

FILLING THE SYSTEMIC VOID

- ▶ One way to fill the void created by the federal and provincial governments not taking on the prosecution and enforcement of Land Code law contraventions is to attempt to carry out the prosecution/adjudication in-house
- ▶ This is a two step process:
 1. Relying on First Nations Land Management Act (FNLMA) law making powers to create an in-house adjudication body that hears prosecutions of Land Code law contraventions, and then issues orders
 2. Relying on the *BC Provincial Court Act* as a basis to enforce, in court, the orders issued by the in-house adjudicative body



1. FNLMA AUTHORITY TO CREATE IN-HOUSE ADJUDICATION BODY: SECTION 20(1)(e)

- ▶ S. 20 (1) The council of a First Nation has, in accordance with its land code, the power to enact laws respecting:
 - ▶ (a) interests or rights in and licences in relation to First Nation land;
 - ▶ (b) the development, conservation, protection, management, use and possession of First Nation land; [...]
 - ▶ (c) the rules and procedures that apply, during a conjugal relationship, [...]
 - ▶ (d) limits on the liability of, and defences and immunities for, any person or body in respect of an act or omission occurring in the exercise of a power [...] under a First Nation law or the land code; and
 - ▶ (e) **any matter** arising out of or **ancillary to the exercise of the power to enact laws under paragraphs (a) to (d)**
- ▶ A plain reading of s. 20(1)(e) allows for the enactment of laws which are needed to support (i.e. “ancillary to”) other purpose-specific Land Code laws that have been enacted
- ▶ S. 22 (1) A First Nation law may create offences punishable on summary conviction and provide for the imposition of fines, imprisonment, restitution, community service and any other means for achieving compliance
- ▶ If these purpose-specific laws can contain offences/impose sanctions, then a law which allows for the adjudication of these offences is arguably “ancillary to” the purpose-specific laws
 - ▶ This is because without an adjudication mechanism (and the eventual enforcement of any adjudication orders), the purpose-specific laws enacted under the FNLMA are meaningless



SUPPORT FOR IN-HOUSE ADJUDICATION UNDER 20(1)(e): MODERN PRINCIPLE OF STATUTORY INTERPRETATION

- ▶ Driedger's Modern Principle: words of statute read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament
 - ▶ Scheme of Act: other FNLMA/Framework Agreement provisions don't conflict with the creation of in-house adjudicative bodies (and may even support such a body)
 - ▶ Object of Act: UNDRIP implementation, Framework Agreement ratification (which Agreement aims at First Nation decision-making, governance, jurisdiction)
 - ▶ Intention of Parliament: FNLMA was to be a major step towards self-government, giving control back to First Nations
 - ▶ During debates, opposition members explicitly raised concern about the wide scope of enforcement powers under the FNLMA, as well concern over the ability of Land Code Nations to create a 'parallel First Nation justice system'
 - ▶ This wide scope of powers did not appear to be a major concern for the rest of the House of Commons, and FNLMA was enacted with these broad enforcement powers in place



SUPPORT FOR IN-HOUSE ADJUDICATION UNDER 20(1)(e): INTERPRETATION OF STATUTES ON FIRST NATIONS & OTHER INTERPRETATION TOOLS

- ▶ Interpretation of statutes related to First Nations: large, liberal and doubtful expressions resolved in favour of First Nation
 - ▶ “statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.” (*Nowegijick v The Queen*, SCC)
 - ▶ “[. . .] The *Nowegijick* principles must be understood in the context of this Court’s sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. [. . .] It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians [. . .] Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.” (*Mitchell v Peguis*, SCC)
- ▶ *Federal Interpretation Act*
 - ▶ “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects” (s. 12)
- ▶ *Bill C-15: An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples (Article 3) & BC Declaration on the Rights of Indigenous People (s.5)*
 - ▶ Require the respective governments to ensure that their laws are consistent with declaration



2. ENFORCEMENT OF IN-HOUSE ADJUDICATION ORDERS THROUGH BC COURTS

- ▶ *BC Provincial Court Act (s. 2(3))*:
 - ▶ The court and every judge have jurisdiction throughout British Columbia to exercise all the power and perform all the duties conferred or imposed on a judge of the Provincial Court, a magistrate, justice or 2 or more justices sitting together, under an enactment of British Columbia or of Canada
- ▶ *Federal Interpretation Act (s. 2)*:
 - ▶ “enactment” means an Act [of Parliament] or regulation [...]
 - ▶ “regulation” includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established [...] in the execution of a power conferred by or under the authority of an Act [of Parliament]
- ▶ Taken together, the *Provincial Court Act* requires a court to perform all duties imposed on it under a [by-law that is established in the execution of a power conferred by an Act of Parliament]
 - ▶ by-law likely includes Land Codes laws
 - ▶ FNLMA is an Act of Parliament
 - ▶ Land Code laws are established in the execution of a power conferred by FNLMA
 - ▶ So Land Code laws are “enactments”
- ▶ This means that court enforcement of in-house adjudication orders might be possible by including in the First Nation prosecution/adjudication law language that requires courts to register the adjudication orders



ENFORCEMENT OF IN-HOUSE ADJUDICATION ORDERS THROUGH BC COURTS (cont.)

- ▶ Court registration/enforcement of an in-house adjudication order has already been done: *Waterslide Campground v Goulet* (2008 BCSC 532)
 - ▶ In this case, an order issued by a decision maker under a Westbank First Nation (WFN) law was allowed to be registered and enforced as an order of court, because the WFN law was found to be an 'enactment' under the *BC Provincial Court Act* (i.e. the WFN law was authorized by an act of parliament, being the *Westbank First Nation Self Government Act*)
- ▶ *K'omoks v Thordarson* decision supports Land Codes laws being 'enactments', since if it were otherwise, the court would likely not have had the jurisdiction to try (and ultimately issue a sanction in respect of) the contravention of the K'omoks Land Code offence at issue

