

DEFINITIONS

PERSONAL PROPERTY – Anything mobile.

FEE SIMPLE – Highest form of ownership off-reserve.

LAWFUL POSSESSION – Highest form of ownership on-reserve

Given (4 Things)

- Interest in Lands
- Exclusive Use and Possession in lands
- Right to Lease
- Right to Transfer

Not Given (3 Things)

- S 58(4) – Removal of Sand and Gravel
- Dispose of Capital Assets (Timber)
- S38(1) – Sale to Non-Band Member

CERTIFICATE OF POSSESSION – Evidence of a lawful possession. [S. 20 (2)]

TENURE – Holding, how property may be held.

JOINT TENANTS - 2 or more people have an interest in property, survivor takes all.

TENANCY IN COMMON – Undivided interest, interest can be willed to heirs, all interests must agree.

CERTIFICATE OF OCCUPATION – Temporary possession, good for two years [S. 20(5)], renewable once. [S. 20(4)]

EASEMENT – Non-possessing interest held by one person over property of another. Restricts but does not prevent conveyance. Registered under S 28(2) or S 35.

HIGHEST & BEST USE – Single use that generates the highest return for the property.

MARKET VALUE (5 Points)

- Highest Price
- Open Market
- Willing Buyer
- Willing Seller
- No Duress

APPRAISAL (4 Points)

- Written
- Estimated Value
- Legally Described
- Specific Date

ASSIGNMENT – Full Transfer of leasehold interest, approved by the Minister.

QUIT CLAIM – Transfer of interest in property where no legal title has been registered.

EMINENT DOMAIN – Power of the Government to expropriate land for general welfare of the public [S.35]

BUNDLE OF RIGHTS – Affirms that through ownership you receive a bundle of legal privileges, subject to limitations

5 Rights	Limitations
- Give Away/Will	- Police Power
- Lease	- Expropriation
- Use	- Taxation
- Enter	- Escheat (No wills goes back to Band)
- Sell	

ABSOLUTE MAJORITY – No matter how many electors vote, 50% of the eligible electors plus 1% consent to proposal

MAJORITY OF A MAJORITY – A majority of all eligible electors vote, and a majority of the ballots cast support the proposed Surrender/Designation

S 18 (2) (3 Things)

- Setting aside/expropriating by Band Council
- General Welfare of the Band as a whole
- Approved by the Minister

S 20(1) – Allotments (4 Criteria)

- Not detrimental to the Band as a whole
- Consistent with the Bands Development Plan
- Free from any other encumbrances (Available for Allotment)
- Individual is aware of the limitations to his/her rights

S 20(2) – Certificate of Possession

- Evidence of a lawful possession

S 20(4) – Allows Temporary Possession

S 20(5) – Certificate of Occupation

- Temporary Possession
- Period up to 2 Years

S 20(6) – Extension

- Not exceeding 2 Years

S 24 – Transfer of CP (3 Criteria)

- Lawful Possession
- Right to Possession
- Approved by the Minister

S 25(1) – Cease to be a Band Member

- 6 months to dispose of interest to another Band Member

S 25(2) - Lands Revert to the First Nation

- Individual formerly in Lawful Possession is entitled to compensation

S 26 – Correction of CP

- Reissue with Correction

S 27 – Cancel of CP

- Fraud or Error

S 28(1) – Interest to Reserve Land

- Band Member
- Band

S 28(2) – General Permits

Allows (4 Things)

- Use – Particular Use
- Occupy - Periodic
- Reside - Periodic
- Otherwise Exercise Rights, i.e. entering reserve for road construction; utility distribution lines; and hunting & fishing.

Not Allow (4 Things)

- Sale
- Lease
- Granting of an Interest
- Permanent Alienation

S 35 – Expropriation for Public Purposes

- By Federal, Provincial, Crown Corporation, and Municipal
- Transfers Administration and Control
- Approved by the Governor-in-Council

S 35(1) – The Governor-in-Council is authorized to consent to the expropriation of reserve land by a province, federal, municipal or a crown corporation empowered to take or use lands without the consent of the owner

S 35(2) – All matters relating to the compulsory taking or using of reserve lands should be governed by the particular statute which confers the expropriating powers

S 35(3) – The Governor-in-Council may authorize a transfer or grant of the land to the province, authority or corporation subject to any conditions it may prescribe

Land interest which are to be expropriated may be partial which involves an easement/right of way

S 37(1) – You can not alienate Reserve Land until it has been Surrendered

S 37(2) – You can not alienate Reserve Land until it has been Designated

S 38(1) – Absolute Surrender

- Absolute
- Sale
- Losses Reserve Status

S 38(2) – Designation (4 Things)

- Setting aside for Leasing
- Other than Absolute
- Retains Reserve Status
- Legal Title remains with Her Majesty

S 39 – Mandatory Provisions

- Provisions to Validate the Process

S 39(1)a – Made to Her Majesty

S 39(1)b – Must have assent by the majority of the electors of the Band (Absolute Majority)

S 39(1)c – Approved by the Governor-in-Council

S 39(2) – Second Vote (Simple Majority)

- If the first vote did not get majority of the electors of the band out to Vote, but those that voted, the majority voted in favour. (Absolute Majority – 50% + 1)

S 53(1)a – Surrendered Lands

- Does not have to be a complete sale

S 53(1)b – Leases on Designated Lands

S 54 – Assignment of Leases on Designated Lands

S 58(1)b – Leases on cultivated, unused CP Land

- For grazing and agriculture purposes
- No Designation required

S 58(1)c – Leases on cultivated, unused Band Land

- For grazing and agriculture purposes
- No Designation required

S 58(3) – Leases on CP Land

- No Designation required

S 58(4) – Permit for Disposal/Removal

- For sand, gravel, fallen-timber, and other non-metallic substances.

S 59 – Allows the Minister to Adjust/Reduce rents payable

S 60 – Manage and Control over Reserve Lands

- Approval of Governor-in-Council

S 81(1)g – Zoning Bylaws

- Not Retroactive
- Imposes Site Plan Controls & Development Plans
- Revenue Sharing

SECTION OF THE CONSTITUTION ACT (Formerly the BNA Act)

S 91(24) – The fiduciary responsibility of the Federal Government over Indians and lands reserved for Indians, creates the “Trust Status” over Indian Lands.

S 92(13) & 109 – All land within a province have Provincial Jurisdiction, unless they hold a “Trust Status”.

Fiduciary Responsibility

- Unique Indian Interest in Lands
- Crown is within the Middle of a Transaction
- Crown Exercises a Discretionary Power

INDIAN ACT PROVISIONS RELATING TO LANDS - LMTP

Transaction affecting Reserve Land is an act that creates changes, transfers or terminates an interest in Reserve Land. It may be:

INTERNAL – Involving only the First Nations and it’s Members.(11 Sections)

18(2) – Band Expropriation

20(1) – Allotments

20(2) – Certificate of Possession

20(5) – Certificate of Occupation

24 – Transfer of CP

26 – Correction of CP

27 – Cancel of CP

28(1)-Interest to Reserve Land

37(1) Can not alienate Reserve Land until we Surrender

37(2) or Designate it.

38(1) - Absolute Surrender

38(2) – Designation

39(2) – Second Vote

EXTERNAL – Involving the First Nation and/or it's Members and Third Party

PERMITS (2 Sections)

- 28(2) General Permits
- 58(4) Permits for Disposal or Removal of sand, gravel, fallen timber, etc.

LEASES (4 Sections – 1 with Designation & 3 Without Designation)

- 53(1)b Leases on Designated Lands
- 58(1)b Leases on Agricultural CP Land
- 58(1)c Leases on Agricultural Band Land
- 58(3) Leases on CP Land

EXPROPRIATION (S 35) – For Public Purposes

Lands Management Training Program

ORDER-IN-COUNCIL – More than the Minister's Approval

Required for the following (4 Things):

- Expropriation [S 35]
- Designation & Surrenders [S 38(1) & 38(2)]
- Additions to Reserves
- Control of Reserve Lands [S60]

KAMLOOPS AMENDMENT – Bill C115

- Gave Reserve Status to Designated Lands
- Divided the term Surrender to:
 - Absolute Surrender - Sale
 - Designation - Leasing
- Power to Tax
- Power to Impose Bylaws

ALLOTMENT - Approval Process

- S20(1) – Allotment by Band Council
- Approval by the Minister
- Registered by Indian Land Registry
- CP issued by S 20(2)

ALLOTMENT – Conflict of Interest

- Abstain from Voting
- Abstain from any Discussion
- Band Meeting

ALLOTMENT – Factors Affecting the Validity

- Third Party Encumbrances
- Conflict of Interest

CERTIFICATE OF POSSESSION -Dissolved through the Following:

- S 18(2) – Expropriation by Band Council
- S 20(5) – Cease to be a Band Member
- S 35 – Expropriation for Public Purposes
- S 38(1)- Absolute Surrender
- S 38(2) Designation

CP LEASES – Difference Between

58(3) – Lease on Designated Land

- No Designation Required
- No Council Approval
- No Revenue Sharing
- Any Purpose

58(1)b – Lease on Agricultural CP Land

- No Designation Required
- Requires Council Approval
- Revenue Sharing
- Agricultural/Grazing Purposes Only

SURRENDER/DESIGNATION - Land Officer should Consider (4 Things):

- Appropriate Advance Notice
- Information Disclosed to Members prior to Vote
- Fair Market Value
- Seek independent Legal Advice with respect to any contemplated Transaction

DESIGNATION PROCESS - Sections Involved

- 37(2) – Can not alienate reserve land until it has been designated
- 38(2) – Designation
- 39(1)a – Made to Her Majesty
- 39(1)b – Assent by the majority of electors of the Band (Absolute Majority)
- 39(1)c – Approval by the Governor-in-Council
- 39(2) – Second Vote (Simple Majority) – if the first vote did not get the majority of electors of the band, but those who voted, voted in favor.

SURRENDER/DESIGNATION - Voting Requirements

- Provide at least 14 days between the notice of the vote and the information meeting
- Advertise in local newspapers or where it is known that off-reserve members reside
- Hold the vote on a date when most voters will be available to vote
- Provide a telephone number where members can obtain information concerning vote

DESIGNATED LANDS - Sections that do not Affect

- 18(2) – Expropriation by Band Council
- 20(2) – Certificate of Possession
- 24 – Transfer of CP
- 38(1) – Absolute Surrender
- 58(3) – Leases on CP Land
- 60 – Manage and Control Reserve Lands

53(1)b LEASE - 5 Sections Involved

- 37(2)
- 38(2)
- 39(1)
- 39(2)
- 53(1)b

LEASE/PERMIT – Difference Between

Lease (4 things)

- Grants an Interest in Land
- Exclusive Possession
- Assignable (S54)
- Long Term

Permit (4 Things)

- Personal Right
- Non-Exclusive Possession
- Non-Assignable
- Short Term

Lease is legally binding once it is executed. **Modification is required** if lease has been executed, if not, make changes and initial.

Headlease/Sublease is not practical when cost and administration is not covered.

EXPROPRIATION - Mandatory Provisions

- The use of lands by the transferee is subject to the retention by the Crown of all mineral rights
- The lands may only be used for the purpose for which they were granted
- Lands are to be returned to Crown when they are no longer required by the expropriating authority

Band Consent – Membership Agreement where:

- Locattee interests are affected
- Large portions of land are being taken
- Where compensation is other than Fair Market
- Conflict of interest by Band Council
- Major Social Impact

Procedures - Obtain Band Consent

- Adequate Notice
- Adequate explanation of proposed taking and compensation
- Opportunity for discussion of opposing views
- Free and impartial vote
- A secret ballot where advisable

Disturbance Damages

- Where expropriation results in the displacement of an individual's occupation (relocate)
- Defined as the personal economic loss suffered by an owner caused by vacation the property taken
- Compensation is received for subsidiary items stemming from the disturbance

Injurious Affection

- Refers to the decrease in value suffered by lands adjacent to the land taken due to expropriation
- Compensation may also be awarded to a different owner of an adjoining piece of land which is negatively affected by the expropriation

Land Exchanges – In determining the quantity of land to be exchanged, the negotiated agreement must make it clear whether the exchange is to be acre for acre, value for value or some combination of both

Appraisals - Negotiations of compensation will be based on an appraisal of land to be expropriated

- The amount of compensation must be supported by documentary evidence of market value
- If band obtains it's own appraisal, it should be reviewed by Public Works ensuring standard industry practices and fair evaluation
- If band has not obtained an appraisal, the band should be advised in writing to obtain one
- The band may request the expropriating authority to fund an appraisal or LTS may elect to pay for one

EXPROPRIATION – DIA's Involvement

- If asked by the band
- If the project is of national importance
- Band Council's views do not represent the Band Membership

FAIR MARKET VALUE – 3 Approaches

COMPARITIVE APPROACH – Valuation based on direct comparison with recent sales or listing of similar properties in the open market

INCOME APPROACH – Valuation based on capitalization of the property's net income

COST APPROACH – Valuation based on the current cost of constructing the buildings, less depreciation, plus the market value of the land

DELEGATION OF AUTHORITY

S 53 – Ministerial Delegation

- Delegation to a person
- Surrendered and Designated Land
- Sell, manage, lease, etc.

S 60 – Governor-in-Council

- Grants right to a band
- Lands in their reserve
- Control and management that Governor-in-Council considers desirable

S 53 – Grants Powers to

- Manage or lease designated lands

S 60 – Grants Powers to

- Authorize use of band lands via S 18(2)
- Approve member transactions
- Between members and the band S 20
- Between members via S 24
- Extended Disposition time limit via S 25(1)
- Grants right of interest in reserve
 - Occupy and use (Permits) under S 28(2)
 - Agricultural Lease via S 58(1)b&c
 - Lease on behalf of a member via S 58(3)

Not Given Under S 53/60

- Cancel leases
- Initiate legal action for unpaid
- Act as an agent of the Crown in a Surrender/Designation Vote

Band Council Agrees

- Exercise the Delegation of Authority
- Maintain proper accounting records
- Refer all cases of default/breeches to the DIA

DELEGATION – Entry Criteria (3 Things)

- Good opinion from auditor for last 2 years
- Authority under S 69
- Consent by the majority of the electors of the band

EXTERNAL LIAISONS

Natural Resources Canada – Surveys

Justice Canada – Legal Advice

Public Works – Engineering and Architectural

Treasury Board – Funding

Revenue Canada – Tax Interpretation

Health Canada – Indian Health and Environmental Health

Environment Canada – Environmental Health

3 TYPES OF GOVERNMENT SETTINGS

JUDICIAL – Interpret the laws by Courts

EXECUTIVE – Execute (enforce and monitor) the Laws by Governor-in-Council

LEGISLATIVE – Make or enact the laws by Parliament

3 EVENTS THAT LED TO THE CREATION OF INDIAN INTERESTS IN LAND

ROYAL PROCLAMATION of 1763

- First acknowledgement that Indians had an interest in land and it needed to be protected

BRITISH NORTH AMERICAN ACT of 1867

- Divided the powers of the Federal and Provincial Governments
- Created the Fiduciary responsibility of the Federal Government over Indians and land reserved for Indians [S 91(24)]

CONSTITUTION ACT of 1982 - Recognized Aboriginal Rights as inherent [S 35]

LAND REGISTRY

- Paper Trail – a written document was used
- A permanent record available for public scrutiny
- A standard of quality in the recording process itself

Typical Use

- Status Checks - What Process/Authority & Land Use Planning
- Check for any Encumbrances
- Encumbrance Checks
- Research

TYPES OF LAND SURVEY PLANS

- **OFFICIAL PLANS (S 29) CLSR** – all types of land transactions
- **REGISTRATION PLANS** – leases/permits that are less than 49 years, allotments, etc.
- Explanatory Plans – various interests, excluding S 20, 18(2), surrenders, etc.
- Land Use Area Plans
- Textual Descriptions

Legal surveys are registered with **Canada Land Surveys Records** and/or with the **Provincial Land Titles or Registry System**.

Transaction Recording Systems – Netlands

INDIAN AFFAIRS

- Encumbrance checks
- Assist with appraisals
- Present – highest and best use

CASE STUDIES - LMTP

CORBIERE vs. CANADA (Minister of Northern & Indian Affairs) – Questioned S. 77(1) as discriminatory to the Charter of Rights, and it affirmed that off-reserve members can vote at elections.

CARDINAL vs. QUEEN (Supreme Court – April 5, 1982) – The assent of an Absolute Majority is not required, affirmed a “Majority of a Majority” is required to assent a Surrender.

KING vs. QUEEN (Federal Court Trial Division – February 26, 1986) – Vote assented by the Majority of the Electors of the Band by S. 39(1)b, the issue being whether or not a “Majority of the Majority” would approve a Surrender. Reaffirmed Cardinal, “Majority of a Majority” assents a Surrender, and examined S 39(2) concluding a Second Vote is not required if the Majority of the Electors of the Band votes in favor at the first meeting.

ST ANN’S ISLAND SHOOTING & FISHING CLUB vs. KING – Issue where a Conditional Designation – good for 10 years, after 10 years a new Designation is required with proper Governor-in-Council approval or lease is not valid. Affirmed proper approval to Conditional Terms.

ST CATHERINE’S MILLINGS CASE – Once Indian land has been Surrendered, Indian interest legally disappears, land becomes Provincial Crown under S 92(13) & 109, therefore, Federal Government does not deal with it. Affirms Provincial Jurisdiction.

LEONARD vs. GOTTFRIEDSON – The defendant took possession of Parcel FR by BCR, transferring the land to the defendant, no resolution was passed, and no duly convened meeting was held. Affirmed Minister’s Approval is required.

BOYER vs. CANADA – Band did not consent to a particular lease, therefore, lease was void, affirmed no Band Council consent is required.

- Affirmed 58(3) Lease
- No Band Council Consent
- No Revenue Sharing
- DIA’s responsibility first to Locatee and second to the Band
- Should not be long term without consent of membership

49 YEAR RULE - Any CP Lease over 49 Years must have consent by the membership by a Simple Majority Vote

Meeting – Issues to be Discussed

- Social/Cultural Influences
- Economic Impact
- Environmental Consideration
- Compatible with the Bands Bylaws

Amendments/Modifications – Long Term CP Leases

- Extension of Term
- Extension of Area
- Change in Use

PARK ROYAL CLAUSE – A Permit only grants a right.

KRUGER CASE - Stated that the Federal Crown could expropriate reserve land