LEASES: STEPS TO APPROVAL, NEGOTIATION, STRUCTURING & DRAFTING

These materials were prepared by John W. Gailus, Partner with Devlin Gailus Barristers and Solicitors, for a conference held in Vancouver, BC hosted by Pacific Business & Law Institute, February 20 & 21, 2014.

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John W. Gailus
Devlin Gailus Barristers and Solicitors

I. INTRODUCTION

The legal regime governing leases of reserve lands is a complex one, involving substantially different issues from lands located off reserve. In addition, recent legislative changes have further complicated the process. This paper outlines the legal framework and process for leasing reserve lands, describes the different types of leases and lease structures, highlights a number of potential pitfalls and important considerations, and explains the recent legislative changes and their impact on the leasing process.

II. THE LEGISLATIVE FRAMEWORK

Reserves are governed by a patchwork of federal legislation. 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").[1] However, there are a variety of legislative regimes that exempt First Nations from the application of the Act's land provisions. A few First Nations self-manage their reserve lands, such as the Sechelt under the *Sechelt Indian Band Self-Government Act* or Westbank under the *Westbank First Nation Self-Government Act*. Other First Nations have their own land codes under the *First Nations Land Management Act* (the "FNLMA"). First Nation lands may also be governed by Treaties, 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 Act regime as well. For example, some First Nations operate under sections 53 or 60 of the Act, which can be used to delegate rights to manage reserve lands from the Minister of Aboriginal Affairs and Northern Development (the "Minister") to the First Nation.[2] However, these First Nations remain subject to the Act and federal policies. It is always

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[1] R.S.C. 1985, c I-5.
[2] Section 53/60 delegations have been overtaken by the FNLMA process.

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 Act, 1867*. 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 Act to carry out its constitutional responsibilities. Aboriginal Affairs and Northern Development Canada ("AANDC") 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 considered to be federal lands. All transactions involving reserve land must be approved by either the Minister or the Governor in Council.

The application of provincial laws to reserve land is limited. However, reserves are not federal enclaves completely beyond the reach of provincial law. To be found inapplicable, a provincial law must be found to affect "Indianness", and to "regulate Indians as Indians" or "Indians in relation to core values of their society".[3] Provincial laws that do not affect Indians in this way, such as traffic laws, will apply subject to any inconsistency with federal law.

The analysis does not end here. Section 88 of the Act also provides that, subject to the Act and any treaty, federal statute or band bylaw, all laws of general application from time to time in force in a province are applicable to Indians. However, section 88 does not say that provincial laws of general application are applicable to lands reserved for Indians. In *Derrickson*[4], 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

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[3] See for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309
[4] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285

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.[5]

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*, the *Strata Property Act, Residential Tenancy Act* and *Manufactured Home Tenancy Act* do not apply on reserve land.[6] Municipal zoning will not apply either. To the extent that these laws regulate the use of reserve lands contrary to those principles, they will not apply to those lands. One exception to this rule is found in the *First Nations Commercial and Industrial Development Act* ("FNCIDA"), which allows a First Nation to enact regulations that harmonize its approval processes with the local authority.

A. NON-DESIGNATED BAND LANDS

Reserves are held for the use and benefit of the band. Section 18(1) of the Act provides:

> 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, generally non-band members and third parties cannot occupy or use band land that is not designated.

B. DESIGNATED RESERVE LANDS

Section 37(2) of the Act provides:

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[5] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23.
[6] *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262, leave to appeal to SCC filed.

> 37(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

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

> 38(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of 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.

While the band membership must hold a vote to approve any designation, a number of procedural steps must be completed beforehand.

The band is responsible for determining the area to be designated and may have to carry out a survey. The value of the land must be appraised. An environmental assessment under the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"), or a more informal review by AANDC, may also be necessary.[7] In addition, a designation document must be prepared in conjunction with the Department of Justice setting out the particulars of the designation such as its term, the lease area and permitted uses.

These processes can be expensive and time-consuming. Once the requirements set out above are met, the band should confirm the band list is up-to-date and distribute information to on and off reserve band members in preparation for a band vote. Post *Corbiere*[8], a referendum under the *Indian Referendum Regulations* involving both on and off reserve members is required for a designation of reserve land.

Referenda for designations previously required a double majority under section 39 of the Act; that is, a majority of members were required to vote, and a majority of voters were required to approve the designation. If a majority of members did not participate, a second vote was required. The approval of the Governor in Council was also required for all designations. This procedure was amended by the federal government's omnibus *Jobs and Growth Act, 2012* (Bill

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[7] With the enactment of CEAA 2012, the environmental assessment regime changed significantly. Formal assessments are now only required for designated major projects, but AANDC still conducts environmental reviews of all projects requiring ministerial approval.

[8] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 3 C.N.L.R. 19 (S.C.C.).

C-45). The quorum requirement has been removed, and a simpler procedure has been introduced. Now, a designation is valid if it is assented to by a simple majority of voting members, recommended by the Band Council, and accepted by the Minister.[9] It is expected that these changes will shorten the length of the designation process.

C. 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 through the Minister, or develop their land. However, the band council still has a role to play. In the *Tsartlip* case, the Federal Court of Appeal held that the Minister must balance of the interests of the CP holder and the First Nation as a whole when making a decision to lease CP land to a third party.[10]

IV. OBTAINING A LEASE ON RESERVE LANDS

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 under a Certificate of Possession. AANDC has recently revised its policy and directive on leasing CP lands.[11] The remainder of its policies and directives on leasing on reserves are currently under review.[12]

AANDC has template leases, and it is unlikely to enter into a lease that diverges significantly from these templates. Accordingly, attempting to draft your own lease is typically not an effective use of client resources and will likely lead to delays. While certain lease terms are negotiable, others are mandatory and must comply with AANDC policy.

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[9] *Indian Act*, s. 39.1.
[10] *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development),* [2000] 2 FC 314 (C.A.)
[11] AANDC, "Locatee Lease Policy and Directive", modified July 24, 2013 online at: http://www.aadnc-aandc.gc.ca/eng/1374091139187/1374091182369.
[12] AANDC, "Land Management", modified July 24, 2013, accessed January 23, 2014, online at: http://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738#ch5.

AANDC template leases have tended to differ across regions. We understand that AANDC is currently working on a national lease precedent that they hope to roll out by April 2015 at the latest.

A. GENERAL CONSIDERATIONS

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 lawyers, consultants and experts to carry out the required steps.

1. Relevant Legislation and Bylaws

As already discussed, the provisions of provincial statutes and local bylaws normally applicable to off-reserve land do not apply to reserve land. The exception to this rule is FNCIDA, which allows a First Nation to request the Minister to pass regulations in respect of development on reserve lands to harmonize laws with the provincial regime.[13]

There may be federal legislation or band bylaws that need to be examined. A variety of bylaws applying to non-Indians may 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 AANDC and reviewed by legal counsel.

First Nations may also have tax bylaws passed under s. 83 of the Act or under the *First Nations Fiscal Management Act*. Favourable zoning and tax treatment by the First Nation may provide incentives to develop land on reserve, and should be carefully examined.

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

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[13] Three regulations have been enacted under FNCIDA to date: the *Fort McKay First Nation Oil Sands Regulations*, the *Fort William First Nation Sawmill Regulations*, and the *Haisla Nation Liquefied Natural Gas Facility Regulations*.

2. Relevant Stakeholders

Make sure you talk to the right people and talk to them early. Both First Nations and AANDC must be involved throughout the process. When dealing with the First Nation, identify whether the band council, individual band members, a band-incorporated entity or any combination of these stakeholders 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 likely will want to have a significant say over the type and scale of development on reserve as a condition of contracting for services.

3. 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 to determine whether there are other interests which may affect the lands.

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.[14] 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 surrender) or Certificate of Possession. Fortunately, the ILRS is now available electronically and accessible via the AANDC website.

The ILRS is maintained by AANDC in Ottawa. However, documents are usually submitted to the 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.

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[14] The *First Nations Certainty of Land Title Act (Bill C-24)* is intended to address this deficiency, allowing the federal government to pass regulations to establish a land title system similar to the provincial system.

Some First Nations self-manage their reserve lands, such as First Nations covered by the FNLMA. The Act provisions discussed above do not apply to these First Nations as they have adopted their own land management codes under the FNLMA. The First Nation Land Register System, also accessible online, contains information relating to FNLMA lands.

Interests in these reserve lands are subject to the provisions of the relevant land code governing transfers and leases. In accordance with the provisions of the land code, the band councils may make laws respecting interests in reserve lands including laws for zoning, granting new interests and environmental assessment. The relevant codes and bylaws should be consulted for guidance on how to secure an interest in those lands. However, it is important to note that some provisions of the Act, like the restrictions on mortgaging reserve lands, continue to apply.

4. Consultants and Legal Advisors

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 and legal advisors with experience in reserve land development to conduct the surveys, appraisals, and environmental site assessments, reconcile design plans and review legal documents. It is also important to set reasonable timelines to accommodate the complexities associated with developing reserve lands.

B. OBTAINING A LEASE ON DESIGNATED LANDS

Once a designation has been obtained, the designation documents should be reviewed 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.

Designated lands may be leased under section 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 the lands is left with the Minister unless the First Nation has been delegated the authority or has adopted a land code under the FNLMA. The Minister has delegated his authority for leasing on reserves to a local Lands Manager at AANDC. There is also a Lands Officer who is assigned responsibility for managing the lands issues of various First Nations.

In *Guerin*, 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.[15] Although the lease is entered into with AANDC, the First Nation influences 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.

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, AANDC provides a draft lease for review. Before executing a section 53(1) lease, AANDC will require a Band Council Resolution ("BCR") from the First Nation requesting the Minister to execute the lease. AANDC will also likely require a certificate of independent legal advice from the First Nation's solicitor.

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

For any significant development, AANDC will require an appraisal, legal survey and conceptual plans to be approved prior to lease execution. In some cases, an environmental assessment ("EA") or review may be required. Depending upon the nature of the particular project other parts of government may be involved in reviewing the appraisal, EA, survey and conceptual plans, e.g. Public Works and Government Services for the appraisal, Departments of Environment & Fisheries for the EA, and Natural Resources Canada for the legal survey.

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[15] *Guerin v. R.*, [1984] 2 S.C.R. 335

The valuation of reserve land can be extremely complex. In the *Musqueam*[16] case the majority of the Supreme Court of Canada held that the phrase "current market value" meant the value of a hypothetical interest in fee simple ownership on the reserve that reflects the legal restrictions on land use, as opposed to restrictions found in the lease, and market conditions. Like municipal zoning, restrictions on land use imposed by a band can either increase or decrease land value depending on how the market responds to them. Since the legal environment on a reserve must be taken into account when appraising land value, fee simple off-reserve value cannot simply be transposed.

This concept of the "hypothetical fee simple value" has caused problems in the appraisal community when determining whether the reserve status of the lands should be taken into account in determining the fair market value. Generally, this has led to appraiser making significant deductions given the lack of on-reserve comparable properties and the limited market for reserve lands. However, it is often more of an academic argument when dealing with new leases as AANDC (through Public Works) will provide a potential lessee with terms of reference for the appraisal which contain certain assumptions, eg. land is held in freehold, highest and best use, etc.

Under the predecessor act to CEAA 2012, an EA and a screening decision was required for virtually any development on reserve land. Now, a formal EA is only required for certain activities designated in the *Regulations Designating Physical Activities*, which includes various types of resource extraction, power generation, and major infrastructure developments.[17] While residential developments on reserve are not listed in the regulations this does not mean that these projects do not require any review. For projects not subject to assessment under CEAA 2012, AANDC still conducts its own review to determine whether a project is likely to cause significant environmental effects before making any decision that would allow the project to

[16] *Musqueam Indian Band v. Glass,* [2002] 2 S.C.R. 633
[17] SOR/2012-147.

proceed.[18] AANDC claims that its new environmental review process will lead to shorter timelines and more predictable processes for lower-risk developments on reserve land.

Any major development requires financing. Mortgages of leases 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.

C. 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 section 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. However, even for leases of CP lands, the *Tsartlip* case provides that consent from the band council is usually required.

A significant 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. While section 89(1.1) of the Act expressly permits a leasehold interest in designated lands to be mortgaged, it does not

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[18] AANDC, "Environmental Review Process for Non-Designated Projects on Reserve Land", modified January 10, 2014, accessed January 23, 2014, online at: http://www.aadnc-aandc.gc.ca/eng/1345141628060/1345141658639.

address a lease of CP lands. Nonetheless, many financial institutions are either blind to this risk or willing to take such a risk. This section of the Act also causes solicitors acting for lenders a great deal of concern when they are asked by a financial institution to provide an opinion on their security.

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.

AANDC will require that the CP holder and the proposed lessee complete a detailed application form, including a release and indemnity agreement, provide a development proposal, survey plans, an environmental site assessment, and other supporting documents relevant to the proposed lease. Similar to a lease for designated lands, before executing a Section 58(3) lease, AANDC will require the consent of the CP holder and a letter or band council resolution from the Band indicating the Band's position on the application.

In the wake of the *Tsartlip* case, AANDC is unlikely to proceed with a CP lease without the Band's consent. However, the nature of the consent required has changed with AANDC's new policy on CP leases. Previously, leases with terms in excess of 49 years had to be approved by a vote of the band membership. Now, the recent policy no longer contains a distinction based on term; AANDC considers feedback from the Band Council or their representative on a non-binding basis in all cases.

V. CHOOSING A HEAD LEASE STRUCTURE

There are a number of different ways to structure a head lease, each varying in certainty and revenue potential. Bands and CP holders favour lease structures that maximize revenue generation, purchasers and lenders value a high degree of certainty, and developers value a low initial outlay. While there are a variety of possible structures, the main options are: fully prepaid; prepaid in stages; rent-based with 5-year rent reviews; rent-based with adjustment by a formula; and nominal rent to a band-owned corporation with subleases at fair market value.

A. FULLY PREPAID

Fully prepaid head leases offer the highest degree of certainty. In this scenario, all of the rent that would be collected over the term of the lease is paid in a lump sum when the lease is executed. This situation is particularly attractive to purchasers of subleases and lenders, as it avoids the risk of sudden future increases in fair market value. However, for developers entering into a long term lease it requires a very large initial expenditure that may take some time to recoup. For bands, it has the advantage of making this large sum available immediately for investment or expenditure, but carries the risk of lost opportunity for even greater revenues if land values increase significantly during the term of the lease. This structure is particularly attractive for real estate projects, because it may allow for 99-year subleases at near fair market (off-reserve) value.

B. PREPAID IN STAGES

For certain large projects, it may make sense to separate the development of the project into stages. Each stage can then be prepaid as it occurs. This may be by way of separate head leases for each of a series of parcels, or by a single large head lease covering several parcels with a provision for prepayment to occur when each parcel is subleased. This approach strikes a balance that sacrifices a degree of certainty to achieve a lower initial outlay, making it more attractive to developers but reducing its attractiveness to lenders.

C. RENT-BASED (NON-PREPAID)

Older leases are typically based on the ongoing payment of rents with rent reviews every five years to keep the rents in line with fair market value. This approach allows the band or CP holder to take advantage of rising real estate prices throughout the term of the lease. For the same reason, this model provides the lowest level of certainty, and is therefore not favoured by lenders. To deal with this uncertainty, rent-based leases may also be linked to a formula, such as a fixed percentage increase or an external index like the Consumer Price Index. However, such formulas are rarely reflective of increases in real estate value, making them less attractive to the band. While a rent-based approach with regular rent reviews is probably the best way for AANDC to fulfil its fiduciary obligations, that obligation requires active due diligence to ensure that rent reviews are conducted properly and on a timely basis. For all of these reasons, rent-based head leases have declined in popularity in recent years.

D. NOMINAL RENT TO A FIRST NATION-OWNED ENTITY

One way for the band to take a more direct role in the development of reserve land is to lease the land to a First Nation-owned corporation or limited partnership for nominal rent. The corporation or limited partnership can then develop and sublease the land at fair market value, paying out the proceeds of the subleases to the band members as shareholders or reinvesting them for the future benefit of the band. The advantage to this approach is the First Nation has de-facto control over the management of the project. In addition, the corporation will be able to take advantage of its limited liability protection. This structure will be attractive to lenders because there is minimal risk of a monetary default on the head lease. The disadvantage is that the band-owned entity carries the fiduciary duty and risk if the project is unsuccessful. There also may be tax implications that need to be considered when using this type of structure.

VI. MAKING THE HEAD LEASE ATTRACTIVE TO LENDERS

As outlined above, an important factor in attracting lenders is providing as much certainty as possible. The following specific factors should be kept in mind:

1. Lenders don't like rent reviews. Regular rent reviews mean regular opportunities for increases in rent that could lead to lease defaults.

2. For the same reason, lenders like prepaid head leases. Prepayment means the lease is entirely isolated from the uncertainty of fluctuating real estate markets, and gives the lender more control over the purchaser's repayment obligations.

3. Lenders like longer term leases. Short term renewals provide the same uncertainty as rent reviews, while longer terms allow for more investment in improvements to maximize the productive value of the land over time.

4. Lenders want to be assured that they will receive ample notice of any defaults of lease, to give them the opportunity to cure the default before the lease is terminated. Where a lease is terminated for default, the lender may be unable to recover its outstanding security in

the lease.[19] Therefore, if default is imminent, the lender will generally prefer to foreclose on the mortgage, pay the arrears, and assume the role of lessee to protect its investment.

5. Lenders also like to see Non-Disturbance Agreements in place that would allow a sublessee or group of sublessees to "step into the shoes" of the head lessee in the event of default.

To ensure that leases are negotiated with terms favourable to lenders, the lender should be involved as early as possible in the process. Ideally, the lender should be contacted before substantive negotiation of the lease terms begins.

VII. OTHER CONSIDERATIONS

A. CMHC APPROVAL

Because of the inherent uncertainties involved in leasing reserve lands, the Canada Mortgage and Housing Corporation ("CMHC") provides mortgage insurance that protects lenders against borrower default. CMHC mortgage insurance is often the key to ensuring that conventional lenders will support a development. However, CMHC will not provide mortgage insurance in all cases. CMHC has specific requirements for lease conditions, and these conditions may not always align with AANDC's standard form leases. Be sure to consult with CMHC early in the process to ensure that your lease meets their requirements and that your development will be approved for mortgage insurance.

B. ARRANGING FOR SERVICES

A new development has little value without highway access and water and sewer connections. Depending on the location of the reserve, access to these services may require negotiations with a number of different authorities, which should be undertaken as early as possible in the process. Since reserves are outside of provincial jurisdiction, the relationship between municipal agencies and the development will require special consideration. Typically, water and sewer connections and similar municipal services will require a special service agreement with the adjacent municipality. Highway access may require a separate agreement with the Province. If the band

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[19] See e.g. *Peace Hills Trust Co. v. Terbasket*, 2006 BCSC 446.

has a service agreement with the municipality, the developer should determine how that agreement will apply to leased land, if at all.

VIII. SUMMARY

Developing reserve lands and acquiring leasehold interests 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 lands are reserve lands subject to the *Indian Act* land regime, and not lands governed by a Treaty, self-government agreement or the FNLMA, the next steps are to determine the nature of the reserve land holding. Whether the lands are held by the band, an individual CP holder, or designated will dictate how you must proceed.

The designation and leasing processes are complex and time consuming. Adequate and realistic timelines should be established and good relations amongst the stakeholders should be developed early. Experienced, knowledgeable consultants and legal advisors must be retained to ensure a smother approval process.