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CANADIAN BANKERS ASSOCIATION
ASSOCIATION DES BANQUIERS CANADIENS

Building a Better Understanding / Pour mieux se comprendre



Understanding the Regulatory Environment for On-Reserve Lending

Frequently Asked Questions

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INTRODUCTION

Doing business on Indian reserve land is a challenge for lenders. The land-holding regime, restrictions on access, the taking of security, the administrative regimes of bands – with their different structures, powers and financing arrangements – all contribute to create a complex situation where standard mainstream lending practices are not applicable. Despite these limitations, however, financial institutions have been increasingly active in First Nation communities.

When Aboriginal leaders, financial institution representatives and government officials met for a roundtable discussion in November 1997, clarification of the regulatory environment was identified as an important priority to provide lenders with the certainty needed to increase their activities on Indian reserve land. A working group formed to follow-up on the roundtable included a subgroup tasked with the clarification of the regulatory environment, and the identification of ways to increase business within that regulatory framework.

The original of this document was prepared by members of the working group as a guide for borrowers, lenders, Aboriginal organizations and government officials in the form of definitions of key concepts and answers to frequently asked questions. This second edition has been updated to reflect changes in policy and/or legislation, particularly the *First Nations Land Management Act (FNLMA)* S.C. 1999, c.24.

This text is available in French and English.

Revised January 2005

IMPORTANT NOTICE - PLEASE READ

The information in this document is not a comprehensive overview of the legal and administrative aspects of lending on Indian reserve land, nor does it constitute or provide a legal interpretation of the applicable sections of the Indian Act by INAC or the participating financial institutions. The information is not to be relied upon as the basis of any transaction or legal opinion. The objective is to facilitate a general understanding of the regulatory environment. Readers are advised to seek legal advice from qualified counsel before entering into any of the transactions reviewed or discussed herein.

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DEFINITIONS

All statutory references are to the *Indian Act*, R.S.C., 1985, c. I-5, as amended, unless otherwise stated.

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Absolute Surrender

This is a process under the *Indian Act* by which a First Nation absolutely relinquishes its entire interest in all or part of its reserve land to the federal Crown. Absolute surrenders are done for proposed sales/exchanges, where the whole interest in the land is required for the transaction. (s.37 - s.41)

Allotment

This term refers to the granting of the right to use and occupy reserve land to a member of a First Nation by the council of that First Nation. Once ministerial approval is given, the allotment becomes lawful possession. The Indian Lands Registry then issues a Certificate of Possession to the First Nation member.

If ministerial approval is withheld and conditions are imposed by the Minister, the allotment becomes temporary possession. The Indian Lands Registry then issues a Certificate of Occupation to the First Nation member. (s.s.20(4); *see definitions of “lawful possession”, “temporary possession”, “Certificate of Occupation”, “custom allotment”*)

Appropriated Funds

The *Financial Administration Act* defines appropriation as “any authority of Parliament to pay money out of the Consolidated Revenue Fund.” The funds are allocated to INAC to carry out its mandate, including transfer payments to First Nations. Transfer payments to First Nations are to provide for common objectives, such as education, health, etc. They are governed by the *Financial Administration Act* and the *Appropriation Act*.

Funds appropriated for First Nation programs and services are distinct from “Indian Moneys” and are thus not governed by the “Indian Moneys” sections of the *Indian Act*.

Band/First Nation

Although the term “First Nation” is not defined under the *Indian Act*, it is used interchangeably with the term “band”, which is defined under the Act. A band is a group of Indians for whom a reserve has been set aside on or after September 4, 1951, or for whose benefit moneys are held by the federal Crown, or which is declared by the Governor in Council to be a band for the purposes of the *Indian Act*. (s.s.2(1))

Note: The term “band” and the official band name should be used in any formal documentation to ensure legal certainty – financial institutions should refer to the Band Name System (*see Resources*) for the correct name of a particular First Nation.

Band Council/First Nation Council

Although the term “First Nation council” is not defined under the *Indian Act*, it is used interchangeably with the term “council of a band” (commonly referred to as a “band council”), which is defined under the Act. A band council is a council duly elected under the *Indian Act* or otherwise chosen according to the custom of the First Nation or, where there is no council, the chief of the First Nation chosen according to custom. (s.s.2(1))

Note: The term “Council of the Band” and the official band name should be used in any formal documentation to ensure legal certainty – financial institutions should refer to the Band Name System (*see Resources*) for the correct name of a particular First Nation.

Band Council Resolution (BCR)

This is a record of a First Nation council decision made by a quorum of the councillors of a First Nation at a meeting of the council duly convened. (s.s.2(3); *see definition of “Band council/First Nation council”*; *see also section V. Band Council Resolutions and Access to Reserve*)

Band List

This term refers to a list for each First Nation containing the names of all persons who are members of the First Nation. The list is maintained by either the First Nation or INAC. This list is commonly referred to as the “Band Membership List”. (s.s.2(1), s.8)

Band Member/First Nation Member

Although the term “First Nation Member” is not defined under the *Indian Act*, it is used interchangeably with the term “member of a band” (commonly referred to as a “band member”), which is defined under the Act. A member of a band is a person whose name is on a Band List, or who is entitled to be registered on a Band List. (s.s.2(1))

Bylaw

A bylaw is a permanent continuing rule, enacted by a body authorized to do so by statute. It is used to regulate local internal affairs. First Nation councils are authorized under sections 81, 83, and 85.1 to make bylaws, within the geographical boundaries of the reserve. At present, First Nation bylaws are exempted from publication in the *Canada Gazette*. All section 83 bylaws passed as of August 1998 are published in the *First Nations Gazette*. (*See section VI. Bylaws*)

Certificate of Occupation

This document, issued by the Indian Lands Registry on behalf of the Minister, constitutes evidence that an individual Indian has temporary possession under the *Indian Act*. (s.s.20(5))

Certificate of Possession

This document, issued by the Indian Lands Registry on behalf of the Minister, constitutes evidence that an individual Indian has been granted lawful possession under the *Indian Act*. (s.s.20(2))

Consolidated Revenue Fund (CRF)

This is the “*aggregate of all public moneys that are on deposit at the credit of the Receiver General*”, *Financial Administration Act*. All Indian Moneys collected by the Crown are deposited into trust accounts in the CRF.

Custom Allotment/Custom Holding

This is a right to occupy reserve land which is granted to an individual by a resolution of a First Nation council. However, the First Nation does not request approval or registration of the allotment, and a Certificate of Possession is not issued. It is therefore not lawful possession under the *Indian Act* and is not treated as a legal interest in land under the Act. (*See definition of “lawful possession”; see also sections III. Registration of Reserve Land Transactions and V. Band Council Resolutions and Access to Reserve*)

Designated Land

This refers to land which has been set aside by a First Nation for a specified use and period of time, following the designation process including acceptance by the Governor in Council (e.g., industrial parks, long term lease, urban development). Designated land retains reserve status for many purposes under the Act, but there are a number of important exclusions. The exclusions are intended to ensure that specific transactions do not occur on designated land, such as those related to allotments under s.20 - s.25; the setting aside of reserve land as community land under s.s18(2); permits under s.s.28(2); new surrenders or designations under s.37 - s.38; certain testamentary matters under s.42, s.44, s.46, s.48, and s.50; the property of mentally incompetent Indians under s.51; leases and permits under s.58 and delegated authority over reserve lands under s.60. The exclusions also apply to any regulations passed under any of these provisions. Due to concerns about possible reversion of underlying title to province, designations are not done in Quebec. (s.s.2(1); *see definitions of “designation by way of a surrender that is not absolute”, “reserve land”*)

Designation by way of a surrender that is not absolute (commonly referred to simply as a “designation”)

This designation is the means by which a First Nation relinquishes less than its entire interest (in all or part) of its reserve to the federal Crown for a specified purpose and period of time. In the case of a designation, the relinquishment is not absolute, and the land retains both the underlying Indian interest and its reserve status. Designations are done for leasing or other purposes (e.g., easements) where less than the whole interest in the land is required for the transaction. Due to concerns about possible reversion of

underlying title to the province, designations are not done in Quebec. (s.s.38(2); *see sections II. Reserve Land Transactions and III. Registration of Reserve Land Transactions*)

First Nations Gazette

This publication provides widespread notice of First Nation bylaws. At present, it is not officially sanctioned by any legislation. The first issue of the *First Nations Gazette*, published in 1997, provided notice of section 83 bylaws. It continues to be published semi-annually by the Indian Taxation Advisory Board (ITAB) and the Native Law Centre, University of Saskatchewan. (*See Resources for address*)

Funding Authority

This is the set of rules as defined by the Treasury Board that government departments must adhere to when providing funding. Funding authorities used by INAC include: contributions, Flexible Transfer Payments (FTP), and grants.

Funding Arrangement

This is a document signed between a government department and a First Nation, stating the terms and conditions under which a transfer payment has been made. The funding arrangement must follow the Treasury Board rules or “funding authority” as defined above. Funding arrangements used by INAC include: Contribution Arrangement (CA), Comprehensive Funding Arrangement (CFA), Alternate Funding Arrangement (AFA), and Financial Transfer Agreement (FTA).

Indian Lands Registry (ILR)

This registry was established under the *Indian Act* and operated by INAC for the purpose of recording transactions involving reserve land (e.g., lawful possession/ Certificates of Possession, Certificates of Occupation, transfers of lawful possession, locatee leases, mortgages of locatee leasehold interests, designations and surrenders, leases, etc. (s.21, s.s.55(1); *see section III. Registration of Reserve Land Transactions*)

Indian Moneys

These are “*all moneys collected, received or held by Her Majesty for the use and benefit of Indians and bands*”. (s.2) Indian Moneys are collected from the sale of the reserve’s capital or from revenue generated from leasing, rights-of-way, etc.; these moneys are held in “capital” and “revenue” trust accounts for First Nation communities, as well as for certain individuals. Expenditures of Indian Moneys are legislated under sections 64 and 66. Property purchased with Indian Moneys is deemed “on-reserve” (s.s.90(1(a))) and is thus “*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.*” (s.s.89(1); *see definition of “public moneys”*)

Indian Oil and Gas Canada

This special operating agency within the Land and Trust Services Sector of INAC is responsible for administering and managing Indian oil and gas interests located on reserves. (*See Resources for names and address*)

Indian Taxation Advisory Board (ITAB)

The Indian Taxation Advisory Board, created in 1989, provides First Nations with technical assistance on the development and implementation of section 83 bylaws. The Board also reviews bylaws and makes recommendations to the Minister for their approval. The Board is made up of five regionally based representatives of Aboriginal descent. Offices are located in Ottawa, ON and Kamloops, BC. (*See section VI. Bylaws; see also Resources for address*)

Lawful Possession

A First Nation council resolution allots (grants) an individual member the right to use and possess a parcel of reserve land, which is then submitted for ministerial approval and the issuance of a Certificate of Possession. Upon approval, the Indian Lands Registry issues and registers the Certificate of Possession on behalf of the Minister, which constitutes proof of title. (s.s.20(1),(2); *see definition of “Certificate of Possession”; see also sections II. Reserve Land Transactions and III. Registration of Reserve Land Transactions*)

Locatee

This term can be used to refer to a member of a First Nation who has lawful possession under the *Indian Act*. (It is interchangeable with “individual in lawful possession”.)

Locatee Lease

This is a lease granted by the Crown to a third party for the benefit of an individual First Nation member who has lawful possession of the land. (s.s.58(3))

Location Ticket

This is a document issued up to September 4, 1951 under the *Indian Act*, 1880 as evidence that an individual Indian had the right to occupy and use reserve land. Under the current Act, an individual First Nation member holding a location ticket is deemed to have lawful possession, and the location ticket is deemed to be a Certificate of Possession. (s.s.20(3))

Public Moneys

Public Moneys encompass all fees derived from surrenders of interests in reserve lands, as defined by the *Financial Administration Act* (FAA). The FAA stipulates that “*all public moneys shall be deposited to the credit of the Receiver General*”. Public moneys are deposited into the Consolidated Revenue Fund. (*See definition of “Consolidated Revenue Fund”; see also section VIII. Indian Moneys*)

Reserve Land

Generally this refers to a tract of land, legal title to which is held by the federal Crown, which has been set apart for the use and benefit of a First Nation. (Readers should consult legal counsel for transactions involving Quebec reserves, due to the complex history and nature of their status.) Land which has been designated is still considered to be reserve land, except in the case of specific transactions listed under the *Indian Act*. The purpose of these exceptions is to ensure that land which has been designated will not be considered reserve where it would be inappropriate to do so. Example: While reserve land can be allotted to an individual by a First Nation council, designated land is not considered to be reserve for purposes of allotment. (*See s.s.2(1) for complete list of transactions; see also definition of “designated land”*)

Surrendered Land

This refers to reserve land which has been surrendered absolutely, or designated by way of a surrender that is not absolute, to the federal Crown by the First Nation under the *Indian Act*. Legal title remains vested in the federal Crown, at least until the land is sold or otherwise transferred in the case of an absolute surrender. (Consult legal counsel for the status of Quebec reserves following a designation.)

Land which has been absolutely surrendered loses both its reserve status and the underlying Indian interest. Land which has been designated by way of a surrender that is not absolute loses neither its reserve status nor its underlying Indian interest (As indicated above, there are some concerns in the province of Quebec). (s.s2(1); *see definition of “designation by way of a surrender”; see section II. Reserve Land Transactions*)

Temporary Possession

The Minister does not approve an allotment by a First Nation council, but authorizes the individual to occupy the land temporarily, normally prescribing conditions that must be met before giving final approval. (s.s.20(4)) Example: An individual is required to build a house, finalize specified household improvements, etc., before the obtaining lawful possession. In such cases, as noted above, the individual will be issued a Certificate of Occupation, as opposed to a Certificate of Possession, until such time as the conditions have been satisfied and ministerial approval has been given. (*See definition of “Certificate of Occupation”*)

Tribal Councils

These are not defined by the *Indian Act* but may be considered voluntary associations of First Nation councils. Tribal councils can, but do not need to, be incorporated.

FREQUENTLY ASKED QUESTIONS

All statutory references are to the *Indian Act*, R.S.C., 1985, c. I-5, as amended, unless otherwise stated.

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I. RESERVE LAND TENURE

Refer to the INAC (Indian and Northern Affairs Canada) *Land Management Manual* for further information on applicable policies and processes. (*See Resources*)

Reserve Land

1. What is a reserve, and who holds legal title to reserve land?

Generally, a reserve is a tract of land, which has been set apart by the Crown for the use and benefit of a specific First Nation and legal title to which is held by the federal Crown. (For the status of reserves in Quebec, consult legal counsel.) (s.s.2(1); *see definition of “reserve land”*)

2. How is a reserve created?

While reserves are defined under the *Indian Act*, there are no statutory provisions for creating or enlarging a reserve. Reserve status is normally granted by the Governor in Council through the exercise of the Crown’s Royal Prerogative, and is generally documented by a federal order in council. The process is governed by INAC’s Additions to Reserves Policy (which covers both the creation of new reserves and the expansion of existing ones).

3. What happens to existing interests when land subsequently attains reserve status?

Prior to granting reserve status, the government’s policy is to ensure that all third-party interests (such as leases, mortgages, easements, etc.) are relinquished.

4. Who is legally responsible for managing reserve land?

INAC administers and controls reserves, and manages reserve land for the benefit of First Nations. (*Constitution Act*, 1867, s.s.91(24); *Indian Act*, s.3, s.s.18, s. 28, s. 37, s.39, s.58)

The Minister or the Governor in Council may delegate authority to a First Nation to manage reserve land. Where this occurs, the First Nation can approve allotments and other transactions, and sign leases and other agreements on the Minister’s behalf. (Specific powers are stipulated in the instruments setting out the delegations of authority.) (s.s.53(1) and s.60; *contact regional offices for a list of First Nations with delegated authority*)

Self-government

5. How does self-government affect the management of reserve land?

Under self-government agreements and accompanying federal legislation, First Nations may obtain the right to manage their land without INAC’s involvement. Agreements may address only land management, or may include broader powers related to self-governance. Agreements/legislation should be reviewed individually for provisions relating to land regimes, capacity, etc. (The Sechelt and Cree Naskapi are examples of First Nations currently under self-government regimes.)

First Nations Land Management Act

6. How does the *First Nations Land Management Act* affect the management of reserve lands?

First Nations who choose to opt into the *First Nations Land Management Act (FNLMA)* will be legally responsible for managing their lands in accordance with the Framework Agreement on First Nation Land Management (the Framework Agreement) and the *FNLMA*, as opposed to the *Indian Act*. Each First Nation which signs the Framework Agreement must then develop a land code setting out specific provisions and processes for dealing with interests in land. The First Nation and Canada must also enter into an individual agreement to determine the level of operational funding for land management and to set out the specifics of transition to the new regime. Both the land code and the individual agreement must be ratified by the First Nation membership.

While the *FNLMA* does not permit the use of reserve land as collateral, it does provide First Nations with a mechanism to clear up some of the uncertainties under the *Indian Act*. For example, a First Nation's land code can provide greater certainty as to the mortgageability of leasehold interests in individually held land. The *FNLMA* was approved by Parliament on June 19, 1999, and brought into effect the Framework Agreement. Twelve First Nations are now operating under the legislation.

7. Which First Nations have signed the Framework Agreement?

The following 36 First Nations have signed the Framework Agreement:

- Westbank (BC)*
- Musqueam (BC)
- Lheidli T'enneh (BC)*
- N'Quatqua (BC)
- Squamish (BC)
- Kitselas (BC)
- Osoyoos (BC)
- Sliammon (BC)
- Burrard (BC)
- Skeetchesn (BC)
- Tsawout (BC)
- Pavillion (BC)
- Songhees (BC)
- McLoed Lake (BC)*
- Tsawwassen (BC)*
- Beecher Bay (BC)*
- Siksika (AB)
- Muskoday (SK)*
- Cowessess (SK)
- Kinistin (SK)*
- Muskeg Lake (SK)
- Whitecap Dakota Souix (SK)*
- Opaskwayak (MN)*
- Nipissing (ON)*
- Mississaugas of Scugog Island (ON)*
- Chippewas of Mnjikaning (ON)
- Chippewas of Georgina Island (ON)*
- Garden River (ON)
- Moose Deer Point (ON)
- Mississauga (ON)
- Whitefish Lake (ON)
- Chippewas of Kettle and Stony Point (ON)
- Dokis (ON)
- Chippewas of the Thames (ON)
- Saint Mary's (NB)
- Kingsclear (NB)

* Indicates First Nations which have ratified and are operating under their own land code pursuant to the *FNLMA*.

8. Is the *FNLMA* restricted to the initial 14 signatories?

Initially, the *FNLMA* was limited to the 14 signatories to the Framework Agreement. However, since this initiative received much positive attention from other First Nation communities, the legislation was “opened up” by the Minister on March 20, 2002 and others have signed the Framework Agreement. Many of these interested First Nations have already begun working towards the next steps in coming under the *FNLMA*.

II. RESERVE LAND TRANSACTIONS

Refer to the INAC (Indian and Northern Affairs Canada) *Land Management Manual* for further information on applicable policies and processes. (*See Resources*)

Permits

1. What is a permit?

A permit is a right to use and occupy reserve land granted to non-Indian and/or Indian third parties under s. 28 or 58 of the *Indian Act*. Permits are generally assignable upon Ministerial consent. Permits are generally used to grant short-term rights of use, licences or rights of occupancy on reserve land, and long-term leases or long-term easements are generally granted by the Minister after the land is designated by the First Nation under s. 38 of the *Indian Act*.

2. How are permits issued?

Subsection 28(1) of the *Indian Act* provides that an agreement whereby a First Nation or an individual member of that First Nation grants to any non band member rights to use, occupy, reside on – or otherwise exercise any rights on – a reserve is void (that is, the agreement is not legally valid and enforceable).

The Minister may issue permits without band council consent for less than one year, and with band council consent for longer than one year. The Crown is the permitter and the party receiving the permit is the permittee. Like lease revenues, permit revenues accrue to the benefit of the First Nation.

3. What types of permits are there?

A number of different types of permits authorizing the use of reserve land are allowed under the *Indian Act* (e.g., utility permits, agricultural or grazing permits, and permits allowing the removal of timber, sand and gravel.) (s.s.28(2), s.s.58(4); *see Indian Timber Regulations; Indian Mining Regulations passed under the Indian Act*)

Memoranda of Understanding and letter permits are permits issued to other government departments which need to use reserve land (e.g. the Solicitor General for an RCMP outpost, Environment Canada for an environmental monitoring station). (General authority, *Indian Act*)

Leasing/Sales of Reserve Land

4. Who is the legal lessor of reserve land?

Since the federal Crown has legal title to reserve land, the Minister, as the Crown's representative, is the legal lessor/landlord. However, all leasing revenues accrue to the benefit of the First Nation, or individual member, as the case may be.

5. How does a First Nation lease reserve land to third parties?

The *Indian Act* provides that an agreement whereby a First Nation or individual member of that First Nation grants third parties (persons not belonging to that First Nation) rights to use, occupy, reside on – or otherwise exercise any rights on – a reserve is void. (s.s.28(1))

However, there are a number of mechanisms under the *Indian Act* whereby First Nations can request that reserve land be leased on their behalf. The most common way for long term leasing or for a long term grant of easement is for a First Nation to designate a parcel of reserve land to the Crown for the purpose of leasing or easement pursuant to the designation provisions of the *Indian Act* (s. 37-41). The Minister will, following the designation, lease the land according to the terms set out in the designation. Specific leases and development plans may be attached to the designation, or the designation can be more general, stating the land can be leased for commercial, residential, recreational or industrial purposes. In the case of a general designation, a specific lease proposal would be proposed and approved at a later date. Designations are registered in the Indian Lands Registry (Designated and Surrendered Lands Register). (s.37- 41, s.s.53(1); *see section III. Registration of Reserve Land Transactions*)

Leases of oil and gas resources within reserve boundaries may also be authorized. These rights are granted under the *Indian Oil and Gas Act*, and regulations passed under this Act. Before oil and gas leases can be issued, the First Nation's interest must be designated to the Crown under the designation provisions of the *Indian Act*.

The *Indian Oil and Gas Act* is administered by Indian Oil and Gas Canada. (*For contact information, see Resources*)

6. Can a leasehold mortgage be granted in land which has been designated?

Yes, a leasehold mortgage is possible for designated land. (s.s.89(1.1); *see definition of "designated land;" see also section III. Registration of Reserve Land Transactions*)

7. Can a leasehold interest in designated land be assigned?

A leasehold or other interest (e.g., easement) in designated land can be assigned to any person if the lease or other grant provides for this option, subject to ministerial approval. Conditional assignments are prohibited and are not accepted for registration. (s.54, s.s.55(2))

8. Aside from designations and shorter term leases by permit, are there other ways a First Nation can lease reserve land?

The Minister may grant agricultural or grazing leases of uncultivated, unused land without a designation upon request of the First Nation made by a Band Council Resolution (BCR). As well, individual members of a First Nation who have lawful possession may apply to INAC asking that the Minister lease their land on their behalf. (s.s.58(1),(3))

9. Can a First Nation sell its land?

Lands are more commonly exchanged than sold. In accordance with sections 37-41 of the *Indian Act*, lands can be exchanged after they are absolutely surrendered to the Crown for the purpose of exchange. The Crown will then dispose of the land on the First Nation's behalf,

according to the terms of the surrender. Although sales of reserve land are rare, the Crown can sell reserve land on behalf of a First Nation. Absolute Surrenders are registered in the Indian Lands Registry (in the Designated and Surrendered Lands Register). (s.37 - s.41; *see definitions of “surrendered land”, “absolute surrender”; see also section III. Registration of Reserve Land Transactions*)

Process for Designating/Surrendering Land

10. How is land designated or absolutely surrendered?

The process for surrendering or designating land is the same under the *Indian Act*. It is complex, requiring informed consent procedures (including a First Nation membership vote), various documentation requirements, and ultimate acceptance by the Governor in Council in order to be legally valid. (s.37 - s.41; *see definitions of “designated land”, “surrendered land”*)

11. Can designations and surrenders be revoked?

There are no *Indian Act* provisions for the revocation of designations. However, designations are revocable, depending on whether or not the land is subject to any third-party interests (e.g., leases granted under the designation). The designation document ratified by the band may provide for a procedure for revocation. In all cases, the revocation must be accepted by the Governor in Council.

Revocations of absolute surrenders are not possible, since the land has lost reserve status. However, land which was surrendered for sale, but which remains unsold, can regain reserve status if approved under INAC’s Additions to Reserves policy.

III. REGISTRATION OF RESERVE LAND TRANSACTIONS

Refer to the INAC (Indian and Northern Affairs Canada) *Land Management Manual* for further information on applicable policies and processes. (*See Resources*)

1. Why was the Indian Lands Registry (ILR) created?

The ILR was established pursuant to the *Indian Act*, which directed that INAC establish a Reserve Land Register, and a Surrendered and Designated Lands Register (s.21, s.s.55(1)). The *FNLMA* requires the Minister to establish the First Nation Land Register, to be administered in the same way as the Reserve Land Register established under the *Indian Act*, subject to regulations passed under the *FNLMA*. It is expected that Land Registry Regulations will be passed under the *FNLMA* by the end of 2004.

2. What is the ILR Reserve Land Register and what information does it contain?

The ILR is a documentation archive system established as an inventory of entitlement to land on reserve. Transactions affecting reserve land, such as lawful possession and Certificates of Possession, Certificates of Occupation (*see Definitions*), etc., may be recorded in this register. It should be noted that the ILR does not afford the same protection to registered interests as provincial land registries. Legal advice should be sought concerning priorities and unregistered interests. A search will provide access to documents covering topics such as:

- who has lawful or temporary possession of a particular parcel of reserve land;
- whether the land is subject to a joint tenancy (possible anywhere except in Quebec);
- the history of ownership and transfers of lawful possession (including transfers to heirs under a will or intestacy);
- whether there are any leasehold interests;
- whether the parcel is encumbered by any interest other than s.35;
- whether there are any permits issued over any part of the reserve;
- whether part of the reserve has been set aside for a community purpose under s.s.18(2) of the Act;
- whether part of the reserve is subject to any interests granted under s.35 of the Act.

3. What is the ILR Surrendered and Designated Lands Register and what information does it contain?

Transactions affecting surrendered or designated land (*see Definitions*) are recorded in this register. A search will indicate, for example, the following:

- the parcels of reserve land which have been surrendered and designated;
- all sales and leases of surrendered and designated land, mortgages and assignments of leasehold interests in designated land;

- certificates of *lis pendens* (pending litigation);
- any revocations of designations.

4. Can a First Nation have its own land registry?

The only authorized registry is the ILR. While a First Nation may operate its own registry for information purposes, the registry would not be authoritative.

5. Are all individually held lands registered in the ILR?

All lawful possession interests and Certificates of Possession evidencing these interests are registered in the ILR. However, some First Nations issue custom allotments/custom holdings for lands, without submitting them to INAC for ministerial approval or registration. Custom allotments and any unregistered, unapproved transfers of lawful possession would not show up on a search of the ILR, and neither would they be recognized as validly conferring lawful possession under the *Indian Act*. (See definitions of “custom allotment”, “lawful possession”, “Certificate of Possession”; see also section I. Reserve Land Tenure). FNLMA First Nations are subject to their land codes and are not subject to the restrictions of the *Indian Act* in terms of land tenure nor to Ministerial approval of land tenure documentation. Registrations in the First Nations Land Register will accordingly be of those transfer documents provided for in the First Nation’s land code.

Accessibility of the ILR to the Public

6. Where is the ILR?

To access the ILR you can visit the ILR office (located at 10 Wellington Street, Les Terrasses de la Chaudière, 17th Floor, Gatineau [Hull], Quebec, K1A 0H4). Alternatively, you can request a User ID by e-mailing your name and association (band, company, etc.), address and telephone number to carterd@inac.gc.ca for access to the new web system data base that can be reached at http://www.ainc-inac.gc.ca/esd/index_e.html.

7. Who can search for information in the ILR?

Any member of the public can search either the Reserve Land Register, or the Surrendered and Designated Lands Register. Inquiries can be directed to:

Registrar of Indian Lands:	Tel.: (819) 997-8123, or
Deputy Registrar of Indian Lands:	Tel.: (819) 994-6717
	Fax: (819) 997-6882

Copies of the *Indian Lands Registration Manual*, as updated from time to time, and related documents such as the ILR Application Form, Registration Checklist etc., are available from the ILR. (See *Resources*)

8. Can registry information be obtained from outside the ILR?

All INAC regional and district offices and most First Nations have direct, online access to the Indian Lands Registry System (ILRS), a computerized database which enables users to track all transactions registered in the ILR. It should be noted that the ILRS is only a tracking system; registration can only be done by submitting all required documents to the ILR by mail or in person. (*See Resources*)

The following is a list of regions and districts on-line (January 2004):

Atlantic: Pat Collins – Regional Office, Amherst, NS

Tel.: (902) 661-6346

Quebec: Marie Claude Leclerc – Regional Office, Quebec, QC

Tel.: (418) 951-7579

Ontario: John Ross – Southern District Office, Brantford, ON

Tel.: (519) 751-2584

Christine Laino – Sudbury District Office, Sudbury, ON

Tel.: (705) 522-2987

Angie Albers – Western District Office, Thunder Bay, ON

Tel.: (807) 624-1512

Manitoba: Duncan Mercredi – Regional Office, Winnipeg, MB

Tel.: (204) 984-3543

Saskatchewan: Melissa Brandt – Regional Office, Regina, SK

Tel.: (306) 780-7312

Dianne Tymko - North Central District

Tel.: (306) 953-8620

Alberta: Dayle Callihoo Campbell – Regional Office, Edmonton, AB

Tel.: (780) 495-6534

British Columbia: Marge Toews – Regional Office, Vancouver, BC

Tel.: (604) 666-7421

National inquiries: Tel.: 994-3666

Registration in the ILR

9. What is the process for registering a transaction in the ILR?

The process is as follows: the First Nation submits a completed transaction to the region or district for registration; in turn, the region or district forwards the document to the ILR with a standard application to register. When a First Nation has delegated authority under s.s.53(1) or s.60, the First Nation will forward transactions directly to the ILR.

10. What are the requirements of the ILR for registering a transaction?

A transaction must be submitted to the ILR for registration in accordance with the ILR's policy and procedures. The ILR will review the application to register in accordance with a Registration Checklist to ensure the accompanying documents meet all statutory, policy and ILR requirements, including proper identification of parties, the necessary originals, approvals, any required certifications, affidavits, proper signatures, etc. In the normal course of business (barring any major transactions which create an unusual volume of paperwork), the application is reviewed and is either registered or returned to the sender with stated reasons for refusal within 48 hours of being received. All registered transactions are assigned a registration number, and the date and time of registration are recorded. (*See Indian Lands Registration Manual, as updated from time to time, and related documents such as the Registration Checklist*)

11. What can delay the registration of a transaction?

As noted in question 10, the volume of transactions can slow down the registration of a particular transaction in the ILR. More commonly, delays can occur at the First Nation, regional or district level. For transactions involving new or subdivided parcels of reserve land, Canada Lands Surveys are normally required and are time-consuming. (Even a less official Regional Surveyor's plan can take up to five months to complete from the time it is requested.) Transactions which are submitted with incomplete documentation are rejected and must be re-submitted. To expedite registration, the ILR will accept transactions by fax for pre-approval (send fax to the attention of the Deputy Registrar at (819) 997-6882).

12. What are the most common reasons for the ILR to refuse an application to register?

This normally happens when documents are incomplete, or information is incorrect or missing: Example: Survey requirements are not met, required approvals are missing, or uncertified copies are submitted instead of originals.

13. Does the ILR guarantee registered transactions are valid?

The ILR reviews incoming transactions for registrability (i.e., the ILR's registration requirements have been met, such as the right number of certified copies/originals, affidavits, approvals, signatures etc.). The ILR does not, however, guarantee that transactions are legally valid. The ILR may be incomplete, has no priority system and does not provide the same protection which exists in provincial or territorial land registries.

14. Will the ILR refuse to transfer an interest in reserve land if there is a mortgage registered on title?

When lawful possession or leasehold interests are subject to a mortgage, it is the Registrar's general policy to register a transfer of these interests only if the purchaser assumes the mortgage, the mortgage is discharged or the ILR receives an undertaking (usually from a lawyer) that the mortgage will be discharged once the transaction is complete.

Note: Due to subsection 89(1), mortgages of lawful possession would not be valid where the mortgagee is neither a First Nation nor an individual First Nation member; similarly,

leasehold mortgages in individually held land made in favour of financial institutions would not be valid where the leasehold interest is held by an Indian. (See section II. Reserve Land Transactions)

15. Does the ILR accept caveats for registration on title?

The ILR no longer registers caveats on title. Notices have replaced caveats and operate as follows: A Notice, like a caveat previously, can be placed on title as a Notice of Claim. The party placing the Notice must also provide the ILR with a “Depositor’s Affidavit of Service”, a document verifying that the person holding the interest has been notified that the Notice has been placed on title. Unlike a caveat, a Notice *does not* entitle the depositor to be notified when a subsequent transaction affecting the same parcel of land is submitted for registration and such registration will occur without delay. The person against whose interest the Notice has been placed can register a “Response to Notice” and a Notice can be withdrawn at any time by registering a “Withdrawal of Notice”. Unlike a caveat, a Notice expires automatically after one year and a new one must be submitted.

16. Is the information contained in the ILR accurate?

As noted in question 8, the information is stored in the ILRS, which is a reliable electronic database system. However, the ILRS, like any other database, is only as reliable as the data received, and problems can and do arise when transactions (such as custom allotments, transfers of custom allotments, transfers of lawful possession and Certificates of Possession, transfers under wills or intestacies, spousal occupation of a marital home, leases, mortgages and assignments) occur without INAC’s approval and are not registered. In such cases, a search of the ILR would not indicate the current status of these interests. (Note: The legal status remains unchanged if ministerial approval is required and has not been obtained.)

17. Why doesn’t the ILR have a priorities system for dealing with competing interests in reserve land?

The ILR’s mandate under the *Indian Act* does not provide for sorting out priorities among competing interests. Provincial jurisdictions have passed fairly complicated and sophisticated legislation dealing with this area of law. New federal legislation would be required to properly implement a reserve land priorities system.

18. How does the *First Nations Land Management Act (FNLMA)* affect the registration of transactions for First Nations under the *FNLMA* regime?

First Nations under the *FNLMA* regime will have their own First Nation Lands Register which will be administered by the Federal government as a subsystem of the existing Reserve Land Register. The regulations being developed to administer these registry systems do not require the diligence currently required of registry officials operating under the *Indian Act*. Once received at the ILR, all documents, provided they comply with the draft regulations, will be entered onto the registry and any errors or omissions will be the responsibility of the First Nation registering the transaction.

IV. LEGAL CAPACITIES OF FIRST NATIONS

First Nations and First Nation Councils

1. What is the legal status of a First Nation?

Although there is no statutory provision addressing this question, the courts have found that First Nations, as represented by their First Nation councils, are legally capable of being sued and of suing on their own behalf. A First Nation council will often be a party to a court action as the representative of the First Nation and its members.

2. Can a First Nation council enter into a legally binding financial agreement on behalf of the First Nation?

While this area of law is somewhat unclear, a First Nation can be legally bound to uphold its obligations under a financial or other agreement if a contract is approved or its execution is authorized, by a duly passed resolution of the First Nation council and if the transaction fully complies with the *Indian Act*. Each transaction should be reviewed in advance by the financial institution's legal counsel. (*See definition of "Band Council Resolution (BCR)"*)

3. Can a First Nation council contract on its own behalf and be legally bound under the contract?

A First Nation council can contract in its own name, and have legally enforceable rights and obligations under that contract. However, readers should seek the opinion of legal counsel with respect to individual transactions.

First Nation-owned Corporations

4. What is the legal status of a corporation which is wholly owned by First Nation members?

A corporation which is wholly owned by a First Nation and its members may enter into contracts and be legally bound on the same basis as any other corporation. The same requirements and corporate law principles apply (e.g. non-exhaustive: liability of the corporation as a separate legal entity, as opposed to personal liability of the shareholders; directors' liability for unpaid taxes under the federal *Income Tax Act*, and for wages under provincial employment standards legislation, etc.; directors' authority under common law – indoor management rule, etc.).

The current status of a First Nation-owned corporation can be checked in the same way as any other corporation's status would be checked – a search of the relevant provincial or federal corporate registry will indicate whether the company has duly incorporated, and whether the corporation is in good standing. While not addressed by the *Indian Act*, the courts have ruled that this type of corporation is not "an Indian" for the purposes of taxation and other corporate

obligations. Only in special circumstances will the courts “lift the corporate veil” and deem the status of shareholders to affect the status of a company.

Notwithstanding the separate legal status of a First Nation-owned company, many financial institutions request BCRs from the First Nation authorizing the company to borrow money, to postpone the First Nation’s interest in the company in favour of the financial institution or to obtain loan guarantees.

5. Do First Nation-owned corporations incorporate under federal or provincial law?

They can incorporate at the federal or provincial level.

Self-governing First Nations

6. What is the status and contractual capacity of a self-governing First Nation?

Individual self-government agreements set out the status, rights and obligations of a self-governing First Nation, and should be reviewed with respect to each First Nation.

Tribal councils

7. What is the legal status of a tribal council?

While INAC requires incorporation for funding purposes, not all tribal councils are incorporated. The current status of a tribal council can be checked in the same way as any other corporation’s status would be checked – a search of the relevant provincial or federal corporate registry will indicate whether the tribal council has incorporated and whether it is in good standing. Where a tribal council has not incorporated, its legal standing should be verified by legal counsel.

8. Do tribal councils incorporate under federal or provincial law?

Tribal councils can incorporate at the federal or provincial level.

9. Can a tribal council be legally bound under a contract?

A tribal council which has incorporated may enter into contracts and be legally bound on the same basis as any other corporation. The same requirements and principles of corporate law apply. Where a tribal council has not incorporated, its ability to enter into binding contracts should be verified by legal counsel.

V. BAND COUNCIL RESOLUTIONS AND ACCESS TO RESERVE

Band Council Resolutions

1. What is a Band Council Resolution (BCR)?

Although BCRs are not defined anywhere in the *Indian Act*, they are referred to in the *Indian Band Council Procedure Regulations* and are required to initiate, authorize or approve numerous transactions under the Act; they are a First Nation's means of providing instructions, approvals, etc., to INAC (Indian and Northern Affairs Canada). They may, for reference purposes, be defined as a record of a First Nation council decision made by a majority of the councillors of a First Nation at a meeting of the council duly convened. (s.s.2(3); see *Indian Band Council Procedure Regulations*)

2. Is there a central BCR registry?

Unlike the Indian Lands Registry for reserve land and land-related transactions, there is no public registry which records all BCRs and which can be searched. However, it may be possible to request copies of BCRs from First Nations themselves. Where a BCR is required to request, approve or authorize a particular transaction such as an allotment or permit, it will be recorded as part of the transaction in the Indian Lands Registry and is thus publicly available.

3. Why don't BCRs have a standard format?

As noted above, although BCRs are required for certain purposes under the Act, the Act does not require standardization. BCRs have therefore evolved over time as a convention. While there are some common elements, BCRs are internal to each First Nation, and differ according to tradition or the wishes of the current Chief and Council.

4. Can BCRs be standardized?

The *Indian Act* does not require the standardization of BCRs. However, INAC requires the BCR to contain specific elements and/or wording for some transactions (e.g., allotments, s.35 transfers, etc.).

5. Can a financial institution or other third party rely on a stand-alone BCR as a legally binding and enforceable document?

A stand-alone BCR is not a legally binding contractual document, although BCRs are required for a First Nation council to exercise its decision-making powers under the *Indian Act*. As noted above, since BCRs simply record decisions, they may be superseded or revoked by subsequent BCRs. This is based on principles of administrative law – one First Nation council cannot bind a subsequent council in the exercise of a statutory power. (s.2(3))

6. How is a BCR used in the contracting process?

A BCR is an essential part of a contract with a First Nation. A First Nation council must first approve and/or authorize the execution of an agreement by way of a BCR in order for a third party to be able to rely on the agreement as being legally binding and enforceable. (s.s.2(3). Readers should seek their own legal advice in respect of the enforceability of any particular contract; *see section IV. Legal Capacities of First Nations.*) As a practical matter, financial institutions rely on BCRs as evidence of an agreement and First Nations themselves tend to view undertakings based on BCRs as evidence of serious commitments.

Access to Reserve Land

7. Do laws of trespass apply to reserve lands?

As with land which is not reserve, the issue of trespass only arises where the entry onto a reserve is challenged. The *Indian Act* provides that the Crown may, on behalf of a First Nation or an individual member of that First Nation, bring an action in trespass against non-Indians entering reserve land without the proper authority. However, since the *Indian Act* does not define the term “trespass”, common law principles apply. This means that a financial institution must have the permission of a First Nation (or member of that First Nation in the case of lawful possession) to enter a reserve. Permission would also likely be required from an Indian who has a “custom allotment/custom holding” (as opposed to lawful possession).

Entry to a reserve for lawful purposes such as serving a subpoena, seizing goods under a conditional sales contract or entering into possession under a valid leasehold mortgage in designated lands would not legally constitute acts of trespass.

It should be noted that individuals cannot legally refuse to grant access to land which has not been allotted to them. Such access can only be denied by the First Nation council. However, individuals who have lawful possession of reserve land (or who hold custom allotments) can oppose entry onto their property. (s.30, s.31, s.s.89(1.1), 89(2); *see section II. Reserve Land Transactions*)

8. What are the legal means by which a financial institution can legally enter on reserve land without committing a trespass?

As noted in question 7, consent to enter a reserve to inspect and/or seize personal property may be provided under a conditional sales contract (since s.s.89(2) exempts this type of agreement from the general prohibition in s.s.89(1)). As well, if the contract is with the First Nation (as opposed to an individual), the council must have passed a BCR either authorizing or approving the execution of the contract in order for the financial institution to legally rely on it. A mortgagee who has a leasehold mortgage on designated land can also legally enter a reserve for the purpose of enforcing the terms of the mortgage. (s.s.89(1.1))

Anyone enforcing these remedies should seek legal advice before doing so.

9. Is a BCR necessary for the purposes of inspecting and/or seizing personal property located on reserves (leasehold mortgages on designated land/conditional sales agreements)?

Generally no (from a technical standpoint). As noted above, creditors normally will have rights to inspect and/or seize personal property under a conditional sales agreement or a leasehold mortgage in designated land by the terms of those agreements.

In order for the financial institution to be able to rely on the agreement, a duly passed BCR would only be legally required where the First Nation itself, as opposed to an individual, has entered into a conditional sales contract.

VI. BYLAWS

Sources: Indian Taxation Advisory Board and Native Law Centre, *First Nations Gazette*, Vol. 1, no. 1, 1997; Robert A. Reiter, *The Fundamental Principles of Indian Law*, 1994.

1. What is the statutory power of First Nation council bylaws?

First Nation councils are delegated, federal legislative bodies, authorized under sections 81, 83 and 85.1. First Nation bylaws are statutory instruments of power under the *Statutory Instruments Act*. They have no force or effect outside the geographical boundaries of the reserve. Section 86 of the *Indian Act* provides for the certification of true copies of bylaws by specific departmental officials in regional and district offices for the purpose of the prosecution of bylaw offences in court.

2. What types of bylaws can First Nation councils make?

Sections 81, 83, and 85.1 authorize the First Nation council to make bylaws. When a First Nation council has passed a bylaw, those under sections 81 or 85.1 are submitted to INAC (Indian and Northern Affairs Canada) for approval and those under section 83 are submitted to the Indian Taxation Advisory Board (ITAB, *see definitions*) for approval.

- Section 81 bylaws include: (g) the dividing of the reserve into zones, prohibition of construction, prohibition of any business; (h) regulation of building construction; (i) survey and allotment of reserve lands and establishment of a register.
- Section 83 bylaws include expenditure, financial administration, business licensing, taxation, assessment and rates bylaws.
- Section 85.1 covers intoxicants bylaws, such as prohibiting possession or sale of intoxicants on the reserve.

(Refer to the *Indian Act* for the complete list of bylaw-making powers.)

First Nation governments operating under specific self-government legislation have similar taxation authority. (Refer to the *appropriate self-government act*.)

3. What is the approval process for section 81 and 85.1 bylaws?

When the First Nation council passes a section 81 bylaw, it must be sent to INAC within four days. The Minister has the power of disallowance. If the Minister does not disallow the bylaw, it will come into force on the 40th day after the date of mailing. Bylaws are reviewed by the Band Governance and Estates Directorate, which may provide to the council feedback or suggestions for amendment. If the council decides to amend a bylaw, the unamended bylaw is in force until 40 days after the amended bylaw has been sent to INAC. The process is the same when a bylaw is changed or revoked.

Section 85.1 (intoxicant) bylaws come into force once they have been approved by a majority of electors of the First Nation who attend and vote at a special meeting called by the First Nation council for the purpose of considering the bylaw. A copy of the bylaw must be mailed to the Minister within four days after it is made.

4. How can records of section 81 bylaws be found?

At present, section 81 bylaws are not included in the *First Nations Gazette*. To obtain information about a certain bylaw, contact the First Nation. INAC's regional offices and headquarters also keep records of all section 81 bylaws.

5. What is the approval process for section 83 bylaws?

All section 83 bylaws are submitted to the ITAB office, where they are examined for: conformity with the *Indian Act* and the *Charter of Rights*; comprehensiveness; equity and natural justice; fairness; adequacy of notification and appeal procedures; and absence of ministerial liability. The Band Governance Branch of INAC may also provide comments on bylaws which are in a form not previously approved by the Minister. Bylaws which have passed examination are submitted to ITAB members, who meet four times per year. Board members review all bylaws submitted in that quarter and formulate the Board's recommendations to the Minister. When the bylaws have been approved by the Board, they are submitted to the Minister for formal approval.

6. How are section 83 bylaws amended or revoked?

This is done by passing a new bylaw. The original bylaw is in effect until the amending or revoking bylaw has been approved by the Minister.

7. Why are First Nation bylaws not published in the Canada Gazette?

According to the *Statutory Instruments Regulations*, First Nation bylaws do not have to be published in the *Canada Gazette*.

ITAB, together with the Native Law Centre at the University of Saskatchewan, has initiated the publication of the *First Nations Gazette* to provide notice of new bylaws. The main focus is on property tax bylaws pursuant to section 83; it is anticipated that the *First Nations Gazette* may eventually publish notice and text of other First Nation laws.

8. What information is included in the First Nations Gazette?

All section 83 bylaws will be published (notice and full text) in the *First Nations Gazette*. Volume 1, No. 1 of the *First Nations Gazette* (1997) contains sample bylaws and a partial list of bylaws approved to May 1, 1997. Sample bylaws include "First Nation Business Licensing Bylaw" and "First Nation Financial Administration Bylaw." Each issue contains full text versions of bylaws passed pursuant to s.83. The *First Nations Gazette* is not a publication of the Government of Canada and provides information on an informal and non-official basis. For annual subscriptions or to purchase past volumes contact the *First Nations Gazette* at the University of Saskatchewan. For information, see Resources.

VII. FUNDING ARRANGEMENTS

For further information on funding arrangements, refer to INAC (Indian and Northern Affairs Canada) *Evolution from Direct Service Delivery to a Funding Agency*, 1993; Treasury Board of Canada Secretariat, *Guide on Financial Arrangements and Funding Options*, 1995; INAC, *Financial Management Manual*.

1. Who funds First Nations?

Government funding is an important part of the annual budget of most First Nations and INAC has the lead on behalf of the federal government in providing funding. Overall, thirteen federal departments and agencies, including INAC, offer programs for Aboriginal people with total planned spending of approximately \$7.5 billion in 2002-03. Of this amount, a large portion (about 70 percent or \$5.2 billion) is provided by INAC, primarily to First Nations. Further, about 80 percent of INAC's funding (excluding Claims) to First Nations is to enable them to provide a range of basic services within their communities comparable to those provided to other Canadians through provincial, territorial and municipal governments.

Other federal departments and agencies with significant funding for First Nations include Health Canada, Canada Mortgage and Housing Corporation, and Human Resources Development Canada.

2. How will First Nations be funded in the future?

Canada remains committed to maintaining and improving the fiscal relationships with First Nation/Aboriginal governments. This includes but is much broader than simply "funding". *Gathering Strength*, Canada's January 1998 response to the Royal Commission on Aboriginal People (see Resources), specifically indicated that Canada is looking to develop a new fiscal relationship with Aboriginal people. This work is continuing. In collaboration with provincial and territorial governments, the focus is on a government to government transfer system which, along with other necessary tools, supports and fosters the development of sustainable First Nation/Aboriginal governments. The long term goal is to have First Nation/Aboriginal governments with significant law-making powers, knowledge, capacity and experience so that they will be primarily responsible and accountable for matters affecting their citizens and communities.

3. What is the difference between a "funding authority" and a "funding arrangement"?

Funding authorities are the rules, set by the Treasury Board of Canada, that INAC must adhere to when providing funding. Examples of funding authorities include: contributions, Flexible Transfer Payments (FTPs), and grants. (See question 5)

A **funding arrangement** is the document containing terms and conditions by which a transfer payment is made by the Crown for the delivery of programs and services by the recipient First Nation. Funding arrangements range from one to five years; they are all subject to annual availability of funds from Parliament. (See question 4; see definition of "appropriated funds")

4. What are the different funding arrangements available to First Nations?

Comprehensive Funding Arrangements (CFA) are the basic program-budgeted funding arrangements used with First Nations for a one-year duration. A CFA contains programs funded by means of the following funding authorities: contributions, Flexible Transfer Payments (FTPs), and grants.

Canada/First Nations Funding Agreements (CFNFA), also referred to as **Alternative Funding Arrangements (AFA)** and **Financial Transfer Agreements (FTAs)** are block-budgeted funding arrangements used with First Nations for a five year duration. CFNFAs are more flexible than CFAs and allow longer-term planning. First Nations have increased authority over program design and delivery and management of funds to meet specific community needs. CFNFAs contain common federal government funding terms and conditions in the main body, while schedules attached contain terms and conditions specific to federal departments' programs.

A **Contribution Agreement (CA)** is used to fund specific programs or projects requiring significant interaction between INAC and the recipient (e.g., major capital projects). It follows Treasury Board's rules for "contributions."

Self-government funding arrangements are sometimes referred to as "grants"; however, self-government funding arrangements include terms and conditions. (*Refer to the appropriate self-government legislation.*)

5. What are the different funding authorities?

These are the rules defined by the Treasury Board that INAC must adhere to when providing funding. Funding authorities are described here in order of increasing First Nation control.

Contribution authority involves significant terms and conditions which stipulate matters such as what service is to be provided, to whom it is to be provided, what expenses are eligible for reimbursement, and the reporting requirements. The reimbursement process involves financial and operational reporting throughout the year, and a year-end financial audit. Contribution Agreements (CAs) and Comprehensive Funding Arrangements (CFAs) use contribution authority.

Flexible Transfer Payment (FTP) authority has simpler terms and conditions than the contribution. FTPs are provided for delivery of specific programs or services with defined results or program outputs, and the funding is based on a fixed amount rather than on the reimbursement of eligible expenses. Programs are funded separately. The First Nation's accountability is to provide the products or services that were specified. FTP performance information is collected through program-specific reports submitted during the year and at year-end. Comprehensive Funding Arrangements (CFAs) include FTP's.

Alternative Funding Arrangement (AFA) is the funding authority which establishes a different relationship between INAC and First Nations than that which exists under Contribution or FTP. First Nations may redesign block funded services to meet specific community needs, subject to maintaining minimum delivery standards, and may reallocate funds between block funded services.

Grants are unconditional transfer payments which are not subject to being accounted for or audited, but for which eligibility and entitlement may be verified. Comprehensive Funding Arrangements (CFAs) include grants.

Table: Funding Agreements and Funding Authorities

Funding Agreement	Funding Authority
Contribution Agreement	Contribution
Comprehensive Funding Agreement (CFA)	Grant Contribution FTP
Canada/First Nations Funding Agreement (CFNFA)	Block Funding - AFA Targeted Funding - Contribution FTP

6. What information on individual funding arrangements is available to third parties from INAC?

INAC may provide general information to third parties, such as the provisions within the funding arrangements and the First Nation’s historic funding levels. INAC will not provide the First Nation’s credit ratings, nor information that is exempt from release under *Access to Information* legislation, such as the First Nation’s financial statements which contain confidential information regarding own-source revenues.

7. Can funding payments be redirected to a financial institution?

Under the terms and conditions of the funding arrangement, INAC may, at its discretion, redirect payments due to a First Nation to a financial institution for deposit to the credit of the First Nation’s account. The First Nation must make a request to INAC, by way of a Band Council Resolution (BCR), to redirect the payments. The First Nation must also provide INAC with instructions regarding the process by which the funds are to be redirected. INAC will provide confirmation in writing to the First Nation, indicating that there is no guarantee as to the level of funding (it is contingent on availability of funds (*Appropriation Act*) and on the First Nation satisfying the conditions of the funding arrangement). INAC does not recognize “irrevocable” BCRs; council decisions can therefore be superseded by a new BCR.

INAC will not redirect funds nor continue to act upon any existing redirection if a band is in third party management.

8. Are there enforceable agreements for redirection of payments to a financial institution?

No. All arrangements are informal and subject to statutory debtor/creditor priorities and to statutory restrictions in respect of the assignment of Crown funds. In Manitoba, INAC has been involved in *Tripartite Agreements* with financial institutions and First Nations. INAC may

agree to enter a Tripartite Agreement only when the loan is used exclusively for meeting the objectives of the funding arrangement and the financial management plan. INAC agrees to direct funds in care of the financial institution and to do so until the First Nation provides, in writing, new instructions and the consent of the financial institution to the new instructions. INAC does not guarantee the level of funding, as it is contingent on availability of funds and on the First Nation satisfying the conditions of the funding arrangement. Tripartite Agreements have been used successfully but have not been tested in court.

Financial institutions should consult their legal advisors in respect of the statutory provisions and substantial statutory restrictions that apply in respect of assignments of funds payable by the Crown. See the *Financial Administration Act*.

9. Can a First Nation assign future funding payments to a third party?

When a First Nation agrees to assign its funds to a third party, the agreement is not enforceable and not recognized by INAC. INAC will consider requests for re-direction of funds from the First Nation, but will not enter into any arrangement directly with a third party. Further, as noted above, financial institutions should consult the law in respect of statutory restrictions that apply in respect of assignments of Crown funds.

10. Under what circumstances will INAC withhold payments to a First Nation?

If there is a serious default by the First Nation on delivery of services, INAC will treat the problem as a corporate problem; it will review the First Nation's overall management, and not just the area in which it is defaulting. INAC may withhold payments as a last resort. Essential services will be maintained; in extreme cases, this may be through a third-party administrator.

11. Are there restrictions on borrowing imposed on a First Nation?

There are no limits on indebtedness beyond the ability to repay the debt and the willingness of suppliers and financial institutions to provide credit or financing. However when the annual financial statement shows that a First Nation runs a cumulative deficit which exceeds eight percent of total annual revenues, INAC will review the situation and may put in place a remedial management plan (RMP) to address and remedy the causes of the deficit.

The RMP may be recipient managed and in more extreme cases the RMP will be co-managed or managed by a third party.

12. If a First Nation has a surplus for completed projects or activities, can these funds be spent at its discretion?

It depends on the funding authority:

Contribution – No. Overpayments, unexpended balances and disallowed expenditures must be repaid.

FTP – Yes. The First Nation may use non-capital surplus amounts at its discretion. Capital surplus amounts can be used for projects on the approved capital plan. Any deficit is the responsibility of the First Nation.

AFA – Yes. First Nations can redesign programs and reallocate funds between programs based on its priorities. The only restriction is that capital surplus must be spent for capital purposes. Any deficit is the responsibility of the First Nation.

Grant – Yes. Since the payment is not dependent on performance, surpluses can be redirected to other First Nation priorities.

13. What are a First Nation's obligations with respect to unexpended year-end balances for incomplete projects?

Where a government funded project or activity is incomplete at year-end, the unexpended balance is a debt due to the Crown for agreements under contribution or FTP authority. It is recommended to auditors that this amount be carried on the First Nation's balance sheet as a current liability (deferred revenue). The Crown may provide funds from its new year appropriation to allow the First Nation to complete the project or activity.

Funding agreements using an AFA authority are typically signed on a five year basis. The First Nation can transfer funds according to community priorities (as long as capital funds are being used for capital purposes). At the end of the term of the funding agreement, the unexpended balances are treated in the same manner as an FTP authority.

14. What are INAC's guidelines for dealing with a First Nation deficit?

INAC monitors the financial health of First Nations, primarily through the annual audited financial statements. The terms and conditions of the funding arrangements require a full financial review where a First Nation's cumulative deficit exceeds eight percent of total annual revenues.

Where a problem is confirmed, the funding arrangement requires the First Nation to put into place a remedial management plan to preserve essential services, settle the debt and prevent recurrences. Where the problem is severe or a remedial management plan is not effective, INAC may require that a co-manager or third-party manager be brought in.

15. What are INAC's requirements regarding year-end financial statements?

As part of their funding arrangements, First Nations are required to provide annual audited consolidated financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP). As well, further detailed financial information is required regarding programs and services, and trust funds. All financial reporting requirements are detailed in the *Year-end Reporting Handbook (YERH)*. (See *Resources*)

INAC depends on financial statements to determine whether:

- the requirements of the *Financial Administration Act* have been met;
- funds have been used for the purposes intended;
- the terms and conditions of the funding arrangements have been met; and
- each recipient's management and financial situation is sufficiently strong to assure the continued delivery of essential services.

First Nations require financial statements in order to account to their membership and to Parliament for their expenditures.

16. What accounting principles apply to the financial statements?

INAC's *Year-end Reporting Handbook (YERH)* sets out the financial reporting requirements of First Nations. Financial reporting is based on general purpose financial statements that meet the needs of all potential readers. Reports must be prepared in accordance with GAAP, as defined by the Canadian Institute of Chartered Accountants (CICA). The financial statements must be audited by an independent professional auditor and shall consolidate the activities of the entire reporting entity as defined in GAAP. (*See Resources*)

First Nations are not recognized in CICA's Public Sector Accounting Board (PSAB) Handbook. The CICA has been approached to recognize First Nations for inclusion as government bodies within the accounting standard. In the interim, INAC asks that financial statements of First Nation governments be prepared in accordance with the PSAB standards for local governments.

VIII. INDIAN MONEYS

Refer to INAC (Indian and Northern Affairs Canada) *Manual for the Administration of Band Moneys*, 1997 for further information on Indian Moneys. (See Resources)

1. What are Indian Moneys?

Indian Moneys are derived from the sale of an interest in reserve land (including oil, gas, timber, etc.) or from revenue generated from leasing, rights of way, etc. The money is collected by the Crown and is thus “public money”. The money is deposited into capital or revenue accounts in the Consolidated Revenue Fund and held in trust under the name of the First Nation for which it was collected.

Note: Although Indian Moneys include accounts held for certain individuals such as minors, deceased persons, adoptees, etc., in this document the term will be used to refer to accounts held for a First Nation community. (See definitions of “public moneys” and “Indian moneys”)

In accordance with the *Indian Act*, there are expenditure criteria for each type of account. For most First Nations, Indian Moneys are a small part of the financial regime of a First Nation; however, over 55 First Nations have Indian Money accounts in excess of \$1million (that is, over 55 First Nations have revenue and capital accounts combined in excess of \$1 million).

2. What are “capital moneys” and “revenue moneys”?

Capital moneys are Indian Moneys derived from the sale of surrendered lands, or the sale of the capital assets of a First Nation (including royalties, bonus payments and other proceeds from the sale of timber, oil, gas, gravel or any other non-renewable resource). (s.62)

Revenue moneys are Indian Moneys which are not capital moneys. They are derived from a variety of sources which include, but are not limited to, the interest earned on Indian Moneys, fine moneys, proceeds from the sale of renewable resources (crops, etc.), leasing activities (e.g., commercial leasing ventures, cottages, land for agricultural purposes) and rights of way. (s.62)

Within the Consolidated Revenue Fund (CRF), capital and revenue accounts are set aside for First Nations. INAC generally maintains one capital account and one revenue account per First Nation (approximately 1,200 accounts in total). (See definition of “Consolidated Revenue Fund”)

3. What are the Minister’s responsibilities with respect to Indian Moneys?

The Minister may authorize the expenditure of capital or revenue moneys of a band in accordance with the *Indian Act* and with the consent of the band council.

All moneys collected by the Crown from transactions related to reserve lands (such as sale of land, capital, renewable resources, leasing, right of way, etc.) are Indian Moneys and must be deposited into the Consolidated Revenue Fund (CRF) trust accounts.

With the consent of the band council, the Minister or his/her delegate is also responsible for approving the expenditure of all Indian Moneys and for subsequently reviewing band audits to confirm that funds were actually spent by the First Nation for the purpose approved by the Minister.

4. How can a First Nation opt to manage its revenue moneys?

A First Nation can opt to obtain section 69 authority. Subsection 69(1) enables a First Nation to “*control, manage and expend*” its revenue moneys (not capital moneys). With this authority, the First Nation, not INAC, determines how revenue monies are to be spent. About 70 percent of First Nations have section 69 authority.

Section 69 authority is only granted with the support of a majority of First Nation members, as determined by a vote. Once a First Nation receives section 69 authority over its revenue moneys, it assumes full responsibility for all revenue expenditures that are requested by the council. This includes determining whether any given expenditure will be for the general progress and welfare of the First Nation and its members. INAC will not require substantiation that a release of revenue moneys will benefit the First Nation, but will rely on the expenditure decision made by the council. Duly elected Chiefs and councillors are fiduciaries for all members of the First Nation, and these fiduciary obligations are legally enforceable by First Nation members.

5. Are oil and gas royalties “Indian Moneys”?

Yes, revenues from oil and gas royalties are Indian Moneys. They are collected by Indian Oil and Gas Canada (IOGC) and are credited to the First Nation’s capital moneys accounts by IOGC.

6. Do Indian Moneys earn interest?

Accounts earn interest at a rate which is equivalent to the market yield of bond issues having a maturity of 10 years or over (even though the moneys may be held in CRF accounts for less than 10 years). Tax is not charged on the interest earned. There are also no management fees levied for administering the accounts.

7. What are the expenditure criteria of capital and revenue moneys?

The expenditure of *capital* moneys is addressed in s.s.64(1). This subsection lists the expenditure of capital moneys for a number of specific purposes such as the construction of housing, roads, fences; purchasing livestock; loans to members, etc.; and “*any other purpose that in the opinion of the Minister is for the benefit of the Band*”.

Subsection 66(1) allows *revenue* moneys to be expended for any purpose that, in the opinion of the Minister, “*will promote the general progress and welfare of the Band or any member of the Band*”

8. Can Indian Moneys be used for investments or to secure a loan guarantee?

Investing in stocks, bonds or GICs does not constitute an expenditure of Indian Moneys and is thus not deemed permissible under s.64 and s.66. Use of Indian Moneys to secure a loan guarantee does not constitute an expenditure (since the expenditure does not occur unless the First Nation fails to repay the loan). Therefore, the use of Indian Moneys as collateral for a loan to a First Nation, as well as line-of-credit arrangements, is not permissible under s.64 and s.66. However, loan guarantees for housing purposes are allowable pursuant to paragraph 64(1)(j).

9. What is the process for an expenditure of Indian Moneys?

The process is initiated when a First Nation council adopts a Band Council Resolution (BCR) requesting a release of Indian Moneys from the trust account. In some cases, for example if the money is being used to pay debts, a membership vote can be requested. The BCR is sent to the appropriate regional or district office of INAC. If the First Nation has section 69 authority and the request is for revenue money, the money is usually released immediately. For expenditure requests of capital moneys and revenue moneys for a First Nation without Section 69 authority, the regional office analyses the request, assesses whether the expenditure would benefit the First Nation and its members and provides a recommendation (approval/denial) to appropriate approval authorities.

At the end of each fiscal year, a First Nation must submit a separate schedule as part of its overall Audited Financial Statements reporting on the receipt and expenditure of Indian Moneys, to show that they were spent for the purpose originally approved by the Minister or his/her delegate.

10. What revenues are *not* considered “Indian Moneys”?

All revenues that do not meet the definition of Indian Moneys as stated in Section 62 of the *Indian Act* are not Indian Moneys. Own-source revenues that are not Indian Moneys include property taxes, grants in lieu of taxes from utility companies, resource revenue sharing, profits from community-owned businesses (including casino revenues), and compensation moneys received as a result of the ratification of a land claim settlement (commonly referred to as “settlement funds”).

As explained above, all revenues derived from the sale of reserve land resources (renewable and non-renewable) are Indian Moneys.

11. Are own-source revenues assignable?

Own-source revenues that are not governed by Indian Moneys legislation can be assigned. Section 89 restrictions may apply.

IX. CLAIM SETTLEMENTS

1. What are the different types of claims?

Comprehensive Claims are based on the recognition that there may be continuing Aboriginal rights and title to lands and natural resources. Comprehensive claims arise in those parts of Canada where Aboriginal title has not been dealt with by treaty and other legal means. They may include land title, fishing and trapping rights, financial transfers and other social and economic benefits.

Specific Claims deal with specific grievances that First Nations may have regarding the non-fulfilment of treaties and other lawful obligations, or from the alleged improper administration of lands and other assets under the *Indian Act* or other formal agreements.

Treaty Land Entitlements are a special type of specific claim. They involve claims for land under existing treaties.

Other Claims are grievances that fall within the spirit of the comprehensive and specific claims policies but do not meet strict program acceptance criteria.

2. Are there conditions for the use of funds from claim settlements?

That depends on the type of claim agreement:

Comprehensive claims funds are granted with no conditions – the use of the funds is determined by the First Nation. Normally funds are deposited into a “settlement trust” where they can earn tax-free interest under a number of conditions specified in the land claim agreement.

Specific Claims vary depending on how the First Nation negotiates the agreement. Usually, the purpose for which the funds will be used is stated in the settlement agreement; sometimes it is for the purchase of lands. Most First Nations have the settlement funds paid into a trust account managed by appointed trustees; however, some have it placed into a revenue account maintained by INAC. Some First Nations also request a per capita distribution of a portion of the funds.

Treaty Land Entitlement (TLE) funds are designated for the purchase of land. For the Saskatchewan TLE Framework Agreement (1994), settlement funds are kept in trust accounts managed by trustees (not the First Nation council). Funds must be spent on acquiring land up to a stated number of short-fall acres. The TLE settlement agreement prohibits a First Nation from pledging the funds. When the stated amount of acreage has been acquired and put into reserve status, remaining funds can be used for “band development”. Interest from the TLE trust funds may be kept in a revenue trust account. They are used to cover “authorized expenses” associated with acquiring land (e.g., acquisition expenses, honoraria for attending meetings). Any remaining funds from the revenue trust account can be released into the First Nation’s account by the trustees.

3. What is the status of comprehensive claims in Canada?

Fifteen comprehensive claim agreements have been settled since 1975:

The James Bay and Northern Quebec Agreement (1977)

Settlement cost: \$225 million (\$135 million in 1975\$ for the Cree and \$90 million in 1975\$ for the Inuit)

The Northeastern Quebec Agreement (1978)

Settlement cost: \$9 million

The Inuvialuit Final Agreement (1984)

Settlement cost: \$152 million in 1984\$ plus \$17.5 million economic enhancement and social development funds

The Gwich'in Agreement (1992)

Settlement cost: \$75 million in 1990\$ over 15 years, plus a share of resource royalties from the Mackenzie Valley

The Nunavut Land Claims Agreement (1993)

Settlement cost: \$1.17 billion (\$580 million in 1989\$ plus interest) over 14 years, plus a share of resource royalties

The Sahtu Dene and Metis Agreement (1994)

Settlement cost: \$75 million in 1990\$ over 15 years, plus a share of resource royalties from the Mackenzie Valley

The Nisga'a Agreement (2000)

Settlement cost: \$190 million

Yukon First Nations Claims:

The Vuntut Gwich'in First Nation (1995);

The First Nation of Nacho Nyak Dun (1995);

The Teslin Tlingit Council (1995);

The Champagne and Aishihik First Nations (1995);

The Little Salmon/Carmacks First Nation (1997);

The Selkirk First Nation (1997);

The Tr'ondëk Hwëch'in First Nation (1998); and

The Ta'an Kwach'am First Nation (2002)

Kluane First Nation (2004)

Settlement cost: \$159,599,153 in 1989\$ for these nine bands, less loan repayments to be paid out over 15 years, as their share of the total \$242,673,000 in 1989\$ for all fourteen Yukon First Nations

Ongoing Claims Negotiation:

- Algonquins of Eastern Ontario (Ontario side of the Ottawa River watershed)
- Akaitcho Treaty 8 Dene (N.W.T.)

- Atikamekw and Montagnais Claim - three tables - (1) Assemblée Mamu Pakatatau Mamit (2) Conseil Tribal Mamuitun (3) Conseil de la Nation Atikamekw
- Atlantic Process: Long-term Response to the *Marshall* Decision (Maritimes and Quebec)
- Crees of Quebec Offshore Islands Claim (Nunavut)
- Deh Cho First Nations (N.W.T.)
- Innu Nation Claim (Central Labrador and northern Quebec)
- Labrador Inuit Association (LIA) Claim (coast line, interior and offshore of northern Labrador)
- Makivik Claim - Nunavut (offshore) and Labrador (offshore and onshore)
- Manitoba Denesuline Reconciliation and Renewal (Manitoba)
- Saskatchewan Athabasca Denesuline Reconciliation and Renewal ('Benoanie Case') (Saskatchewan)
- South Slave Métis Tribal Council (N.W.T.)
- Treaty 11 Dogrib Claim (N.W.T.)

4 Yukon First Nations Claims

- White River First Nation, Carcross Tagish First Nation, Kaska Nation, Kwanlin Dun First Nation,

Claims in British Columbia

The British Columbia Treaty Commission was established (1993) to facilitate and monitor treaty negotiations and to allocate negotiation funding to B.C. aboriginal groups. To date, 54 First Nations (125 Indian bands), representing 70 percent of B.C. First Nations, are negotiating treaties.

RESOURCES

This document is also available on the Canadian Bankers Association Web site:

<http://www.cba.ca>

For general information relating to Indian and Northern Affairs Canada contact:

INAC Public Enquiries Contact Centre

Tel.: 1-800-567-9604

Other Sites

Indian and Northern Affairs Canada Web site:

<http://www.ainc-inac.gc.ca>

First Nation Profiles, providing information on each First Nation, such as band address, official band name, names of Chief and councillors, etc. can be found at:

<http://sdiprod2.inac.gc.ca/FNProfiles/>

Manuals

Although INAC manuals are created for internal use, copies may be obtained from the department. Some manuals are available on the Web site, as shown below, or contact the INAC Public Enquiries Contact Centre at 1-800-567-9604.

Land Management Manual (http://www.ainc-inac.gc.ca/ps/lts/lmm_e.html)

Lands and Environment Branch

Lands Directorate

Tel.: (819) 953-6040

Indian Lands Registration Manual (includes *ILR Application Form, Registration Checklist*)

(http://www.ainc-inac.gc.ca/ps/lts/ilr98toc_e.html)

Lands and Environment Branch

Lands Directorate (Indian Lands Registry)

Tel.: (819) 997-8130

Manual for the Administration of Band Moneys (Indian Moneys)

(http://www.ainc-inac.gc.ca/pr/pub/man/mon_e.html)

Lands and Trusts Services

Indian Moneys and Estates Directorate

Tel.: (819) 994-9547

Other Sources

INAC Band Name System

(for official band names)

Lands and Trusts Services

Indian Registration and Band Lists Directorate

Tel.: (819) 997-8278

INAC, *Year-end Reporting Handbook; Sample Financial Statements*

Available on the Web site: http://www.ainc-inac.gc.ca/pr/pub/yrh/yrh01_e.html

or contact the INAC Public Enquiries Contact Centre at 1-800-567-9604.

Treasury Board of Canada, *Guide on Financial Arrangements and Funding Options*

Available on the Internet:

http://www.tbs-sct.gc.ca/Pubs_pol/dcgpubs/tbm_133/arra_e.asp

or contact:

Treasury Board: Distribution Centre

Tel: (613) 995-2855

Fax.: (613) 996-0518

Indian Lands Registry (INAC)

10 Wellington Street, 17th floor, Hull, QC K1A 0H4

Deputy Registrar of Indian Lands: Tel.: (819) 997-8130

Fax: (819) 997-6882

Indian Oil and Gas Canada

9911 Chula Boulevard, Suite 100

Tsuu T'ina (Sarcee), AB T2W 6H6

Tel: (403) 292-5625

First Nations Gazette

Subscription and Distribution Office:

(<http://www.usask.ca/nativelaw/publications/desc/fng.html>)

First Nations Gazette

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