Government of Saskatchewan

Saskatchewan's Experience with the First Nations Commercial and Industrial Development Act (FNCIDA)

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Presentation Outline

The Problem:

- Application of Provincial Laws of Reserve
- The Regulatory Gap/Legal Uncertainty

What is FNCIDA and how does it solve the Problem?

The First Project: Solution Potash Mine on Reserve

The Project Specific Regulations and Tripartite Agreement

Template Project: Hydroelectric Dam on Reserve

S. 91(4) of the Constitution Act, 1867

The Crown power to legislate in relation to “Indians, and Lands reserved for the Indians” has been exclusively vested with the federal government.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

24. Indians, and Lands reserved for the Indians.

S.91(24) Unique Bilateral Relationship

In 1867, Canada was granted exclusive legislative authority over "Indians, and lands reserved for the Indians." Why?

- To enable Canada to protect Indians and their land from the provinces who would benefit from the sale of Indian land;
- Maintain a uniform national Indian Policy; and,
- Vesting responsibility from the British Crown to the Federal Crown was a natural extension.

How has Canada exercised Jurisdiction?

Canada chose to exercise jurisdiction under section 91(24) in some of the following ways:

- Signed Treaties
- Enacted the *Indian Act*
- Created reserves for Indian Bands
- Signed Self-Government Arrangements

End of the Enclave Theory

Although section 91(24) of the *Constitution Act, 1867* provides the federal government with exclusive jurisdiction over "Indians, and lands reserved for Indians," this does not mean that Indian reserves are enclaves where only federal laws apply.

The General Rule and Exceptions

The general rule is that provincial laws apply on reserves just as they apply anywhere else in the province (either by their own force and effect or by virtue of section 88 of the *Indian Act*).

However, this general rule is **subject to FOUR important exceptions.**

1. Singling out:
2. Paramountcy:
3. Constitutional Rights:
4. Interjurisdictional Immunity (IJI):

1. Singling Out

Singling out: Provincial laws cannot single out Indians or Indian reserves for special treatment.

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31.

- The Court confirmed that the mere mention of the word “Indian” or “First Nation” within provincial legislation would not render the legislation constitutionally impermissible

- The provisions were part of a valid provincial legislated scheme and the impugned provisions that affected Aboriginal artifacts were sufficiently integrated into that scheme

2. Paramountcy

Provincial laws do not apply if they are inconsistent with the *Indian Act* or any other federal law, including subsidiary legislation under the *Indian Act* such as regulations and Band bylaws.

The courts have defined inconsistency narrowly.

3. Constitutional Rights (Section 35)

Provincial laws do not apply if they unjustifiably infringe upon any Aboriginal or Treaty rights protected under section 35 of the *Constitution Act, 1982*.

2: Interjurisdictional Immunity (IJI)

Provincial laws cannot impair matters that are integral to or at the core of federal jurisdiction under 91(24).

- "possession" of lands on reserves falls within the core of 91(24) or "Indianness"
- The SCC has indicated that IJI should be applied sparingly.
- Also, while provincial laws impairing the core of section 91(24) or "Indianness" cannot apply by their own force, some of these laws are made applicable through the operation of section 88 of the *Indian Act*.

Section 88 of the *Indian Act*

88. General provincial laws applicable to Indians – Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Conclusion of Confusion

Notwithstanding the wealth of jurisprudence on issues concerning the application of provincial laws on reserves, this remains an area of legal uncertainty.

Both Canada and many First Nations view the regulatory gap as being much broader than Saskatchewan.

Consequences of the regulatory gap/uncertainty?

On-reserve projects can be difficult or impossible to approve, finance or finalize.

There is uncertainty with respect to the process, time and costs associated with a project, and can divert potential investors from First Nation reserve lands to off-reserve jurisdictions where an established and familiar regulatory framework exists.

What is FNCIDA?

Canada explains FNCIDA as follows:

- FNCIDA allows the federal government to produce regulations for complex commercial and industrial development projects on reserves. The Act essentially provides for the adoption of regulations on reserve that are compatible with those off reserve. This compatibility with existing provincial regulations increases certainty for the public and developers while minimizing costs.
- Federal regulations are only made under FNCIDA at the request of participating First Nations.
- The regulations are project-specific, developed in cooperation with the First Nation and the relevant province, and are limited to the particular lands described in the project.
- These regulations allow the government to delegate monitoring and enforcement of the new regulatory regime to the province via an agreement between the federal government, the First Nation and the province.

The Project

- The proposed project involves a solution potash mine on Muskowekwan First Nation.
- It is expected to produce up to 2.8 million tonnes of potash per year.
- It has an estimated capital cost of $3 billion, and is a joint venture between the Muskowekwan First Nation, Muskowekwan Resources Ltd., and Encanto Resources Ltd.

How large was this Regulatory Gap?

There are no potash mines operating on Indian reserves in Canada and the federal government lacks a regulatory framework to govern these activities.

Unlike the Government of Saskatchewan, federal departments, including Aboriginal Affairs and Northern Development Canada, have little expertise in the area of mine regulation.

FNCIDA Negotiations with Canada/SK/MFN: The Regulations

Challenge #1: What laws are required to regulate a solution potash mine and need to be incorporated by reference into the Federal project specific regulation.

Challenge #2: How should the law be incorporated by reference through the FNCIDA Regulations and what adaptations are required to each law?

The Tripartite Agreement

- It confirms and clarifies the application of provincial regulatory laws to the solution potash mine on reserve:
- It provides Saskatchewan and its officials with clear authority to carry out these regulatory duties.
- A process to update and amend the FNCIDA regulations to account for inevitable changes in provincial regulatory laws;
- A process to resolve regulatory issues that might arise from time to time including a commitment by Canada and the MFN to assist the Government of Saskatchewan enforce its laws;
- A right for Saskatchewan to terminate the agreement with conditions.

Tripartite Agreement: Costs of Regulating

No payments to Government of Saskatchewan are contemplated under the terms of the Tripartite Agreement for the provision of regulatory services. This commitment reflects the following points:

- All fees, charges or penalties owed by the operator in relation to the incorporated provincial laws are payable to the Government of Saskatchewan; and,
- For most of the incorporated laws, the Government of Saskatchewan is of the view that these laws apply in their own right and government ministries and agencies would be incurring these costs irrespective of the agreement.

A procedure to review the cost of service delivery if the regulatory costs incurred by the Government of Saskatchewan exceed those that it would normally incur in relation to a comparable off-reserve project.

Will the agreement establish a precedent for other industrial projects on reserves in Saskatchewan?

Yes! This tripartite agreement has already provided a template for future agreements between the Government of Saskatchewan, the Government of Canada and Saskatchewan First Nations to advance the development of large commercial and industrial development on Indian reserves.

Concluding Comments

- Avoid the constitutional barriers rather than break them! Tackle individual problems not the entire system.
  - Move away from trying to solve polarized theoretical perspectives...(agree to disagree approach)
- Work within the system by consensus through trilateral relationships.
- FNCIDA is a good tool to help First Nations to realize economic development opportunities on reserves.
- Questions?

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