Jack Woodward, QC

16 types of Aboriginal Interests in Land that May Be Encountered by Lawyers and Notaries in BC

Photo credit: Union of British Columbia Indian Chiefs

From a Guest Lecture presented March 31, 2016, to BC Notary students in Ron Usher's SFU 611 Real Property class in the Master of Arts in Applied Legal Studies (MA ALS) program at Simon Fraser University.

This article lists 16 different types of aboriginal land interests; Lawyers and BC Notaries will normally come into contact with only 2 or 3 of them.

The interests frequently encountered are nested within a broad and complex system of indigenous land law. Transactions involving some of the aboriginal land interests are obscure, highly specialized, or even constitutionally off-limits to lawyers and Notaries!

The Basic List

1. Aboriginal Title Lands
2. Land-based Aboriginal Rights and Treaty Rights
3. Reserves: The Unallocated Lands in an *Indian Act* Reserve, Section 18
4. Reserves: Band-owned Houses under Customary Allotments
5. Reserves: "Buckshee Leases" by the Band or by Individuals, Section 28(1)
6. Reserves: Designated Reserve Land. Leases and Subleases under Section 53(1)(B.
7. Reserves: Certificates of Possession, Section 20
8. Reserves: Leases under Section 58(3).
9. Reserves: Section 28(2) Permits and Other Rights of Temporary Use
10. Reserves: Absolute Surrender
11. Reserves: The Right of a Non-Indian Spouse to Occupy the Family Home
12. Land Codes under the *First Nations Land Management Act*
13. Special Legislation such as Sechelt Lands
14. Lands Held pursuant to Modern Treaties
15. Métis Lands
16. Severalty Lands under Treaty 8

First, a brief note on Canada's Constitution

Canada was founded in 1763[1] under a constitution based on five principles.

1. Sovereignty of the British Crown
2. Democracy
3. The rule of law
4. Benefits for veterans
5. Protection of Indian lands

Protection of Indian lands is a central feature of one of the oldest written constitutions in the world and it is still a fundamental part of Canadian law. In 1867 Canada was divided into provinces[2] and became a federal state with exclusive federal legislative jurisdiction over Indian, Inuit,[3] and Métis[4] matters, including exclusive federal legislative jurisdiction over aboriginal lands.

Second, a Brief Note on Terminology

"**Indians**" is the name given by the constitution to the aboriginal occupants of Canada.

Similar legal terms include Inuit, Métis, Aboriginal, First Nations, Indigenous, Native.

Since 1763 the word "Indian" has been a legal term and the question, "What are the land rights of Indians?" has been a legal question.

1. Aboriginal Title Lands

There is only one tract of aboriginal title land known to exist in British Columbia: About 2000 square kilometres in the Nemiah Valley and north of Chilko Lake, declared to belong to the Tsilhqot'in people by the Supreme Court of Canada in 2014[5]. It is likely there are many more areas of Crown land that are subject to aboriginal title within the province.

1 Royal Proclamation of October 7, 1763.

2 For the second time. In 1791 the "Province of Quebec" was divided into Upper Canada and Lower Canada. In 1840 those two provinces were united into the "Province of Canada." In 1867 the Province of Canada was divided into Ontario and Quebec.

3 Re. Eskimo Reference [1939] SCR 104.

4 *Daniels v. The Queen*, 2016 SCC 12.

5 *Tsilhqot'in Nation v. Canada and B.C.* 2014 SCC 44.

Almost every part of British Columbia is subject to either aboriginal rights or treaty rights.

The process for deciding if land is subject to aboriginal title is usually the British Columbia Treaty Process or, as happened in Tsilhqot'in, by Court decision. Lawyers and Notaries are never involved in land transactions involving aboriginal title lands.

Why? The principles outlined in the Royal Proclamation of 1763 apply with full force to those lands. Unless and until there is a surrender, as described in the Royal Proclamation, those lands are off limits to non-Indians. Internal land transactions are governed by the laws of the particular aboriginal nation; lawyers and Notaries do not have the expertise to give advice about them.

2. Land-based Aboriginal Rights and Treaty Rights

Almost every part of British Columbia is subject to either aboriginal rights or treaty rights. Those rights are typically the rights to hunt, fish, trap, and gather. There is no registry or public database in which the existence of those rights to a particular tract of land is recorded.

Fee simple lands are often subject to such rights,[6] although the impact is obviously diminished when there are no longer any big game animals to hunt or any fur-bearing animals to trap.

Legal professionals should never advise their clients that the specific lands being conveyed are free of aboriginal or treaty rights. The fact that such rights have fallen into disuse does not mean they do not exist. As a practical matter, for most residential and commercial purposes, the existence of those rights is not a serious concern to the non-Indian purchaser.

6 *R. v. Bartleman*, 12 DLR (4th) 73; 55 BCLR 78; 13 CCC (3d) 488; [1984] 3 CNLR 114, is a B.C. Court of Appeal case that upheld a treaty right to hunt on some fee simple lands just north of Duncan. There are dozens of similar examples and they cover virtually the whole province.

3. *Indian Act* Reserves: The Unallocated Lands in a Reserve. Sections 18 and 30

Indian Act

18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

That is the starting point for reserves. The *Indian Act* carries forward a policy for reserves that is almost identical to the policy set down by the Royal Proclamation of 1763. There are over 600 bands in Canada, with over 2000 reserves, and the *Indian Act* governs most of them. Most reserves remain communally held lands controlled by the Chief and Council of the band. It is trespass for a nonmember of the band to be on a reserve.

Indian Act

30 A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

Lawyers and BC Notaries should never engage in a transaction concerning an interest in the ordinary unallocated lands in a reserve because any such dealing will almost always run afoul of the *Indian Act*.

4. Reserves: Band-owned Houses under Customary Systems, Known as "Customary Allotments"

Band members often have houses on the reserve that are owned by the band. The houses may be held pursuant to long-settled expectations under customary aboriginal law unique to each band. There is no registration system outside the band for such rights of ownership. Houses are passed from generation to generation pursuant to the laws and customs of the band. That is how most Indians acquire their houses on reserve in British Columbia.

Lawyers and Notaries usually have no role in the internal transfers of ownership of customary allotments. Wills and estates dealing with such houses, and contracts for the purchase and sale of such houses, are seldom the subject of Court proceedings and are almost never dealt with by lawyers and Notaries in BC. Here is the reason.

Indian Act: Possession of Lands in Reserves

20(1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

We will come back to certificates of possession below. For now, the question a lawyer or BC Notary asks when a client wants to deal with ownership of a band member's house on reserve is, "Is there a certificate of possession under section 20 of the *Indian Act?*" If the answer is No, then the matter is almost never dealt with in the mainstream legal system.

5. Reserves: "Buckshee" Leases by the Band or by Individuals, Section 28(1).

The *Indian Act* carries forward the policy of the Royal Proclamation of 1763 by prohibiting private leases for the use of reserves. Such rentals or leases are often called *buckshee*, an odd, informal word that hints at the taint of illegality of these arrangements. Lawyers and BC Notaries frequently encounter such leases and are asked to enforce them, assign them, value them, or otherwise treat them as a form of property.

For 253 years they have been illegal and they are still illegal. Here is why.

Indian Act

28(1) Subject to subsection (2), any deed, lease, contract, instrument, document, or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve, **is void.**

6. Reserves: Designated Reserve Land. Leases and Subleases under Section 53(1)(b).

The most common type of transaction where lawyers and Notaries may encounter interests on a reserve is where the land has been "designated" under the *Indian Act*. A designation is a conditional surrender.

That means that under the policy established by the Royal Proclamation, carried forward by the *Indian Act*, a public decision by the band membership has been made to release some of the reserve land for non-Indian settlement. The process of designation is formal and time-consuming and beyond the scope of this writing. Once there is a designation, section 53(1)(b) of the *Indian Act* applies.

Indian Act

53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(a) manage or sell absolutely surrendered lands; or

(b) manage, lease or carry out any other transaction affecting designated lands.

Usually the Minister enters into a head lease with a corporation. That corporation is sometimes owned by the band. The corporation then becomes the landlord of a number of subleases that can be registered in the Surrendered and Designated Lands Register in Ottawa. It is a registry system roughly similar to the British Columbia Land Title Registry. Mortgages can be created through assignments of subleases.

This is a specialized field of practice for lawyers and Notaries, but it is becoming increasingly common. For example, many of those transactions have taken place on the reserves of the Penticton, Campbell River, Kamloops, Okanagan, and Musqueam First Nations, to name just a few. (But see also the section on Land Codes below.)

The only way to remove reserve lands from federal jurisdiction and place them within the British Columbia land title system is by way of absolute surrender.

7. Reserves: Certificates of Possession under Section 20

Some bands have allocated reserve lands to individual members of the band.

Indian Act

20 . . .

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

Those allocations are very similar to fee simple ownership off reserve, with some very important limitations. The main limitation is that a certificate of possession cannot be sold to a nonmember of the band. Upon death, the interest can pass by Will or by intestacy, but only to a band member. Lawyers and Notaries can assist in drafting such transfers but again, that is a specialized field.

There is a Registry in Ottawa for such interests, called the Reserve Land Register, but that is a different registry from the Surrendered and Designated Lands Register referenced above.

Important: It does not have a guarantee of priority based on the time of registration. There is no guarantee that registration first in time creates a priority interest. The opinion a lawyer or Notary can give, based on such a registration, is therefore severely limited.

8. Reserves: Leases under Section 58(3)

Leases can also be created from Certificate of Possession lands under section 58(3) of the *Indian Act*.

Indian Act

58(1) . . . . ,

(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

Once such a lease has been created, it functions similarly (but not identically) to a lease created under section 53(1)(b) referenced above. Lawyers and BC Notaries frequently assist clients with subleases of such properties, but again, that is a specialized area, and the special situation applicable to each band must be considered.

9. Reserves: Section 28(2) Permits and Other Rights of Temporary Use

Several sections of the *Indian Act* allow for the creation of temporary use permits. The most common is section 28(2), frequently used for power lines, pipelines, and similar rights of way.

Indian Act

28 . . .

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

They are not usually transferrable interests and lawyers and Notaries will seldom be involved in dealing with them. There is a great deal of complexity in each case and frequent litigation. Specialized advice should be obtained about them.

10. Reserves: Absolute Surrender

The only way to remove reserve lands from federal jurisdiction and place them within the British Columbia land title system is by way of absolute surrender. In modern times that is never done but there are a few archaic examples that occasionally show up.

A historical land search or abstract may show that land was once part of a reserve, but was subject to a

"surrender" by the band. It is very important to determine if that was an absolute or conditional surrender. If the latter, then it is now known as "designated" land and it is still under the *Indian Act*.

Indian Act

38(1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

39(1) An absolute surrender is void unless

(a) it is made to Her Majesty;

(b) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender, or

(iii) by a referendum as provided in the regulations; and

(c) it is accepted by the Governor in Council.

11. Reserves: The Right of a Non-Indian Spouse to Occupy The Family Home

Legal professionals will frequently have a non-Indian client whose spouse is, or was, a band member, and during the marriage the spouse lived on a reserve. Your client may have a right to occupy the family home under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA).

As of December 16, 2014, the "Provisional Federal Rules" came into force for most First Nations. That is one of the rare situations where a non-Indian has a right to live on a part of a reserve that has not been formally leased. The right to occupy the family home is an interest that cannot usually be sold, mortgaged, or given to the kids in a Will, but it might be taxed.

The prudent lawyer or BC Notary will examine each reserve separately to ascertain the exact legal regime in force on those lands…

12. Land Codes under the *First Nations Land Management Act*

Roughly one quarter of British Columbia's First Nations have a Land Code. Most of the First Nations located in or near urban areas have a Land Code, and most land transactions on reserves in British Columbia are now subject to a Land Code.

Before agreeing to assist a client regarding an on-reserve land transaction, a lawyer or Notary must check to see if the particular band has a Land Code and, if so, must take into account the provisions of the *First Nations Land Management Act* (FNLMA) and the particular Land Code itself and the laws that have been enacted pursuant to the band's Land Code. The FNLMA enables a First Nation to replace the land provisions of the *Indian Act* with the band's own laws.

There are no general rules. The prudent lawyer or BC Notary will examine each reserve separately to ascertain the exact legal regime in force on those lands, before undertaking a land transaction on that reserve.

13. Special Legislation such as Sechelt Lands

In a small number of cases, there is special legislation that takes the reserves of the band completely outside the *Indian Act*. An example is the *Sechelt Indian Band Self-Government Act* that creates a completely separate legal system for the Sechelt Band.

Sechelt Indian Government District

17 There is hereby recognized the Sechelt Indian Government District, which shall have jurisdiction over all Sechelt lands.

18 The District is a legal entity and has the capacity, rights, powers and privileges of a natural person and, without restricting the generality of the foregoing, may

(a) enter into contracts or agreements;

(b) acquire and hold property or any interest therein, and sell or otherwise dispose of that property or interest;

Lawyers and BC Notaries work within that system.

There are a few other special statutes in Canada. Westbank First Nation, for example, has a similar statute, but it is different from Sechelt, so the rules in one system do not transfer immediately to another system. The land offices in such First Nations are usually very helpful to lawyers and BC Notaries in that regard. But, as usual, it is not always a good idea for practitioners to take legal advice from government officials and this is no exception.

14. Lands Held under Modern Treaties

Only a few of British Columbia's First Nations have modern treaties. Tsawwassen is a notable example. In such cases the land transactions on reserve are governed primarily by the Treaty, which is a constitutional document that overrides the *Indian Act* and any other statute. Before agreeing to assist a client regarding an on-reserve land transaction for a First Nation with a modern treaty, a lawyer or BC Notary must fully understand the treaty itself and the laws enacted pursuant to it.

15. Métis Lands

Your Métis client just moved from Alberta and owns some land back home. Can you help your client sell it or deal with it?

The Supreme Court of Canada confirmed in *Daniels v. The Queen*, 2016 SCC 12, that Métis are "Indians" within the meaning of section 91(24), so they are subject to federal jurisdiction. But Métis lands are held collectively under an Alberta statute, the *Métis Settlements Act*, which reads a lot like the *Indian Act*.

You are thinking, "Hey, isn't that Alberta statute unconstitutional?" Wrong. It is valid, probably because it is an ameliorative measure under section 15(2) of the *Charter of Rights and Freedoms*, 1982.[7] There is plenty of litigation about these unique lands. If you have nerves of steel, you could buy lots of insurance and join the action or maybe it would be more prudent to work with one of the small group of experts that specialize in this fascinating and complex subcategory of indigenous lands.

Practitioners should never be embarrassed that they don't know this information; it is complicated, exotic, and has gone through major changes in the last 10 years.

16. Severalty Lands under Treaty 8

Most legal professionals will never encounter the rare and valuable "severalty lands" created under Treaty 8. Less than .001 percent of British Columbia's land area is held under this unusual tenure, which is found north of Prince George near Tumbler Ridge and Mackenzie. Severalty lands are always subject to a "proviso as to non-alienation" and cannot be sold, mortgaged, or taxed.

But there is no rule book and they can only be properly understood through litigation.[8] If you are a legal professional who has a once-in-a-lifetime encounter with severalty lands in your practice—like a hiker who stumbles across a rare white spirit bear, take a picture, back away slowly, and call an expert.

Obviously, this brief introduction is just a list, not an analysis. Lawyers and BC Notaries may find this a useful checklist to orient themselves to the type of land or the type of interest with which they are dealing.

Practitioners should never be embarrassed that they don't know this information; it is complicated, exotic, and has gone through major changes in the last 10 years. There are reported cases of solicitor's negligence where practitioners ventured into this field without knowing the whole story!

My thanks to Gary Campo, who read this over and offered suggestions, but the errors and omissions are entirely my own. ▲

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7 *Daniels v. The Queen*, 2016 SCC 12, at paragraph 51, and *Peavine Métis Settlement v. Alberta*, 2011 SCC 37.

8 See, for example, *Chingee v. Canada* (Attorney General), 2005 BCCA 446.

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Statutory and Treaty Registration Systems on Aboriginal Lands

Photo credit: Union of British Columbia Indian Chiefs

These are the second and third parts of a four-part series discussing the types of Aboriginal lands and the several systems for registering interests on First Nations lands in Canada.

PART 1
Sixteen types of Aboriginal interests in land that may be encountered by lawyers and Notaries in BC (published in *The Scrivener*, Winter 2016, page 65)

PART 2 In This Issue
Statutory and Treaty Registration Systems on Aboriginal Lands

PART 3 In This Issue
Which Aboriginal Land Registry You Should be Using and How to Use Each Registry

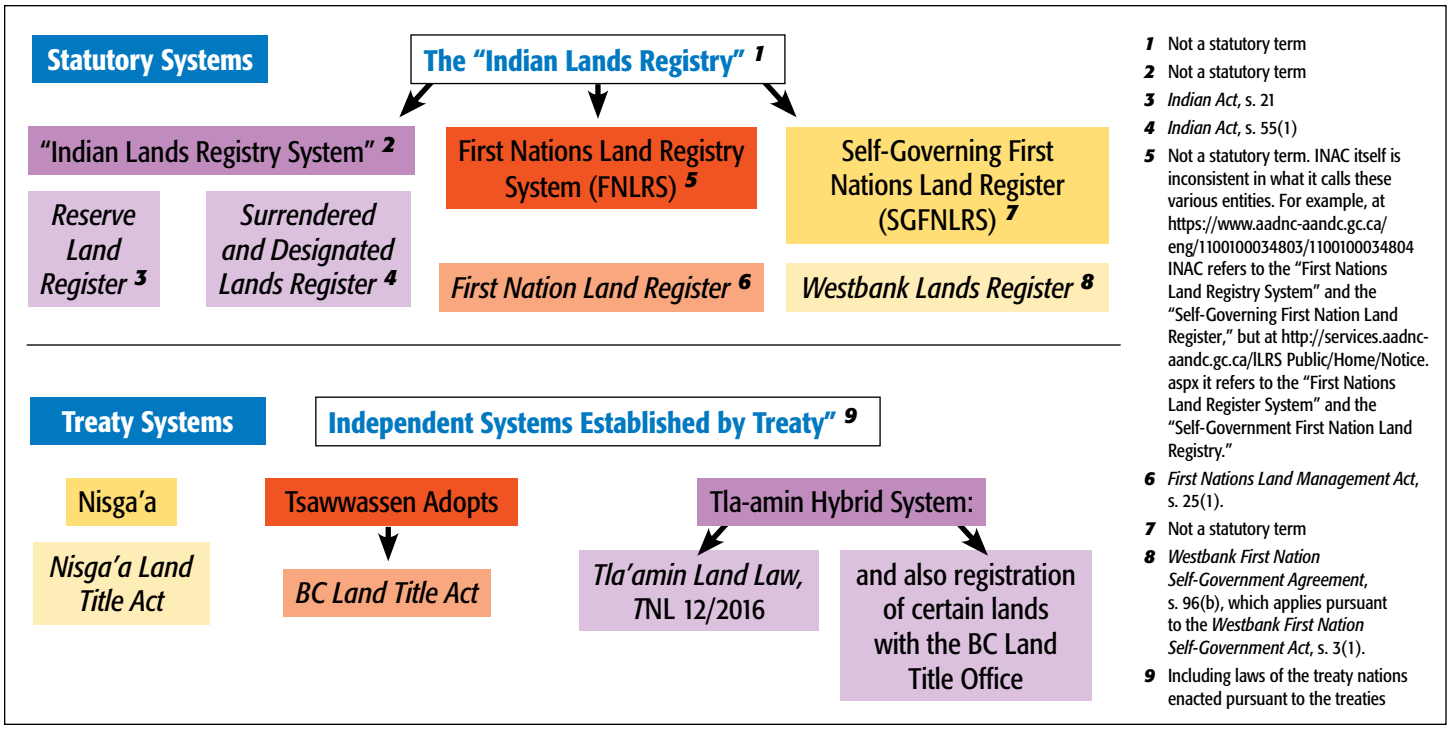
Forthcoming in the Winter 2017 Edition of *The Scrivener*

PART 4
The Legal Effect of Registration in an Aboriginal Land Registry

Of the 16 different types of Aboriginal lands, most are never encountered by legal practitioners.

Lawyers and BC Notaries are mainly interested in securing their clients' property rights through registration of their interests. There are several different types of First Nations lands on which interests can be registered and several different registers where those interests can be recorded.

Here is the "family tree" of registration systems for Aboriginal lands in Canada.



1 Not a statutory term
2 Not a statutory term
3 *Indian Act*, s. 21
4 *Indian Act*, s. 55(1)
5 Not a statutory term. INAC itself is inconsistent in what it calls these various entities. For example, at https://www.aadnc-aandc.gc.ca/eng/1100100034803/1100100034804 INAC refers to the "First Nations Land Registry System" and the "Self-Governing First Nation Land Register," but at http://services.aadnc-aandc.gc.ca/ILRS Public/Home/Notice.aspx it refers to the "First Nations Land Register System" and the "Self-Government First Nation Land Registry."
6 *First Nations Land Management Act*, s. 25(1).
7 Not a statutory term
8 *Westbank First Nation Self-Government Agreement*, s. 96(b), which applies pursuant to the *Westbank First Nation Self-Government Act*, s. 3(1).
9 Including laws of the treaty nations enacted pursuant to the treaties

Comparing First Nations Land Registers to the BC Torrens System

In this series of articles, we frequently compare the compare the provincial (Torrens) system with the First Nations land registration systems because legal professionals are already familiar with the use of the provincial land registration system. A provincial land register includes searchable records that tell who holds title for each parcel of land, as well as any interests registered against that title.

If the practitioner wishes to transfer title or record a new interest, he or she will typically

- perform a pre-registration search of the state of the title,
- submit a registration package to the registry, and
- conduct a postregistration search to ensure the transfer or new interest has been registered and that no other competing interests have appeared in the intervening time.

Registering interests on First Nations lands, such as Indian Reserve lands, is quite different. There are a number of unique features and considerations of which a lawyer or a BC Notary should be aware.

What Type of First Nations Land is it?

The procedures involved in registering an interest on First Nations land may vary considerably depending on what type of First Nations land it is. For example, the legal professional may be dealing with reserve lands, treaty lands, or the lands of self-governing First Nations.

1. Indian Reserve Lands

If the land in question is on a reserve,[1] the next question for the legal practitioner is whether that reserve is administered under the *Indian Act* or the *First Nations Land Management Act* (FNLMA). By default, reserves are administered under the *Indian Act*. A First Nation may, however, elect to opt out of certain provisions of the *Indian Act* by passing its own Land Code, thereby bringing it under the FNLMA instead.

The procedures involved in registering an interest on First Nations land may vary considerably…

Reserve lands administered under the FNLMA will have different procedures for registering interests. A list of First Nations currently operating under the FNLMA ("operational"), as well as those working toward developing a Land Code ("developmental"), can be found at https://labrc.com/member-communities/.

Unlike fee simple lands, title to reserve lands is held by the Federal Crown in trust for the band and does not change hands in a transaction (unless the land in question is being absolutely surrendered to the Crown, which has not happened in modern times).

Instead, interests in reserve lands can be registered on particular parcels. Legal practitioners are most likely to encounter interests involving "designated" reserve lands, which have been "conditionally surrendered" by the band so they can be leased.

2. Treaty Lands

When dealing with lands subject to a treaty between the Crown and First Nations, especially a modern treaty, the legal practitioner will need to consult the terms of the treaty in question to see how transactions involving land are handled. Depending on the terms of the treaty, the land may also be subject to the laws of the First Nation.

Unlike fee simple lands, title to reserve lands is held by the Federal Crown in trust for the band and does not change hands in a transaction…

Some First Nations administer lands pursuant to self-government agreements with the Federal Crown.

3. Lands of Self-Governing First Nations

Some First Nations administer lands pursuant to self-government agreements with the Federal Crown. In BC, the Sechelt Indian Band and the Westbank First Nation have such agreements.

As with treaties, the details of land management will vary with the terms of the agreement; the legal practitioners will need to familiarize themselves with the details of the agreement in question. For example, the agreement might give the First Nation law-making power over their Indian reserves or might convert those reserves to fee simple lands registered within a provincial land registry.

Unlike the 100-year-old Torrens system, Aboriginal land registration systems are relatively new to the legal scene; there are ongoing growing pains as those systems are brought on stream. There will be changes to those systems and there may be errors in this article.

In the fourth and final article in this series, we will attempt to bring the reader up to date with recent changes and fix any errors we have made. Please contact us if you find a mistake.

NEXT ARTICLE IN THIS SERIES

Which Aboriginal Land Registry You Should be Using and How to Use Each Registry ▲

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1 Indian Act, s. 2(1) "reserve": (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band (etc.).

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Which Aboriginal Land Registry You Should be Using and How to Use Each Registry

Of the 16 different types of Aboriginal lands, most are never encountered by legal practitioners.

But when dealing with one of the types of interest that can be bought, sold, or leased, the first step for lawyers and BC Notaries who are attempting to secure their clients' property rights through registration of their interests is to determine which registry is applicable.

Which Register Do You Use?

After determining the type of land, the legal practitioner will want to determine the appropriate registry in which to register the instrument.

The Indian Lands Registry

Reserve lands are administered by Indigenous and Northern Affairs Canada (INAC) via the Indian Lands Registry, based out of Ottawa, ON, (the "Registry").[1] The Registry is

Reserve lands are administered by Indigenous and Northern Affairs Canada…

comprised of several separate registry systems:

- The **Indian Lands Registry System (ILRS)** consists of interests in and documents related to interests in reserve lands administered under the *Indian Act*.

  The ILRS consists of two separate registers.

  - The **Reserve Land Register** is established by section 21 of the *Indian Act*. It records instruments respecting lands allotted to individual band members, as well as other transactions.
  - The **Surrendered and Designated Lands Register** is established by section 55 of the *Indian Act*. It records particulars in connection with any transaction affecting absolutely surrendered or designated lands.
- The **First Nations Land Registry System (FNLRS)** records instruments relating to Reserve lands administered under the FNLMA. The register within the FNLRS is known as the **First Nation Land Register**, established pursuant to section 25(1) of the FNLMA and the *First Nations Land Registry Regulations*. Do not confuse the "registry," which is an administrative office, with the "register" itself.[2]

1 Section 2 of the First Nations Land Registry Regulations requires the location of the Register to be in the National Capital Region. Section 25(1) of the First Nations Land Management Act says, "The Minister shall establish a register to be known as the First Nation Land Register." The First Nations Land Registry Regulations define the "Register" to mean "[T]he First Nations Land Register established by the Minister under subsection 25(1) of the Act." Clearly the register does exist, but the authors have been unable to locate any clear evidence as to when or how the Minister "established" it.

2 Section 25(1) of the FNLMA requires the Minister to establish the "First Nation Land Register" (no s), but the definition of Register under section 1 of the First Nations Land Registry Regulations refers to the First Nations Land Register (with an s). In the authors' opinion, the statute should take precedence over the regulation, so the correct name of the register has no s, and

- The **Self-Governing First Nations Land Register (SGFNLR)**, established in accordance with the terms of First Nations self-government agreements, records documents that grant an interest in self-governed First Nation lands. (More on this later.)

All three registry systems can be accessed through a single website. http://services.aadnc-aandc.gc.ca/ILRS_Public/home/home.aspx

Treaty Lands

If dealing with treaty lands, the legal professional will need to consult the terms of the treaty and possibly the First Nation's constitution and laws, to determine the appropriate registry. Some treaties may provide for fee simple ownership of the treaty lands, registered within the provincial land registry as with any other title (although there will likely be some additional restrictions on alienation found within the treaty itself).

The treaty may also empower the First Nation to pass laws concerning the alienation of treaty lands or even to establish the First Nation's own separate land register. The legal professional will wish to contact the First Nation to inquire about what register records interests in the land in question, what laws and procedures apply to registering an interest, etc.

There are presently four modern treaties in effect that give First Nations powers over some or all their former reserve lands: The *Nisga'a Final Agreement*, the *Tsawwassen First Nation Final Agreement*, the *Maa-nulth First Nations Final Agreement*, and the *Tla'amin Final Agreement*.

- The *Nisga'a Final Agreement* gives the Nisga'a Nation fee simple ownership of "Nisga'a Lands," which are core lands over which the Nisga'a Lisims Government has jurisdiction, and also "Nisga'a Fee Simple Lands" (also known as Category A and Category B lands), which are former reserve and Crown lands over which the Nisga'a Lisims Government does not have jurisdiction. While the Agreement authorizes the Nisga'a Lisims Government to use the provincial land title system, it has instead elected to set up its own land title system under the *Nisga'a Land Title Act*. This land title system applies to Nisga'a Lands, but not to Nisga'a Fee Simple Lands, which are part of the provincial land title system.

If dealing with treaty lands, the legal professional will need to consult the terms of the treaty and possibly the First Nation's constitution and laws, to determine the appropriate registry.

The Nisga'a Land Title Office can be contacted through its website at http://www.nisgaalandtitle.ca/.

- The *Tsawwassen First Nation Final Agreement* grants fee simple ownership of former reserve lands and certain other lands to the Tsawwassen First Nation (TFN). Some of those lands are subject to restrictions on alienation as set out in the Agreement and TFN laws, such as the *TFN Land Act*. The Agreement authorizes the TFN to pass laws establishing their own land registry or to register lands in the BC Land Title system. Thus far, transactions involving TFN treaty lands are handled through the BC Land Title Office.

  Please also note: SC. 2008, c. 32, s. 25: "As of the effective date of the Agreement, registrations or records affecting Tsawwassen Lands that are registered or recorded in a land registry under the *Indian Act* or the *First Nations Land Management Act* have no effect." The treaty also identifies certain "Other Tsawwassen Lands," which are lands that the Tsawwassen own in fee simple but that are not under Tswwassen's legal jurisdiction.

- The *Maa-nulth First Nations Final Agreement* is an agreement between the Crown and five separate First Nations: Ohiaht, Toquaht, Uchucklesaht, Ucluelet and Kyuquot[3]—all on the west coast of Vancouver Island. The Agreement contains some elements that are specific to each individual Nation but, broadly speaking, it gives each Nation fee simple ownership of former reserve and Crown lands as well as law-making authority over its lands, subject to the restrictions on alienation set out in the Agreement and in each Nation's laws. Each Nation may apply to have its lands registered in the BC Land Title Office. In practice, the actual procedures and registries used by each Nation may vary; for example, the Huu-ay-aht First Nation established its own web-based lands registry while some other signatory Nations may be using the provincial system. They are mostly rural First Nations without a great deal of commercial development on their lands, so that is a very specialized area.

- The *Tla'amin Final Agreement* gives the Tla'amin Nation (near Powell River, formerly known as Sliammon) fee simple ownership of former reserve and Crown land and gives the Nation law-making authority over those lands. The Agreement also authorizes the Nation to use the provincial land title system or to establish its own land title or land registry system for lands not registered in the provincial system. At this time, the Nation appears to have adopted a hybrid system: The *Tla'amin Land Law,* TNL 12/2016, that provides for the registration of certain lands with the BC Land Title Office, while the *Lands and Interests File Registry Law*, TLN 15/2016, establishes a Tla'amin

the regulation contains a typo. However, the "Registry" is different from the "Register" and the Regulations can call the Registry by whatever name they want; in this case they include the s throughout. To summarize, Register = "Nation" (no s); Registry = "Nations" (with the s).

3 These are the anglicized names. Most of the Maa-Nulth First Nations have a preferred spelling that differs from this.

Lands Registry to maintain records in relation to "Non-Titled Lands," i.e., lands that are not registered in the provincial system, as well as some "Titled Lands" prescribed by regulation.

Self-Governing First Nations

Both the Sechelt Indian Band and the Westbank First Nation in BC have self-governance powers, including powers over land, granted by special legislation. Under the *Sechelt Indian Band Self-Government Act*, SC 1986 c. 27, title to former reserve land has been transferred to the Band in fee simple; the Band has full power to dispose of the land or any interest in it, subject to the Band's own constitution. The Band is authorized (but not required) to use the provincial land title system for registration of land transactions. Transactions not registered under the provincial system are instead registered in the Reserve Land Register under the *Indian Act*.

The *Westbank First Nation Self-Government Act*, SC 2004 c. 17, gives full force of law to the Westbank First Nation Self-Government Agreement signed October 3, 2003. Note that the Agreement is not considered to be a treaty. Under the Agreement, title to Westbank First Nation Indian Reserves remains with the federal Crown, but the Westbank First Nation has all the rights, powers, responsibilities, and privileges of an owner of those lands, and the lands are administered under Westbank's own laws rather than the *Indian Act*. Transactions concerning those lands are recorded in Westbank Lands Register, a subregister of the SGFNLR accessible through the Indian Lands Registry website.

The WFN Land Registry is administered by INAC pursuant to the Westbank First Nation Land Registry Regulations (SOR/2007-232) under the *Westbank First Nation Self-Government Act* (S.C. 2004, c. 17). Pursuant to section 99.2 of the WFN Constitution, however, the Westbank Lands Office is responsible for administering Westbank lands themselves, as well as receiving and reviewing instruments that purport to affect Westbank Lands, forwarding instruments for registration upon request and maintaining and protecting records in relation to Westbank Lands, among other things. A copy of the Register is kept at the Westbank Lands Office. The Regulations are almost identical to the First Nations Land Registry Regulations, with "Westbank Land" in place of "First Nations Land."

Any instrument that grants or claims a right or interest in reserve land or transfers, encumbers, or affects Indian reserve lands, designated lands, or surrendered lands, may be registered in the ILRS.

Thus, like the FNLRS, the Registry records "document[s] that affect Westbank land" (section 10(1)), and there is a priority scheme by date and time of registration (subsections 28 to 30). Further, section 112.2 of the WFN Constitution states, "An interest in Westbank Lands is not enforceable unless it is registered in the Westbank Lands Register." The website is http://www.wfn.ca/bitterroot/landsregistry.htm?RD=1.

Title remains with the Crown pursuant to section 87 of the Westbank First Nation Self-Government Agreement (that has force of law under section 3(1) of the Act). Section 113.2 of the WFN Constitution prohibits cancellation or forfeiture of interests in Westbank lands if it would adversely affect an interest in those Westbank lands held by a third party, or a claim against, or interest in, those Westbank lands held by Westbank.

Westbank Lands are also subject to Westbank laws, particularly Part XI of the WFN Constitution (that Part is referred to elsewhere on the WFN website as the "Land Rules") and the *WFN Land Use Law No. 2007-01*. Per section 32 of the *Regulations*, however, the *Regulations* prevail over Westbank Law in the event of conflict.

How to Register the Instrument

Registering an Instrument in the ILRS

Detailed procedures for registering instruments in the Indian Land Registration System (ILRS) are set out in the *Indian Lands Registration Manual* (the "Manual"), published by the Registry. The following summary is based on the December 2014 version of the Manual.

What Instruments May be Registered

Any instrument that grants or claims a right or interest in reserve land or transfers, encumbers, or affects Indian reserve lands, designated lands, or surrendered lands, may be registered in the ILRS.

Who May Register an Instrument

An instrument may be submitted for registration by the person transferring, receiving, or claiming the right or interest ("the applicant"), the applicant's solicitor, or agent, an Indigenous and Northern Affairs Canada (INAC) employee, or a First Nation.

The Application Package

A typical application package to register an instrument in the ILRS would include the following.

- **The instrument itself.** According to the Manual, this must be the original document; a certified true copy is not acceptable except in certain specified circumstances, such as a Court order. The instrument must identify the parties and show their signatures, the signatures of witnesses, the date of execution, a legal land description, and the nature of the right or interest to be registered.[4]

4 Submitting original documents: The December 2014 *Indian Lands Registration Manual* (the most recent version available online) states in Chapter 3 that an instrument submitted for registration must be the original instrument, not a copy (with a few specific exceptions). This relates to registration within the ILRS, not the FNLRS. The FNLRS will accept scanned documents for registration; that is specifically provided for in the Regulations which state, at section 10(1), that "Any person may apply for the registration or recording in the Register of a document that affects first nation land...

- **Affidavit of witness**: The witness must not be a party to the instrument and must attest to execution by each executing party.
- **Two copies of the Application for Registration**. The relevant application forms can be obtained from INAC, although the application may also take the form of a covering letter as long as it includes all the relevant information as set out in the Manual.
- **Legal land description**: Some transactions may require specific documentation for the legal land description, such as an Official Plan. See the Manual for details.
- **Supporting documents:** Depending on the type of transaction being registered, different supporting documents (such as a supporting Band Council Resolution) may be required. See the Manual for details.

Recommended Procedure

The authors recommend that the legal professional adopts practices similar to those for registering an instrument in a provincial land registry, to wit, conducting a pre-registration search, then submitting the registration package, then conducting a post-registration search.

The ILRS can be searched online by going to http://services.aadnc-aandc.gc.ca/ILRS_Public/home/home.aspx. New users will need to create an account before they can log in. You will also need some identifying information for the parcel, such as a PIN number, before conducting your pre-registration search.

Once logged in, the user can select from a number of different search systems (by instrument, by Evidence of Title, or by land parcel) and which of the registries they wish to search (ILRS, FNLRS, or SGFNLRS). You may then enter your identifying information for the parcel and conduct your search.

Searching the website will pull up an abstract for the parcel in question, showing a history of all instruments that have ever been registered on that parcel. Note that this abstract is not "certified" by the registry; the authors recommend emailing INAC to specifically request a certified copy of the abstract. The certified copy comes with a cover page with a seal, a statement that it is a certified true copy of the parcel abstract report, and the registrar's signature. Double-check to ensure you have in fact received a certified copy; in our experience, INAC sometimes mistakenly sends an uncertified copy.

Practitioners should be aware, however, that First Nations who administer their lands pursuant to the FNLMA will have adopted their own Land Code as part of the transition process.

Unfortunately, due to concerns over potential conflicts with the federal *Privacy Act*, scans of the registered instruments and supporting documents are no longer accessible directly through the ILRS website. Should you wish to see a particular document, you will need to email your local INAC office and submit a request for it. INAC will then contact the affected First Nation and request permission to add you to a list of authorized users and, if approved, will then email you the relevant scans. Alternatively, INAC might email the scans directly to the First Nation so the First Nation can forward them on to you.[5]

Once you have conducted your pre-registration search, submit your registration package to your regional INAC office. The procedure for the post-registration search is the same as for the pre-registration search and, again, we recommend requesting a certified copy of the parcel abstract.

Registering an Instrument in the FNLRS

Section 25(2) of the *First Nations Land Management Act* (*FNLMA*) requires that the First Nation Land Register be administered substantially in the same manner as the Reserve Land Register established under the *Indian Act*. Thus, from the Registry's perspective, the procedure for registering an interest in the First Nations Land Registry System (FNLRS) is likely similar to that for the ILRS.

Practitioners should be aware, however, that First Nations who administer their lands pursuant to the *FNLMA* will have adopted their own Land Code as part of the transition process. This Land Code is a law of the First Nation and may set out additional procedures, requirements, and fees for registering interests on their reserve lands.

For example, the First Nation may have established a two-step process in which the lawyer's client fills out an application to the First Nation and then it is the First Nation that applies to the Registry to register the transaction. Practitioners should contact the First Nation they are dealing with to confirm the applicable procedures and obtain a copy of the relevant laws of the First Nation and review them carefully.

Unlike the ILRS, the *First Nations Land Registry Regulations* specifically allow for electronic filing of an application package for registration in the FNLRS. The Regulations specify the scan must be a scan of an original document.

(c) electronically, in the manner set out in section 12." Section 12 adds that the document may be submitted by filling out an online registration application at the INAC website, then attaching a scan of the original document in either PDF or .tif format. It is unclear to the authors whether the Indian Lands Registry now also accepts scans for the ILRS or only for the FNLRS.

5 The ILRS is not truly public: Arguably, the whole point of a land registry is that its contents should be accessible by anyone so that the state of title is known. The ILRS online search engine now only displays parcel abstract reports, however. Scans of the registered documents are not available through the website and must be specifically requested from INAC due to privacy concerns (despite the fact that the ILRS website "Acceptable Use Policy," which pops up and requires the users to click "Agree" before they can even access the service, requires the users to agree to the following: "Information registered in the system is public information. Participants agree to not enter private or confidential information in the system.")

If conducting a pre- or post-registration search of the FNLRS, instead of contacting the local INAC office, the legal practitioner will need to contact INAC Canada at RCN.Demande.de.document-NCR.Document.Request@aadnc-aandc.gc.ca to request certified abstracts and/or copies of any registered instruments or supporting documents.[6]

[6] INAC's policy is to ask permission from the First Nation that owns the parcel before sharing the documents. It is unclear what would happen if the First Nation denied this permission or simply failed to answer. Section 5 of the Regulations say, "Any person may, during the hours referred to in subsection 3(1), inspect at the First Nations Land Registry the electronic image of any document that is registered or recorded in the Register." Furthermore, section 6 says that on request, the Registrar shall provide a copy or certified copy of a document registered or recorded in the Register. INAC's current policy would therefore appear to be in conflict with their statutory obligations under the Regulations, in addition to being seemingly contrary to the fundamental purpose of a land registry.

Obtaining Certified Copies from the FNLRS

Section 6 of the Regulations say, "On request, the Registrar shall provide a copy or certified copy of a document registered or recorded in the Register." Similarly, section 7 says, "On request, the Registrar shall issue a certificate indicating all the interests registered—or, in Quebec, all the rights registered—and other documents recorded on the abstract of a specified parcel of first nation land."

Based on the authors' experience, it seems likely that INAC is not accustomed to receiving requests for certification and may not have standard operating procedures in place for handling such requests, but they are available if the practitioner is persistent.

The ILRS website does not say whether INAC "stands behind" the parcel abstract reports accessible online, i.e., whether a report printed directly from the website could be relied upon as an accurate statement of the contents of the register. A cautious practitioner will insist upon certified copies before giving an opinion to a client.

Registering an Instrument in Respect of Treaty Lands

The procedure for registering an instrument in respect of treaty lands will depend on the terms of the relevant treaty and may also be affected by the land laws of the First Nation.

NEXT ARTICLE IN THIS SERIES

The Legal Effect of Registration In an Aboriginal Land Registry ▲

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The Legal Effect of Registration in an Aboriginal Land Registry

Photo credit: Union of British Columbia Indian Chiefs

These is the fourth in a four-part series discussing the types of Aboriginal lands and the several systems for registering interests on First Nations lands in Canada.

PART 1
Sixteen Types of Aboriginal Interests in Land that may be Encountered by Lawyers and Notaries in BC
(Published in *The Scrivener*, Winter 2016, page 65)

PART 2
Statutory and Treaty Registration Systems on Aboriginal Lands
(Published in *The Scrivener*, Fall 2017, page 57)

PART 3
Which Aboriginal Land Registry You Should be Using and How to Use Each Registry
(Published in *The Scrivener*, Fall 2017, page 59)

PART 4
This Article
The Legal Effect of Registration in an Aboriginal Land Registry

Legal practitioners always want to register the land interests of their clients in a formal registry.

The complex and varied Aboriginal land registry systems raise the important question of exactly what is the effect of registration.

The purpose of this article is to assist the practitioner in giving an opinion to a client about the security of his or her title, because such an opinion may be quite different from the opinion that would be given with respect to an interest registered in a provincial land title system.

Effects of Registering the Instrument

Effects of Registration in the ILRS (Indian Lands Registry System)

Under section 55(4) of the *Indian Act*, a transaction affecting absolutely surrendered or designated lands, once registered in the Surrendered and Designated Lands Register, "is valid against an unregistered assignment or an assignment subsequently registered." That might appear to create a priority scheme similar to that found in, for example, the BC Land Title system. The language of the statute, however, refers only to "assignments"—and there is no priority scheme in place for anything other than an "assignment."

The complex and varied Aboriginal land registry systems raise the important question of exactly what is the effect of registration.

Furthermore, it should be noted that the Reserve Land Register, established pursuant to section 21 of the *Indian Act*, does not include any statutory priority scheme whatsoever.

INAC (Indigenous and Northern Affairs Canada) does not guarantee that any document registered in the ILRS is legally valid or effective or that all documents affecting an interest in land have been submitted for registration. That is a difference from the formal assurance given under the *BC Land Title Act*. The Manual, (which is not law, but government policy), specifically states that registration in the ILRS does not guarantee title and places the onus on the parties to a transaction to search the records prior to submitting an instrument for registration.

Important: Two different kinds of leases

Leases on Indian Reserve lands can be created under section 53(1) or 58(3) of the *Indian Act*.[1] The practitioner must be aware of which type of lease this is because there is a major difference between them.

1 There are also historic leases under section 58(1)(c) but this section now appears to be moribund and the practitioner is not likely to encounter it.

- **A lease under section 53(1)** is a lease of designated land and will be registered in the Surrendered and Designated Lands Register. Accordingly, priority is granted against other assignments of the lease based on the time of registration.
- **A lease under section 58(3)** is registered in the Reserve Land Register and no priority is created by registration at all.

The two types of leases may appear on their face to be almost identical, so it is imperative that the practitioner find out which type it is. Once a First Nation adopts a Land Code under the FNLMA (*First Nations Land Management Act*), this distinction should disappear (see "effect of registration in the FNLRS" below), although that is not a point on which there has been any litigation for guidance.[2]

[2] The transition from the old Reserve Land Register to the *FNLMA* and Regulations may raise issues. The legal point that may arise is whether a document that did not have priority under the old Reserve Land Register because it was executed at a later date than a subsequently registered document suddenly gains priority when the *FNLMA* and Regulations begin to apply.

Effects of Registration in the FNLRS (First Nations Land Registry System)

Under section 25 of the FNLMA, the First Nation Land Register is to be administered in the same fashion as the Reserve Land Register established under section 21 of the *Indian Act*, subject to any regulations passed by the minister.

As noted above, the Reserve Land Register does not include a statutory priority scheme. However, the *First Nations Land Registry Regulations* do include a priority scheme. Under section 28(1) of the *Regulations*, "interests—or, in Quebec, rights—registered under these Regulations that affect the same parcel of first nation land have priority according to the time and date the documents were executed or, in Quebec, signed according to all the required formalities for its validity."

And per section 29, "A registered interest—or, in Quebec, a registered right—affecting a parcel of first nation land is entitled to priority over an unregistered interest or right affecting the same parcel."

Registration of an interest in the FNLRS does not guarantee title as it would under the BC land title system.

Effects of Registration under FNLTS (First Nations Land Title Systems)

Legal professionals dealing with a land title system established and administered under a First Nation's own laws will, of course, need to familiarize themselves with the specifics of that registry to determine the effects of registration. For example, the Tla'amin Lands Registry assigns priority to registered interests according to the type of interest and who holds it, with date of registration acting as a secondary "tie-breaker" between two otherwise equal interests.

Summary Chart

Some of the information presented in our four articles is summarized in the following chart.

This is an emerging field of law; the authors acknowledge there may be gaps in this information and would be grateful to any readers who point out any errors or omissions.

Type of land	System	Legal Authority	Administration	Registration of deeds or of titles	Priority according to time of registration	Guarantee or assurance?
1. Ordinary fee simple land in BC (For comparison)	BC land title system	*Land Title Act*	Land Registries administered by the Land Title and Survey Authority of BC.	Title and all subordinate interests are registered	*Land Title Act*, section 22: "at the time of its registration, irrespective of the date of its execution"	Usually no need for title insurance, because of the Assurance Fund
2. Certificate of Possession lands "and other transactions respecting lands in a reserve"	The Reserve Land Register	*Indian Act*, section 21	INAC (see Manual section 1.2.3)	Crown retains title, registration of interests only	No priority based on time of registration.	No. (See Manual, section 1.2.4—no guarantee of title)
3. "Any transaction affecting absolutely surrendered or designated lands"	The Surrendered and Designated Lands Register	*Indian Act*, section 55	INAC (See Manual section 1.2.3.)	ILRS records transactions, not titles.	*Indian Act*, section 55(4) "An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered."	No. (See Manual section 1.2.4—no guarantee of title)
4. "First Nation Land" under FNLMA, when there is a Land Code	First Nation Land Registry System (FNLRS)	FNLMA section 25(1) and the First Nations Land Registry Regulations	INAC Indian Lands Registry	Documents that affect FN Land—Regs. Section 10(1)	Yes—Regs. ss 28-30. "priority according to the time and date."	No guarantee. Title insurance should be purchased, if available. Canada and First Nations give indemnities to each other. Section 34 FNLMA
5. Westbank and Sechelt	Self-Governing First Nations Land Register (SGFNLR)	Sechelt and Westbank self-government statutes	Sechelt: may adopt BC Land title system. Westbank: Uses the SGFNLR via the Indian Lands Registry website.	Sechelt: BC title registration system. Westbank: "Documents that affect Westbank lands" like FNLMA	Sechelt: BC priority system, pursuant to agreement. Westbank: Same system as FNLMA Regs	Sechelt: BC Assurance Fund. Westbank: WFN Constitution some forfeitures, otherwise, similar to FNLMA
6. Treaty lands: Nisga'a, Tsawwassen, Maa-nulth, Tla'amin. (See text of each treaty.)	Various treaty systems	First Nation Laws authorized by the treaty itself, such as the *Nisga'a Land Title Act*.	Varies; sometimes treaty systems, sometimes BC Land Title system adopted by reference.	Some specialized "fee simple" interests created under the treaty.	Varies. For example, Tla'amin law creates a unique hybrid system.	Varies—when BC Land Title system is adopted, the BC guarantee applies subject to the restrictions under the treaty.

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