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PAPER 1.1

Land Management and Economic Development under the Indian Act

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LAND MANAGEMENT AND ECONOMIC DEVELOPMENT UNDER THE INDIAN ACT

I. Introduction

A solicitor, acting for a First Nation, developer, lessee or mortgagee faces an entirely different legal regime when dealing with reserve lands. Developing and acquiring legally enforceable interests on land in a reserve is substantially different from dealing with lands located off reserve.

II. Initial Considerations

Do your homework. The starting point when dealing with any interest in reserve land is determining what legal regime is in place. Most reserve lands are governed by the *Indian Act* (the "Act"). Other reserve lands operate outside of the Act and therefore, the provisions discussed in this paper do not apply to these First Nations or their land. A few First Nations self-manage their reserve lands, such as the Sechelt under the *Sechelt Indian Band Self-Government Act.* Other First Nations are covered by the *First Nations Land Management Act* (the "*FNLMA*").

First Nation lands may also be governed by Treaty, like the Tsawwassen First Nation Final Agreement and the Nisga'a Nation Final Agreement. The *Indian Act* provisions discussed in this paper do not apply to these First Nations.

There are variations even within the *Indian Act* regime as well. For example, some First Nations operate under ss. 53 or 60 of the Act, which can be used to delegate rights to manage reserve lands from the Minister to the First Nation. However, these First Nations remain subject to the Act and the policy. It is always necessary to refer to the instrument by which the powers are conferred on the First Nation since there is much variation in the type of powers that may be granted under these provisions.

III. Nature of Reserve Landholdings

The essential starting point for any discussion relating to reserve lands is the Constitution. Section 91(24) of the *Constitution Act, 1867* provides that "Indians and Lands Reserved for Indians" are a federal responsibility. As a result, the federal government has enacted the *Indian Act* to carry out its constitutional responsibility. The Department of Indian Affairs and Northern Development (also known as Indian and Northern Affairs Canada, or "INAC") administers the Act.

The Act provides the following definition of "reserve":

> "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band ...

Thus, reserves are federal lands. All transactions involving reserve land must be approved by the Minister or the Governor in Council.

The application of provincial laws to reserve land is severely limited. However, reserves are not federal enclaves completely beyond the reach of provincial law. To be found inapplicable, the provincial law must be found to affect "Indianness," and to "regulate Indians as Indians" or "Indians in relation to core values of their society." Provincial laws that do not affect Indians in this way, such as traffic laws, will apply subject to any inconsistency with federal law.

Unfortunately, the analysis does not end here. Section 88 of the Act also provides that, subject to the Act and any treaty, federal statute or First Nation bylaw, all laws of general application from time to time in force in a province are applicable to Indians. However, s. 88 does not say that provincial laws of general application are applicable to *lands reserved for Indians*. In *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, the Supreme Court of Canada held that although provincial laws of general application may apply to Indians, they cannot apply to the right of possession of reserve lands.

Adding another level of complexity, if both provincial and federal laws could validly apply to reserve lands, the doctrine of federal paramountcy applies, giving priority to the federal legislation.

Given all of the above, the provisions of statutes and local bylaws normally applying to land in the province such as the *Land Title Act*, *Real Estate Act*, the *Strata Property Act*, *Residential Tenancy Act*, *Manufacturd Home Tenancy Act*, and the *Builders Lien Act* do not apply on reserve land. Municipal zoning will not apply either. To the extent that they regulate the use of reserve lands contrary to those principles, they will not apply to those lands. One possible exception to this rule is found in the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53, which allows a First Nation to enact regulations that harmonize its approval processes with the local authority. There may be federal legislation or band bylaws that need to be examined. If there are no federal provisions or band bylaws that apply to the reserve land (as is the case of strata property) then those things must be dealt with through contractual provisions between the parties of the development.

A. Non-Designated Band Lands

Reserves are held for the use and benefit of the band according to s. 18(1) of the Acts:

> 18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Reserve lands may be designated pursuant to s. 38(2) of the Act. Designation is a process in which band lands are surrendered non-absolutely to the Crown for the purpose of "being leased or a right or interest therein being granted" to a third party. All other reserve lands are non-designated lands. Non-designated lands under the authority of the band, as opposed to an individual band member, are vested in the entire band and are a collective right of band members. Therefore, non-band members cannot occupy or use band land that is not designated.

B. Certificate of Possession Lands

Certificate of Possession ("CP") lands are also non-designated lands, which have been allocated by the First Nation to a band member and approved by the Minister pursuant to s. 20 of the Act. A CP grants the band member an exclusive right to possess a parcel of reserve land.

A CP holder may occupy the land without interference, sell or devise their right of possession to another band member, lease their interest to a non-band member, or develop their land. In *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 FC 314 (C.A.), the Court held that the Minister must balance of the interests of the CP holder and the First Nation in making a decision to lease the land.

C. Designated Reserve Lands

Section 37(2) of the Act provides:

> 37(2) Lands in a reserve shall not be leased or an interest in them granted until they have been surrendered to Her Majesty pursuant to s. 38(2) by the band for whose use and benefit in common the reserve was set apart.

Therefore, on order to acquire a leasehold interest on a reserve from the band, the land must first be surrendered or designated for lease under s. 38(2) of the Act, which states:

> 38(2) A band may, conditionally or unconditionally, designate by way of a surrender that is not absolute, any right or interest of a the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

The designation process is explained in more detail in Donna Jordan's paper.

IV. Pre-Negotiation: Types of Rights and Interests

The Act contemplates four ways in which a non-band member may derive an interest in reserve lands by sale, lease, permit and easement/right of way.

A. Sale

Section 37(1) of the Act provides:

> 37(1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Before reserve lands can be sold, they must first be absolutely surrendered by the First Nation to the federal Crown, thereupon ceasing to be reserve lands. However, absolute surrenders are now

extremely rare and would likely only be used for land exchanges, where the First Nation will receive replacement land for addition to their reserve.

B. Permits

Permits tend to be for a short duration and generally do not involve construction of improvements. Therefore, most third parties acquiring an interest in reserve lands do so pursuant to a lease.

The Crown, not the First Nation, has legal title to reserve lands and as a result, the legal capacity to contract with third parties for the use of reserve land. The lack of legal power of First Nations to dispose of reserve lands is reflected in s. 28(1) of the Act, which provides that:

> 28(1) ... a deed, lease contract, instrument, document or agreement of any kind, whether written or oral, by which a band or member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is *void.*

As is evident, any agreement by which a First Nation or a member of the band purports to allow a third-party to occupy reserve land is *void ab initio.*

Permits have been commonly issued for the purpose of granting rights to graze livestock on reserve lands or extracting items such as sand, gravel, clay and other non-metallic material from reserve lands pursuant to s. 58(4) of the Act. Permits have been frequently used for access rights or for utilities rights of way that service the reserve or ancillary to a development.

Section 28(2) of the Act provides:

> 28(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Permits tend to be short-term and temporary. Band council consent is required for a permit in excess of one year. The Supreme Court of Canada held in *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 that a permit need not specify an exact end date, as long as the end of the period is capable of ascertainment so that it does not constitute a grant in perpetuity.

C. Leases

Reserve lands which may be leased to third parties for development purposes fall into two categories:

a) Designated lands: lands held in common that are designated according to ss.37 to 41 of the Act, and leased in accordance with s. 53(1) of the Act; and

b) Certificate of Possession Lands: lands that are in the lawful possession of an individual band member may be leased in accordance with s. 58(3) of the Act.

The process of obtaining a lease over reserve lands differs depending on whether the land is held by the First Nation collectively or by an individual member.

Once designation has been obtained, the potential lessee should review the designation documents to ensure that the designation is valid and was affected in complete conformity with the Act. The designation should contain a correct description of the land designated as well as a clear statement of any qualifications or conditions attached to the designation.

1. Obtaining a Lease on Designated Lands

Designated lands may be leased under s. 53 of the Act by the Minister on behalf of the band. Section 53 of the Act provides:

> 53 The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,
>
> (a) manage or sell absolutely surrendered lands; or
>
> (b) manage, lease or carry out any transaction affecting designated lands.

The matter of leasing of the lands is left with the Minister unless the First Nation has delegated authority or adopted a land code under the *First Nations Land Management Act.* In the context of leases on reserves, the Minister has delegated his authority to the Manager of Lands at INAC in the BC Regional office. There is also a Lands Officer who is assigned responsibility for managing the lands issues of various First Nations.

In *Guerin v. R.*, [1984] 2 S.C.R. 335, the Supreme Court of Canada established that the Minister has a fiduciary obligation to act in the best interests of the Band when leasing lands that are the subject of a designation or surrender. Although the lease is entered into with INAC, the First Nation may influence the terms and conditions included in the lease by imposing conditions on the designation. Any conditions imposed by the First Nation in a designation must be incorporated into the lease.

INAC leases tend to have certain commonalities. They tend to be triple net leases, with numerous consents required from the Minister. There are indemnities required of the lessee and extensive insurance requirements.

Anyone seeking to acquire a leasehold interest in reserve should be aware that the procedure may be lengthy and frustrating. For any significant development, INAC will require an appraisal, environmental assessment ("EA"), legal survey and conceptual plans will need to be approved prior to lease execution. Depending upon the nature of the particular project other levels of government may be involved in reviewing the appraisal, EA, survey and conceptual plans (e.g., Public Works for the appraisal, Departments of Environment & Fisheries for the EA, Natural Resources Canada for the legal survey).

Developers should ensure they have retained competent consultants experienced in dealing with reserve lands and provide sufficient time in order accommodate the complexities of leasing reserve lands. For example, valuation of reserve land is complex.

In *Musqueam Indian Band v. Glass,* [2002] 2 S.C.R. 633, the Supreme Court of Canada held that leasehold values should be determined:

a) as though the interest in the land was a freehold interest or fee simple interest; and

b) that the value should be determined according to fair market value.

However there was disagreement between the justices as to whether the "reserve status" of the lands should be taken into account in determining the "current land value." This disagreement remains unresolved.

For virtually any development on reserve land, an EA may be required under the *Canadian Environmental Assessment Act* ("*CEAA*"). A *CEAA* is triggered if a federal authority:

a) proposes a project;

b) provides financial assistance to a proponent to enable a project to be carried out;

c) sells, leases or otherwise transfers control or administration of federal land to enable a project to be carried out; or

d) provides a licence, permit or an approval that is listed in the Law List Regulations that enables a project to be carried out.

In some instances, an EA may be required on a reserve when it would not be required off reserve and often projects on reserve have more than one trigger for an EA, although only one EA is required.

Although the Minister issues leases under the Act, it is up to the First Nation and lessee to negotiate all the necessary business terms. Once the parties have reached the essentials of the agreement, INAC provides a draft lease for review. Before executing a s. 53(1) lease, INAC will require a Band Council Resolution ("BCR") from the First Nation requesting the Minister to execute the lease. INAC will also likely require a certificate of independent legal advice from the First Nation's solicitor.

Mortgages of lease require Ministerial consent. Much has been made about the immunity from seizure enjoyed by Indian bands. However, it is important to note that this immunity does not extend to valid third party interests. Section 89 provides:

> 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> (1.1) Notwithstanding subsection (1), a leasehold interest in *designated lands* is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Thus, once a property interest is granted to a third party it enters the commercial mainstream and is subject to similar rules as off-reserve interests.

2. Obtaining a Lease on Certificate of Possession Lands

There is an important distinction between designated lands and CP lands and it is the reason why most development on reserve is on designated land. A CP holder may request that the Minister, under s. 58(3), lease that land to a third party. Section 58(3) states:

> 58(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

On the one hand, CP lands do not first have to be designated, so leases of CP lands may appear to be easier. The designation procedure can be complex and time-consuming. In addition, the *Tsartlip* case provides that consent from the band council to a CP lease is usually required. INAC's current policy is to require that, if a lease is for a term less than 49 years, it will seek the concurrence of the band council. If a lease has a term for longer than 49 years, INAC's policy is that it must be approved by a majority of electors present at a meeting called to discuss the proposed lease arrangement. Unless the First Nation is provided with benefits, it is unlikely to be approved by the membership.

On the other hand, the disadvantage of CP lands is the absence of any explicit provision permitting a mortgage over the lands, restricting the lessee's ability to get financing. Section 89(1.1) of the Act expressly permits a leasehold interest in designated lands to be mortgaged, but does not address a lease of CP lands. Nonetheless, many financial institutions are either blind to this risk or willing to take such a risk.

If someone wishes to lease lands from an individual member of a First Nation who claims to be the holder of an interest in reserve lands, he should search the Indian Land Registry first to confirm that the person is, in fact, in lawful possession of the land in question.

INAC will require that the applicant for a lease of CP Lands complete a detailed application form and provide an appraisal, environmental assessment, survey and conceptual plans. Similar to a lease for designated lands, before executing a s. 58(3) lease, INAC will require a CP Holder Consent and a resolution from the Band Council requesting that the Minister execute the lease.

D. Easement/Right of Way

Section 35 of the Act permits reserve lands to be taken or used for public purposes. Section 35 states:

> 35(1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> ...
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

In order to rely on this section, there must be expropriation legislation for the entity to acquire the sort of interest that it will ultimately receive. Historically, the common practice was to grant the entire interest to the expropriating authority. However, as a result of *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, land required for a public purpose is often taken by way of easement or right of way as the nature of the transfer of lands from a reserve to the Crown must be interpreted in such a way that minimally impairs the Aboriginal interests in those lands. The Supreme Court of Canada in *Osoyoos* held that, while s. 35 of the *Indian Act* does authorize the removal of lands from a reserve in fee simple, the Order in Council at issue did not evince a "clear and plain intent to extinguish the Band's interest in the reserve land" and therefore, should be interpreted as granting an easement. In the event that an entity does not have expropriating authority, then it must obtain a permit under s. 28(2) of the Act.

V. Substantive Negotiations: Seeking an Interest in Reserve Lands

Once the regime and type of interest sought are identified, the next steps include determining what legislation applies, who the relevant stakeholders are, the status of the parcel of land and obtaining the required consultants and experts to carry out the required steps.

A. Relevant Legislation

As already discussed, the provisions of provincial statutes and local bylaws normally applying to off-reserve land do not apply to reserve land. There may be federal legislation or band bylaws that need to be examined.

Under s. 83, bands may pass assessment and property taxation bylaws. These bylaws are often published in the First Nations Gazette. A variety of other bylaws applying to non-Indians may also be passed by bands under s. 81, including zoning and bylaws to regulate "construction, repair and use of buildings whether owned by the band or by individual members of the band." Therefore, before any development is planned for reserve lands, copies of these bylaws should be obtained from the First Nation or INAC for review. Favourable zoning and tax treatment by the First Nation may provide incentives to develop land on reserve.

If there are no federal provisions or band bylaws that apply to the reserve land (as is the case of strata property) then those things must be dealt through contractual provisions between the parties of the development.

B. Relevant Stakeholders

Make sure you talk to the right people and talk to them early. Both First Nations and INAC must be involved throughout the process. When dealing with the First Nation, identify whether the band council, individual band members, a band corporation or any combination of these must be consulted and involved in the negotiations.

Any large scale development on the reserve will also involve discussions with provincial or local government, particularly in areas such as highway access, utilities and services. If the First Nation does not have a municipal service agreement with its neighbouring municipality, that municipality may want to have a significant say over the type and scale of development on reserve.

C. Status of the Land

Most interests in reserve lands are not registered in the provincial land title system but in the federal Indian Lands Registry System ("ILRS"). Accordingly, anyone interested in acquiring an interest in reserve lands should first confirm the status of the land involved by searching the ILRS and determine whether there are other interests which may affect the lands.

Unlike the Torrens land title system, the ILRS is a notice registry only; it does not provide the safeguards of a Torrens system, meaning there may be unregistered interests that may affect the leases, permits or mortgages. Therefore, the onus is on the person doing the search to trace the history of the interest in question back to the original designation or Certificate of Possession. Fortunately, the ILRS is now available electronically and accessible via the INAC website. Any solicitor interested in accessing the website can make a request to INAC and set up a user name and password. The service is free.

The ILRS is maintained by INAC in Ottawa. However, documents are usually submitted to the BC Regional Office, which arranges for registration in Ottawa. A few First Nations have powers delegated to them by the Minister under ss. 53 and 60 of the Act to manage their lands and, in such cases, documents may be sent to them for registration. Similarly, FNLMA First Nations are responsible for setting up their own registry.

D. Consultants

Depending on the regime in place, the type of land, the status of land and the type of interest sought, different steps will be required as outlined in previous sections. It is imperative that you have qualified consultants to conduct the surveys, appraisals and environmental assessments with experience in reserve development. It is also important to set reasonable timelines to accommodate the complexities associated with developing reserve lands.

VI. Common Ethical Issues

A common issue that arises when dealing with development on reserve is that developers and their solicitors who are unfamiliar with reserve lands fail to comply or resist compliance because they find that regime too complicated. However, even solicitors for the Crown and First Nations who deal with reserve lands regularly may encounter ethical issues in developing those lands.

A typical scenario involves a lease issued by the Minister to the First Nation owned entity for nominal rent. The First Nation corporation, either enters into a joint venture agreement or sublets the same land to a third party tenant at a fair market price and distributes the profits to its shareholders (the band council as trustees or the band members). Solicitors for INAC in this type of transaction must satisfy themselves that the process is transparent to ensure that the rents collected from third party tenants are correctly distributed. Solicitors acting for First Nations must ensure that the interests of

the First Nation and First Nation corporation coincide. Reserve land is for the benefit of the band so there must be no conflict of interest between the First Nation corporation and the First Nation. If the interests of the First Nation and the First Nation corporation do not coincide, then independent legal advice should be sought.

In many circumstances, third parties occupy reserve land without the benefit of a lease or permit from the Minister. There are several Manufactured Home Parks that operate without the benefit of ministerial approval. With the absence of a formal lease agreement and no protection from residential tenancy legislation, the occupancy of these individuals is essentially at the sufferance of the First Nation or the CP holder, as the case may be. This poses significant challenges for the solicitor advising these third parties.

The BC Supreme Court has grappled with this issue, trying to graft principles of equity to disallow a First Nation or CP holder from evicting tenants from reserve, notwithstanding the clear language of the Act. See for *Ziprick v. Braunfel Engineering & Construction Ltd.*, [1994] B.C.J. No. 312 (S.C.); *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 61 B.C.L.R. (2d) 370 (C.A.); *Terbasket v. Harmony Coordination Services et al.*, [2003] B.C.J. No. 28, 2003 BCSC 17. That solution does not address the security of the third party's tenure. Although not foolproof, one option that the writer has exercised is to attack the issue head-on, to explicitly address the issue of s. 28 in the Act, having both parties agree beforehand that in the event there is a dispute, neither party will rely on the infirmity in section 28 to void their contract. Unfortunately, this is an imperfect fix in the face of the clear language of a statute. Under most circumstances, notwithstanding the challenges that it may present, a lease or permit executed by the Minister is definitely the preferred option.

VII. Summary

Developing reserve lands and acquiring the requisite interests for development on reserve is a complex undertaking involving different rules and stakeholders than those involved in development off reserve. The initial step when development is first contemplated is to determine what regime is in place. If it is determined that the Indian lands are in fact reserve lands under the *Indian Act*, and not lands governed by a Treaty, self-government of the *FNLMA*, the next steps are to determine the type of reserve land and interest sought. Whether the lands are held by the band or an individual CP holder or designated will dictate how you must proceed.

The designation, leasing and permitting processes are complex and time consuming. As solicitor for the developer, Crown or First Nation, adequate and realistic timelines should be established and good relations amongst the stakeholders should be developed early. If you represent the developer, your client should be prepared to seek authorisation from the particular band and/or Minister and experienced, knowledgeable consultants must be retained. Whoever you represent, you must be familiar with the laws and rules that apply to the particular lands at issue and ensure that your client and any third parties that they retain are in compliance in order to avoid delays, conflicts of interest and other issues that commonly arise in reserve land development.