



PREPARING FIRST NATIONS LANDS FOR RENEWABLE ENERGY DEVELOPMENT

Energizing Atlantic First Nations:
Clean Energy Conference

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Topics to be Addressed

1. How to secure access rights on First Nations Lands
2. How to make your lands marketable and attractive to developers
3. Top considerations for First Nations Procurement Programs

What is Unique About First Nations Lands?

1. Indian Act (*Canada*) lands have restrictions:
 - Restrictions on ownership & land transfer
 - Restrictions on leasing lands
 - Restrictions on financing and obtaining security

While these restrictions exist, economic development is still possible....**BUT START PLANNING NOW**

What is Unique About First Nations Lands?

2. Provincial laws do not always apply.
 - The law itself must be examined to determine if it is applicable
 - Must review the “scope of the law” and “purpose”
 - Does it impact “land”, “use of land”, or “Indians” ?
 - If the law is in respect of lands only – **it may not be applicable**
 - However, some provincial laws can be referentially incorporated by operation of federal law from *Section 88 of the Indian Act*, provided it is a law that impacts persons

Take away: *Laws of general application apply so long as another law does not expressly exclude its operation.*

What is Unique About First Nations Lands?

3. There may be multiple jurisdictions (Fed/Prov/First Nations) that could apply on First Nations lands and it is not always clear. Verification with the Provincial body may be required if there is uncertainty.

Example: *Ontario created a separate enviro/energy approval for renewable energy projects. After much review, it was determined that the provincial energy approval did not apply on FN lands so long as the connection point to the grid was within FN lands.*

What is Unique About First Nations Lands?

4. There are no federal laws dealing with local land matters, such as zoning, land use and building codes. These are “property and civil rights” that are under the exclusive jurisdiction of the provinces.
- *Land titles Act* – does not apply
 - *Construction Lien/Builders Lien Act* – does not apply
 - *Development Charges Act* – does not apply
 - *Local Property tax laws* – do not apply (unless First Nation has its own property tax law)

Take Away: *Energy projects may be more easily developed on First Nations lands!*

What is Unique About First Nations Lands?

5. The federal laws that typically do apply are laws relating to environmental protection:

- *Canadian Environmental Protection Act**
- *Fisheries Act*
- *Species at Risk Act*
- *Canadian Environmental Assessment Act**

*if the First Nation has its own Land Code, it may also have its own environmental protection laws – **verification is required.**

What is Unique About First Nations Lands?

6. While the feds exercise jurisdiction over “lands reserved for Indians” and “Indian Act” through s.91(24) of the Constitution Act (1982), **not all lands are administered by the Indian Act.**
- First Nations Land Management Act (FNLMA) may apply
 - Self-government agreements may apply

Take Away: *First Nations who have enacted Land Codes pursuant to the FNLMA have taken positive steps to restore local autonomy and local laws. These may be communities that want to develop energy projects!*

How can you make your lands ready for renewable energy development?

1. Because lands cannot be transferred to developers or development companies owned by First Nations (i.e. no fee simple), **First Nations must put in place land leases.**

Consider: Long term 50 yr or 99 year head leases from Crown to First Nation and sublease to Project co (12 to 24 months)

Consider: Putting in place FNLMA Land Code and have full autonomy for own direct commercial leases from FN to Development Co

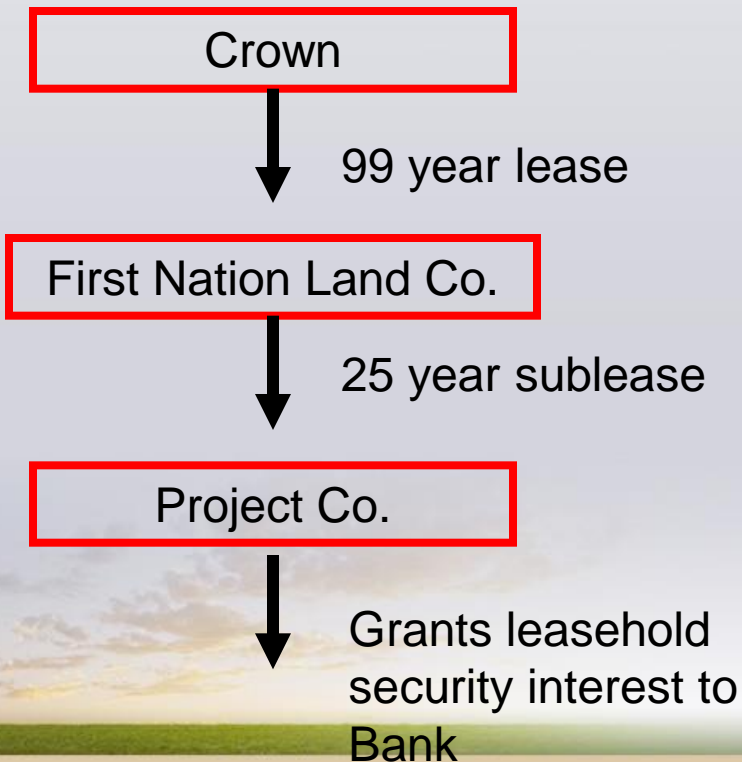
Consider: Lease from Certificate of Possession holder to FN or to Project Co. CP Lease will take much less than 12 months.

How can you make your lands ready for renewable energy development?

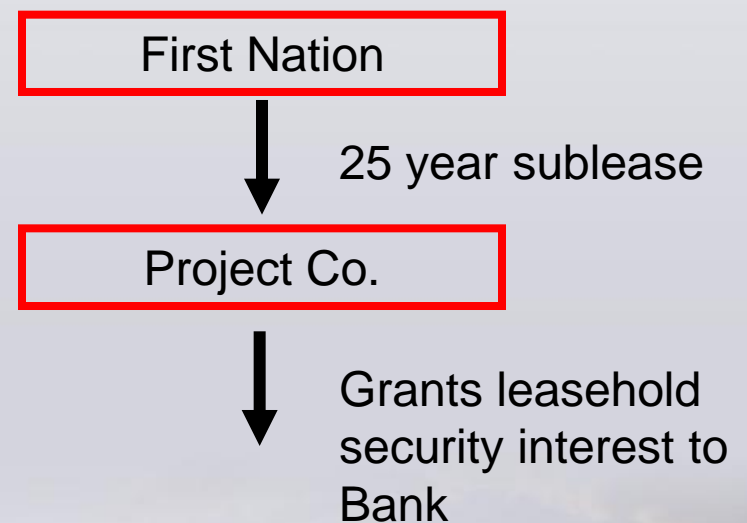
1. Lands also must be able to be financed to be attractive for development.
 - *S. 28(1) Indian Act* will void any deed, lease, contract or agreement of any kind that permits use of FN lands unless permission is granted by the Minister
 - *S. 89(1) Indian Act* – Real and personal prop of Member or Band is not subject to mortgage or seizure
 - *S. 89(1.1) Indian Act* – **Notwithstanding (1) a leasehold interest can be mortgaged.**

Establishing Leasehold Interests

Crown Leases (Indian Act)



First Nation Leases (FNLMA)



Recommendations for Energy Procurement

1. Procurement Rules for projects on First Nations should acknowledge that access rights, site control, and/or development rights may require extra time given the Indian Act regime
 - **Outside advocacy from First Nations is typically required so that First Nations projects are not inadvertently prejudiced by Procurement Rules**
2. Procurement Rules that incentivize economic partnerships among First Nations and proponents have been very successful in other provinces
3. Consider Rules that enable First Nation entrepreneurs not just First Nation governments to become developers/partners

Conclusion

- Regulatory regime on First Nations lands may be unfamiliar to many developers and their advisors.
- There are very few laws of general application related to land development (i.e zoning restrictions) on First Nations lands. This should create an opportunity!
- The sooner developers understand that projects can be financed on First Nations lands through leaseholds interests, the greater interest there will be for developing projects on First Nations lands.
- Leasing can take time and so **START PLANNING NOW** 😊

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