

Indigenous Law Issues in Commercial Law

**Commercial Law Intensive
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- Residential Schools apology occurred on June 11, 2008. The prime-minister spoke of the steps being taken to forge:



“a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding.”

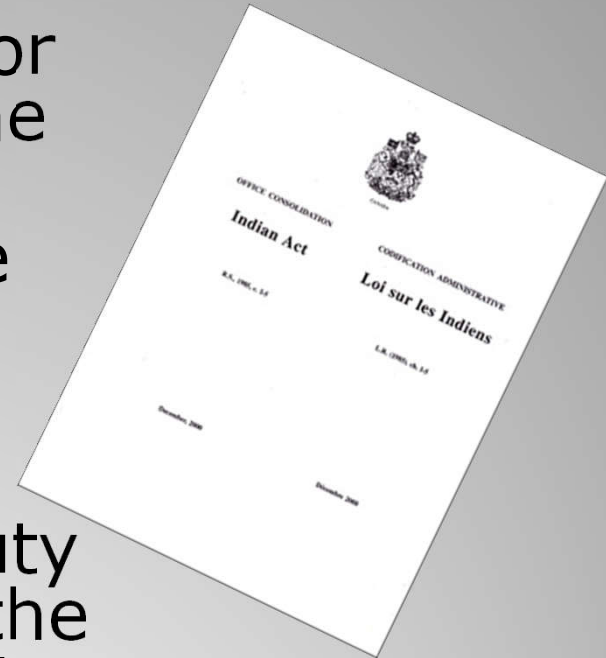
Introduction

PART I: ON-RESERVE ECONOMIC DEVELOPMENT

- If we look back in history, we see that reserves were created in three ways:
 - By Religious Organizations
 - By Treaties;
 - By Unilateral Government Orders
- Created for a number of purposes, including:
 - Places to be confined until 'civilized'
 - Protect land from encroachment by Europeans
- Paternalism (high level of ministerial involvement) continues to play a central role regarding decisions to develop reserve land

History of Reserves

- Authority to surrender land for development occurs under the *Indian Act*
- Many of these surrenders are historic; currently accomplished by ss.37(1) and 38(1) of the *Indian Act*
- Crown is under a fiduciary duty to comply with the terms of the surrender, and act in the best interest of the First Nations when dealing with the surrendered rights.



Land Surrenders

- Instead of surrendering, First Nations can 'designate' a piece of land for development under s. 38(2) of *Indian Act*
- Allows development to remain on-reserve
- Significant INAC supervision; lengthy process to designate (referendum and ratification by Chief and Council)
- Inflexible to modern business realities – eg) Solar developments in SW Ontario

Designated Lands

- Permit issued by Minister under s.28 of the *Indian Act*
- No referendum req'd – Minister may grant s.28 on authority of BCR
- Normally used for pipeline / transmission ROW; other passive dev't aligned with Gov't objectives
- INAC hesitant about larger applicability; term normally won't exceed 49 years.



Permits

- *First Nations Land Management Act*
- *First Nation Commercial and Industrial Development Act*
- *First Nations Oil and Gas and Moneys Management Act*

Beyond the *Indian Act*

Pros:

- Keeps jobs in the community
- Allows First Nation to make use of available tax exemptions
- Promotes economic self-sufficiency

Cons:

- Extremely burdensome and paternalistic
- Functions (often primarily) as a process of off-loading government liability
- Reserve land ill-suited for such ventures

On-Reserve Economic Development

PART II: CORPORATE MODELS FOR ABORIGINAL ECONOMIC DEVELOPMENT

- Band-owned corporations that conduct 90% or more of their business on reserve land are exempt from tax
- Exemptions are also afforded to municipalities and public bodies

Income Tax Act, Section 149(1)(c): public bodies performing a function of government in Canada are exempt from tax

October 2016: CRA issue letter that “all bands created under *Indian Act* meet the criteria to be exempt from tax under Section 149(1)(c).”

Corporations



- Provincial *Limited Partnership Acts* may allow First Nations to be limited partners in an LP.
- Designation of '*public body performing a function of government in Canada*' means distributions to FNs are tax exempt
- Allows First Nations to move off reserves in their economic development initiatives

Limited Partnerships

- Joint Ventures allow First Nations to take advantage of expertise of a non-FN company
- Joint Venture Agreements can allow for capacity transfer to First Nations
- Common for off-reserve projects to grant enhanced business opportunities to FN owned businesses.
- JVs allow these opportunities to be seized even where FN is still developing expertise in a particular business area



Joint Ventures

- Video:
First Nations struggle
to save traditions
while profiting
from boom



Oil Sands Case Studies

PART III: IMPACT BENEFITS AGREEMENTS



Impact Benefits Agreements

- IBAs are viewed as part of a consultation and accommodation framework
- Recognition by a company of the impacts on Aboriginal and Treaty rights as a result of development
- Agreement provides a spectrum of benefits in return for approval from Indigenous group for the development to proceed (regulatory certainty).

Introduction to IBAs

- IBAs are not consultation, per se. They are the result of a legal framework that requires consultation with and accommodation of the groups impacted by development
- Developer may see an IBA as a contract. From the aboriginal perspective, they are a step towards greater recognition of Aboriginal and Treaty rights and the reassertion of Indigenous forms of governance over resource development.

Introduction to IBAs

- Bargaining power will always be at issue in IBA negotiations.
- Litigation, lobbying, PR campaigns and/or direct action are all used and sometimes achieve a more level bargaining context, but all carry risks

Negotiating an IBA: Bargaining Power



International corporate relationships with First Nations (Choc v. Hudbay Minerals)

International Context

- 2007, UN General Assembly adopts UNDRIP, which affirms doctrine of *FPIC: Free, Prior and Informed Consent*
- Led to a revision of the *Operational Policies* of the World Bank and its private arm, International Finance Corporation
- *Equator Principles*, governing IFC associated financial institutions, brought into line with these revised standards 2 years later
- Tensions remain regarding how these standards are implemented on the ground.

International Context

- New Environmental and Social Framework approved by the World Bank in 2016
- *Alignment* between decreased project risk and meeting standards for env'l and social protections
- ESS7: principle safeguard standard borrowing countries obliged to follow to protect the rights of indigenous peoples
- ESS7 adopts FPIC: where consent not obtained, aspects of project requiring FPIC will not be processed further.

International Context

- IFC has been unprepared to define a situation in which an agreement has not been reached;
- Instruction can be gleaned from reviewing factors evidencing consent has been reached:
 - (i) agreed engagement and consultation process;*
 - (ii) env'l, social and cultural impact management (including land and resource management);*
 - (iii) compensation and disbursement framework or arrangements;*
 - (iv) employment and contracting opportunities*
 - (v) governance arrangements*
 - (vi) other commitments such as those pertaining to continued access to lands, contribution to dev't, etc;*
 - (vii) agreed implementation/delivery mechanisms to meet each party's commitments*

International Context

- Once industry comes to the table, there are 3 main components of IBA negotiations:
 - Agreement on Process / Interim Measures
 - Exploration Agreements
 - Impact Benefit Agreements

Negotiating an IBA: Steps

- Negotiations can continue for years; costs to negotiate can be significant
- Important to get full funding commitment prior to incurring significant costs;
- Scientific, archaeological, ethnographic, legal, hr, accounting, finance expertise are all required to build a robust agreement
- Run processes parallel to negotiation. Establishes initial oversight; helps to identify what processes work and which ones need work

Process / Interim Measures

- Covers many of the same issues an IBA will eventually cover in less detail
- Exploratory undertaking (i.e. fly-overs; seismic; test drilling; etc.) generally have less impact on the land compared to full-scale development

Exploration Agreements

- Financial compensation
- Regulatory Certainty
- Ownership
- Preferential Employment Opportunities
- Preferential Procurement
- Education and Training
- Environmental Protection Mitigation and Monitoring

Components of an IBA

- Social or Cultural Support
- Participation in Environmental Assessment Process
- Monitoring and Implementation
- Ratification by community
- Dispute Resolution
- Renegotiation

Components of an IBA

PART IV: BUYING INTO ENERGY AND INFRASTRUCTURE PROJECTS



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BARRISTERS AND SOLICITORS

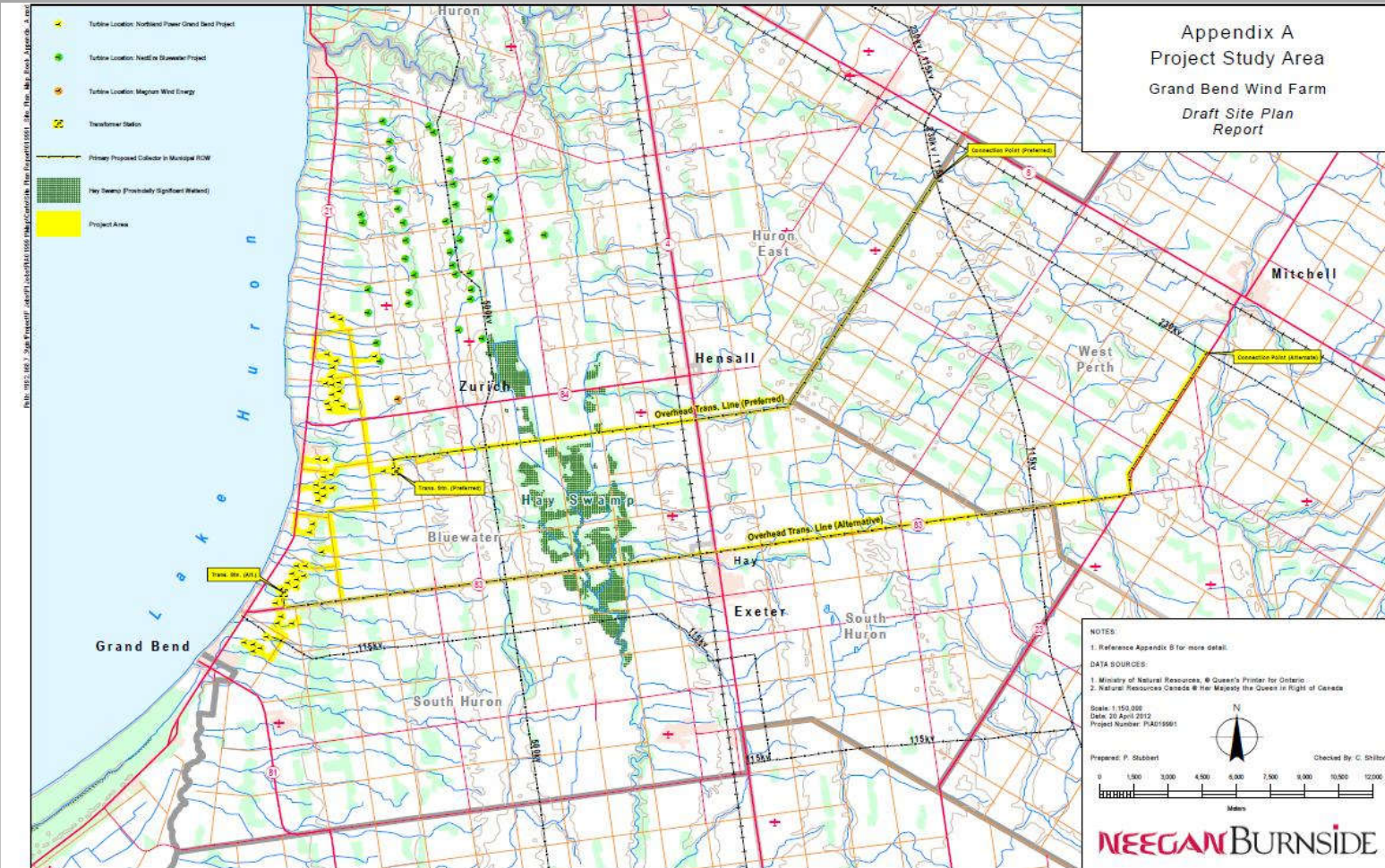
Outwork by Robert S.



Giiwedin Noodin FN Energy



Grand Bend Wind Project



Grand Bend Wind Project

PART V: CONCLUSION

- *Reconciliation*
- *On Reserve Economic Development*
- *Business Structures Used in Aboriginal Economic Development*
- *Negotiation of Impact Benefit Agreements*
- *Principles of Equity Ownership*

Conclusion