



HIAWATHA FIRST NATION LAND CODE

Community Meeting #3 – April 17, 2021

Last time...

- March 10, 2021 – Law Making under the HFN Land Code
- March 22, 2021 - Interests and Rights Relating to HFN Land

Today...

1. Enforcement of Land Laws
2. Dispute Resolution
3. Summary: Advantages & Disadvantages of Land Codes



What should a Land Code Accomplish?



01

Transfer land management to the First Nation

Transfer ISC's administrative functions with respect to reserve land to First Nation governance structures and provide them with complete and workable rules and powers under which they will operate, capable of implementation within the context of HFN's human and financial resources.



02

Establish the rules for making decisions, land laws

Provide substantive and procedural rules for decision-making and the enactment of land-related laws by the Council and the community. The rules should be complete, legally sound, and enforceable in courts of law.



03

Improve community life and facilitate development

Provide rules, processes and governance institutions to promote a prosperous, respectful and vibrant community, to guide and control community development – residential, commercial and industrial – for the benefit of all, and to protect the environment.

1. Enforcement 1/5

Legislative Authority of Council

- Council, on behalf of the HFN members, may enact land laws relating to a variety of matters
- Under that legislative authority Council may enact laws relating to enforcement measures

Power to enact land laws

- 4.01 Council has the power to make land laws in accordance with this Land Code, respecting
- (a) Interests and rights in or licences relating to Hiawatha First Nation land;
 - (b) the development, conservation, protection, management, use and possession of Hiawatha First Nation land; and
 - (c) any matter arising out of or ancillary to the exercise of that power.

Particular powers

- 4.02 Without restricting the generality of section 4.01, Council may enact land laws respecting:
- [...]
- (f) enforcement measures, consistent with federal laws, including the power to inspect, search and seize and to order compulsory sampling, testing and the production of information.

1. Enforcement ^{2/5}

Offences

A land law, if enacted with community consultation or approval, may:

- Create land law offences punishable by summary conviction under the Criminal Code
- Provide for penalties such as fines or community service
- Environmental laws with standards and punishments with at least the same effect as Ontario laws

Offences created by land laws

4.03 A land law, regulation or other instrument created with community consultation or community approval may include enforcement measures consistent with federal laws and, without limiting generality,

- (a) may create offences punishable in accordance with the summary conviction procedures of the *Criminal Code*, as amended from time to time;
- (b) may provide for the imposition of fines, imprisonment, restitution, community service and any other means for achieving compliance provided therein; and
- (c) as provided in the Framework Agreement, land laws governing environmental protection shall include standards and punishments having at least the same effect as those in the laws of the province of Ontario.

(See also section 16.01)

1. Enforcement ^{3/5}

Fees and Fines

- All fines paid on conviction of an offence are the property of HFN
- HFN may deduct outstanding fine amounts from funds owed by the First Nation to the person liable for such fine.

Fees and penalties payable to Hiawatha First Nation

16.03 All confiscated property and all fees, fines and penalties required to be paid on conviction for an offence established by a land law shall be paid and transferred to the Hiawatha First Nation.

Deduction of outstanding amounts

16.04 Any fees, fines or penalties which remain unpaid in excess of thirty (30) days may be deducted from any other funds in the control of the Hiawatha First Nation and payable to the person liable for such fees, fines or penalties.

1. Enforcement 4/5

Enforcement Officials

- For the purpose of enforcing land law, HFN may appoint its own prosecutors, enforcement officers and justices of the peace
- The Land Code protects office holders from liability for performing their duties under the land code

Appointment of Justices of the Peace and other enforcement officials

16.02 The First Nation may appoint prosecutors, enforcement officers and, by itself or in co-operation with Canada, Justices of the Peace for the purpose of enforcing this Land Code and any land law or regulation enacted under it.

Immunity of office holders, etc.

17.01 No criminal or civil proceedings shall lie against any office holder or for anything done or omitted to be done in good faith during the course of the exercise or purported exercise of any power or the performance or purported performance of any duty or function pursuant to this Land Code or any land law.

1. Enforcement ^{4/5}

Scenario:

HFN adopts a land law under its Land Code, with community consultation, which makes it an offence punishable on summary conviction to interfere with an izhitwaawin site – a site of spiritual, historic, cultural or other significance. Mike is seen using a metal detector near a designated izhitwaawin site, and appears to have collected several artifacts. Mike is not a member. Can HFN enforce the land law against him?

Applying the Land Code

- Enforcement officials can be appointed under the Land Code with authority to search Mike and to charge him with interfering with an izhitwaawin site. HFN can also appoint a prosecutor to prosecute Mike and a Justice of the Peace to conduct the trial **[s. 16.02]**
- If Mike is convicted, he may be ordered to pay a fine to HFN, to pay for restoration of the site or may receive a prison sentence **[s. 16.03]**
- All enforcement officials are protected from liability under the Land Code **[s. 17.01]**

2. Dispute Resolution (1/5)

Voluntary Process

- The HFN land code provides for a voluntary process for the resolution of land related disputes with the exception of certain matters set out in section 12.03.
- There are two different processes available: mediation and binding arbitration

Voluntary dispute resolution

12.01 A person who wishes to seek the resolution of a dispute with the Hiawatha First Nation or another person in relation to the management, possession, use or occupation of or provision of services to Hiawatha First Nation Land may submit to Council a written request for dispute resolution pursuant to this Part.

Dispute resolution processes

12.02 Dispute resolution under this Part may take the form of:

- (a) discussions between the parties facilitated by a mediator, appointed by Council, who shall seek to assist the parties in reaching agreement without taking a position on the issues in dispute; or
- (b) binding arbitration by an arbitrator appointed by Council.

2. Dispute Resolution (2/5)

In order to use the Land Code dispute resolution process the parties to the dispute must agree in writing to:

- What the dispute it about
- Who the parties are
- Whether they would like to use mediation or arbitration
- Council's authority to appoint the mediator/arbitrator
- Participate in the process and be bound by the outcomes

Agreement of parties required

12.04 Council, prior to accepting a dispute for resolution under this Part, shall require the written agreement of all the parties whom Council deems to be necessary to the resolution of the dispute with respect to the following:

- (a) a statement of the disputed matter or nature of the dispute;
- (b) the parties necessary to the dispute;
- (c) the dispute resolution process or sequence of processes selected by the parties;
- (d) the appointment by Council of a mediator or arbitrator; and
- (e) each party's commitment to participate in the dispute resolution process and to be bound by the rules and outcomes of the process including any orders as to costs.

2. Dispute Resolution (3/5)

Powers of the Mediator/Arbitrator

- The mediator or arbitrator may make an order requiring a party to pay the costs of the resolution process
- An order by the mediator or arbitrator under this process is binding on the parties who participated

Order for costs

12.09 Upon termination of facilitated discussions or an arbitration, the mediator or arbitrator, or, in default thereof, Council, may order that any party pay:

- (a) all or part of the costs thereof to the Hiawatha First Nation; and
- (b) all or part of the costs of any other party to that other party;

which order shall be immediately due and payable and enforceable as a debt of the party against whom the costs are ordered.

Dispute resolution orders binding

12.10 An order of a mediator or arbitrator pursuant to this Part shall be binding upon the parties.

2. Dispute Resolution (4/5)

Scenario:

Nick, a member of HFN with a house on HFN Land, decides to lease his house to his friend Oliver. The lease requires the tenant to keep the land clean and tidy at all times. Oliver has been accumulating old cars to scavenge parts to keep his main vehicles going, and there are now several wrecks in the yard. Nick has asked Oliver to remove them but Oliver has done nothing, saying the wrecks are mostly out of sight and he still needs them for a project car he is working on. Neither wants to go to court over this. What can Nick and Oliver do to address this dispute?

2. Dispute Resolution (5/5)

Applying **Part 12** of the Land Code

- If they both agree, Nick and Oliver may use the dispute resolution process set out in the Land Code by jointly submitting a request for dispute resolution to Council **[s. 12.03]**
- Oliver and Nick must provide written proof to Council that they both agree:
 - 1) on the nature of the dispute;
 - 2) on the choice of either mediation or arbitration;
 - 3) to accept Council's appointed mediator or arbitrator; and
 - 4) to participate in the dispute resolution process and be bound by any orders or agreements resulting from the process **[s. 12.04]**
- At the end of the process, either Nick or Oliver may be required to pay all or part of the cost of the dispute resolution process if ordered to by the mediator or arbitrator **[12.09]**

OKAY....

Looks interesting and progressive...

BUT....

What are the advantages and disadvantages of going to a land code?



3. Overview – Land Code vs *Indian Act*

What happens when a First Nation adopts a Land Code?

- The control, power and responsibility for managing HFN's reserve land will be transferred from Canada to the First Nation
- 44 sections of the Indian Act will cease to apply within the reserve and will be replaced by laws, policies, processes and institutions created by the First Nation

Which system is better?

- Depends on the land governance and development objectives of the community
- Decision to adopt a land code is final – no way back into the Indian Act system – so decision must be taken carefully

3. Overview – Pros and Cons ^{1/9}

Community-based land management

- Hiawatha's land code and land laws will replace the *Indian Act's* colonial land management system, which vests ultimate authority in the Minister, with an Indigenous culture-based system which vests law-making powers and decision-making in the community and its elected government.
- Taking over land administration is part of the “sectoral” approach to building self-government – taking over one sector at a time, with the opportunity to grow in governance effectiveness and efficiency.

Reduction in federal responsibility

- Part of Canada fiduciary responsibility to manage the First Nation's land – the part which is embedded in those 44 sections of the *Indian Act* which are no longer applicable to Hiawatha – is transferred to the First Nation.
- Canada remains responsible for what happened to reserve land before the transfer but not what happens after (with a few exceptions).

3. Overview – Pros and Cons ^{2/9}

Broader spectrum of land management tools

- The Framework Agreement permits First Nations to exercise much broader powers over reserve lands than are available under *Indian Act* bylaws, and to replace Indian Affairs decision-making on land management issues with Council and community decisions.
- These broader powers give First Nations more direct control over their reserve lands and will allow it to respond to community needs and priorities, including economic development opportunities, in ways and timeframes that are not feasible under the *Indian Act* system and bureaucracy.

Regulatory gaps must be filled

- New land laws on matters such as interests in land, comprehensive land use planning, laws to govern matrimonial property, environmental stewardship and *izhitwaawin* sites will be required.
- Developing these land laws will take money, community involvement and time to develop and roll out.

3. Overview – Pros and Cons ^{3/9}

Increased transparency and involvement of members

- Under the *Indian Act*, Council may, with certain exceptions, enact by-laws without input from or approval of members.
- Under the proposed Land Code, Council is limited in the kinds of laws it can pass without community input or approval, and there is a mandatory notice period prior to the enactment of any land law.
- All land laws must be published and registered in the First Nation Lands Registry and on the First Nation's website.

Increased accountability of Band Council

- Under the *Indian Act*, Council is accountable to the Minister for land management decisions.
- Under the proposed Land Code, Council is accountable to the membership, is required to obtain approval and input from member or certain decisions, and must report annually on all land transactions in a special community meeting.

Increased transparency and involvement of members

Scenario:

A delegation of HFN members asks Council to enact a banishment law. Assuming Council agrees to proceed, what further role will HFN citizens have in the enactment process?

Indian Act

- Council may enact a banishment by-law under its *Indian Act* authority to enact by-laws regarding trespass without community input or approval.

Land Code

- In all land law enactments, Council must provide a minimum of **21 days' notice** to members before it can enact the land law [s.5.06]
- If the land law creates offences punishable under the Criminal Code, the land law can only be enacted with either prior **community consultation** (i.e. community meeting) or **community approval** [s. 16.01]
- If Council felt that the matter was controversial, it could submit the draft law to a community approval vote [s. 5.08(g)]

3. Overview – Pros and Cons ^{4/9}

Transition from discretion to rule-based decision-making

- Under the proposed Land Code, Council actions and decisions in relation to land development proposals and the protection of the environment will have to confirm to community-approved rules – for example, the Comprehensive Land Use Plan and Environmental Stewardship Regime, both developed with community consultation.
- Reduces the role of discretion in Council decision-making.

Prior interests are “grandfathered” into the Land Code

- All CP’s, leases, licences and other interests that exist on the date the Land Code comes in force will continue in effect unchanged. If they were lawful before the Land Code, they will be lawful after.
- Once the Land Code is in force, all land transactions will have to follow the procedural parts of the Land Code, and any changes in an interest or licence will have to conform to the Land Code and applicable land laws such as a Comprehensive Land Use Plan or environmental stewardship regime.

Council discretion vs. rule-based decision-making

Scenario:

Rebecca has a plan to open an animal rescue on HFN Land. Stacey has a plan to open a bird sanctuary. Both Rebecca and Stacey submit detailed business proposals with a request for a grant of lease of HFN Land in order to open their businesses. Council approves Stacey's proposal but rejects Rebecca's as "not suitable for our community." Rebecca believes she has not received fair and equal treatment. Does she have a valid complaint?

Indian Act

- Since the decision to approve or reject either of the proposals is left wholly up to Council with no decision-making rules, the process and the decision may appear to be entirely subjective and arbitrary.

Land Code

- Immediately after the Land Code is ratified, HFN is required to develop a Comprehensive Land Use Plan and an Environmental Stewardship Regime, both with community approval, to provide written rules for deciding land development applications and objective criteria for making those decisions.

3. Overview – Pros and Cons ^{5/9}

New Indigenous forms of interests, rights and licences

- The *Indian Act* model of certificates of possession can be replaced by Land Code First Nations with purpose-limited grants of exclusive use of land (e.g. only for residential use, only for farm use, only for industrial or commercial use).
- New forms of land interests, such as designations for protected sites or “public use land”, may be created.

Transition from the IRLS to the FNLRS

- Hiawatha land transactions are currently recorded in the Indian Land Registry System, which has no priority rules to decide between conflicting claims.
- Under the proposed Land Code, Hiawatha records will be moved to the First Nations Land Registry System, in which a “priority of earlier registration” rule will apply to all new registrations: this will create greater certainty of claims and reduce land due diligence costs going forward.

3. Overview – Pros and Cons ^{6/9}

Advancement of economic development

- Land management under a Land Code is faster and more efficient, meaning Land Code First Nations can deal with economic opportunities that arise at the "speed of business" as opposed to the speed of ISC.
- The First Nation's direct control of land use eliminates the role of the Minister and the Department of Justice in matters such as leasing and permits, which removes politics from commerce and provides certainty for outside business partners and investors.

Hiawatha must assume environmental management

- Under the *Indian Act*, environmental assessment, permitting and protection are managed and funded by ISC.
- Under the proposed Land Code, the First Nation must develop an environmental stewardship regime and provide it with appropriate resources – manpower, expertise and funding – to protect the First Nation's lands.

3. Overview – Pros and Cons ^{7/9}

Improved enforcement of Band laws

- Under the *Indian Act*, First Nation by-laws often go unenforced because there is no workable prosecution process for First Nation laws.
- Land Code First Nations may appoint their own Justices of the Peace and special prosecutors and such enforcement officials are protected from liability when conducting their duties under the Land Code.
- A Land Code First Nation has the power to establish comprehensive enforcement procedures including offences that are punishable on summary conviction, and providing for inspections, searches, seizures, fines, imprisonment, restitution, community service and alternative means for achieving compliance with its laws.

No dedicated enforcement funding allocation

- The operational budget provided by ISC does not include law enforcement as a budget item – if the costs of enforcement exceed the operational budget, the First Nation will have to negotiate new ISC funding or draw on the First Nation's own resources.

3. Overview – Pros and Cons ^{7/9}

Inexpensive dispute resolution options

- The Land Code provides two new community-values based processes for resolving disputes between members and others who wish to avoid the expense of going to court.

Fixed operational fund

- Canada will provide fixed operational funding to support the implementation of the Land Code and the development and enforcement of the First Nation's laws.
- If the funding falls short of the First Nation's actual needs, cost overruns will be the First Nation's responsibility.
- Certain land management costs currently covered by Canada (i.e. surveying, the creation of locatee leases, five year lease appraisals) may become the responsibility of the First Nation or the interest holder.

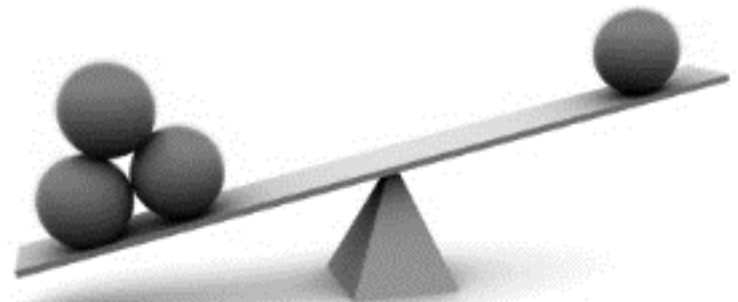
3. Weighing the Pros and Cons

Advantages

1. Community-based land management laws
2. Broader land governance powers
3. Increased transparency and community involvement
4. Increased accountability of Council
5. Transition to rule-based decision-making
6. New forms of interest, rights and licences
7. Improved registration and protection of members' interests
8. Speed-up for economic development
9. Community control of environmental matters
10. Enhanced law enforcement options
11. Culturally-appropriate dispute resolution process
12. Protection of pre-Land Code interests

Disadvantages

1. No going back
2. Council's fiduciary obligations increased and Canada's fiduciary liability for land management equally reduced
3. Development of several key new land laws will be necessary
4. Operational funding is fixed: excess land management costs may have to be funded by HFN or members.



How will these pros and cons play out in
everyday life for HFN members?

A couple of examples...



Questions?

Thank you!



Important Upcoming Date

Ratification Vote - May 15, 2021