

# Due Diligence and First Nations Business Developments

Manitoba Bar Association Mid-Winter Conference  
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January 20, 2012

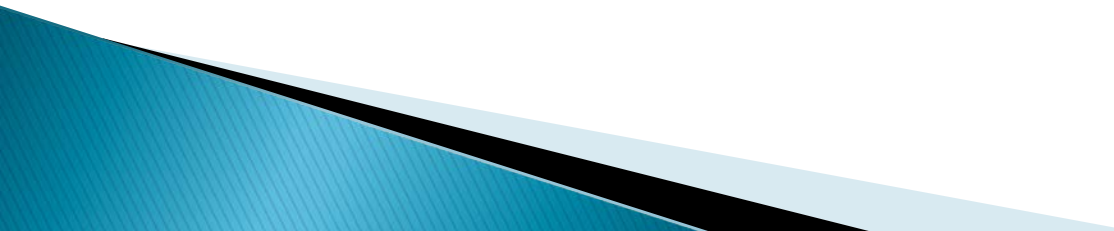
# Due Diligence

- ▶ Purpose of due diligence:
  - Determine that what was agreed to is delivered
  - Assess risks and potential/real problems
  - Determine what assets belong to entity
  - Determine what charges/encumbrances are against entity
  - Check on compliance with various government entities

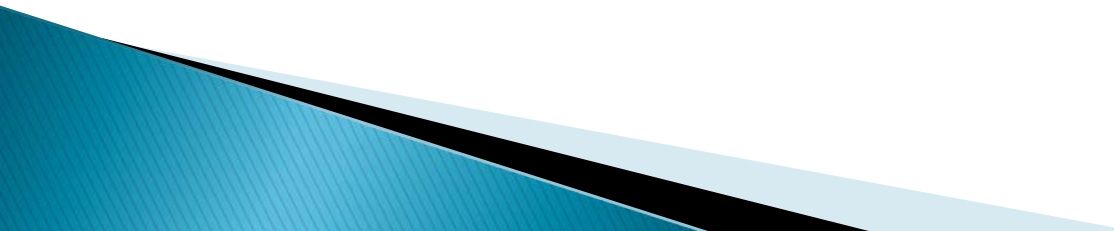
# Due Diligence

- ▶ Typical legal due diligence involves:
  - Review of minutes books, partnership agreements, shareholder agreements
  - Review of key contracts
  - Searches of federal, provincial and municipal government departments and agencies
  - Surveys and environmental assessments also common

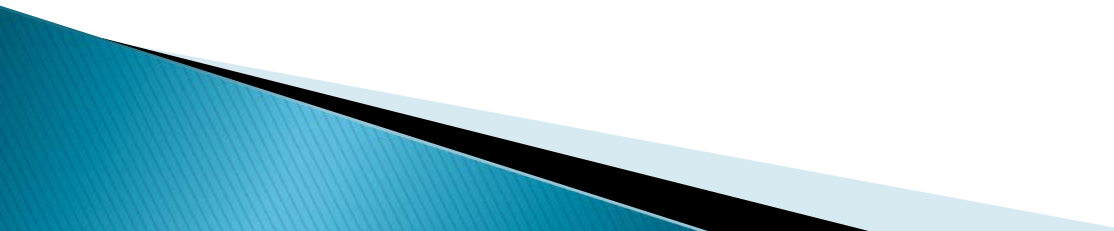
# Due Diligence

- ▶ Due diligence involving First Nation developments add further complexities
  - ▶ Impact of *Indian Act*
  - ▶ Role of federal government – Aboriginal Affairs and Northern Development Canada
  - ▶ Impact of *First Nations Land Management Act* and Land Codes
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# First Nations

- ▶ Sometimes questions arise as to whether a First Nation exists as a legal entity
  - ▶ Common usage is now First Nation or Cree Nation, etc.
  - ▶ AANDC currently recognizes 616 First Nations in Canada
  - ▶ There are “unrecognized” First Nations in Canada – Assembly of First Nations recognizes over 630
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# First Nations

- ▶ Use of the term “band” is not common
  - ▶ Seen as a paternalistic and dated term
  - ▶ New federal legislation dealing with First Nations doesn't use the term unless absolutely necessary
  - ▶ There are on-line resources which can provide a wealth of information about First Nations
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# First Nations


- ▶ An excellent resource is located on the AANDC website
- ▶ The First Nation Community Profiles page contains information on most First Nations in Canada
- ▶ <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Index.aspx?lang=eng>

# First Nations

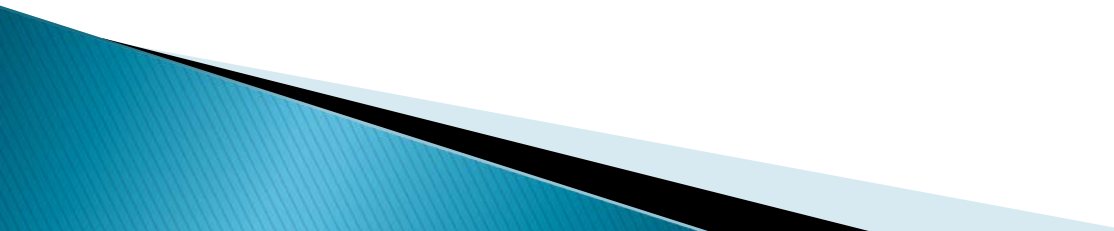
- ▶ Obtain information on:
  - Official name – can be different than common used name
  - First Nation number
  - Names of Chief and Councillors
  - Method of Council elections – Indian Act or custom election
  - List of reserves
  - Quorum



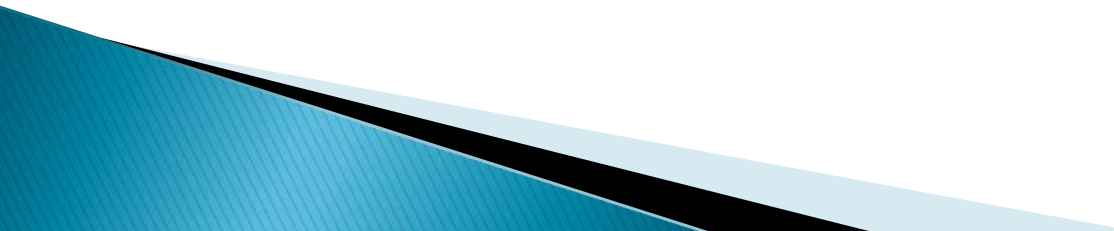
# First Nations

- ▶ AANDC website includes a disclaimer and accepts no responsibility for accuracy of information
  - ▶ Some First Nations have requested their information not be posted
  - ▶ Information tends to be accurate – can be a delay in listing Chief and Council after an election
  - ▶ Useful to get a representation (like a Certificate of Incumbency) from a member of Council that First Nation is a “band” as defined by the Indian Act
  - ▶ Also list members of Council
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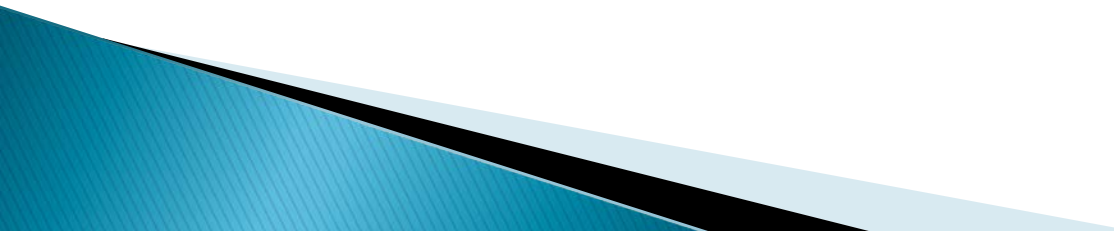
# Powers of Council

- ▶ Council of a First Nation has power to deal with First Nation assets and bind First Nation (subject to certain exceptions)
  - ▶ *Indian Act* at s. 2(3)(b) states that a power conferred on a Council can only be exercised by the majority of the councillors of the First Nation
  - ▶ *Indian Band Council Procedure Regulations* at s. 6 state that a majority of the whole council constitutes a quorum – but if 9 or more members, quorum is 5
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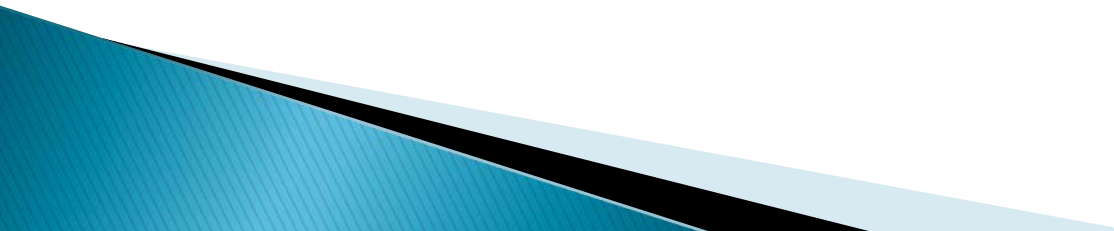
# Powers of Council

- ▶ Very important to determine quorum requirement
  - ▶ Validity to contracts could be called into question if no quorum
  - ▶ Contracts and other documents should be authorized by a Council Resolution signed by a quorum of Council
  - ▶ Request copies of authorizing Council Resolutions
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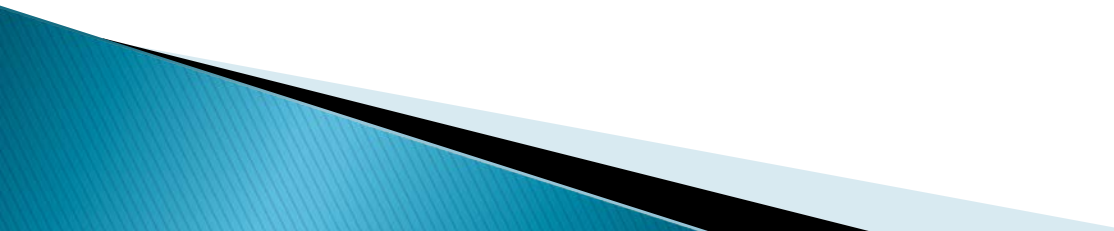
# By-Laws

- ▶ First Nations can enact by-laws under s. 81(1) of the *Indian Act*
  - ▶ Some key areas of law-making powers include zoning, construction requirements and access to water supplies
  - ▶ Can impose fines up to \$1000 or 30 days imprisonment or both
  - ▶ Can obtain orders upon conviction that contravention of by-law cease
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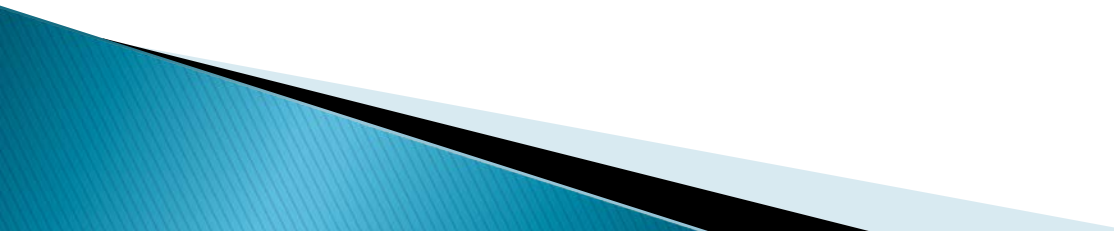
# By-Laws

- ▶ First Nations can enact taxation by-laws under s. 83 of the *Indian Act*
  - ▶ Can tax land interests, licence business and develop enforcement of payment
  - ▶ Must have appeal process related to assessments
  - ▶ Only Opaskwayak Cree Nation and Pinaymootang First Nation have enacted s. 83 by-laws in Manitoba
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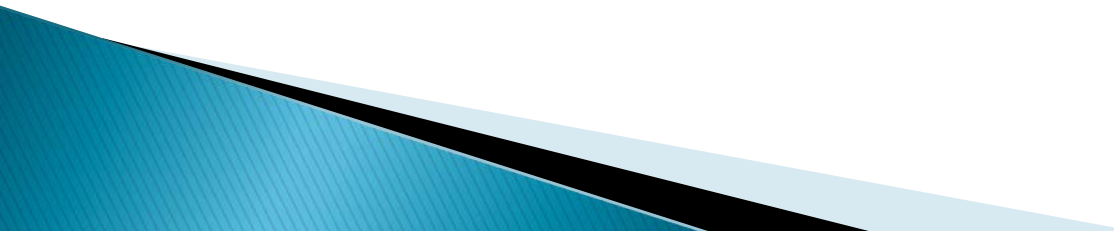
# By-Laws

- ▶ First Nations can enact anti-intoxicant by-laws under s. 85.1 of the *Indian Act*
  - ▶ Requires consent of a majority of electors who vote at a special meeting of the First Nation
  - ▶ The sale and manufacture of intoxicants are subject to harsher penalties than being intoxicated or possessing intoxicants
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# FNFSMA

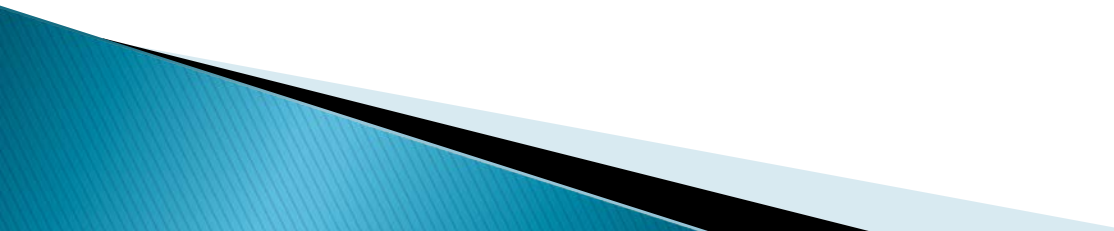
- ▶ Some First Nations have opted into the *First Nations Fiscal and Statistical Management Act*
  - ▶ Allows First Nations to engage in developing taxation laws
  - ▶ Replaces s. 83 of the *Indian Act*
  - ▶ Approval of taxation laws done by First Nation Taxation Commission
  - ▶ Only Brokenhead Ojibway Nation has opted into this in Manitoba
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# On-Line Resources

- ▶ By-laws and taxation laws should be reviewed to see impact on proposed development
  - ▶ First Nations Gazette publishes by-laws (primarily taxation by-laws and laws) on-line:
  - ▶ <http://www.fng.ca/>
  - ▶ The First Nations Tax Commission also has useful information and a listing of First Nations with s. 83 by-laws or *FNFSMA* taxation laws: [www.fntc.ca](http://www.fntc.ca)
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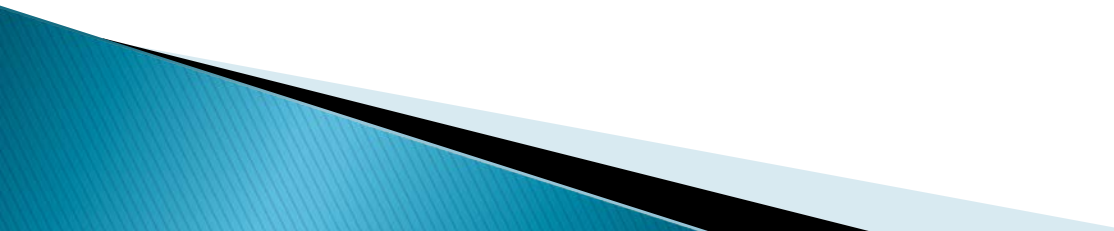
# First Nation Land

- ▶ One of the key items requiring due diligence on First Nation developments
  - ▶ In Manitoba there are two systems of land tenure on reserve
    - *Indian Act*
    - *First Nation Land Management Act*
  - ▶ Majority of First Nations still under the Indian Act
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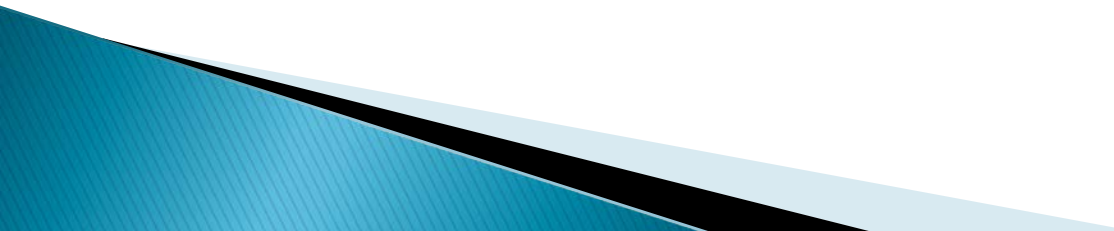
# First Nation Land – Indian Act

- ▶ First Nations cannot grant fee simple interest in reserve land
- ▶ *Indian Act* has provisions on how interests can be granted in reserve land:
  - Certificates of Possession (s. 20)
  - Permit (ss. 28(2) & 58)
  - Designation (ss. 37, 53 & 58)
  - Indian Timber Regulations and Indian Mining Regulations

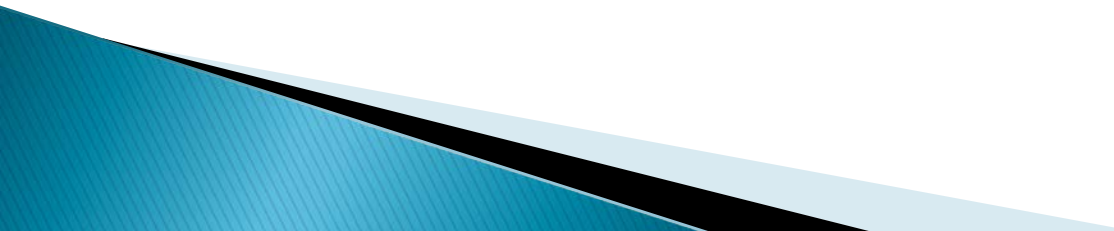
# Certificates of Possession

- ▶ Issued by Minister to First Nation member
  - ▶ Land in question must have been allotted by First Nation council
  - ▶ Grants right of possession
  - ▶ Can be sold or transferred to other First Nation members
  - ▶ Becomes asset of estate of deceased First Nation and can pass to heirs
  - ▶ Interest can be expropriated by First Nation
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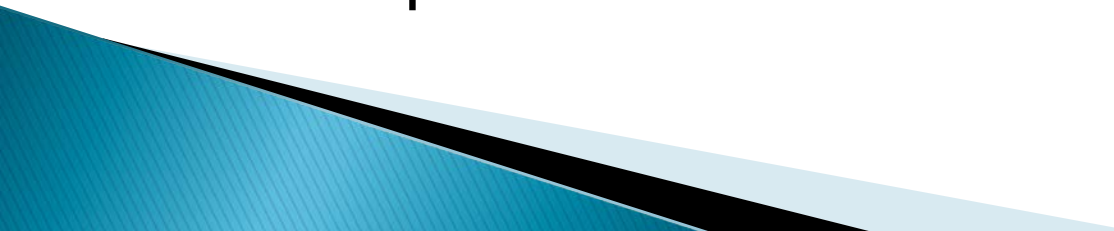
# Certificates of Possession

- ▶ CPs cannot be mortgaged – rights in a CP cannot be transferred to non-members
  - ▶ Member can apply to have Minister lease land under CP
  - ▶ Lease is between Her Majesty as landlord and developer as lessee
  - ▶ Holder of CP only signs consent to lease
  - ▶ Leases of 49 years or less require consent of First Nation council
  - ▶ Leases of more than 49 years require meeting of members of First Nation
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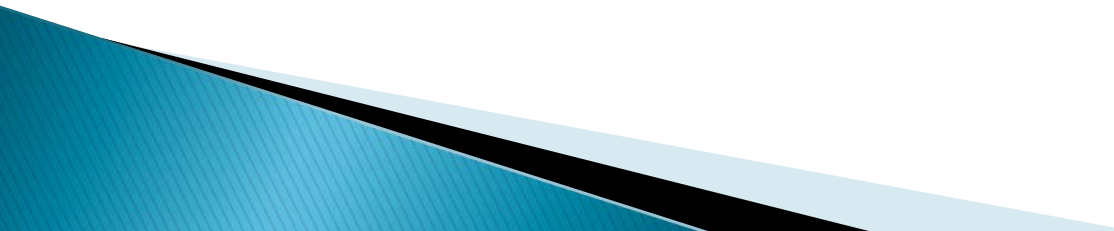
# Certificates of Possession

- ▶ Leases don't have legal effect until Minister has consented
  - ▶ Should request an assurance that no other charges affecting land have been consented to by the Minister
  - ▶ Should also request assurance when registering mortgage of such leases
  - ▶ It is advisable to review the original CP and Council Resolution consenting to the CP
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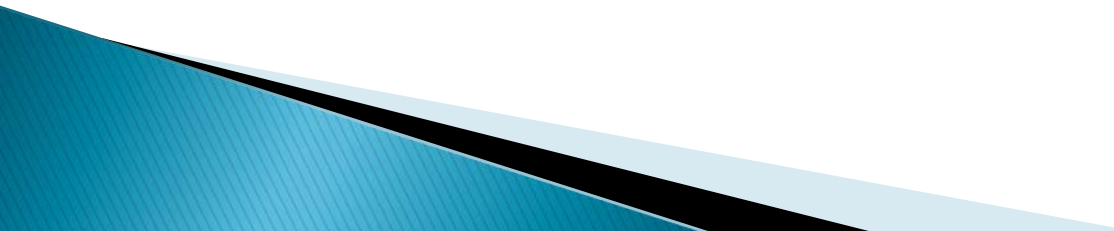
# Permits

- ▶ Permits issued under s. 28(2) are non-exclusive possession and only for specific permitted use
  - ▶ Used for easements and utility lines
  - ▶ MOUs/Letter Permits can be issued to other federal and provincial departments for limited uses
  - ▶ Permits under s. 58(4) relates to disposal of wild grass, dead timber, sand, gravel, clay and other non-metallic substances
  - ▶ It is advisable to determine if any permits or MOUs affect the land which forms part of the development
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# Designations – Leasing

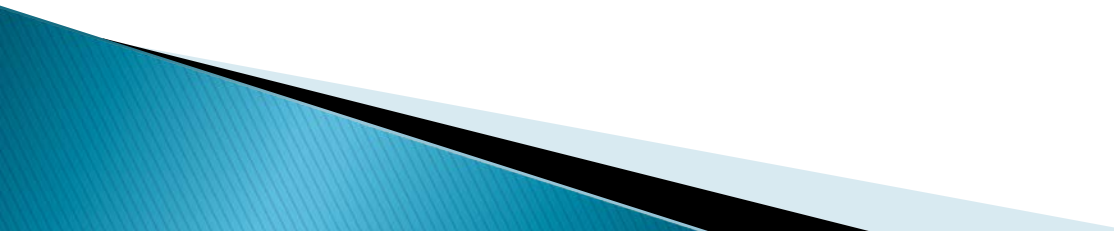
- ▶ Sections 37–41 of the *Indian Act* set out the requirements for a designation of reserve land
  - ▶ Designated land is still reserve land, but it can be leased to non-members
  - ▶ Requires a vote of the members of the First Nation
  - ▶ Advisable to review the actual vote process to ensure that a proper designation process was followed – valid designation process required for a valid lease
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# Designations – Leasing

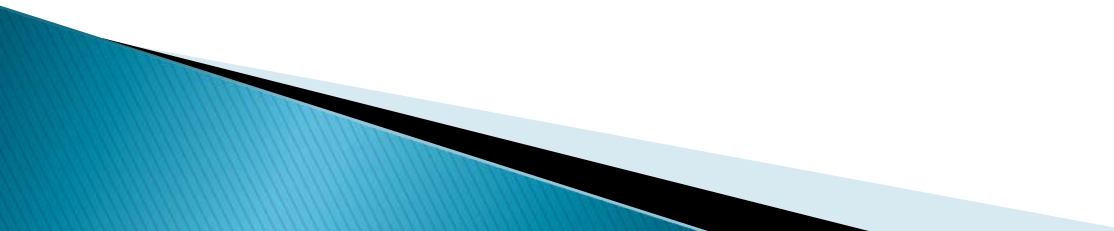
- ▶ Leases are issued by Her Majesty as landlord
  - ▶ Can have a developer be the tenant or can have a First Nation entity be the tenant
  - ▶ The First Nation entity then enters into a sublease to the developer
  - ▶ Leasehold interests can be mortgaged and assigned
  - ▶ Requires approval of the Minister
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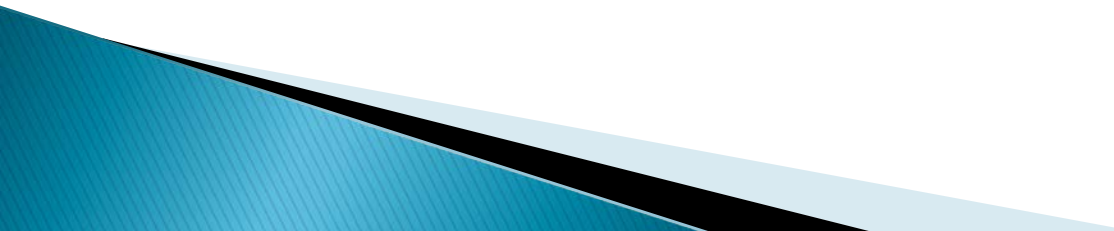
# Designations – Leasing

- ▶ Review the designation documents
  - ▶ Review the lease/sublease
  - ▶ Ensure that ministerial consents have been obtained
  - ▶ What other requirements are set out?:
    - Development plans
    - Service agreements
    - Access agreements or consents
    - Environmental assessments
    - Appraisal
    - Surveys
    - Leases of locatee/CP lands will often require the same items
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# Timber/Mining Regulations

- ▶ The removal of timber from reserves must be done by permit or licence under the *Indian Timber Regulations*
  - ▶ The removal of metallic substances from reserve musts be done by permit or lease under the *Indian Mining Regulations*
  - ▶ If any permits, licences or leases for such activities affect land to be developed, it is advisable to review them to see impact
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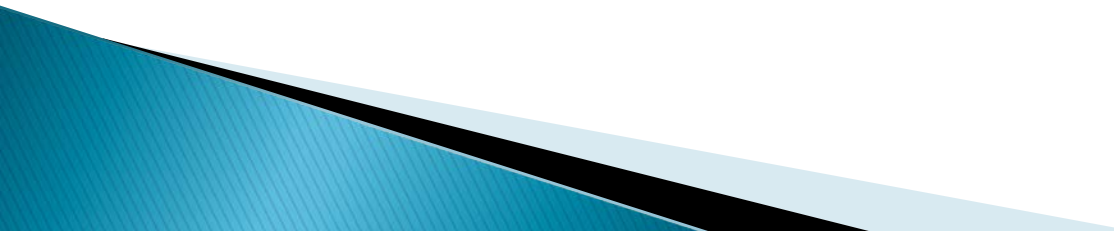
# First Nation Land – Indian Act

- ▶ Management of reserve land can be done a number of ways
  - ▶ Management by AANDC – all transactions require departmental involvement and approval
  - ▶ Delegated management by First Nation – commonly called “53/60” – First Nation deals with the land management of its reserves – reduced involvement of AANDC – First Nation is an agent of AANDC
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# On-Line Resource

- ▶ A good resource if the Land Management Manual of AANDC
- ▶ Chapters dealing with several topics, including permits, leases and designations
- ▶ <http://www.aadnc-aandc.gc.ca/eng/1315105587875>

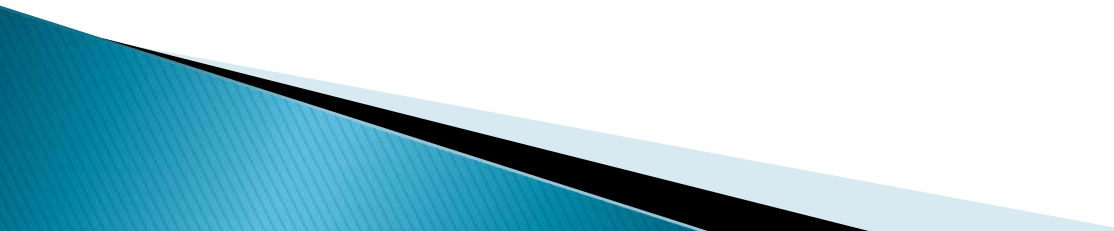
# First Nation Land – FNLMA

- ▶ *First Nations Land Management Act*
  - ▶ Opt in legislation – First Nations take over total management of reserve lands
  - ▶ Requires First Nations to develop land codes and land laws relating to management of reserve lands
  - ▶ Three First Nations in Manitoba have enacted land codes – Opaskwayak Cree Nation, Chemawawin Cree Nation and Swan Lake First Nation
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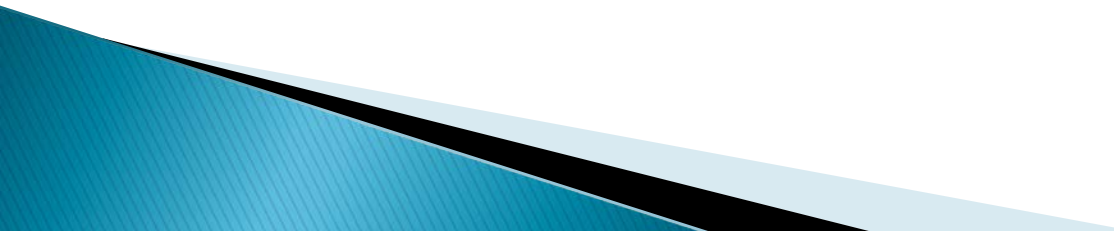
# FNLMA

- ▶ First Nations have power to:
  - manage land as owner
  - grant interests, rights and licences to land
  - Manage natural resources
  - enact laws dealing with interests and rights and development of land
  - develop enforcement measures
  - expropriate

# FNLMA

- ▶ Land codes are supposed to be made publicly available
  - ▶ Website of the First Nations Land Advisory Board has copies of many Land Codes:  
<http://www.fafnlm.com/>
  - ▶ Only the Opaskwayak Cree Nation Land Code is currently on the website
  - ▶ Land laws developed under the Code are not on the website
  - ▶ Advisable to review the applicable Land Code and to review any Land laws issued
  - ▶ Must also review instruments issued by First Nation
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# Indian Land Registry

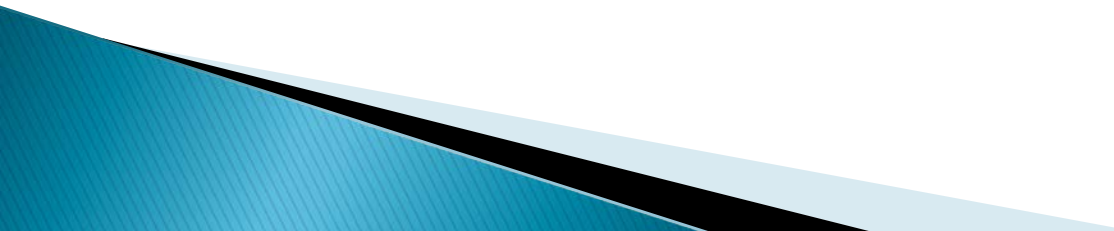
- ▶ Sections 21 and 55 of the *Indian Act* mandate the establishment of Registries dealing with reserve lands
  - ▶ Section 25 of the *FNLMA* mandates the establishment of a Registry dealing with reserve lands under the *FNLMA*
  - ▶ Indian Land Registry located at AANDC Headquarters in Ottawa
  - ▶ You can apply for access on-line or by contacting the ILR in Ottawa
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# Indian Land Registry

- ▶ Allows you to search an abstract of a parcel of reserve land
- ▶ Abstract will show you a listing of all instruments dealing with reserve from when it was created
- ▶ Won't assure whether a charge is valid or not
  - simply lists what charges/documents affect the reserve

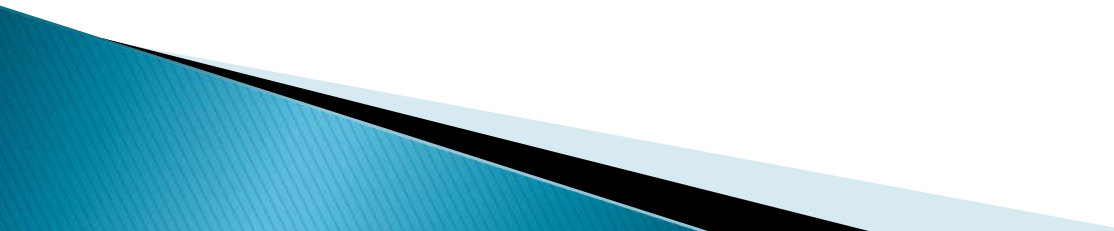
# Indian Land Registry

- ▶ ILR operates by way of policy – Indian Land Registration Manual 2006
  - ▶ <http://www.aadnc-aandc.gc.ca/eng/1100100034806>
  - ▶ Provides details on how the ILR operates and requirements for registering documents
  - ▶ Access to the ILR and registration of documents is currently free of charge
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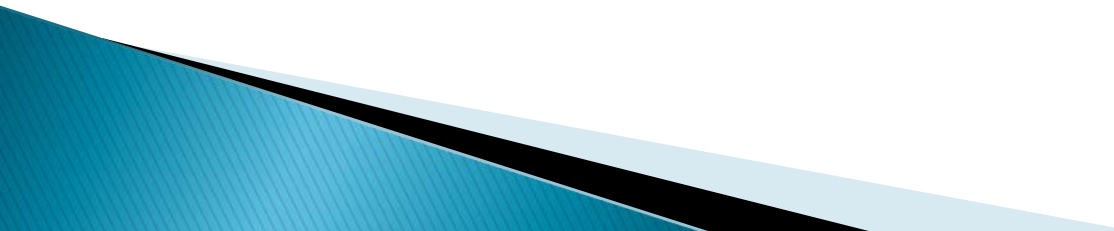
# Indian Land Registry System

- ▶ Can search both reserve lands under the *Indian Act* and the *FNLMA*
- ▶ Can search by First Nation, by reserve name, by instrument type, etc.
- ▶ Copies of most document can also be viewed and printed out
- ▶ ILRS website: <http://pse5-esd5.ainc-inac.gc.ca/ILRS/home/home.aspx>

# Indian Land Registry System

- ▶ There are some limitations to the ILRS:
    - Not a Torrens land title system – more of a deed registry system – you have to assess the risk
    - Not all documents may be registered
    - Not all registered interests may be on smaller specific parcels
    - Won't include traditional interests – occupations by certain individuals by First Nation – advisable to seek representation that there are no traditional interests affecting parcel of land
    - No assurance – mistakes or lack of priority – may want to consider title insurance
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# Conclusion

- ▶ In addition to the aspects of due diligence presented, need to consider what other due diligence required
  - ▶ If First Nation corporation involved, usual due diligence still required – searches in federal and provincial departments and agencies
  - ▶ Searches in municipal departments not normally required – reserves not part of municipalities
  - ▶ However, increase in number of urban reserves will often require municipal searches – service agreements often provide for application of municipal zoning and standards, fees in lieu of taxes, etc.
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# Conclusion

- ▶ With the increase in the number of reserves in Manitoba and the increased participation of First Nations in economic development, a corresponding increase in the awareness of due diligence involving developments on First Nations lands will be required of legal counsel