Legislative Summary

Bill C-24:
First Nations Certainty of Land Title Act

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Legislative Summary of Bill C-24

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-24: FIRST NATIONS CERTAINTY OF LAND TITLE ACT

1 INTRODUCTION

Bill C-24, An Act to amend the First Nations Commercial and Industrial Development Act and another Act in consequence thereof (short title: the First Nations Certainty of Land Title Act), was introduced in the House of Commons on 12 May 2010. The bill amends the *First Nations Commercial and Industrial Development Act* (FNCIDA) to enable participating First Nations communities to request that the Government of Canada make regulations respecting the establishment and operation of a system for the registration of interests and rights in reserve lands that would replicate the provincial land title or registry system. The proposed legislation is optional. Its application is dependent on a First Nation having a private-sector proponent and a province willing to participate.

Bill C-24 is virtually identical to Bill C-63, which was introduced in the 2nd Session of the 40th Parliament on 10 December 2009. Bill C-63 died on the *Order Paper* on 30 December 2009 when Parliament was prorogued.

2 BACKGROUND

Attracting private investment on First Nations lands has become an issue of increasing priority for federal, provincial and First Nations governments. Inefficiencies affecting land registry systems on reserves are widely considered to be disincentives to economic development and impede outside investment.[1] Currently, most interests in reserve lands are registered in the federal Indian Lands Registry System (ILRS), not in the provincial land title system. The ILRS has been criticized as lacking the necessary rigour to protect third parties' legal interests in land. In addition, the transaction costs can be significantly higher as the parties must search a number of historical documents to ascertain effective title.[2]

Given the effect of these uncertainties on potential investors, First Nations are often unable to realize the full value and benefit of their lands. The economic consulting firm Fiscal Realities concluded that "the cost of establishing a marketable property right on First Nation land is at least four times more expensive than establishing the same property right off First Nation lands."[3] Accordingly, the primary objective of the proposed legislation is to establish a First Nations land title system that can support private investment by enabling legal interests in the lands to be more easily "defined, enforced and traded."[4] At the request of a First Nation, on-reserve commercial real estate developments could be registered in a system that replicates the more efficient, accessible and secure provincial land title systems, thereby helping to make the value of on-reserve land and properties comparable to that of equivalent properties off reserves.[5]

The Squamish First Nation in British Columbia is at the forefront of the proposed amendments to the *First Nations Commercial and Industrial Development Act*. In an effort to realize the "highest and best use" of its reserve lands,[6] in particular with regard to proposed commercial condominium developments in West Vancouver, the Squamish have requested legislation enabling the establishment of a First Nations land title system.

2.1 *First Nations Commercial and Industrial Development Act*

The FNCIDA, which received Royal Assent on 25 November 2005 and came into force on 1 April 2006, was developed in cooperation with the Government of Canada and five First Nations (Squamish Nation in British Columbia, Fort McKay First Nation and Tsuu T'ina Nation in Alberta, Carry the Kettle First Nation in Saskatchewan, and Fort William First Nation in Ontario). The FNCIDA is optional legislation enabling a First Nation that has decided to pursue a large-scale commercial or industrial on-reserve project to ask the Government of Canada to develop regulations applying to a specific project on a specific piece of reserve land. The FNCIDA works by essentially reproducing the provincial rules and regulations that apply to similar large-scale commercial or industrial projects off reserves and applying them to a specific on-reserve project. At the time of writing this paper, of the five partnering First Nations, only the Squamish Nation in British Columbia has proposed a Land Development Plan through the FNCIDA.

2.2 Land Registry Systems On/Off First Nations Reserves

The Indian Lands Registry System provides for two distinct registration systems under the *Indian Act*: the Reserve Land Register (RLR) and the Surrendered and Designated Lands Register (SDLR). Although the legislation relating to each registry requires each transaction to be registered, failure to provide particulars to the RLR attracts no legislative penalties and registration provides few benefits except in the case of a transfer of a Certificate of Possession. Section 24 of the *Indian Act* provides that no transfer of a Certificate of Possession is effective until it is approved by the Minister, and section 21 requires particulars relating to Certificates of Possession to be entered into the RLR. As mentioned by Lang Michener LLP in its 2007 study *Best Practices in First Nations' Land Administration Systems*, these two sections of the *Indian Act* "provide some assurance that the [RLR] reflects all effective Certificates of Possession," although section 55(4) provides a more direct level of certainty for an SDLR since it ensures validation "against an unregistered assignment or an assignment subsequently registered."[7]

However, as both the RLR and SDLR are deeds-based land registry systems, the registrar is *not* responsible for verifying the legal validity of the registered documents maintained within the registry.[8] In contrast, provincial land registry systems applicable off reserves, such as the Torrens land title system,[9] provide: certainty of title in the registry; a system of priorities for ranking competing interests; and assurance that the registered owner is the true owner of the title.[10]

Since deeds-based land registries oblige the parties to a transaction to research and ensure the chain of title, they are more costly and difficult to use than land title systems. Off-reserve land registry systems are therefore said to be more effective in providing a level of confidence to investors to promote economic development.

3 DESCRIPTION AND ANALYSIS

Bill C-24 contains 10 clauses. The bulk of the bill relates to the Governor in Council's power to make regulations, at the request of a First Nation, to permit the registration of project lands in a land registry system that replicates provincial land title or registry systems.

3.1 INTERPRETATION (CLAUSE 2)

Clause 2 amends section 2(1) of the *First Nations Commercial and Industrial Development Act* by adding the following new definitions: "provincial body" and "provincial official."

3.2 REGULATIONS (CLAUSES 3 TO 5)

Clause 3 amends subsection 3(2) of the FNCIDA by adding provisions for the arbitration of disputes arising under the regulations as well as for the disposition and destruction of documents created or submitted under the regulations.

Clause 4 inserts a new section 4.1 to the FNCIDA and provides that the Governor in Council may make regulations for the establishment and operation of a system for the registration of interests and rights in reserve lands (land title system). The types of things that may be provided for in the regulations are described in section 4.1(2).

Specifically, regulations may establish priorities among interests or rights that have been registered (section 4.1(2)(*a*)), as well as provide for a fund to compensate for losses in relation to interests that have, or should have, been registered (section 4.1(2)(*b*)).

The regulations may provide that for the purposes of registration, a First Nation's or the Crown's interests or rights in reserve lands constitute fee simple title or ownership (section 4.1(2)(*c*)). In addition, the regulations may deem valid any surrender or designation of reserve lands made under the *Indian Act*, despite an assertion to the contrary by any person (section 4.1(2)(*d*)). Section 4.1(2)(*e*) will permit the regulations to confirm the legal capacity of a First Nation to hold, transfer and register interests and rights in reserve lands.

Regulations may also:

- authorize the Crown to grant fee simple title, without any new surrender or designation of reserve lands under the *Indian Act*, for a purpose authorized under that Act prior to the grant or conferral (section 4.1(2)(*f*));

- for the purposes of registration, certify that the Crown or any other person has an interest or right in reserve lands (section 4.1(2)(*g*));
- entitle holders of registrable interests and rights in reserve lands to apply for registration (section 4.1(2)(*h*));
- at the request of the Minister or a First Nation, provide for the registration of registrable interests and rights of any person that existed at the time of initial registration of title in reserve lands (section 4.1(2)(*i*));
- provide for the substitution, by the Minister or a First Nation, of registrable interests and rights in reserve lands for non-registrable ones (section 4.1(2)(*j*));
- provide for the extinguishment of any interests or rights that are not registered (section 4.1(2)(*k*)).

The manner of calculating compensation to be paid by a First Nation, as well as the time frame for claiming such compensation, for either the substitution or extinguishment of any interests and rights referred to in paragraphs (*j*) and (*k*) may be provided for by regulations under section 4.1(2)(*l*).

Regulations may exclude reserve lands from the application of section 19 (surveys and subdivisions), section 21 (Reserve Land Register) and section 55 (Surrendered and Designated Lands Register) of the *Indian Act* (section 4.1(2)(*m*)).

New section 4.1(3) provides that a grant or conferral effected according to regulations made under section 4.1(2)(*f*) will not affect the Crown's title to, or a First Nation's interests and rights in, reserve lands. Section 4.1(4) stipulates that regulations may also incorporate laws of the province by reference, as amended from time to time.[11]

Clause 5(1) amends section 5 of the FNCIDA and provides that regulations made under section 4.1, as well as under section 3, can be made only if (i) the Minister receives a resolution of the council of the First Nation requesting the making of the regulations and (ii) in cases where the regulations specify that a provincial official or body may exercise a power or perform a duty, an agreement has been concluded between the Minister, the province and the council of the First Nation for the administration and enforcement of regulations by that official or body. These conditions, however, are not required for the repeal or amendment of regulations made under those sections (clause 5(2)).

Clause 5(2) provides for arbitration, in accordance with provincial laws, of disputes arising from the interpretation or application of an agreement concluded between the Minister, the province and the council of a First Nation for the administration and enforcement of regulations (as per section 5(1)(*b*)), and stipulates that in such cases the *Commercial Arbitration Act* does not apply.

3.3 Conflict with First Nations Laws, Application of Other Acts (Clause 6)

Clause 6 amends section 7 of the FNCIDA, providing that regulations made under section 4.1, as well as under section 3, prevail over any laws and by-laws made by a

First Nation where any conflict or inconsistency occurs between them, unless those regulations specify otherwise.

Clause 6 also amends section 8 of the FNCIDA and provides that the *Statutory Instruments Act* does not apply to instruments made under the authority of a provincial law incorporated by reference in regulations made under section 4.1. Clause 6 further amends section 9(1) of the FNCIDA, providing that any provincial official or body exercising a power or performing a duty pursuant to regulations made under section 4.1 is not a federal board, commission or other tribunal for the purposes of the *Federal Courts Act*, and that the exercise of provincial law powers that are incorporated by reference into the regulations pursuant to section 4.1 can be reviewed by the provincial courts.

3.4 Limits on Liability, Defences and Immunities (Clauses 7 and 8)

Clause 7 amends section 11 of the FNCIDA and provides that the Crown has the same limits on liability, defences and immunities relating to acts or omissions in the performance of a duty or in the exercise of a power under regulations made under section 4.1 as would a provincial official or body exercising the same authority.

Clause 8 adds new section 12.1 to the FNCIDA, prohibiting any civil proceeding from being brought against the Crown or a province in relation to the registration, substitution or extinguishment of title or of any registrable interest or right, as described in paragraph 4.1(2)(*i*), in reserve lands made pursuant to regulations under section 4.1.

3.5 Consequential Amendment (Clause 9)

Clause 9 amends subparagraph 24(1)(*a*)(i) of the *Canada Lands Surveys Act* and provides that reserve lands described in the regulations made under section 4.1 of the FNCIDA are excluded from the definition of "Canada Lands" under the *Canada Lands Surveys Act*.

3.6 Coming Into Force (Clause 10)

Clause 10 provides that the bill will come into force on a day or days to be fixed by order of the Governor in Council.

4 COMMENTARY

Bill C-63, the predecessor to Bill C-24, received light media attention following its original introduction in the House of Commons for first reading on 10 December 2009, during the 2nd Session of the 40th Parliament. General support for the proposed legislation was expressed by B.C. Premier Gordon Campbell and West Vancouver Mayor Pamela Goldsmith Jones,[12] although others raised some concerns.

Although the Squamish First Nation has spearheaded the proposed amendments to the FNCIDA and views the introduction of Bill C-24 as a significant step forward in

promoting economic development on reserve lands, an article appearing in *Pique Newsmagazine* on 15 December 2009[13] suggests that it feels the bill did not go far enough. In that article, Squamish Nation Chief Gibby Jacob is quoted as stating that the proposed legislation "… still falls short of allowing them to compete on a level playing field in the growing Vancouver real estate market." Chief Jacob is also asking the federal government to allow the Squamish Nation to "enact a Property Transfer Tax, which would be similar to the province's rates." This request stems from a consultant's report presented to the Squamish Nation,[14] in which it is proposed that a property tax regime harmonized with those applicable off reserves would eliminate tax competition and provide the Squamish Nation with an essential stream of revenue to support an on-reserve regulatory regime.

In an opinion piece appearing in the *Vancouver Sun* on 16 December 2009,[15] Jon Kesselman (Canada Research Chair in Public Finance, Simon Fraser University) argues that, despite assertions by the Department of Indian Affairs and Northern Development, the establishment of certainty of title alone would not sufficiently address differences in the value of leaseholds on First Nations reserves relative to off-reserve lands. In his view, these differences cannot be attributed solely to title uncertainty. Rather, he proposes that differences in market valuation are more directly attributable to uncertainties on reserve lands in relation to local governance and the lack of effective input into decisions on taxation, public services, land use and bylaws. As a possible solution to this issue, he proposes that First Nations governments allow leaseholders on reserve lands to operate their own administration, make local taxing and servicing decisions as well as bylaws, and pay property taxes to senior governments.

In a pre-budget presentation to the House of Commons Standing Committee on Finance on 15 September 2009, Manny Jules, Chief Commissioner of the First Nations Tax Commission, proposed similar legislation which he referred to as the First Nation Property Ownership Act (FNPOA). The FNPOA is patterned on changes enacted by the Nisga'a Lisims Government,[16] and would: allow First Nations to opt out, should they choose, from the reserve land system of the *Indian Act*; transfer title from the federal government to First Nations governments; and allow First Nations to move to a Torrens land title system. The proposed legislation has received preliminary support from some First Nations and First Nations organizations, the Minister of Indian Affairs, the Department of Indian Affairs and Northern Development, the Land Title and Survey Authority of British Columbia, and the Institute of Liberty and Democracy.[17] The First Nations Tax Commission estimates that the proposed changes would increase property values by about $4 billion over the next 15 years for 68 First Nations communities in British Columbia alone.

NOTES

1. First Nations Tax Commission, *Towards a First Nation Property Ownership Act – Briefing Note to the House of Commons Standing Committee on Finance from the First Nations Tax Commission*, 15 September 2009.
2. For additional information regarding the Indian Lands Registry System, see Lang Michener LLP, *Best Practices in First Nations' Land Administration Systems*, 2007.
3. Cited in Tom Flanagan, *Unlocking the Value: The Squamish Nation's Land Development Plans*, 2 November 2009, p. 17. See also Fiscal Realities, *The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations*, March 2007.
4. Fiscal Realities (2007).
5. The Nisga'a Nation is the only First Nation in Canada that operates a modified Torrens land title system, known as the Nisga'a Land Title System, to register interests in Nisga'a lands. First Nations operating under the *First Nations Land Management Act* may record interests in land in the First Nation Land Register, which is associated with the Indian Lands Registry System.
6. Squamish Nation Chief Gibby Jacob, quoted in "Federal legislation to unlock up to $7 billion in development on Capilano reserve," *Intertribal Times*, 10 December 2009.
7. Lang Michener LLP (2007).
8. For more information, see First Nations Tax Commission, *Best Practices in First Nations Land Title Systems*, April 2007.
9. Used in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, and the three territories.
10. For a more complete description, see Lang Michener LLP (2007).
11. Incorporation by reference is a legislative drafting practice that allows the inclusion of external or third-party standards or requirements in legislation; the incorporated standards may change over time.
12. "Federal legislation to unlock up to $7 billion in development on Capilano reserve" (2009).
13. "Land Title Legislation Will Help Squamish Nation Develop Real Estate," *Pique Newsmagazine* [Whistler, B.C.], 15 December 2009.
14. Flanagan (2009).
15. Jon Kesselman, "Bill fails to resolve issues related to first nations reserve lands," *The Vancouver Sun*, 16 December 2009.
16. The Nisga'a legislation allows homeowners on former Indian reserves on Nisga'a land in northwestern British Columbia to apply to have their property transferred to fee simple ownership, meaning that Nisga'a citizens could mortgage or sell their residential property, but with control maintained by Nisga'a village governments. The legislation is limited to residential properties, such that large-scale commercial property development is excluded. For further information, see Nisga'a Lisims Government, *Nisga'a Landholding Transition Act*, October 2009.
17. First Nations Tax Commission (2009).