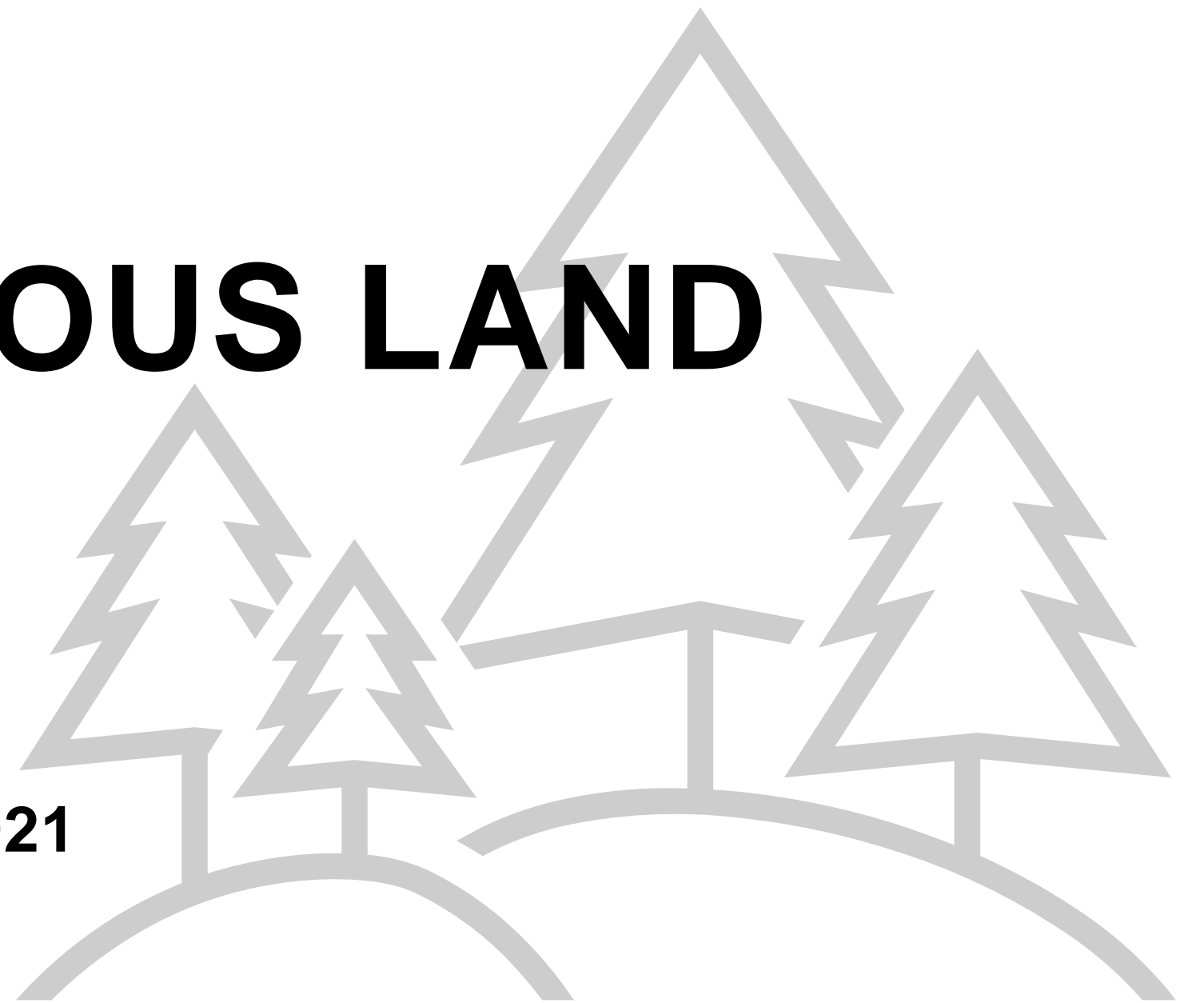


PRIMER ON INDIGENOUS LAND ISSUES

**BC EXPROPRIATION ASSOCIATION
ANNUAL FALL CONFERENCE - OCTOBER 29, 2021**

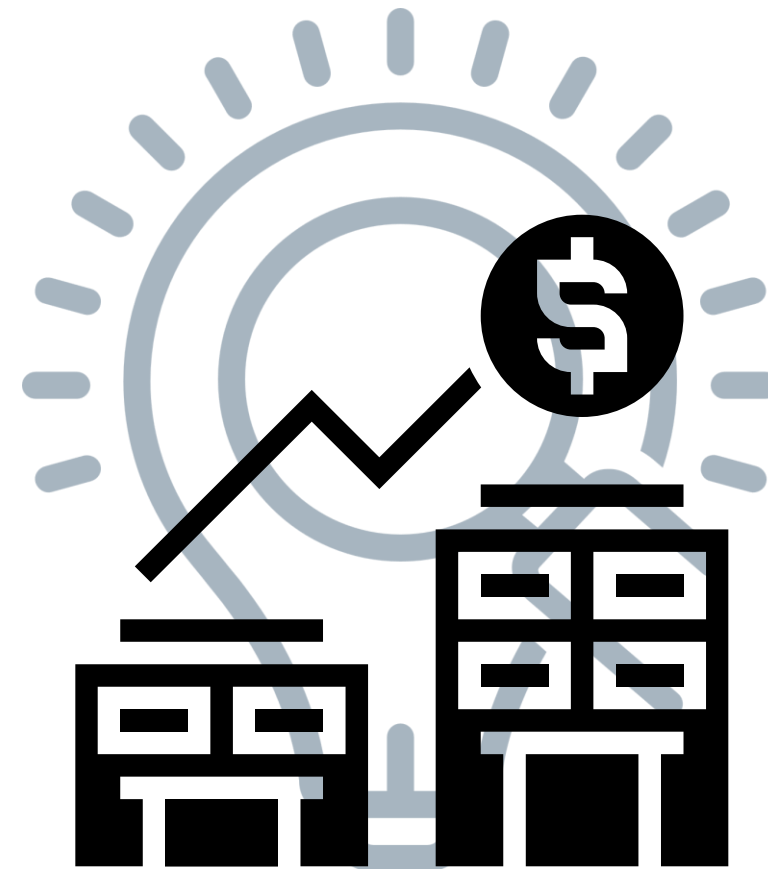
Nick Smith – Lawyer at Miller Titerle Law Corporation
Catherine Musekamp – Lawyer at First Peoples Law LLP
Cliff Smirl – Fee Appraiser at Kent-Macpherson



AGENDA



Indigenous land interests and governance



Expropriation of reserve land interests and insights into best practices and current trends in property acquisitions



Valuation of Indigenous Lands

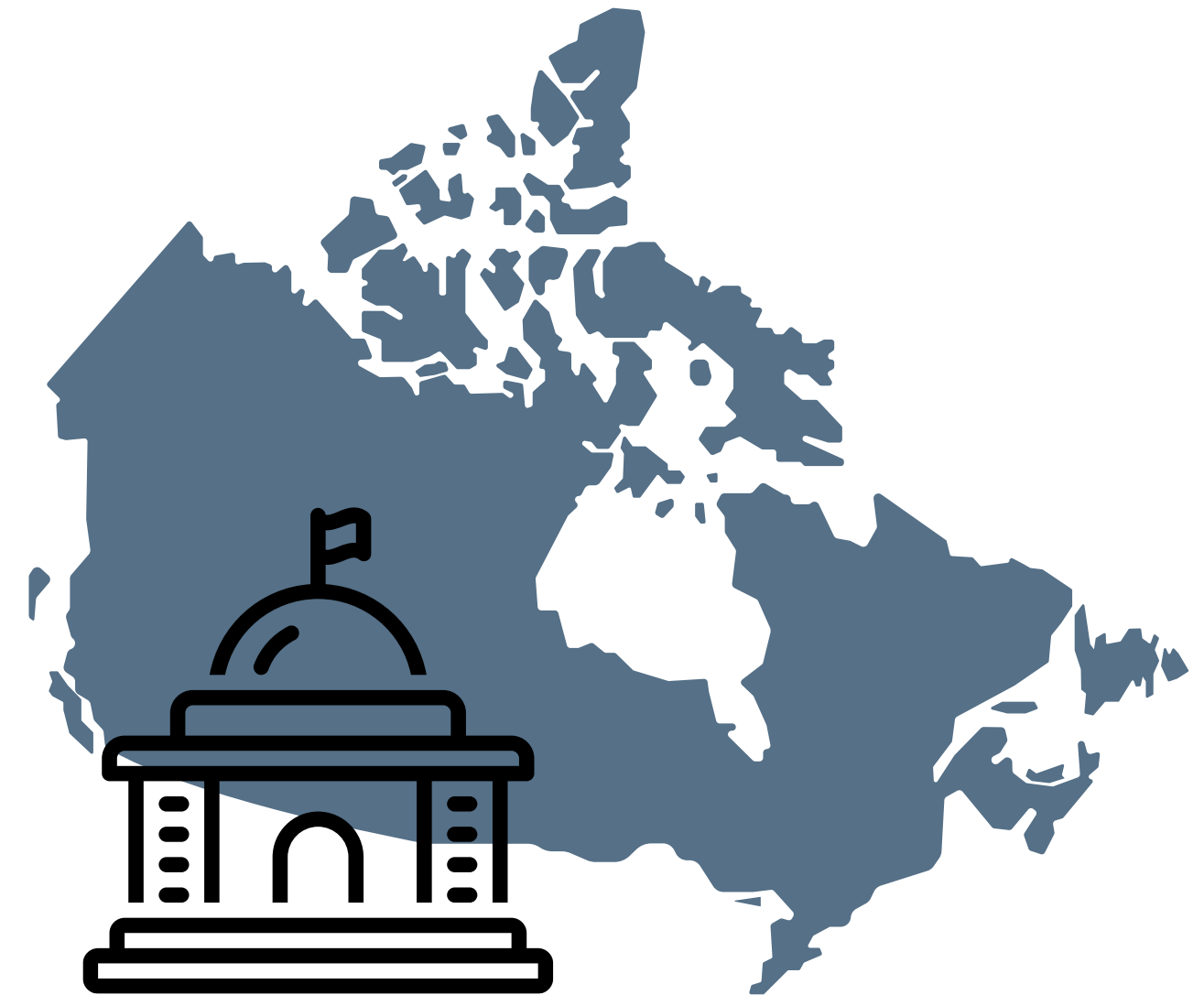
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INDIGENOUS LAND INTERESTS AND GOVERNANCE

Nick Smith – Lawyer at Miller Titerle Law Corporation
nick@millertiterle.com

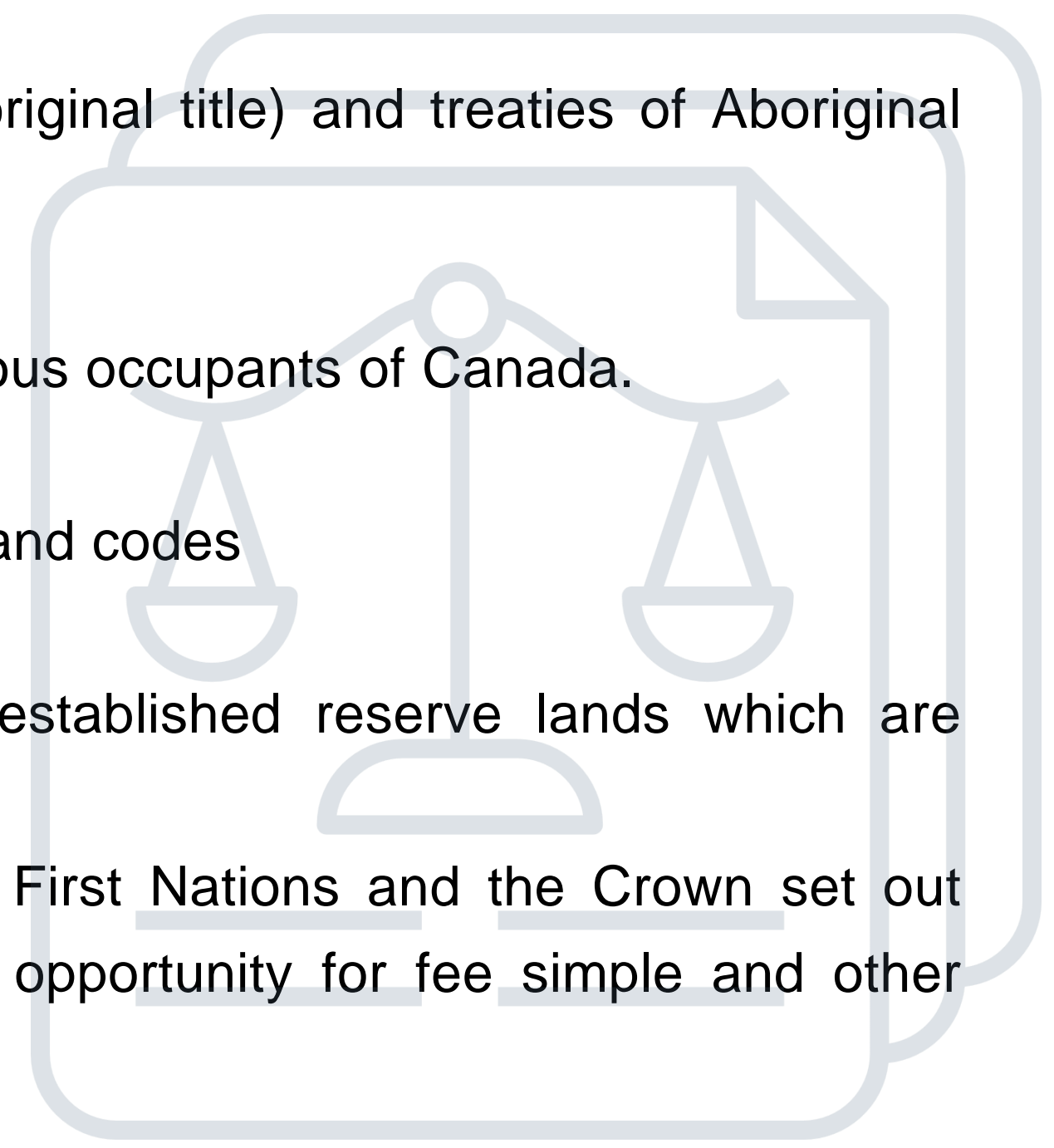
OVERVIEW

- Non-Indigenous lands - Crown and Fee Simple
- Indigenous Lands:
 - Reserve Lands
 - Land Code Lands
 - Treaty Lands
 - Aboriginal Title Lands
 - Self-Government Lands
- Control and use of Indigenous lands may be governed by the *Indian Act*, the *First Nations Land Management Act*, or a treaty/modern land claim agreement/self-government agreement
- First Nations are self-governing over their proven Aboriginal title lands (Tsilhqot'in)



LEGAL LANDSCAPE

- Section 35 (*Indian Act*) of the *Constitution Act, 1982*
 - Recognizes and affirms the Aboriginal rights (including Aboriginal title) and treaties of Aboriginal peoples in Canada
 - Governs Indians and reserve lands
 - “Indians” is the name given by the constitution to the Indigenous occupants of Canada.
- *First Nations Land Management Act*
 - Governs reserve lands where First Nations have developed land codes
- Treaties and Self-Government Agreements
 - Historical treaties between First Nations and the Crown established reserve lands which are governed by the *Indian Act*
 - Modern treaties and self-government agreements between First Nations and the Crown set out nature of land interests and governance of land; provides opportunity for fee simple and other unique land interests



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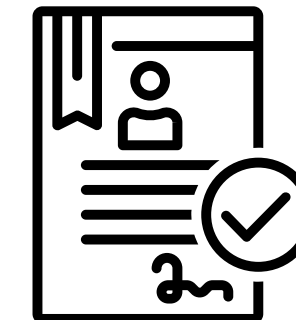
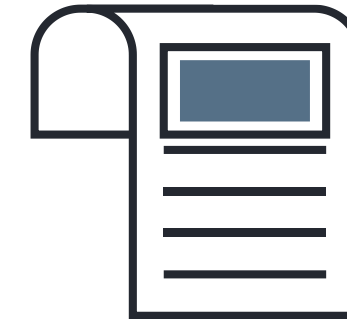
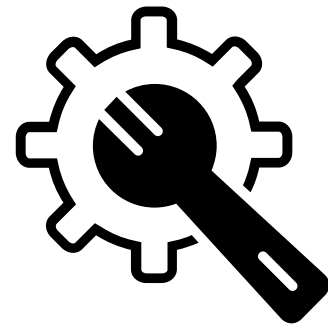
RESERVE LANDS

RESERVE LANDS - OVERVIEW

- Legal framework that applies to reserve lands is distinct from the provincial common law system for land ownership
- Most land interests in BC (aside from Aboriginal title) are regulated by the *LTA*
- Reserve lands are governed by the *Indian Act*, except for the First Nations under the *First Nation Land Management Act*
- The *Indian Act* sets out the nature of reserve land and the framework for the holding or disposal of interests in reserve land
- Reserve lands are held for the use and benefit of the band (s. 18(1)). Legal title is held by the Crown, in trust for an Indigenous Nation
- First Nations hold reserve lands in common, for the benefit of the band members or community
- Individual possession by members is restricted unless possession has been allotted by Council – through a certificate of possession (“CP”) and with the approval of the Minister of Indian and Northern Affairs Canada (INAC)

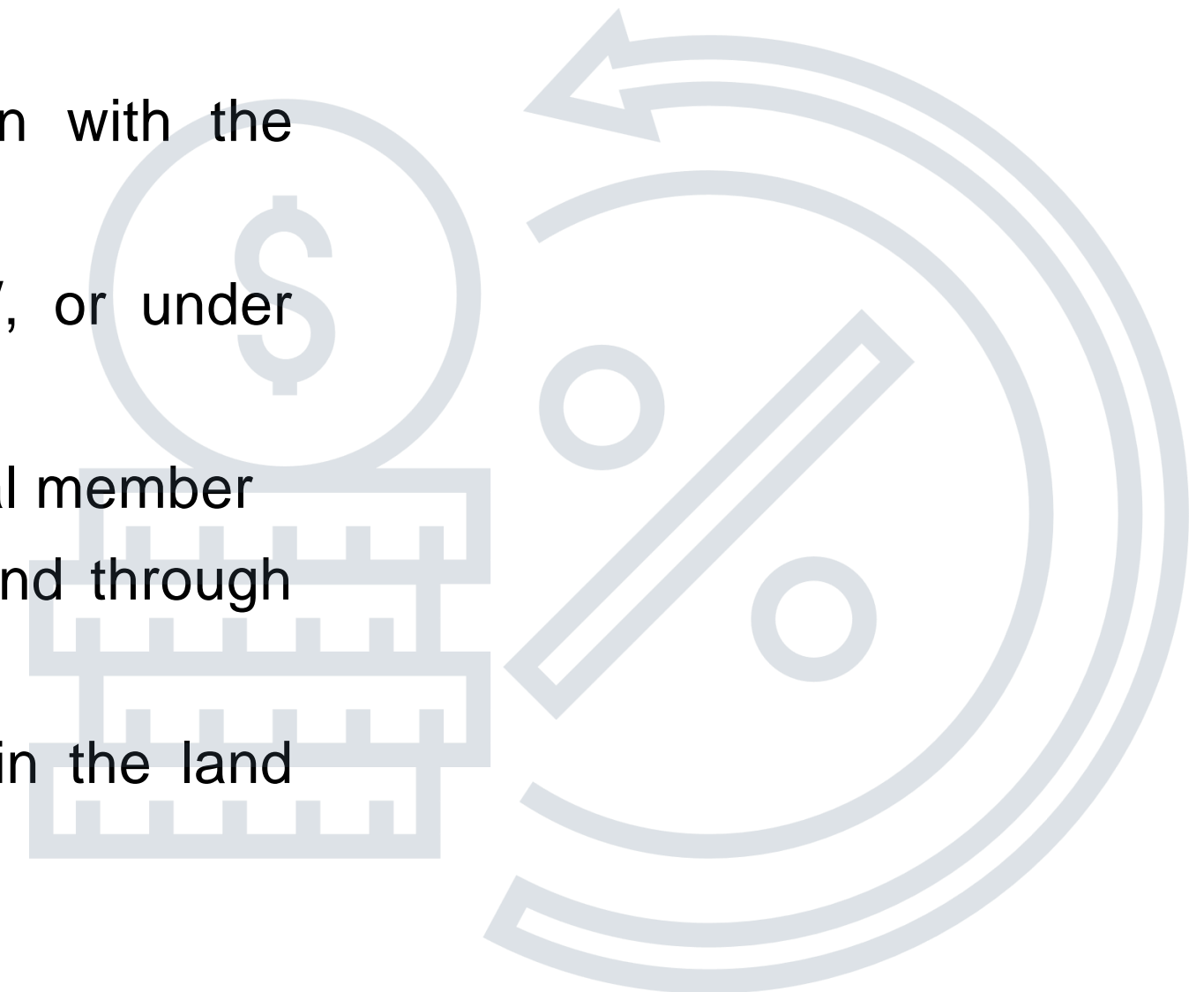
RESERVE LANDS - TYPES OF HOLDINGS

- Custom Allotment Interest
- Buckshee Interest
- CP Interest (s. 20, 24 and 58(3))
- Permit Interest (s. 28)
- Land Designation Leasing Interests (ss. 37-41 and 53(1))



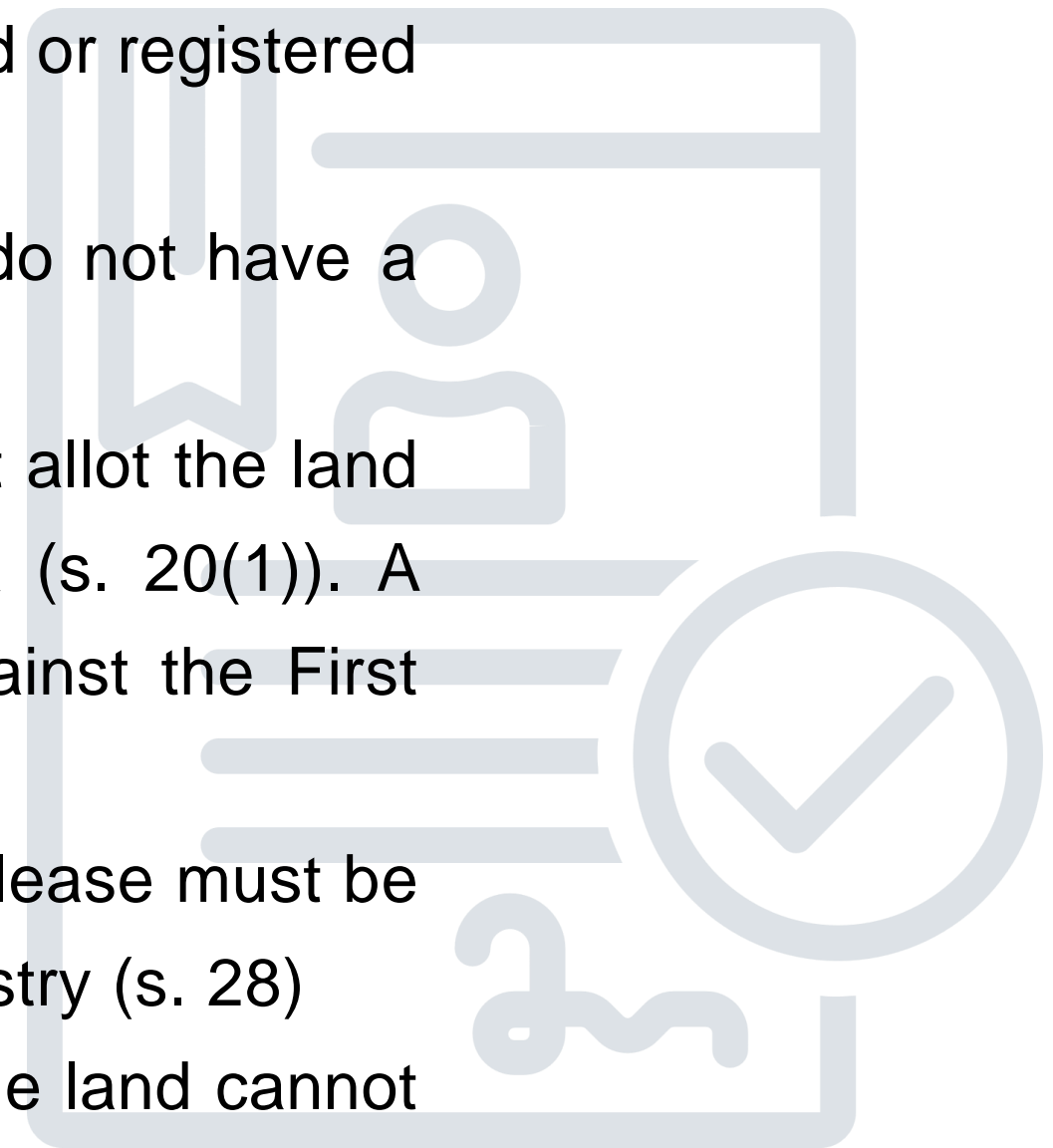
CUSTOM ALLOTMENT INTEREST

- Custom allotment or holding is a right to occupy reserve land which is granted to an individual by a resolution of a First nation council (or other band custom)
- The First Nation does not request approval or registration with the minister and a formal CP is not issued
- Not considered lawful possession under the /I/Indian Act/I/, or under Canadian law – not treated as a legal interest in land
- Simply a mutual agreement between Council and the individual member
- A band member cannot enforce its customary right to the land through the BC Court
- Uncertainties regarding individuals responsibilities to maintain the land and potential liability for those who come onto the land



BUCKSHEE INTEREST

- An unregistered agreement/lease entered into between a member of a First Nation or the First Nation and an individual who may or may not be a member
- Similar to custom allotment – an agreement that has not been approved or registered by the INAC, as required by the *Indian Act*
- Does not carry security of tenure as parties to a Buckshee interest do not have a right to possession of the property against the First Nation or member
- For a member to validly occupy reserve land: (1) the First Nation must allot the land to the member; and (2) the Minister must approve the allotted area (s. 20(1)). A member/tenant will have difficulty enforcing any lease/agreement against the First Nation without this
- For a lease between a First Nation and a non-member to be valid, the lease must be approved and granted by INAC, and registered in the Indian Land Registry (s. 28)
- Takeaway: insecure tenure and enforceability of the agreement, and the land cannot be mortgaged

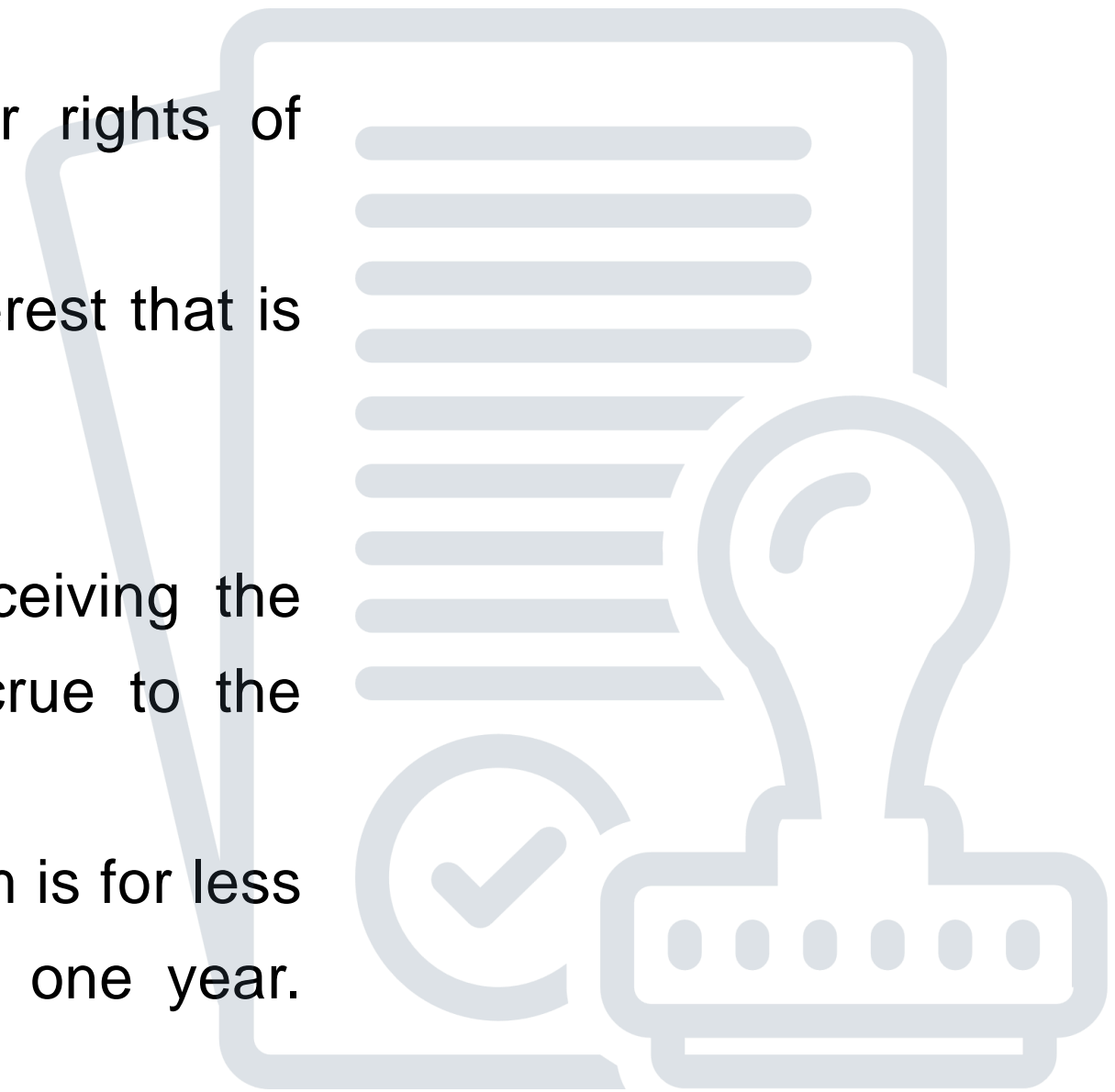


CP INTERESTS

- The minister may issue a CP to an Indian who is lawfully in possession of land in a reserve as evidence of their right to possession of the land (s. 20(2))
- Legal evidence of the right to possess and occupy reserve land
- Stronger property right (legally valid) than customary or Buckshee interests
- A CP entitles the holder to exclusive use and possession but cannot be transferred or willed to a non-member. It may only be transferred or willed to the band or a member (s. 24)
- Non-alienability keeps the land within the First Nation community while allowing independence and flexibility to the member who holds the CP
- Clear who is responsible for maintenance and liability issues, and the CP owner can lease out the lands to non-members (s. 58(3))
- CP owners have autonomy with how they use the land, and council is effectively giving up some control over reserve lands
- Use of CP lands can be limited by council by issuing bylaws

PERMIT INTEREST

- A right to use reserve land granted to non-Indian and/or Indian third parties (s. 28(2))
- Generally used to grant short-term rights of use, licenses or rights of occupancy on reserve land
- Permit grants non-exclusive use, whereas a lease grants an interest that is exclusive to others
- Permits = lesser interest in land than a lease
- Process – the crown is the permitter (landlord), the party receiving the permit is the permittee (tenant), and the permit revenues accrue to the benefit of the First Nation
- The minister may issue permits without council consent if the term is for less than one year and with band council consent for longer than one year. Typically INAC obtain council consent for most permits.

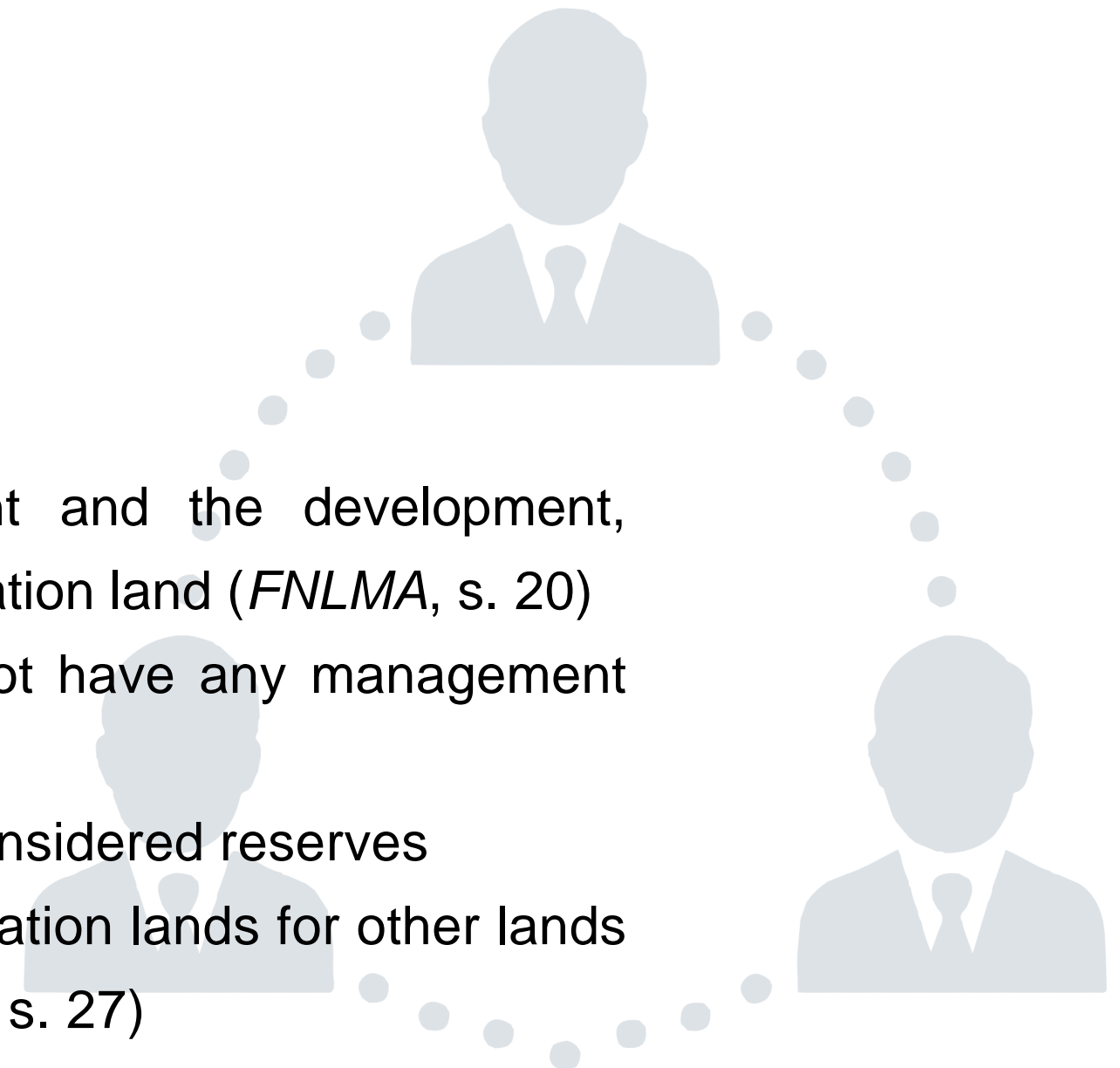


LAND DESIGNATION LEASING INTEREST

- Designation is a process where the band electors give the federal government the authority to grant leases or other interests in reserve lands that have not been allotted to band members.
- Typically done so First Nations can carry out economic development activities.
- A form of non-absolute surrender of reserve lands for leasing (s. 38(2))
- The First Nations community must approve a designation, and after the community approves the Governor in council must also approve
- Once land is designated, the First Nation can have the minister lease out lands to generate income (s. 53(1))
- Head lease between the minister (landlord) and the leasing party (tenant) which can be a proponent that wishes to operate on reserve land, the First Nation or an entity of the First Nation (ex. Ec Dev Corp.)
- Creates opportunity for a First Nation to generate revenues through lease payments, facilitates financing. Mortgages are available because lenders can rely upon leases/subleases as security (s. 89)

FIRST NATIONS LAND MANAGEMENT ACT

- *Indian Act* can often restrict First Nations' management and development of reserve land
- The *First Nations Land Management Act* (implemented by Canada in 1999) grants signatory First Nations authority to create their own land management systems through land codes to manage reserve lands
- Enables First Nations to enact laws respecting the environment and the development, conservation, protection, management, use and possession of First Nation land (*FNLMA*, s. 20)
- Canada continues to hold title to the First Nation land, but does not have any management authority over it (*FNLMA*, s. 5)
- FNLMA lands are the same as interests in reserve land but are not considered reserves
- A First Nation cannot sell its reserve lands, but may exchange First Nation lands for other lands which become reserve lands (requires community approval) (*FNLMA*, s. 27)



FIRST NATIONS LAND MANAGEMENT ACT

- Benefits for First Nations:



Full First Nation jurisdiction
over lands and laws relating to
lands



Members have the ability
to secure mortgages
against their land without
the need for a ministerial
guarantee



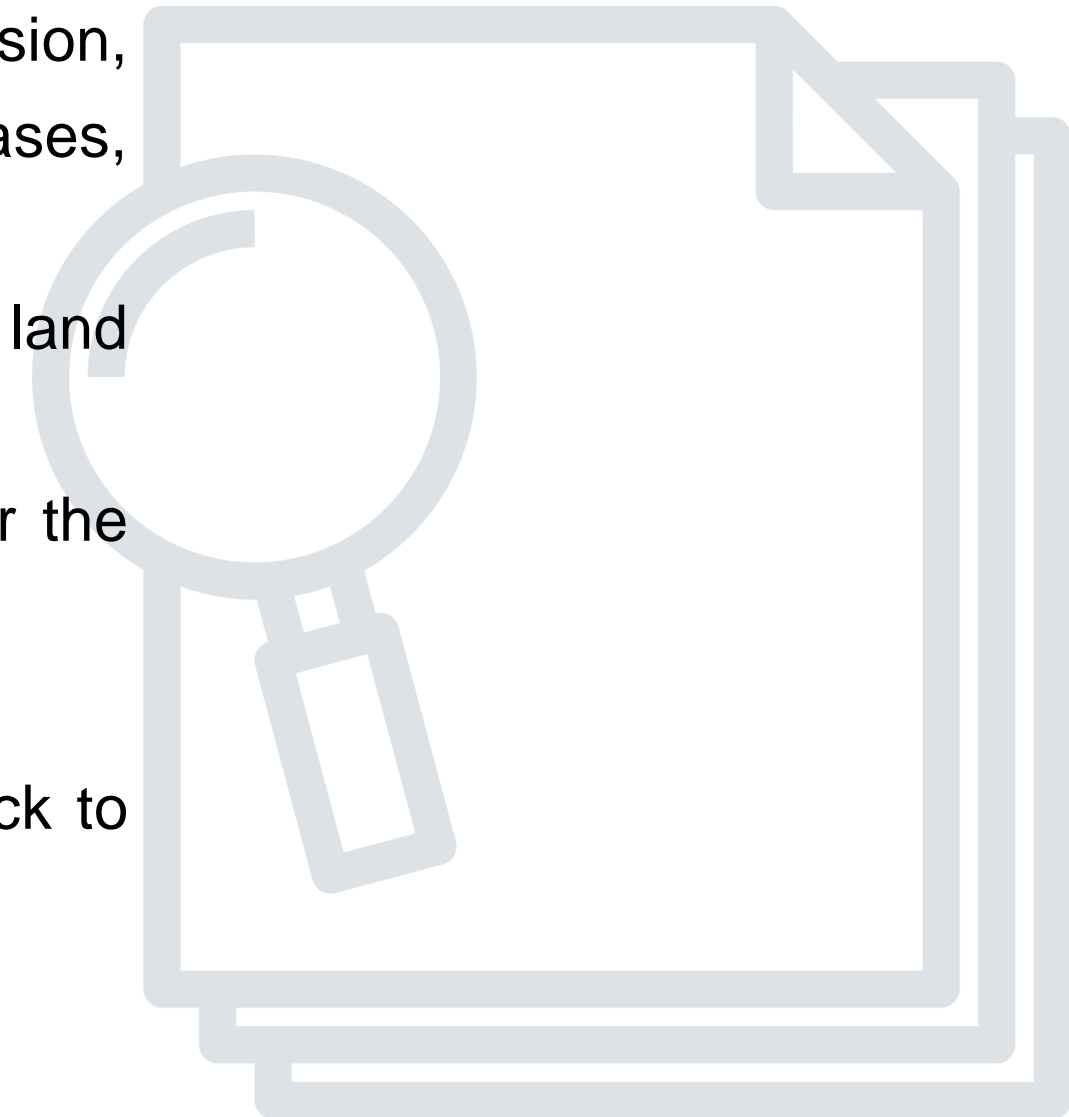
Quick registration of
land transactions



Non-status First Nation
members have the ability
to hold land

INDIAN LANDS REGISTRY SYSTEM (ILRS)

- Established under the *Indian Act* and operated by INAC
- Purpose to record and prioritize transactions involving reserve lands (lawful possession, CPs, Certificates of Occupation, transfers of lawful possession, mortgages of locatee leasehold interests, designations and surrenders, leases, etc)
- Does not mean that an interest registered in the ILRS is necessarily a valid land interest
- No assurance as to title – not the same as indefeasible title issued under the *LTA*
- Uncertainty with the ILRS
- When searching the ILRS follow the history of the interest in question back to the original designation or the original grant of the CP

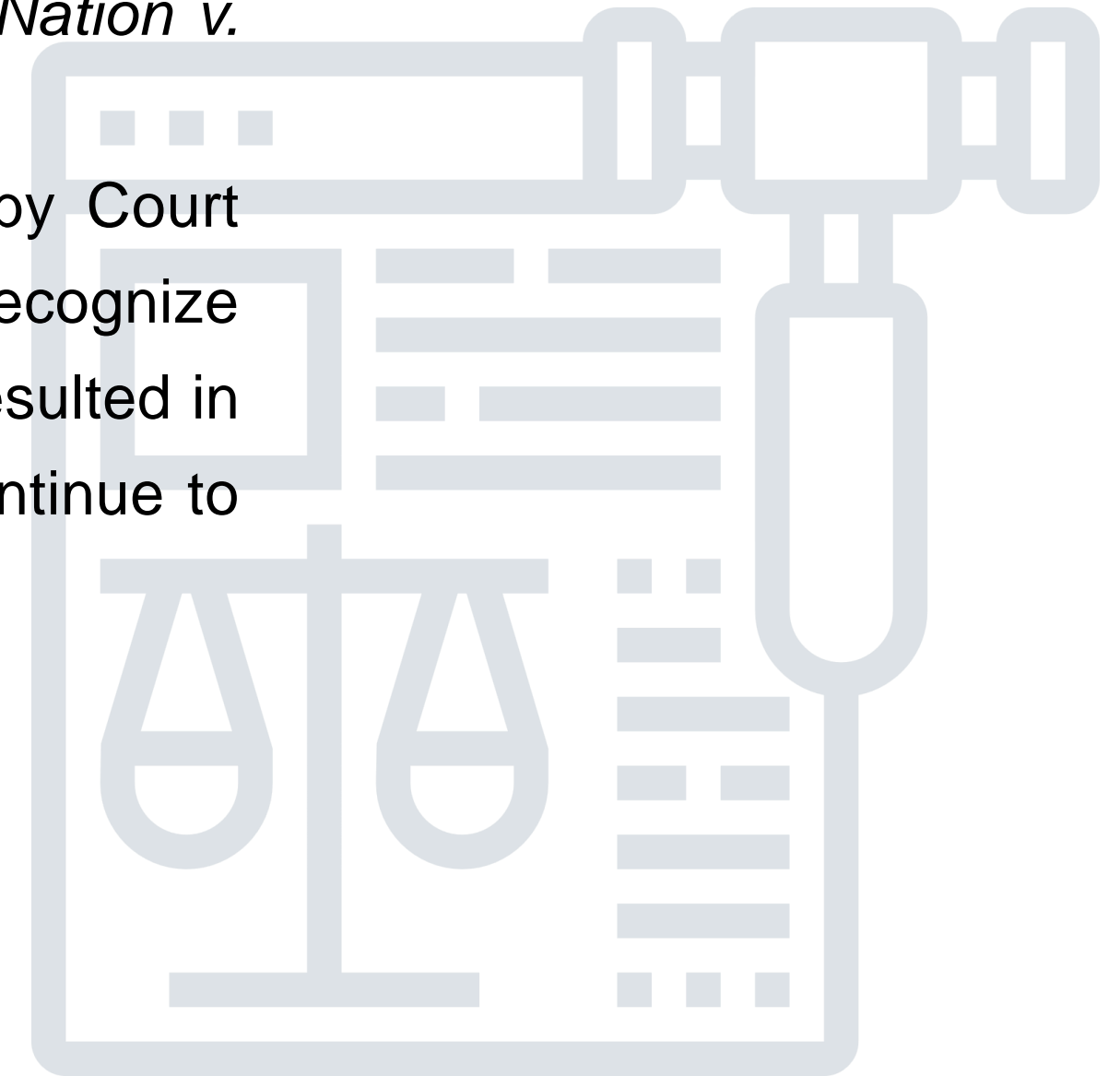


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ABORIGINAL TITLE LANDS

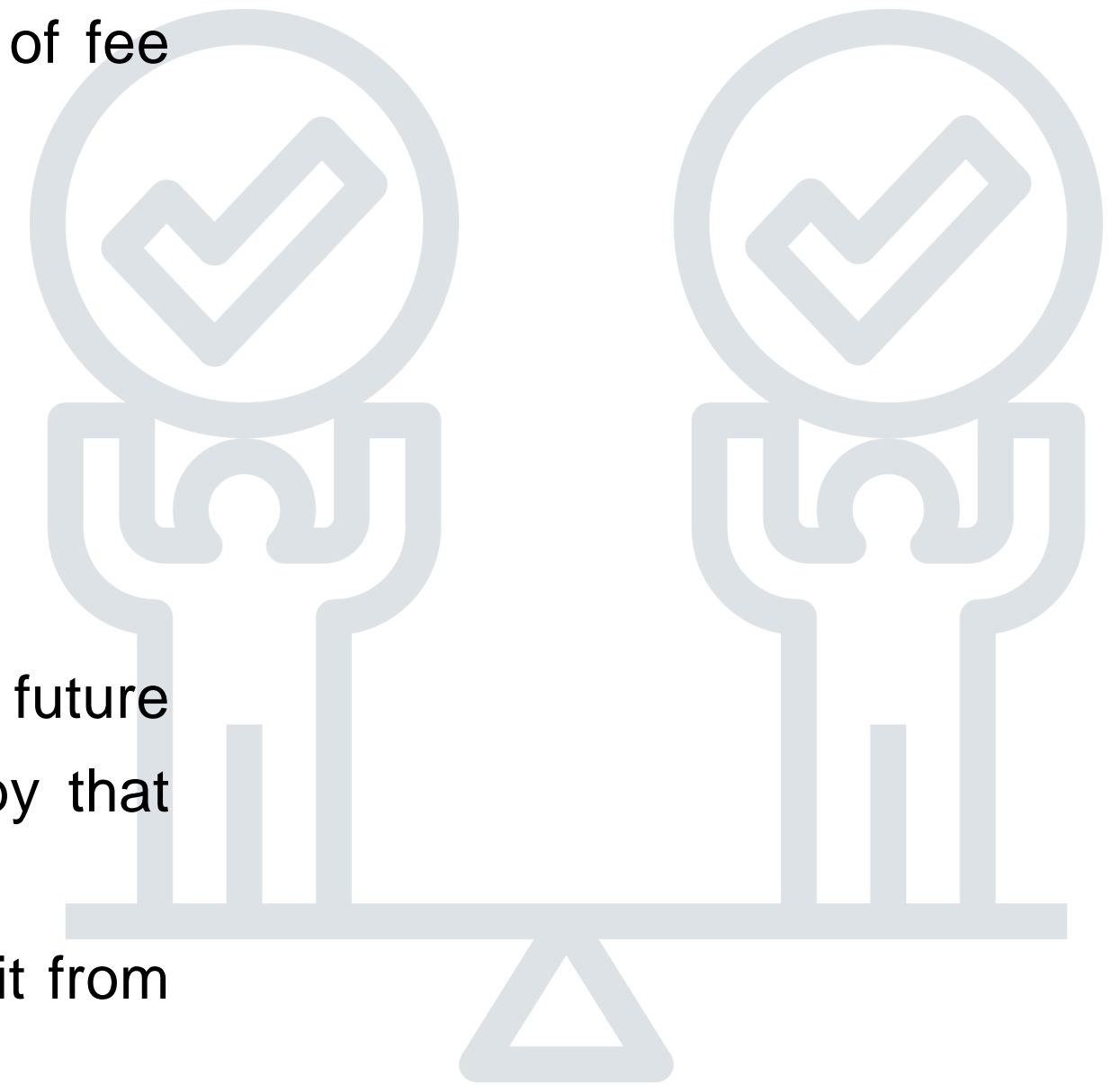
ABORIGINAL TITLE

- There is only one tract of Aboriginal title land in BC declared to belong to the Tsilhqot'in people by the decision of the SCC in 2014. (*Tsilhqot'in Nation v. Canada and B.C. 2014 SCC 44.*)
- The process for deciding if land is subject to Aboriginal title is by Court decision or through the BC Treaty Process – Crown resistance to recognize and the requirement for First Nations to prove Aboriginal title has resulted in minimal Aboriginal title lands in BC; though, many First Nations continue to assert Aboriginal title over lands within BC
- Legal test to establish title – *Delgamuukw v British Columbia*:
 - Occupation of land prior to assertion of sovereignty.
 - Continuity of occupation, if present occupation relied upon.
 - Exclusivity of occupation.



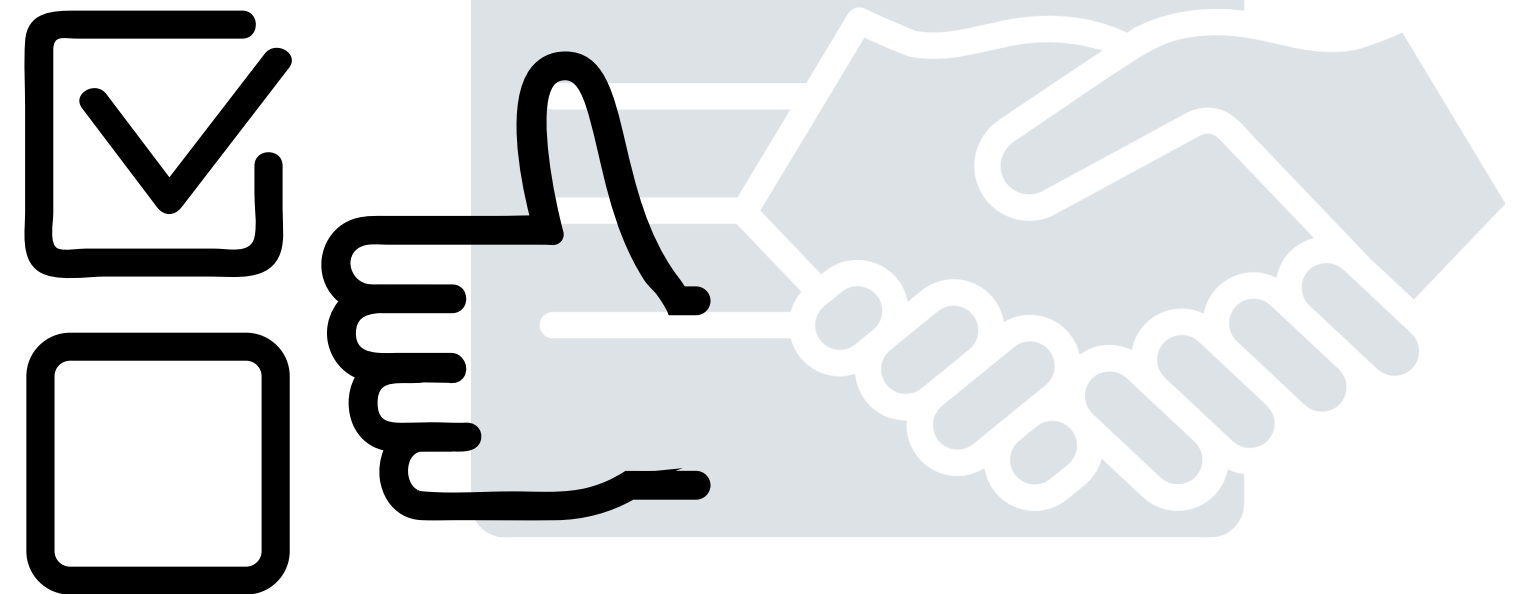
ABORIGINAL TITLE - RIGHTS

- An ownership interest giving an Aboriginal group the right to use and control the land and enjoy its benefits – similar rights as owners of fee simple land
- Holders of Aboriginal title have rights which include:
 - Determining land use
 - Enjoyment, occupancy, and possession
 - Economic benefits of the land
 - Pro-active use and management
- Collective right - a “group title” protected for current and future generations; decisions with respect to the title lands are made by that nation
- Future generations of the nation are expected to be able to benefit from its use and enjoyment



ABORIGINAL TITLE - GOVERNANCE

- Right to control and manage land means Aboriginal title holders can determine governance regimes
- Governments must seek consent to interfere with Aboriginal title lands, unless they can justify the infringement
- Federal and provincial laws of general application apply to Aboriginal title lands, unless they infringe Aboriginal rights or title



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TREATY RIGHTS

TREATY LANDS

- Treaties are *sui generis* agreements between an Indigenous Nation and the Crown – neither international treaties nor simple contracts
- Include both historic treaties and modern land claims agreements
- Nature of Interest:
 - Treaties may confer specific interests in lands, such as reserves, or rights to engage in certain activities on treaty lands
 - Most treaties involve the surrender of Indigenous title to land
 - Crown interests in treaty lands subject to the rights set out in the treaty
 - Interests under a treaty are held collectively, but may be exercised by individual members of the collective

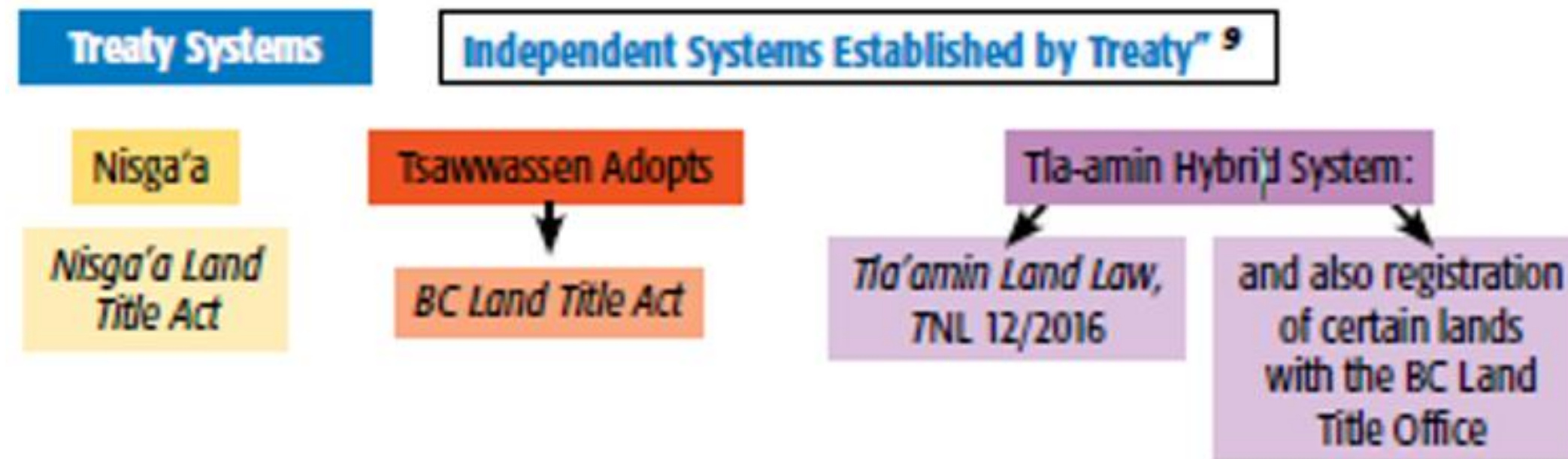


MODERN TREATY LANDS

- A First Nation that completes a modern treaty has extensive options for creating fee simple interests and other unique interests within treaty settlement lands
- First Nations may create fee simple interests and may also create unique fee simple interests such as “restricted” fee simple parcels which are fully registrable in the LTO but only transferable to members of the Nation
- Land transactions on reserve are governed primarily by the Treaty, which is a constitutional document that overrides the *Indian Act* and any other statute.
- Indigenous Nations may exercise legislative authority over lands
- Need to understand the treaty and the laws enacted pursuant to it



MODERN TREATY LANDS



J. Woodward and E. Krindle, *The Scrivener*, Volume 26, Number 3, Fall 2017, "Statutory and Treaty Registration Systems on Aboriginal Lands"

- Tsawwassen and Tla-amin have additional laws enacted pursuant to their respective treaties

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SELF-GOVERNMENT LANDS

SELF-GOVERNMENT LANDS

- As of January 2020, 25 self-government agreements exist in Canada between the Crown and Indigenous Nations
- Indigenous Nations' interests in land under these agreements depend on the content of the agreement, and can include:
 - Reserve-like interests
 - Fee simple ownership
 - Hybrid or other models
- Self-government agreements may originate in specific legislation, or through negotiations between the Crown and an Indigenous Nation.
- Examples of legislation creating self-government agreements include:
 - *Sechelt Indian Band Self-Government Act (SIBSGA)*
 - *Westbank First Nation Self-Government Act (WFNSGA)*



SELF-GOVERNMENT LANDS

- Depending on the content of the agreement or legislation:
 - Self-government agreements may or may not be considered treaties
 - Self-government agreements may give the Indigenous Nation law-making power over their Indian reserves or might convert those reserves to fee simple lands registered within a provincial land registry, meaning an Indigenous Nation may be able to grant or transfer interests in the self-government lands
- The holders of interests in land under self-government agreements are the Indigenous Nation, generally for the use and benefit of the Nation and its members
- The governance of lands and the applicability of provincial and federal law under self-government agreements depends on the content of the agreement or the enacting legislation.
- Under the SIBSGA, the *Indian Act* only applies to the extent that it is consistent with the SIBSGA, and the Sechelt Indian Band's constitution and bylaws



SELF-GOVERNMENT LANDS WESTBANK FIRST NATION

- Westbank First Nation (WFN) has exercised legislative authority to manage former reserve lands since 2005
- Not a treaty
- Title to Westbank Lands remains with Federal Crown; Westbank Lands retain status under s 91(24); though, WFN 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*
- Westbank land transactions recorded in the Westbank Lands Register
- WFN may expropriate Westbank Lands for Community Purposes
 - Compensation payable, provides for dispute resolution re compensation.
 - Federal Crown interests and Indian Act S. 35 interests not subject to expropriation.



SELF-GOVERNMENT LANDS WESTBANK FIRST NATION

- Federal government generally may not expropriate Westbank Lands, except as provided in self-government agreement.
 - Any Federal expropriation requires compensation to SFN in the form of replacement land and other means, as necessary.
 - No expropriation may reduce the total area of Westbank Lands at the outset of the agreement.
 - Governor-in-Council must consent to any expropriation; must be justified in accordance with self-government agreement and necessary for federal public purpose in national interest.
 - Requires that no reasonable alternatives exist, and that smallest interest is taken for shortest term reasonably required.
 - If full interest not expropriated, lands revert to WFN when no longer required.



SELF-GOVERNMENT LANDS SHÍSHÁLH (SECHELT) FIRST NATION

- shíshálh First Nation (SFN) has owned and exercised legislative authority over former reserve lands since 1986
- Sechelt Indian Band Self-Government Act SC 1986 delegates authority to SFN
- SFN owns former reserve lands in fee simple, subject to certain mineral interests, conditions of conveyance, and requirement to hold lands for use and benefit of SFN and its members
- SFN has full power to dispose of the land (or any interest in it) subject to its constitution
- SFN may use the provincial land title system for registration of land transactions



SELF-GOVERNMENT LANDS SHÍSHÁLH (SECHELT) FIRST NATION

- SFN may enact legislation to expropriate interests in its lands for community purposes.
- SFN's Constitution sets conditions on any expropriation:
 - No Federal or Provincial interests may be expropriated.
 - Compensation for expropriation is payable.
 - SFN must provide processes to determine fair compensation and resolve disputes relating to such compensation.
 - Expropriation processes must be at least equal to those in force in BC.



SUMMARY



Reserve Lands

- Reserves created by numerous methods over time (treaties, common law, specific claims agreements and the Federal Additions to Reserves policy);
 - origin of a given reserve is context specific
- Governed by *Indian Act* or *First Nations Land Management Act*



Aboriginal Title Lands

Only one tract in BC, but many First Nations assert Aboriginal title over lands in BC



Modern Treaties and Self-Government Agreements

Look to agreements and/or legislation to understand land interests, including the nature and governance of those land interests



Expropriation of On-Reserve Land Interests

British Columbia Expropriation Association
29th Annual Fall Conference
October 29, 2021

Catherine Musekamp
cmusekamp@firstpeopleslaw.com

Outline

- Applicable Legislation
- First Nation Expropriation Powers
- Expropriation under the *First Nations Land Management Act* (“FNLMA”)
- Expropriation under the FNLMA: Preliminary Questions
- Expropriation under the FNLMA: Procedural Considerations
- Expropriation under the FNLMA: Interest Holder & Community Engagement
- Conclusion: Key Issues & Practical Takeaways

Applicable Legislation

- *Indian Act*, RSC 1985, c I-5;
- *First Nations Land Management Act*, SC 1999, c 24 (“FNLMA”);
- Treaty, self-government agreement or other.

First Nation Expropriation Powers

- Most First Nations governing their own reserve lands under the FNLMA, treaty, etc., have the power to expropriate interests in their reserve lands.
- Self-government examples:
 - shíshálh Nation Constitution
 - Westbank First Nation Expropriation Law;
 - Tsawwassen First Nation Final Agreement;
- We will focus on expropriation powers under the FNLMA, held by First Nations operating under Land Code.

Expropriation under the FNLMA

- *First Nations Land Management Act, s 28:*
 - Greatly restricts the Crown’s power to expropriate interests in reserve lands;
 - Grants First Nations the power to expropriate land interests or rights “necessary for community works or other First Nation community purposes”;
 - Requires that First Nations “pay fair compensation” determined by applying federal *Expropriation Act* rules with necessary modifications.

Expropriation under the FNLMA

– Preliminary Questions –

- Preliminary considerations when asked to engage on an expropriation under Land Code:
 - Is there an expropriation law in place? Is one required?
 - What is the intended use/purpose of the encumbered land?
 - What are the existing interests encumbering the reserve lands?
 - Who is the interest holder (member/non-member)?

Expropriation under the FNLMA – Procedural Considerations –

- A few procedural questions to consider when asked to engage on an expropriation under Land Code:
 - What is the criteria for valuation under the First Nation's Land Code or expropriation law?
 - What are the statutory time limitations for the completion of the expropriation?
 - Deadlines for appraisal report delivery?
 - Are there any good faith negotiation requirements?
 - Is community approval required for the expropriation?

Expropriation under the FNLMA

– Interest Holder & Community Engagement –

- A First Nation has fiduciary duties toward its members and will typically have higher legal standards in place for an expropriation of a member's interest in reserve land;
 - Often the member will hold a “Certificate of Possession” (or other registered/enforceable possessory interest);
 - Members may also hold leases, easements, etc.
- An appraiser may be asked to engage with interest holders and community members in order to assist the First Nation with:
 - Meeting any good faith negotiation requirements;
 - Developing a shared understanding of the land interest and valuation process with the CP holder;
 - Adhering or facilitating a community approval process.

Conclusion

– Key Issues & Practical Takeaways –

- Expropriation will almost always begin with negotiation;
- Most First Nations with expropriation powers do not yet have expropriation laws in place (and most are required to enact a law before expropriation powers may be exercised);
- When assisting a First Nation with an expropriation process, it is important to:
 - Establish a shared understanding of the legal nature of the interest with the interest holder(s) at the outset of any good faith negotiation, expropriation (or potential expropriation) process;
 - Review deadlines and time limitations in advance;
 - Meet all stipulated deadlines (and any other procedural requirements);
 - Make sure all parties are clear on the valuation criteria under the applicable law (and take into account any equitable considerations that may apply).

BC Expropriation Association



Kent•Macpherson

October 29, 2021



OUTLINE

- 1) Context: When do we typically receive requests for partial interest agreements and/or valuations on Reserve Lands?
- 2) How often does a formal Expropriation apply?
- 3) Terms of Reference Considerations
- 4) Valuation Implications



Context

When do we typically receive requests for partial interest agreements and valuations on Reserve Lands?

- Community planning and infrastructure projects.
- Off-site service extensions required to facilitate private On-Reserve developments.
- Typically, a formal Expropriation Act does not apply, and a more traditional negotiation exercise takes place.

What are the Terms of Reference for the Valuation?

- Property Rights to be considered?
 - Certificate of Possession (CP)
 - Leasehold (Lessor's Interest & Lessee's Interest)
 - Fee Simple (actual/encumbered or hypothetical)
 - Example: Tsawwassen Treaty lands held in fee simple but the Tsawwassen Land Act prohibits any sale of Tsawwassen Lands to any non-Member or non-TFN entity under any circumstances, though the prohibition of alienation under Section 6.
 - Effectively, similar issues that are present via CPs on conventional reserves come into play despite the fee simple tenure.

- What is the Highest & Best Use for each interest to be considered?
 - Physically Possible
 - Unlikely to change based on interest.
 - Legally Permitted:
 - Is there zoning and a OCP/CCP in place?
 - Are there restrictive clauses dictated in a registered lease?
 - What about Bucksee leases and/or grandfathered rights?
 - Financially Feasible:
 - Is there market demand?
 - Maximally Productive:
 - What option yields the greatest return?
 - Fourth & final test and can only be applied when a use passes all of the first three tests.



Injurious Affection?

- Injury or damages/reduction in value above and beyond the impacted land taken.
- Injurious affection can impact multiple legal interest within one parcel of land.
- There can be scenarios where there could be injurious affection even if no land is taken from a particular parcel of land.



Concluding Thoughts (Just my \$0.02)

- Does the Nation/Band have expropriation laws/powers, or is this a negotiation exercise?
 - If negotiating... listen to the landowner & be respectful.
Common courtesy will tend to go a long way!
- Consider jointly retaining an experienced appraiser to assist with establishing the Terms of Reference.
- Know what you are asking for—can the question be answered with a high degree of reliability?

Q&A

Thank you.

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