



Housing Loan Security Arrangements on Reserve, a Case Law Review

In urban and rural regions, loans made for housing purchases are typically secured by the land on which the house is located. If a borrower fails to repay the loan, then the land and the house are seized by the lending institution, either the bank, credit union, or other financial institution, and sold. The proceeds of sale are then used to repay the outstanding balance of the loan. However, lending arrangements for housing on reserve are constrained by the *Indian Act*, which specifically prohibits the seizure of reserve land by any person other than an Indian or band.

Reserve land cannot be seized by creditors, unlike land off-reserve in surrounding urban and rural regions. La Société d'Épargne des Autochtones du Canada (ABSCAN in English, SÉDAC in French), located in Québec, offers loans for housing developments on reserve and commissioned a case law review to better understand the national legal context for lending agreements on reserve.

CMHC funded the case law review as part of its commitment to housing autonomy for Indigenous governments across Canada. The results of the case law review can inform lenders as well as First Nations Councils (Band Councils) when assessing loan security on reserve land under the *Indian Act*.

Acknowledgements

This project was designed and led by La Société d'Épargne des Autochtones du Canada (SÉDAC). The research was conducted by Tiffany Murray, who self-identifies as an Indigenous lawyer with expertise in secured lending matters involving Indigenous parties and Indigenous peoples at Borden Ladner Gervais LLP (BLG).

Project Overview

BLG conducted a case law review to identify jurisprudence related to loan security arrangements on reserve. The purpose of the review was to identify issues related to on-reserve security arrangements for housing loans that related to the transfer of Certificates of Possession (CP). Researchers identified judicial decisions that related to the seizure of the property of an “Indian” living on reserve as defined in the *Indian Act*, including chattel offered as security. This review is current as of December 14th, 2022.

Key Findings

The main findings of the case law review are summarized under three main categories: the role of a holder of a CP; the role of the Minister; and circumventing section 89 of the *Indian Act*.

1. The role of the holder of a CP:

- A CP holder controls the CP land within the confines of the *Indian Act* and has “all incidents of ownership” over that parcel of land, short of the title, which remains with the Crown.
- As long as the underlying title remains with the Crown, possession of the parcel of land may be transferred in accordance with the *Indian Act*, and this does not amount to a seizure under the *Indian Act*.
- There is no explicit or implicit requirement for a Band Council resolution in respect of any such transfer. A Provincial Superior court has the jurisdiction to hear a case concerning the transfer of CP on reserve, and to order that an individual completes the documentation to initiate the transfer of a CP.

2. The role of the Minister:

- A transfer is not a legally enforceable obligation unless it has been approved by the Minister in accordance with the *Indian Act*.
- A provincial court cannot order the Minister to approve the CP transfer.
- The Minister’s decisions with respect to CPs is subject to judicial review on the basis of reasonableness.
- The Minister’s duties with respect to CPs do not include a fiduciary duty; s/he has the duty to investigate a transfer of the CPs at issue only when s/he has evidence to doubt their validity.

3. Circumventing s. 89 of the *Indian Act*

- Caselaw suggests that an individual band member may waive s. 89 of the *Indian Act* if a clear intent to allow security to be enforced is demonstrated. Only the individual may do so, not the Band Council on his or her behalf. Moreover, the waiver may only apply to goods in the ‘commercial mainstream’, which excludes ‘home, furniture, appliances and household goods’. A waiver in a non-commercial context has not been tested in court.
- The Alberta Court of Appeal and the British Columbia Supreme Court (the trial-level court in BC) have ruled that a non-Indian cannot assign debt collection rights to an Indian to bypass s. 89 of the *Indian Act*.
- Conditional sales are an exception to the prohibitions on seizure of on-reserve property under section 89(2), but courts will examine the true nature of a transaction and likely see through attempts to structure a secured loan as a conditional sale to circumvent section 89(1).

Implications to Housing Development On Reserve

The following are key principles to keep in mind when examining loan provisions for on-reserve housing:

1. A CP can be seized by a Band Council when it is owed a debt by the CP holder and a court may have a role in enforcing this seizure.
2. Should there be a future transfer of a CP in case of a loan repayment default, the transfer is not legally enforceable unless it has been approved by the Minister in accordance with the *Indian Act*.

3. If the property for which a loan was sought is NOT under a CP, there is very little legal precedent to help inform a judgment. Many Band Council continue to grant a form of property rights to individual members under so-called “customary land allotments”, but their status in law remains somewhat unclear.
4. Assigning to an Indian the collection of a debt due to a non-Indian carries significant risk. This risk probably extends to assigning debt collection to a Band Council. It is reasonable to assume that provincial and federal courts will uphold the legislative intent of the *Indian Act* when examining these issues.
5. Courts will see through transactions which seek to circumvent the *Indian Act* by calling themselves something other than a seizure, such as a conditional sale.

Further Research Opportunities

The case law review illuminated a few areas where further research is needed:

- More research is needed to understand loan security arrangements specific to each type of land holding, namely with a CP, with “customary land allotments”, under a First Nations Land Management Act land code, and on Treaty settlement lands, and other types of Indigenous lands.
- More research is needed to determine how best to make a housing loan in cases where the borrower has a CP for the property. First, it seems that a transfer of this certificate to Band Council for the duration of the loan or a pledge in favor of the Band Council to offer guarantees for the loan could be less risky than other procedures. Second, cooperation of Band Council and the Minister is required to affect the CP transfer in case of a loan default; and the related risks need to be assessed.

Glossary of Key Terms

Band Council: Many Modern Treaty and Self-governing Nations prefer not to use the term “Band” or “Band Council” and view the term as rooted in colonialism, using instead “First Nation” or “Nation Council”. This report specifically addresses First Nation contracts on reserve, and uses the legal term usually found in these contracts and in the *Indian Act*.

The *Indian Act* is the primary law the federal government uses to administer Indian status, local First Nations governments (called Band Councils) and the management of reserve land. (see [The Canadian Encyclopedia](#)¹)

Indian: Many First Nations people in Canada prefer not to describe themselves as “Indians” and view this term as rooted in colonialism and racism. Under the *Indian Act*, the precise legal meaning of the term “Indian” refers to First Nations persons who are entitled to registration (see <https://www.sac-isc.gc.ca/eng/1100100032463/1572459644986>). In this research insight, we use the latter legal term definition of “Indian”.

Section 89 (1) of the *Indian Act* indicates that “the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.” (see <https://laws-lois.justice.gc.ca/eng/acts/I-5/section-89.html>)

The First Nations’ Land Management Act enables the transfer of land administration to First Nations once their land codes come into effect. This includes the authority to enact laws with respect to land, the environment and resources. (see <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>)

A **Certificate of Possession** is issued by the Minister as evidence of the right of possession to a parcel of land located on reserve. It is registered in the Indian Lands Registry and may be transferred to other members, with the approval of the Minister. The underlying title of the land remains with the Crown. (see <https://laws-lois.justice.gc.ca/eng/acts/I-5/section-20.html>)

¹ <https://www.thecanadianencyclopedia.ca/en/article/indian-act#:~:text=The%20Indian%20Act%20is%20the,obligations%20to%20First%20Nations%20peoples>.

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Full Report

ABORIGINAL SAVINGS CORPORATION OF CANADA — Final Project Report (2023), Author: Tiffany Murray, BLG
https://assets.cmhc-schl.gc.ca/sf/project/archive/research_6/2023-abscan-final-project-report.pdf

For Further Reading

Alternative Financing for Indigenous Housing (2021)
https://assets.cmhc-schl.gc.ca/sf/project/archive/publications/research_insight/69784_w_acc-20210618-001a.pdf

Mortgage Insurance: Leasehold Lending on Reserve (2021)
https://assets.cmhc-schl.gc.ca/sf/project/archive/publications_3/69613_w20210601-010a.pdf



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