *Indian Act* are expressly exempt from a First Nation's expropriation power.[37] Section 35 of the *Indian Act* also provides for expropriation of reserve land, or interest in reserve land, by a province, municipality or local authority, with the consent of the federal government. In short, the s. 35 exception is only helpful to grants existing prior to the application of the *FNLMA*. However, the question arises as to how a s. 35 interest can be granted under the *FNLMA* regime, when no express equivalent of section exists within the *FNLMA*.

Under the *FNLMA*, only the federal Crown or the First Nation can expropriate land.[38] However, Canada's power to expropriate is limited to a federal purpose that serves the national interests and only when no other reasonable alternative for expropriation can be found.[39] The expropriation by Canada can only be pursued after reasonable efforts have been made to acquire the interest through agreement with the First Nation.[40] The expropriation must also be limited to the smallest interest, and for only the shortest time necessary.[41] Public utilities and provincial or municipal governments can no longer expropriate reserve land and Canada cannot expropriate on their behalf.

Interests, other than those granted under s. 35 of the *Indian Act*, are subject to expropriation by a First Nation acting in accordance with the *FNLMA* and its land code, with no role for the Crown in such expropriation. While s. 28(2) of the *FNLMA* protects third party interests held under s. 35 of the *Indian Act* from being expropriated, it does not address the broad array of governance and taxation authority held by First Nations on First Nation land to which such land, and interests and licences in respect of such land, would be subject, as discussed below.

C. GOVERNANCE AND TAXATION AUTHORITY

The *FNLMA* and the land codes flowing therefrom that apply to third parties interests in First Nation land create a new legal and policy regime that displaces the Crown from active decision-making and any substantive role with respect to the granting and management of licences and interests in First Nation land. As noted above, once a land code comes into effect, and subject to the *FNLMA*, a First Nation has the power to grant interests in and licences in relation to First Nation land, manage the natural resources of the land and the power to enact laws respecting interests in and licences in relation to First Nation land and in relation to the

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37 *FNLMA*, *ibid.*, s. 28(2).
38 *Ibid.*, ss. 28, 29.
39 *Ibid.*, s. 29.
40 *Ibid.*, s. 29(3)(b).
41 *Ibid.*, s. 29(3)(c).

development, conservation, protection, management, use and possession of such land (including in relation to any matter arising out of or ancillary to such powers).[42]

Additionally, First Nations possess the authority to tax First Nation land or interests in such land for local purposes, and such authority includes taxation relating to rights of third parties to occupy, possess or use First Nation land.[43] The precise limits of this taxation authority have not yet been thoroughly tested in the courts.

Short of expropriation there are significant taxing, zoning, permitting and regulatory powers that could be brought into play by First Nation governments. There is very little in the way of a corresponding rights to notification or consultation held by third parties on First Nations lands.

The governance and taxation authority held by First Nations under the *FNLMA* relating to First Nation land is broad and, on its face, serves a positive purpose by enabling First Nations to take greater control over the governance and regulation of their land base. The challenge, however, is for such First Nations to provide the stability and certainty that business entities require before making substantive investments in infrastructure that requires a licence or interest in such First Nation land. The broad First Nation governance and taxation authority, combined with the expropriation powers, raises serious questions and doubts about the certainty of third party interests in respect of First Nation land. This challenge is further exasperated by the drafting of the *FNLMA* relating to conflict of laws and how the *FNLMA* relates to other federal laws, as discussed below.

D. CONFLICT OF LAWS

Another important factor in understanding the effects of the *FNLMA* on third party interests in First Nation land is to understand the relationship between the *FNLMA*, First Nation laws made under the *FNLMA* and the *Indian Act* and other federal and provincial laws. Section 37 of the *FNLMA* states that "In the event of any inconsistency or conflict between this Act and any other federal law, this Act prevails to the extent of the inconsistency or conflict." This paramountcy clause may create confusion and uncertainty as to which laws, federal, First Nation or both, apply in any given circumstance.

The general rule is that where two laws of the same legislative body are inconsistent, the later law repeals the former.[44] The use of a primacy clause is intended to defeat this doctrine of implied repeal. For example, s. 2 of the *Canadian Bill of Rights*[45] states that "[e]very law

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42 *Ibid.*, ss. 18(1), 20(1), 20(2) lists more particular law making powers such as laws relating to the regulation, control or prohibition of land use and development, including zoning and subdivision control, the creation, environmental assessment and protection, and the provision of local services and the imposition of "equitable" user charges for those services. Note the use of the term "equitable" rather than "equal."

43 Section 83(1)(a) of the *Indian Act*, *supra* note 3, states, in part, that the council of an Indian band, subject to the approval of the Minister of Indian Affairs, may make by-laws relating to "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve."

44 Peter Hogg, *Constitutional Law of Canada*, 2002 student ed. (Scarborough: Carswell, 2002) at 289.

45 R.S.C. 1960, c. 44 [*Bill of Rights*].

of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognised and declared."

In *Waskaganish Band v. Blackned*,[46] the Quebec Provincial Court held that the *Cree-Naskapi (of Quebec) Act*,[47] which stipulates that the provisions of the *Cree-Naskapi Act* take precedence over incompatible provisions of any other federal act, could not prevent the application of the *Bill of Rights*. The *Cree-Naskapi Act* provisions did not meet the requirements for an express declaration stipulated in the *Bill of Rights*. In *R. v. Melford Developments*,[48] Melford Developments paid a German bank a fee for its guarantee of a loan made to a chartered Canadian bank. The Minister of National Revenue claimed that this payment was subject to a withholding tax under the *Income Tax Act*.[49] The respondent objected as the Canada-Germany Income Tax Agreement precluded the application of tax. Section 3 of the *Canada-Germany Income Tax Agreement Act, 1956*,[50] stated that "in the event of any inconsistency between the provisions of this Act, or the Agreement, and the operation of any other law, the provisions of this Act and the Agreement prevail to the extent of the inconsistency." The Court held that while Parliament can neither bind itself, nor any successor of Parliament when acting within its constitutionally-assigned sovereign jurisdiction, if it wishes to repeal an act with a paramouncy clause it must do so expressly. The effect of s. 3 is to make the operation of any other law of Parliament subject to the terms of the Act and the Agreement unless Parliament expressly amends the legislation or exempts the later provisions.

Thus, it appears that the *FNLMA* holds a paramount position among other federal legislation. However, this position is likely not absolute in that other federal legislation dealing with specific matters not contemplated by the *FNLMA* likely still applies (for example, the *National Energy Board Act*[51]). This conclusion is further supported by the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*,[52] where it held that there will only be conflict or inconsistency between two acts "where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other."[53] The Alberta Court of Appeal in *Alberta Power Ltd. v. Alberta (Public Utilities Board)* stated:

> There is no doubt that there exists a presumption of legislative coherence; an interpretation which fosters inconsistency or repugnancy between provisions in different statues is to be avoided.... It is not enough, however, that the two statutes deal "somewhat differently" with the same subject matter; inconsistency requires that the provisions *cannot stand together*.[54]

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46 [1986] 3 C.N.L.R. 168 (Qc. Prov. Ct.).
47 S.C. 1984, c. 18 [*Cree-Naskapi Act*].
48 [1982] 2 S.C.R. 504.
49 S.C. 1970-71-72, c. 63.
50 S.C. 1956, c. 33.
51 R.S.C. 1985, c. N-7.
52 [1982] 2 S.C.R. 161.
53 *Ibid.* at 191.
54 (1990), 102 A.R. 353 at para. 31 [emphasis added].

The question also arises about whether, in the case of a conflict between a First Nation by-law enacted under the auspices of the *FNLMA* or the Framework Agreement, such a bylaw receives the paramountcy benefit of s. 37 of the *FNLMA*. Section 37 of the *FNLMA* refers to "*this Act*" and not a land code or the Framework Agreement. The federal *Interpretation Act*[55] defines the term "Act" as meaning an Act of a legislature. Generally, unless expressly stated, an Act ratifying an agreement does not include the agreement. However, courts will first have to turn to standard methods of statutory interpretation in order to determine whether Parliament intended an attachment, schedule or agreement to be included in an Act. In *British Columbia (A.G.) v. Canada (A.G.)*,[56] the Supreme Court of Canada held that statutory ratification of a scheduled agreement, without more, is not enough to make the agreement a part of the *Act*. Instead, courts must use the tools of statutory interpretation to determine whether the legislature intended incorporation.

The *FNLMA*, while having as its main purpose the ratification of the *Framework Agreement*, simply ratifies and confirms that agreement. Moreover, the *FNLMA* repeats many important clauses of the *Framework Agreement*, suggesting that the whole agreement was not intended to have statutory force. The *FNLMA* states that on certification, a land code has the force of law and judicial notice shall thereafter be taken of it, suggesting binding legal effect and statutory force. Yet there are no provisions in the *FNLMA* for a land code to become part of the *FNLMA*.

E. OPTIONS FOR THIRD PARTY INTERESTS IN FIRST NATIONS LANDS

1. GOOD BUSINESS RELATIONSHIPS WITH FIRST NATIONS

The *FNLMA* does not provide for significant third party input into the process of the creation and certification of a land code.[57] Other than the requirement that a land code have provisions for the publishing of enactments of First Nation laws, there are no specific provisions in the *FNLMA* for third party input into new First Nation laws passed under it.

As a result, both First Nations and third parties need to be proactive in developing and maintaining good communications and relations with each other so as to assist in developing a good stable business environment. This stable environment can be a critical factor in negotiating successful arrangements between First Nations and third parties respecting licences in and interests relating to First Nation land.

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55 R.S.C. 1985, c. I-12, s. 35(1).

56 [1994] 2 S.C.R. 41.

57 Section 10(4) of the *FNLMA*, *supra* note 4, requires that the band council take appropriate measures to inform third parties who have an interest in land subject to a proposed code of both the code and the requisite vote on the code, within a reasonable time before the vote.

2. SECTION 35 OF THE *INDIAN ACT* INTERESTS

It is not clear the extent to which, or how, a First Nation can, for future grants, grant a s. 35 *Indian Act* interest when such interests will likely be granted by a First Nation under the *FNLMA* and not the *Indian Act*. However, existing s. 35 interests are protected from expropriation under the *FNLMA*. Section 35 of the *Indian Act* provides that the province, a municipal or local authority or a public utility may, with the consent of the federal Governor in Council, expropriate First Nation land. Once such land has been "unambiguously expropriated"[58] under s. 35, the interest becomes one of fee simple ownership and the First Nation does not retain authority to tax; however, other charges that do not amount to a tax may still be levied, such as regulatory charges or user fees.[59] The benefits accruing to s. 35 interests seem restricted to the protection from expropriation by a First Nation. While limited, this does offer some level of security from expropriation.

3. AGREEMENTS WITH FIRST NATIONS

Absent extensive legislative amendments to the *FNLMA*, the ability of First Nations to enter into legally binding agreements with third parties in relations to licences in and interests relating to First Nation land appears to be the most sensible and straightforward means of dealing with the ambiguity surrounding security of tenure under the *FNLMA* regime. Such agreements allow the First Nation to exercise their authority, but in a manner than can ensure additional certainty to third parties, as may be mutually agreed upon. It is important to understand the enforceability of such contracts under the new *FNLMA* regime.

In *Mitchell v. Peguis Indian Band*,[60] La Forest J., stated that "[w]hen Indian bands enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements with the provincial Crowns in the same way as with private interests."[61] Justice Wachowich, for the Alberta Court of Queen's Bench in *Telecom Leasing Canada (TLC) Limited v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*,[62] interpreted this statement to mean that bands have the power to contract and to enter into commercial agreements. The exception would be where that power is expressly limited by the need for Ministerial approval under the *Indian Act*. Outside those areas specified by the *Indian Act*, First Nations are free to contract in the same way as any other party, subject to the laws of general application.

The *FNLMA* expressly states that a First Nation that adopts a land code has the legal capacity necessary to exercise its power and perform its duties and functions under the land code and the *FNLMA*. Subsection 18(2)(b) of the *FNLMA* states that a First Nation has the

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[58] *Osoyoos Indian Band v. Oliver (Town of)*, [2001] 3 S.C.R. 746; *BC Tel v. Seabird Island Indian Band*, [2003] 1 F.C. 475 (F.C.A.) where there is ambiguity in the expropriating Order in Council about whether the entire interest of the band was being expropriated, since the Crown is bound to impair the Indian interest in the land as little as possible, the Court held that the Order in Council should be interpreted to leave some Indian interest in the land. In the case of Seabird Island, this meant that the band retained some taxing control.

[59] *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134.

[60] [1990] 2 S.C.R. 85.

[61] *Ibid.* at 138.

[62] (1992), 133 A.R. 355.

power to enter into contracts, and under s. 18(2)(e), be a party to legal proceedings. Subsection 18(4) states that "[a] body established to manage first nation land is a legal entity having the capacity, rights, powers and privileges of a natural person." Further, a corporate entity exercising First Nation powers of land management would be permitted under s. 18(3) of the the *FNLMA*.

Section 17.7 of the *Framework Agreement* states that "[a] First Nation is not precluded from entering into an agreement with a utility or public body for the purpose of granting it an interest in First Nation land that is exempt from expropriation by the First Nation."[63] The *FNLMA* does not expressly include a provision allowing for the type of contract contemplated in s. 17.7 of the *Framework Agreement*. However, it does not expressly disallow such a contract either. However, a third party looking for relief by way of an exemption from expropriation clause would most likely wish that relief to come in the form of an injunction and not necessarily damages. Injunctive relief would provide a security of tenure where damages would not protect third party interests in all cases. While courts have been willing in the past to quash bylaws contradicting previous agreements or contracts,[64] injunctive relief may be more difficult to achieve under the *FNLMA*. Under the *FNLMA*, a First Nation essentially steps into the shoes of the Crown in regard to interests in First Nation land. It is settled law that Parliament cannot bind future Parliaments by contract.[65] However, the other contracting party may still have a remedy if the legislative body acts in defiance of a duly approved contract. In *Wells v. Newfoundland*,[66] Mr. Wells had been appointed to the province's Public Utilities Board on good behaviour until he was 70. The Legislature later abolished the Board and Mr. Wells' position was eliminated. The Supreme Court of Canada, while agreeing that the Legislature had every right to abolish the Board and Mr. Wells' position, stated that he still had the right to be compensated for breach of contract of employment. However, the Legislature could remove the right to be compensated as well, but it would have to be done with clear and specific language. It is unclear if these rights, to legislate out of both contracts and damages, are now possessed by a First Nation under the *FNLMA*.

It is in this area that a simple amendment to the *FNLMA* would be of great benefit to First Nations and affected third parties. An amendment to the *FNLMA* that expressly permits agreements between third parties and First Nations would be definitive respecting the regulatory and legal regime to which the third party interest or licence would be subject.

IV. CONCLUSION

Although enacted to provide greater control for First Nations respecting their reserve land base, the *FNLMA* has created increased uncertainty for third parties seeking access to or interests in First Nation land. If First Nations are to take full advantage of the benefits that the *FNLMA* may offer, then changes must be made to it so as to create a certain and stable tenure system that will attract and retain investors, industry and other third parties.

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63 *Supra* note 6, s. 17.7.

64 *Ross v. Mohawk of Kanesatake* (2003), 232 F.T.R. 238 (F.C.T.D.).

65 *Supra* note 44 at 290.

66 [1999] 3 S.C.R. 199.

This article has focused on the challenges inherent in the *FNLMA* regime applicable to third party licences and interests in First Nation land. However, these challenges must be viewed in the content of the *FNLMA* regime being relatively new and untested, and that many of these challenges may not be borne out in practice, depending on the actions of First Nations under the *FNLMA* regime. Only time will indicate whether the *FNLMA* regime will be implemented and utilized by First Nations in a consistent and fair manner so as to ensure certainty of tenure for third party interests in First Nation land. If not, First Nations run the risk of not being able to attract third party interests to invest in or to utilize First Nation land.

To date, little evidence exists indicating that the challenges and possibilities for improving the *FNLMA* set out in this article will be realized in the near future. The implementation of the *FNLMA* should be carefully monitored by business, First Nations and the federal and provincial governments to ensure that the resulting regime protects First Nations' interests, but also allows First Nations to grant, with certainty and stability, interests and licences to third parties.