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TAB 5

INDIGENOUS LAW ISSUES

First Nations Land Tenure and Tools for Financing

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cpd Continuing Professional Development

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Overview

First Nations must be able access and untap the value in their lands in order to build economies and create sustainable communities. By putting in place leasehold structures (and permits in limited circumstances), First Nations can leverage their assets, grant security interests to third parties and thereby obtain outside financing to assist project development. Leasehold structures can be ideal mechanisms for infusing private property rights into what is traditionally and commonly considered a communal land holding system.

There is a great misconception that lands governed by the *Indian Act* (Canada) (the "Act") cannot be financed because title is held by Her Majesty on behalf of the Crown, sale of lands is highly restricted and there is no provincial land registry system in place to provide assurances on title and establish a priority of interests in respect of the lands.

This paper will address the relevant sections in the Act when seeking to develop commercial projects and demonstrate how financing is possible and a viable means to untap value in First Nations lands. The benefits of carrying out leasing and financing activities on lands governed by the *First Nations Land Management Act* (Canada) will also be covered.

First Nations should be encouraged to create leasehold structures in advance of project development as a means to carry out community land use planning, attract commercial activity to their communities and overall increase the standard of living on First Nations lands.

Leasehold structures can create a functional and stable system of real property and allow First Nations and individual band members to use their assets to generate capital and encourage future investment and growth. In practice, the methods for putting in place leasehold structures in accordance with the Act is by no means straightforward, however the process is more simple for individual band members as will be explained in this paper.

The Aboriginal Affairs and Northern Development Canada ("AANDC") has adopted administrative policies that are cumbersome and the process for creating leasehold structures (i.e called Designation) is time consuming and expensive. This paper will not address the authors concerns about AANDC policy and "designation" in general. Suffice it to say, more can be done by AANDC to create stability, increase flexibility and enable First Nations to access the value in their lands and achieve economic sustainability.

Readers must also consider the financing opportunities that are now available by becoming a member of the First Nation Financial Management Board and accessing the First Nation Finance Authority. See other papers in the conference materials for further information and ensure to also review the paper on the Act generally, also contained in the conference materials.

Disclaimer

This paper does not address all forms of lands held by or on behalf of First Nations across Canada. For example, some communities have self-government agreements in place and the Indian Act may not apply or may only apply in part. In addition, recognition of Aboriginal Title on lands previously thought to be governed by the Indian Act may also have an impact on jurisdictional decision making. The reader must not rely on the information contained in this paper without making due inquiries on any customary practices or future amendments to the Indian Act that may be relevant to land development processes.

Land Tenure on lands governed by the *Indian Act* (Canada).

Possession, Inalienability and limits on granting security to non-Indians

Land tenure on First Nations lands is unique, and is not governed by provincial property law. There are restrictions on alienability that have the effect of lowering the value of the lands. Leasehold structures can restore in part the limited transferability and improve marketability. Leases can contain provisions that allow assignment of the leasehold interest as well as provisions that permit transfers through acquisition of the shareholder interest of the lessee (sometimes called "change of control" provisions), effectively create a viable and stable means of transfers of interests in lands.

Set out below are some of the relevant sections that establish inalienability and provide other unique restrictions and limitations:

- Section 18 of the Act provides that reserve lands are ultimately held by Her Majesty for the use and benefit of First Nations for which they were set apart.
- Section 24 limits those to whom lands can be transferred. Lands can only be transferred by a band member to the First Nation or other band members, upon receipt of Ministerial approval. Lands that are to be transferred by the First Nation band council go through a process that is called a land surrender (section 37(1)).
- Section 29 of the Act states that reserve lands are not subject to seizure under legal process.
- Section 89(1) of the Act states that real and personal property of a member or band 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 band. In effect, property on reserves is not subject to mortgages or seizure[1].

[1] It is important to note that section 89(1) does not preclude band members from seizing real or personal property of another band member. In *Mohawks of the Bay of Quinte v. Brant,*[1] the Mohawks of the Bay of Quinte ("**MBQ**") brought a motion to enforce the transfer of a Certificate of Possession ("**COP**") for parcels of land in order to satisfy a debt owed. Section 29 of the Act provides that reserve lands are not subject to seizure under legal process, and as indicated above section 89(1) prohibits seizure or execution of real or

- Thankfully, Section 89(1.1) exists, that notwithstanding 89(1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution. Hence, leased lands provide the business solution. When a First Nations band designates lands and the lands are subject to a leasehold interest, the leasehold interest itself can be used as security for lenders. Upon enforcement, the lender takes possession of the leasehold interest and can run the business or transfer the project to recoup its loan.
- Section 89(2) states that "A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve." If personal property is purchased by a First Nation individual pursuant to a conditional sales contract, the property is subject to seizure by a non-First Nations vendor regardless of the property's location on a reserve.[2] This is a mechanism by which commercial lending can be encouraged.
- Section 90(1) deems certain property to be situated on a reserve for the purposes of section 87 and 89. When structuring security and considering enforcement against assets, this section is important. It provides that property purchased by Her Majesty with Indian

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personal property on reserves. In analysing these two provisions, the Court determined that they work in concert to ensure that reserve lands, being the property of the Crown, are not appropriated by non-Indians. They ensure that title remains with the Crown, while the right to possess and use the land is with the band or its members. While section 29 preserves reserve lands, section 89 "places no constraints on the ability of Indians to charge, pledge, or mortgage property among themselves".[1] It follows that lenders should be able to rely on the forms of legal rights listed in section 89(1), including the right to seizure. The motion court judge found that the right of possession of reserve land, which is evidenced by a COP, is either real or personal property of an Indian, and therefore subject to seizure and execution in favour of MBQ. The judge also found that the wording of the Act makes it clear that the real and personal property of an Indian is not the same as reserve lands or lands situated in a reserve. Consequently, the court ordered the respondent to transfer his COP to the Indian Land Registrar, which decision was affirmed on appeal. This case encourages lending transactions between band members, as it provides for security.

[2] Anita G. Wandzura, "The Enforcement of Security Interests Against the Personal Property of First Nations Persons on a Reserve" (2007) Ottawa Law Review, 39:1 at 9 [Wandzura].

moneys or moneys appropriated by Parliament for the use and benefit of Indians or Bands or property given to Indians or to a band member under a treaty or agreement between a band and Her Majesty shall be deemed to be situated on a reserve[3].

- First Nations members have various means by which to restrict access of secured creditors from reserves. Section 30 of the Act states that a person who trespasses on a reserve is guilty of an offence and liable on summary conviction. If an Indian or band alleges trespass, relief or remedy may be sought.[4] Further, a band can produce a bylaw or band council resolution in order to interfere with creditors hoping to seize collateral on reserve lands. Courts may be deferential to a band's ability to control access to its lands.[5]

Creative interpretation of the Act provisions may result in greater opportunities. For example, section 89's restrictions on seizure apply to the real and personal property *of an Indian or a band situated on a reserve.* This definition does not include a First Nations corporation.[6] The New

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[3] Another noteworthy case is *Mitchell v. Peguis Indian Band*[3], where the plaintiff creditor sued the Peguis Indian Band and obtained a prejudgment garnishment order attaching to funds held by the Manitoba government in trust for the Band. Manitoba Hydro had imposed an ultra vires tax on the Indian Band, and the provincial government agreed to return these funds to the band. The provision at issue is 90(1)(b) of the *Indian Act*, which states that for the purposes of section 87 and 89 which exempt property from taxation and preclude seizure on reserve lands, personal property that was given to Indians or to a band under a treaty or agreement between a band and Her Majesty shall be deemed always to be situated on a reserve. If the funds held by the Manitoba government were deemed to be personal property given to the band by Her Majesty, they would be on a reserve and not subject to garnishment.

The Supreme Court of Canada determined that "her Majesty" is to be interpreted as referring to both the federal and provincial Crowns, thus the Manitoba government is caught by s. 90(1)(b).[3] The debt owing from the Manitoba government was "personal property".[3] Consequently, the funds held for the Indian Band were protected from garnishment by 89(1) of the Act. This case is an example of the Court interpreting the Act in terms of the Crown's obligations to First Nations peoples pursuant to its treaty commitments and responsibilities flowing from the *Constitution Act,* 1867. The relevant sections of the Indian Act recognize that the Crown is honour bound to shield First Nations from efforts by non-natives to dispossess them of the property they hold as their land base, and to insulate the property interests on reserve lands from intrusion and interference of larger society. This form of "protection", however, is what leads to the restrictions that First Nations face with regard to business development.

[4] Indian Act at 31.

[5] Wandzura at 15.

[6] Wandzura at 8.

Brunswick Court of Queen's Bench in *R. v. Bernard* confirmed that section 89 does not apply to chattels owned by corporations.[7]

Types of Land Tenure

Generally speaking, there are four types of land tenure:

- the tenure that governs community held lands (called "Band Lands");
- the tenure that governs lands held by individual band members through certificates of possession ("CP Lands") issued pursuant to section 20 of the Act;
- the tenure that is established through Land Codes adopted by First Nations signatories to the *First Nations Land Management Act* ("FNLMA Lands"); and
- the tenure that applies pursuant to customary law and practices.

For the purpose of this paper, focus will only be on the first three types of land tenure.

Now due to the special nature, treatment and governance of Band Lands, CP Lands and FNLMA Lands, project development is more restrictive unless the designation process is carried out. Permits to use the lands, called section 28(2) permits in the Act, can also be used for project development. Section 28(2) enables the Minister to grant a permit to authorize the use of reserve land for a period not exceeding one year. However, because a section 28(2) permits do not normally permit assignments to third parties or lenders (due to AANDC policy), they cannot be pledged as security. Consequently, First Nations must provide other forms of guarantees as security in place of the security that would normally be given over the real property interest of a project. Renewable energy projects in Ontario offer what is called an Aboriginal Loan Guarantee, which is a program from the Ontario Ministry of Finance that provides a Ministerial Guarantee over approved projects. In such cases, First Nations do not need to go through the designation

[7] *R v Bernard*. 118 N.B.R. (2d) 361 at 20-21.

process and can proceed straight to section 28(2) permit. The section 28(2) permit is less time consuming and cost intensive.

The *First Nations Land Management Act* received royal assent on June 7, 1999. First Nations can remove their reserve lands from the Minister's control under the Act by adopting a land code (the "**Land Code**"). The goal is to reduce transaction costs, facilitate economic development on First Nation lands and establish greater autonomy over Band Lands and CP Lands by First Nation bands. While a First Nation will not be able to sell their land, they will be able to lease or develop their lands and resources, subject to the Land Codes or laws the First Nation develops. Most land codes have altered the designation process and allow short term leasing (less than 20 years) with great flexibility. For example, under section 18 of the *First Nations Land Management Act*, First Nations can independently grant interests or rights in and licenses in relation to the Band Land and CP Lands, and may acquire and hold property, enter into contracts, borrow money, and expend and invest money.

Surrenders, Designation and the process for obtaining Leases and Permits

Section 38 deals with surrenders and designations. A simple way to understand these terms is to think of "surrender" like a form of sale or transfer and consider a "designation" like a long term lease. The process of obtaining land surrenders and designations by First Nations under the Act involves various sections, which are summarized below:

- Section 37(2) sets out the requirement that Band Lands be designated in order to be leased, whereas lands held by individual band members (CP Lands) are permitted to be leased (without designation) in accordance with section 58(3) of the Act.
- Under section 38(1), a First Nation may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

- Consequently, when a First Nation wishes to engage in business projects involving their lands, under section 38(2), a band may, conditionally or unconditionally, designate, by way of 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 giving a lease or a right or interest therein.
- Under sections 39(1) to 39(5), the Act describes the procedure of how lands are surrendered and designated. It is important to note that a surrender or designation is void unless it is made to Her Majesty, assented to by a majority of the electors of the band, and it is accepted by the Governor in Council. Through designation and surrender, First Nations can use their lands for leasing or resale to third parties.
- Band members can also obtain leases direct from the Minister pursuant to section 58(3). This process is simpler than the designation process and less costly. Consent of community members is not required through community referendums. While Section 58(3) lease requests from band members over CP lands do not explicitly require First Nation band council support, support from the First Nation can nonetheless be important and prudent to obtain.[8]

The Personal Property Security Act and Provincial Laws of General Application

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- [8] In *Tsartlip Indian Bandv. Canada (Minister of Indian Affairs and Northern Development)* [2000] 3 C.N.L.R. 386, the trial judge upheld the decision by the Minister to lease part of an Indian reserve under section 58(3) of the Act. Several members of the band held Certificates of Possession, and sought to develop a manufactured home park for the use of non-Indians. During First Nation band meetings, the band members were advised to put the proposal on hold, however they proceeded regardless and the lease was issued. On appeal, the Chief and Council of the band indicated that the Minister, in granting the lease, did not take the Band's concerns into consideration. The Court determined that the Act is band-oriented in terms of the use of reserve lands, and consent is required where a non-member of the band or non-Indian will be using reserve lands for over one year.[8] The Minister discarded the band's legitimate concerns without proper consideration, and his decision was unreasonable.[8] The lease was declared null and void and of no effect. This case reflects the importance of obtaining band consent when the use of CP Lands by non-band members is at issue.

The Canadian government maintains jurisdiction over the personal property of Indians. However, section 88 of the Act provides for the application of general provincial laws that are not inconsistent with the Act. The *Personal Property Security Act* (the "**PPSA**") is provincial legislation which allows parties to a loan transaction to register their rights to personal property collateral in a public registry. By registering, secured creditors claim a priority interest to the specified collateral and have rights upon default.

In light of the restrictions of section 89(1), the PPSA does not have application on reserve lands in the first instance. However, First Nations can contract in to the PPSA, allowing them to access to increased credit opportunities. It is also arguable that the PPSA does apply to conditional sales contracts described in section 89(2), as this provision acts as an exception to the restrictions on enforcement contained in section 89(1).[9]

Legal Advice and Enforcing Security

It is essential for First Nations bands and members to obtain independent legal advice when considering any of these financing options. Counsel working on these types of transactions should obtain detailed acknowledgments from the First Nations or individual band members confirming that they are aware of the obligations that flow from granting security. If the First Nation or band member does not understand what they are providing or such an acknowledgment is vague or unclear, it is unlikely that the acknowledgment would be enforceable and the security would be consequently weakened.

Conclusion

[9] Wandzura at 11.

First Nations communities need greater access to credit to further economic development. The various restrictions that limit taking security and restrict seizure of personal property on reserves as referenced above, act as a barrier to access to credit needed for businesses and development projects. On the other hand, these limitations can be seen as a form of protection for First Nations in preserving the lands for bands and their members.

From the perspective of seeking to promote marketability of First Nations lands for economic sustainability, these provisions act as disincentives to mortgagees or other lenders who are deprived of collateral when giving a loan. This hinders secured transactions, access to capital and economic development on reserves as individuals and businesses cannot access funding from lenders as the ability to enforce a security interest in the event of default is an important element of risk mitigation for lenders.