

Legal and Policy Tools for Source Water Protection in Indigenous Communities

APPENDIX 6: SAMPLE LOCATEE LEASE UNDER THE *INDIAN ACT*

This template is provided for informational purposes only and is not legal advice. This template is an Appendix to the toolkit “Legal and Policy Tools for Source Water Protection in Indigenous Communities,” current to January 2019.

January 7, 2019



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VIII. Legal Tool: Considering Source Water Protection within Agricultural Leases on First Nation Reserve Lands

During discussions with community members and the Steering Committee, concerns were raised resulting from leases allowing farming on reserve land. Of concern, was the ability of the community to oversee the tenants' actions and ensure methods of farming which did not degrade or impact local waters.

In response to this concern, a template lease under the *Indian Act* was drafted (see Appendix 6). As detailed in this chapter, as all leases include provisions that establish the rights and obligations of the landlord and tenant, provisions can dictate how the land will be used. For example, a lease of land for use as a farm may contain a clause dealing with fertilizer application and as a result, safeguard source waters.

1. Land Transactions under the *Indian Act*

The Canadian Constitution creates a distinction between First Nation territorial lands and other lands in Canada. The legal framework underlying these lands is that:

1. Pursuant to s. 2 of the *Indian Act*, these lands are set aside by the Crown in Right of Canada for the use and benefit of a First Nation;
2. Generally, only First Nations and their members occupy and use these lands. However, a First Nation may ask the Crown to grant interests, such as leases or other rights, to non-members.

First Nation lands governed by the authority of the *Indian Act* have qualities that set them apart from other lands:

- a) All transactions involving these lands must be approved by the Minister or the Governor in Council.
- b) Pursuant to s. 29 of the *Indian Act*, these lands cannot be seized by legal process.
- c) Pursuant to s. 89 of the *Indian Act*, these lands cannot be mortgaged, pledged, or charged to a non-Indian. However, leasehold interests on reserve lands may be mortgaged.
- d) Pursuant to s. 87 of the *Indian Act*, taxation of these lands is restricted: lands cannot be taxed unless held under a lease or permit.

Pursuant to s. 28(1) of the *Indian Act*, transactions without statutory authority are void and therefore unenforceable. This means that all transactions dealing with lands governed by the authority of the *Indian Act* must be authorized under the *Indian Act*.

2. Leasing Land under the *Indian Act* - An Overview

Leases, in general, have certain characteristics that govern the relationship between a lessor (the landlord) and a lessee (the tenant). Every lease includes:

- a) A grant, by the lessor to the lessee, of the exclusive possession of land.
 - Here the lessor retains the underlying ownership of the land (the freehold interest), while the lessee is entitled to “exclusively occupy” the land during the term of the lease.
 - Exclusive occupation is known as the right of possession, one of the rights of ownership. Essentially, the lessor temporarily gives up, in favour of the lessee, one of the rights of ownership of their land.

- b) The term of the lease,
 - A fixed period during which the lessee has exclusive possession of the leased land.
 - A lease must include a definite commencement and termination date for the term.
 - A lease that lasts for an uncertain term, or in perpetuity, could amount to a grant of the ownership of the land rather than a lease. For example, a lease with a term said to last "for as long as required" is not certain, and the lease therefore, may not be valid.

All leases include provisions that establish the rights and obligations of the landlord and tenant. While many of these provisions contain standard terms, other provisions vary depending on the type of lease and how the land will be used. For example, a lease of land for use as a farm may contain a clause dealing with fertilizer application, while one leasing land for use as a shopping centre will not.

The three common types of leases based on land use are:

- a) Agricultural Leases:
 - Appropriate for the grazing of livestock and the growing of agricultural crops.
 - Note that resource extraction, such as the cutting of timber, is not dealt with through leasing, but by means of permits and licenses.

- b) Commercial Leases:
 - Used when the leased property is intended for commercial or industrial ventures.
 - Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water park, gas station, hotel, etc.
 - The commercial lease is also appropriate for multi-unit residential projects, such as a condominium, apartment building or subdivision development.

- c) Residential and Cottage Leases:
 - This type of lease is designed to reflect the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation.

3. Mandatory Steps for Leases under the *Indian Act*

The federal government requires that leasing of land governed by the *Indian Act* involve certain mandatory steps. The general framework for leasing is summarized below.

The provisions which allow for the leasing of land governed by the *Indian Act* are found under Subsections 53(1)(b), 58(1)(b), 58 (1)(c), and 58(3). Reserve lands which have been validly allotted by a First Nation Council under the *Indian Act* are referred to as “locatee lands” , and are usually issued a

Certificate of Possession. Unallotted “band lands” are reserve lands which the Band Council has not allotted to a locatee. Unallotted land is also known as “common band land.”

Locatee land may be leased through several mechanisms:

- a) On the application of the locatee, land may be leased without being designated, pursuant to ss. 58(3). This is referred to as a locatee lease.
- b) Uncultivated or unused locatee land may be leased, with the consent of the Band Council, for agricultural or grazing purposes, or for any purpose that benefits the locatee pursuant to ss. 58(1)(b)). With the increasing use of ss. 28(2) permits, a lease under ss. 58(1)(b) is not commonly used for agricultural purposes.

There are several requirements to using ss. 58(1)(c) to Lease Band lands:

- a) The land to be leased must be either uncultivated or unused. At the time the lease is entered into, therefore, the land should be vacant, and not being used for farming, grazing, habitation or other purposes.
- b) The land must be leased for agricultural or grazing purposes only.
- c) The First Nation Council must consent to the lease. A Band Council Resolution (BCR) or some other form of council consent must be obtained.
- d) The lease must be for the benefit of the First Nation.
- e) If the Minister’s authority has not been delegated to the First Nation under s. 60, an agricultural or grazing lease must be approved by the officer who has delegated authority pursuant to the Delegation of Authority Instrument under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument).

4. Locatee Leases

This section explains how to lease allotted (“locatee lands”) reserve lands under ss. 58(3) of the *Indian Act*, at the request of the locatee.

Locatee lands are lands which a First Nation has validly allotted under the *Indian Act*, possession of which is generally evidenced by a Certificate of Possession (CP). The authority for the leasing of locatee land is found under:

- a) Pursuant to ss. 58(1)(b) of the *Indian Act*, uncultivated or unused land in the possession of an individual may be leased, with the consent of the Band Council, for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession. This mechanism is rarely used today.
- b) Pursuant to ss. 58(3), a locatee can apply to the Minister to lease all or part of the land in the locatee's possession without the land being designated. This type of lease is commonly called a "locatee lease", and it is the most common method used to lease allotted land.

The *Indian Act* does not specifically provide for any First Nation to provide input respecting locatee leases. However, First Nations obviously have an interest in the use and development of reserve lands.

As a consequence, the department must seek input from the Band Council, but it should be noted, an objection by the Band Council does not amount to a veto of the lease.

The Band Council must be requested to express their views as to conformity with First Nation land use policies, zoning or development plans on all locatee leases with terms of 49 years or less, including all renewal terms. The terms of a locatee lease must comply with all existing by-laws of the First Nation.

5. Agricultural Locatee Leases under the *Indian Act*

Mandatory provisions: Most leases contain many provisions dealing with every aspect of the landlord and tenant relationship. Every agreement for the leasing of land, however, must include the following elements:

- a) a lessor (landlord) and lessee (tenant). Because legal title to all reserve lands is vested in the Crown, Her Majesty the Queen in Right of Canada must be the “lessor” in every lease of reserve land, except in the case of a sub-lease. This provision applies even when the Crown has delegated control and management of lands to a particular First Nation under sections 53 or 60 of the *Indian Act*. In these cases, the delegated authority must sign the lease on behalf of the Minister, who represents the Crown. A sub-lease, by its nature, is made between the head lease lessee and a third party sub-lessee and consequently, the Crown is not a party to the sub-lease instrument;
- b) a legal description of the land or premises (eg. Registration Plan or a CLSR Plan) being leased;
- c) the rent to be paid, to whom it is paid, when it is payable and how and when it is to be reviewed;
- d) the term of the lease, stating the date the lease commences and when it terminates; and
- e) the authorized uses of the land.

Implied Covenants: Beyond the minimum requirements of the mandatory provisions, certain obligations, or covenants, are implied by law to form part of a lease unless the parties have chosen to expressly deal with them in the lease. If the parties do not deal with these obligations in the lease, then the covenants will bind the parties as if they had agreed to them.

For the landlord, there are three principal implied covenants:

- a) The tenant's right of quiet enjoyment of the leased premises. The tenant has the right to be protected against any interference by the landlord with the tenant's use and enjoyment of the premises for the stated purposes.
- b) The obligation not to derogate (take away usefulness) from the lease. The landlord may not use other property in any way that makes the leased premises substantially less fit for the purposes for which they were leased.
- c) The obligation to supply premises fit for habitation (applicable only to furnished premises).

For the tenant, there are four significant implied covenants:

- a) To pay rent: Failure to do so may result in forfeiture of possession by the tenant.

- b) To act in a tenant-like manner: In essence, this obligates the tenant to take the action necessary to preserve the state of the property. It does not, however, require the tenant to repair damage caused by wear and tear, or lapse of time.
- c) To allow the lessor to enter and view the state of repair of the property; and
- d) To pay all taxes required by law.

Joint Tenants and Tenants in Common: When a lease involves more than one tenant, a joint tenancy or a tenancy in common is created.

- a) A joint tenancy is one in which all the tenants hold an equal, undivided, interest in the whole of the lease, and in case of the death of a tenant, the remaining tenants automatically receive the deceased tenant's interest. This is referred to as “right of survivorship”. Joint tenancy is not permitted in the Province of Quebec.
- b) A tenancy in common involves two or more tenants, but each tenant may hold a different share of the lease, and there is no right of survivorship. On death, the interest of a tenant in common would pass to his or her estate, not automatically to the other tenants.

Sample Locatee Lease under the *Indian Act*

THIS LEASE AGREEMENT is made this ____ day
of ____, in the ____ [name of First
Nation]__territorial lands

OR

THIS LEASE AGREEMENT is made this ____ day
of ____, in the Township/City of ____ in the
County of ____ in the Province of ____

BETWEEN:

Her Majesty the Queen in Right of Canada,
hereinafter called “Her Majesty”, represented by
the Minister of Indian Affairs and Northern
Development or his authorized representative
(herein after referred to as the “Landlord”) AND:
____ [Tenant]_____, of
____ [address]_____(herein after
referred to as the “Tenant”)

NOTE:

Because legal title to all lands governed by the *Indian Act* is vested in the Crown, Her Majesty the Queen in Right of Canada must be the “lessor” or “landlord” in every lease of these lands, except in the case of a sub-lease. A sub-lease, by its nature, is made between the head lease lessee and a third-party sub-lessee and consequently, the Crown is not a party to the sub-lease instrument.

Identify parties to a contract by their full legal names and their postal addresses. Parties must be identified in exactly the same manner throughout the document. The first party listed is the lessor, and the second party is generally the lessee.

If the lessee is a corporation, the following information should be provided with respect to a corporate party: the registered name of the company as it appears in the Certificate of Incorporation or Letters Patent; the province/territory in which it is incorporated; and the full postal address. In addition, the corporation's Articles of Incorporation must authorize the corporation to carry on business in the province where the land to be leased is found, and to enter transactions involving land.

Because the relationship of landlord/tenant can sometimes be confused with a joint venture or partnership, especially in the case of a crop share lease where both parties are contributing, it is important that the parties be clearly defined as landlord and tenant.

WHEREAS Her Majesty, vested with legal title in the following property commonly known as _____(farm name)_____, consisting of ___ acres as shown in Schedule A, and legally described as: _____(Lot) _____(Plan) (herein after referred to as “the Lands”),

WHEREAS the lands have been set apart for the use and benefit of the ___(First Nation)___,

WHEREAS the ___(First Nation)___ has approved the lease pursuant to Band Council Resolution _____ on ___(date)_____

WHEREAS the Tenant has agreed to lease from the Landlord the land, buildings, and other prescribed features the Lands for the purposes of farming;

WHEREAS the locatee acknowledge his or her agreement with the terms of this lease in a schedule attached hereto;

AND WHEREAS this lease is authorized under ss. 58(3) of the *Indian Act*;

IN CONSIDERATION of the mutual covenants and agreements contained herein, the Landlord and Tenant hereby agree as follows:

1. GRANT OF LEASE

1.1 The Landlord hereby leases to the Tenant and the Tenant hereby leases from the Landlord the property known as ___[insert address]_____ (the “Leased Property”) and more fully described in Schedule “A” attached hereto, subject to all easements now existing or which the Landlord may grant in the future, as outlined in Schedule B, together with any structure(s) located thereon as described below (the “Building”) (the Lands and Building being collectively referred to as “the Premises”).

The description of the land is a very important part of the lease, as accurately identifying the parcel of land is crucial, both for registration purposes and to ensure that the lessee is in fact using the correct land. The description of the lands should also identify any existing easements or encumbrances which affect the land. However, it is the lessee’s responsibility to pay for and verify the accuracy of the description.

The description of the land set out in the lease must meet the requirements contained in Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada*. In the preliminary stages of the project, refer to the Interdepartmental Agreement in effect at the time to identify the survey product required to register the transaction in the Indian Lands Registry. In most cases, leases must be described by either Registration Plan or CLSR survey.

Where a lease has been assigned, mortgaged, amended, an addendum added, or the legal description has changed: a recitation of the complete chain of events leading up to the present transaction and containing the dates of previous contracts, Indian Lands Registry registration numbers, the parties involved, and a complete legal description of the land is required.

2. TERM OF THE LEASE

2.1 This Lease will be in force for a term of _____ months/years commencing on the _____ day of _____, 20____ (the “Commencement Date”) and ending on the _____ day of _____, 20____ (the “Termination Date”) unless terminated in accordance with the provisions of this Lease.

2.2 The term of this Lease may be extended by mutual agreement of the Landlord and the Tenant in writing prior to the Termination Date for a further period upon the same terms and conditions herein, except as otherwise agreed in writing by the parties executing a renewal statement.

2.3 The total term of this Lease may not extend beyond 49 without the consent of the _____ [name of First Nation] _____ Council.ⁱⁱ

If the lease is for **ordinary agricultural grazing or a cash crop**, the recommended term is five years or less; if the **lease involves major agricultural development**, such as a dairy, where security of tenure is required, longer periods, to a maximum term of 25 years, may be considered. Longer terms may be appropriate where undeveloped land is involved, and clearing or extensive irrigation may be required.

For an agricultural lease under ss. 58(3) of the *Indian Act*, there should be no right of renewal specified in the lease.

When it comes to the termination of the lease, it is important to know that the tenant has no legal right to remain in the premises upon termination of the term of the lease.

3. RENTⁱⁱⁱ

3.1 Minimum Rent. The Tenant covenants to pay the Landlord rent in the amount of \$____ each year. The Tenant shall pay the entire amount of the rent to the Landlord at the beginning of the lease term and on the anniversary thereof unless otherwise mutually agreed.

3.2 Additional Rent. The Tenant shall also pay throughout the Term, at the times and in the manner provided in this Lease, all Additional Rent which shall, except as otherwise provided in this Lease, be payable within 15 days of receipt by the Tenant of an invoice, statement or demand for it.

3.3 The Tenant shall pay as Rent the following amounts in advance annually on the 1st day of _____ during the term, except that the first such payment is to be made before the signing of this lease by the parties:

- a) during the “first period” the Lessee will pay the sum of \$_____ dollars per annum;
- b) for the second and each subsequent Period commencing in _____, the rent will be the greater of:
 - i) the annual Rent which the Minister determines to be the Fair Market Rent for the respective Period; and,
 - ii) the same annual Rent as due in the last year of the immediately preceding period.

The payment of rent can be tailored to the unique circumstances of the Landowner and Tenant, including annually, on a monthly basis, or a portion at the commencement date and the remainder after harvest. The most common formulas provide for regular interval cash payments, or payments in crops, or a hybrid of both payment in cash and crops.

All consideration should be based upon the fair market value of the land. Any departure from fair market rent should be justified by the proposed lessee, approved in writing by the locatee or the Band Council (as may be), and recommended for approval by the Lands Officer. The Band Council or locatee should also be advised to seek independent legal or financial advice before accepting less than fair market rent.

A lease may, and a lease more than five years must, provide for a review and adjustment of the rental payable which must be repeated at a minimum every five years for the term of the lease, but can take place more frequently. If the term of a lease exceeds five years, the first rent review must take place within five years of the commencement of the lease.

When providing for rent review, using what is called a ratchet clause is permissible. A ratchet clause provides that during subsequent rent reviews, the rent to be charged may be higher than the current rent should fair market values rise, but may never be lower than the current rent, even if fair market values fall.

Note that a First Nation may call upon the Lands Officer to assist in the negotiations with the proposed lessee on the negotiable non-mandatory terms of the lease) including: the amount of rent. Both parties should be advised early in the negotiations if a standard lease document will form the basis of the lease. The basic terms and conditions of the lease (including the amount of rent, the proposed use of land, lease term, and legal description of the leased lands) should be conditionally negotiated and inserted into the precedent lease by the Lands Officer. Any changes proposed by either party should be highlighted with redline/strike-out.

Note that the originator of a lease document is always the Lands Officer, or a First Nation with section 53/60 delegation. A proponent's draft lease, or precedent, should not be used as the basis for a lease or the starting point of negotiations. Any amendments must be made by the Lands Officer not the proponent or their legal counsel.

This lease is based on annual lump sum rent payments. For a lease with monthly rent payments, the following clause may be used: *The Tenant shall pay to the Landlord, during each year of the Term, rent for the Premises of \$__ per annum, payable in equal monthly installments of \$__ in advance of the first day of each and every month.* If required, a schedule can be attached to the lease agreement laying out the formula for how rent will be paid. In this case, this clause of the agreement may read: *The Tenant agrees to pay to the Landlord, during each year of the term, rent for the Leased Property in accordance with the Rental Formula, as set out in Schedule "XX" as attached hereto.*

4. PERMITTED USES

4.1 The Tenant will use the Lands only for the sole purpose of _____;

- [list].

5. PROHIBITED USES

5.1 The Tenant shall not, unless by mutual agreement to the contrary, engage in any of the following activities on the Leased Property.

- [list].

6. LANDLORD and LOCATEE ACCESS

6.1 The Landlord has the right to access the Leased Property for the purpose of _____ with prior notification of _____ to the Tenant.

6.2 The Locatee, in possession of a valid Certificate of Possession (CP), has the right to access the Leased Property for the purpose of _____ with prior notification of _____ to the Tenant.

Together Clauses (4) and (5) restrict the tenant to business activities and premises specified in the agreement; and may be drafted to include restrictions on farm or environmental practices, such as agricultural BMPs, soil management and water conservation practices. If the Tenant is intended to have limited access to the use of structures or buildings located on the Leased Property, the Lease Agreement should specify which structures/buildings and for what purposes.

Note that that you may want to include provisions addressing the use of farm property for residential premises for farm workers.

Note that Clause (6) gives a right to the Landlord which the Landlord doesn't otherwise have under a commercial lease. Given the complex shared land use arrangements that can arise in the context of agricultural leases, it is common for a landowner to want or need continued access to the Leased Property, especially if he/she resides or farms on property abutting the Leased Property. Likewise, Tenants want to ensure their rights and the exclusivity of their leasehold interest. It is wise to address this issue up front in the lease agreement, and establish terms to which the Parties can agree, including a provision requiring the Landlord give the Tenant notice.

9. REPRESENTATIONS AND

WARRANTIES OF THE TENANT

9.1 The Tenant makes the following representations and warranties to the Landlord acknowledging that the Landlord is relying on each such representation and warranty in connection with the lease of the property under this Agreement, and with the further acknowledgment that the Landlord would not have entered this Agreement without any of the representations and warranties of the Tenant.

9.2 The Tenant represents and warrants to the Landlord that:

(a) the Tenant is not bankrupt, insolvent or subject to any legal form of reorganization, moratorium, preference or other law or regulation relating to or affecting the enforceability of creditors' rights generally;

(b) this Agreement has been duly authorized, executed and delivered by the Tenant and is a legal, valid and binding obligation of the Tenant, enforceable against the Tenant by the Landlord in accordance with its terms except only as such enforcement may be restricted or limited by any applicable laws in regard to bankruptcy, insolvency or the enforcement of creditors' rights generally.

In the context of a lease agreement, a 'representation' is an assertion of fact upon which another party to the agreement is expected to rely, and a warranty is an express or implied promise or assurance that a statement of fact with respect to the Leased Property is true.

If a representation is untrue or is made with the belief that it is true and the party discovers it is untrue before the signing of the Agreement, the party must disclose this information to the other party, otherwise the clause may be deemed a misrepresentation.

The representations and warranties included a lease should include the facts and promises made which induced the parties to enter the agreement, and on which they are relying. These may relate to assurances that the Tenant will obtain a leasehold interest free of encumbrances, and that the Landlord is contracting with a Tenant that is financially sound and able to make the agreed upon rent payments.

Note that in addition to representations and warranties made by the lessee, it is recommended that a credit investigation of the proposed lessee be conducted to confirm that the lessee has the means to meet its financial commitments under the lease. It is also recommended that a corporate search be conducted if the lessee is a corporation in order to verify its corporate standing and the names of its current signing officers. The lessee must pay any costs associated with either investigation.

11. TENANT'S COVENANTS

The Tenant covenants with the Landlord:

- (a) to pay all amounts payable by the Tenant to the Landlord under this Lease (collectively the "Rent");
- (b) to observe and perform all the covenants and obligations of the Tenant herein;
- (c) to use the Premises only for the purpose of _____ and any and all uses ancillary thereto;
- (d) to employ agricultural best management practices so as not to impoverish, depreciate or injure the soil, and protect ground and surface waters , and shall:
 - i. cultivate, seed, control weeds, insects and disease, and harvest crops on the Lands in a diligent and sustainable manner and in accordance with the requirements of the laws of ___[name of First Nation]_____ and Canada;
 - ii. use agricultural chemicals, including pesticides, herbicides and fertilizers, in accordance with label directions;
 - iii. rotate annual crops in accordance with good farming practice; and
 - iv. minimize soil loss from erosion
- (e) to refrain from:
 - i. diverting or altering any wetland or watercourse;
 - ii. overloading nutrient levels on the Lands or adjacent water bodies;
 - iii. allowing pesticide to drift onto nontarget lands, including adjacent crops, shelter belts or yard sites;
 - iv. permitting or allowing the accumulation of any waste material, debris, refuse, or garbage on the Lands; or
 - v. allowing any site contamination such as, but not limited to,

Inclusion of the tenant's covenants should be drafted with care, and based on the business decision between the parties. The provisions included here should only be included if appropriate, given the nature of the agreement between the parties, the Tenant's farm operations, and the permitted and restricted uses of the land.

Note that the Landlord may want to, in order to ensure proper care and management of the land, require that the Tenant adhere to certain principles or farming and/or environmental practices such as 'green obligations', (i.e., targets for energy use, water consumption, waste diversion, GHG emissions); soil conservation best practices; or adherence the Canadian Organic Standards.

Consider inclusion of sustainability clauses within your lease which will establish obligations on both the landlord and the tenant to do their respective parts to achieve specified sustainability targets (such as adherence to organic farming, climate change mitigation, energy, water and resource conservation, recycling and air-quality goals, amongst others).

An example may be the inclusion of a "sustainability" standard, defined within the lease, for repair and maintenance as well as building operations obligations, which allow for recycled and re-used material to be used, water and energy conservation targets, or a restriction on the use of certain chemicals (i.e., chemical pesticides or fertilizers, or volatile organic compounds ("VOC's") in construction materials).

chemicals, oil spills,
hydrocarbons, or any other
waste materials on the Lands or
adjacent water bodies.

- (f) to supply to the Landlord a record of what pesticides were applied to crops growing on the Land's upon request;
- (g) to maintain the fences on the Land;
- (h) that no live trees on the Land will be cut and no crop residue such as straw or cornstalks will be burnt without the prior written permission of the Landlord;
- (i) not to remove sand, gravel, topsoil or minerals from the Premises;
- (j) to keep the mouths of all underdrains on the Premises open and free from obstruction and in good running order at all times during the Term and will not suffer or permit such drains or the watercourses in any open ditches on the Premises, to become obstructed, but will constantly keep them free and clear for the escape of the water flowing therein;
- (k) not to allow any public use of the Premises without the written consent of the Landlord, acting reasonably;
- (l) not to install any equipment which would exceed or overload the capacity of the utility facilities for the Premises or the electrical wiring and service in any structure(s) and if any equipment installed by the Tenant shall require additional utility facilities, such facilities shall be installed, if available, and subject to the Landlord's prior written approval thereof (which approval may not be unreasonably withheld), at the Tenant's sole cost and expense in accordance with plans and specifications to be approved in advance by the Landlord, in writing.

Incorporating such clauses as covenants in a lease may stem out of the Landlord and Tenant shared values with respect to environmental protection and resource conservation, or in order to keep an upperhand on anticipated environmental regulation and sustainability standards.

12. COMPLIANCE WITH LAWS

12.1 The Tenant shall use and occupy and shall cause the Leased Property to be used and occupied in compliance with all Applicable Laws, present and future, and in a safe, careful and proper manner, which shall include, but not be limited to, all activities related to the application of pesticides; the generation, use, application, storage, and disposal of nutrients (including manure, commercial fertilizers, and off-farm sources); and the storage and/or disposal of wastewater (including sewage, process water, and stormwater) and hazardous waste. It is the Tenant's responsibility to ensure that its use is permitted by all Applicable Laws. At the Landlord's request the Tenant shall comply with any directive, policy or request of any governmental or quasi-governmental authority or any other reasonable request of the Landlord, in respect of any environmental protection, energy conservation, water conservation, waste management, health, safety, security or other matter relating to the Tenant's use and occupancy of the Leased Property. If due to the Tenant's use or occupancy of the Leased Property, improvements or changes are necessary to comply with any Applicable Laws or with any such directive, policy or request or with the requirements of insurance carriers, the Landlord may at its option either do the necessary work, at the expense of the Tenant, or forthwith give Notice to the Tenant to do such work within the requisite period of time and the Tenant shall then do such work within the requisite period of time. The Tenant shall pay to the Landlord the costs of any such work done by the Landlord.

13. REPAIR AND MAINTENANCE

13.1 The Tenant shall at its sole cost manage, maintain, repair, and keep the Leased Property and all Leasehold Improvements in good order and condition to the standards from time to time prevailing for similar properties in the area in which the Leased Property is located; subject to reasonable wear and tear not inconsistent with such standards with the exception only of those repairs which are the obligation of the Landlord under this Lease, including:

-- [list].

The contents of clause 13 depends entirely on the nature of the leasing arrangement between landlord and tenant, and should be customized given each individual circumstance. This clause is drafted on the assumption that the Landlord will not retain a significant role in farm repair and maintenance. The allocation of responsibility for repair and maintenance should be reflected in the cost of rent.

All commercial leases, farm leases included, should address environmental matters. It is much less costly and less complicated to appropriately allocate environmental risk within the lease agreement, than to leave it to the courts to allocate the environmental liability. It is advisable to specifically allocate environmental risk within the lease agreement. A Landowner may want to include a covenant requiring the Tenant to provide "clean" environmental report at end of Lease term, with a clear definition of what standard the site must adhere, and a mechanism for the landlord's acceptance of the site at lease termination. To have a point of comparison, it is necessary to have detailed the pre-lease condition of the site as far as possible. It is also advisable to stipulate who bears responsibility for environmental problem not created by the Tenant, and clearly identify who has responsibility for off-site migration onto the Leased Property.

14. ALTERATIONS BY TENANT

14.1 The Tenant may from time to time at its own expense make changes, additions and improvements to the Premises to better adapt the same to its business, provided that any change, addition or improvement shall be made only after obtaining written consent of the Landlord, and shall be carried out in a good and workmanlike manner and only by persons selected by the Tenant and reasonably approved in writing by the Landlord. The Tenant shall pay promptly when due all costs for work done or caused to be done by the Tenant to the Premises which could result in any lien or encumbrance on the Landlord's interest in the property and shall keep the title to the property and every part thereof free and clear of any lien or encumbrance.

14.2 Any changes, additions, and improvements to the Premises shall become the property of the Landlord upon the expiration or termination of the lease.

A lease must always state whether improvements become the property of Her Majesty or the lessee upon expiration or termination of the lease. As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor of leasing, and is usually provided for by the lessee's accounting method. If the lessee must remove improvements at the expiration of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which the improvements will revert to the Crown, and may be removed at the lessee's expense.

15. DAMAGE AND DESTRUCTION

15.1 If there is damage, destruction or contamination (collectively; "Damage") to all or any material part of the Leased Property to the extent that the ability of the Tenant to carry on the farming operation thereon is prevented or substantially hindered, then:

(1) If the Damage can be substantially repaired under Applicable Laws within 180 days from the date of such Damage (employing normal construction methods without overtime or other premium), the Landlord shall forthwith repair such Damage other than Damage to Leasehold Improvements and any other property that is not the responsibility of or is not owned by Landlord;

(2) If the Damage cannot be substantially repaired under Applicable Laws within 180 days from the date of such Damage (employing normal construction methods without overtime or other premium), then: (i) either party may elect to terminate this Lease on thirty (30) days' prior written notice to the other Party, failing which the Landlord shall forthwith repair such Damage other than Damage to Leasehold Improvements or property that is not the responsibility of or is not owned by the Landlord.

15.2 If the Landlord is required to repair Damage to the Premises under Section 14.1 the Basic Rent payable by the Tenant shall be proportionately reduced to the extent that the Premises are rendered untenable or inaccessible, from the date of the Damage until 30 days after completion by the Landlord of the repairs to the Premises or until the Tenant again uses the Premises (or the part thereof rendered untenable), whichever first occurs. The Tenant shall effect its own repairs as soon as possible after completion of the Landlord/s repairs in accordance with its obligations under this Lease.

16. INSURANCE

16.1 The Tenant will take out and maintain insurance against any liability of the Tenant to third parties arising from or in relation to the Tenant's use or occupancy of the Lands, in at least the amount of _____.

16.2 The Tenant agrees to provide the Landlord with evidence of liability insurance coverage on or before the Commencement Date.

16.3 The Tenant shall advise the Landlord of any cancellation, material alteration or lapse of any policies of insurance required to be provided hereunder.

16.4 The Tenant covenants not to do, omit to do or permit to be done anything which will cause or shall have the effect of causing the cost of the Landlord's insurance in respect of the Premises to be increased at any time during the Term or any policy of insurance on or relating to the Premises to be subject to cancellation.

16.6 If the Tenant fails to effect and keep such insurance in force, the Landlord shall have the right, upon written notice to the Tenant, to effect such insurance at the cost of the Landlord and all outlays by the Landlord shall be immediately payable by the Tenant to the Landlord as Additional Rent without prejudice to any other rights and recourses of the Landlord hereunder. No such insurance taken out by the Landlord shall relieve the Tenant of its obligation to insure hereunder and the Landlord shall not be liable for any loss or damage suffered by the Tenant in connection therewith.

A lease agreement often provides for the Tenant and/or Landlord to obtain various forms of insurance including: commercial property insurance, rental insurance, leasehold interest insurance, business interruption insurance, liability insurance, boiler/machinery insurance.

Locatee agricultural leases under the *Indian Act* require liability and fire insurance. Generally, liability insurance should be for a minimum of \$1,000,000.

When deciding on the allocation of risk, and which party is required to obtain insurance, consideration should be had of the specific arrangement, nature of the farm business, who is in the best position to minimize risk, who is most at risk, who is most in control of a particular risk, and who is expected to bear the risk of loss. In determining what is right for your situation, thought should be given to what needs to be insured against (i.e., what kind of loss – a landlord may be concerned about environmental risk, or disruption in rental income, while a Tenant may be more worried about the cost of repairing or replacing buildings or equipment, the loss of use of the premises, and the liability to pay rent despite the damage and loss of use). 10

Proof of insurance, such as copies of actual Declarations pages and policy wordings, should be acquired prior to the lease effective date, and proof of continued insurance provided annually. It is advisable to have the insurance clause of the lease agreement reviewed by a lawyer as well as your insurance provider. Note that a Tenant (in ground lease, or net lease) may also be able to obtain a title insurance policy to insure its leasehold interest in the premises.

If included, an indemnity clause will serve to protect one party against liability, effectively shifting liability from one party to the other. Insurance and Indemnity clauses need be drafted (and reviewed) together to ensure the risk allocation intentions of the parties are properly reflected in their written agreement. Indemnity clauses that are overly broad may be found to be unenforceable. A contractual undertaking by one party to secure property insurance operates in effect as an assumption of risk by that party (i.e., an implicit agreement that the insurance proceeds would cover the risk of loss.) As such, the purchase of insurance, or sharing of the cost of insurance, by the Landlord or Tenant, may implicitly release a party from liability, even for acts of negligence. That said, a covenant to insure may be limited by express provisions to the contrary.

17. RIGHT TO ENTER

17.1 Landlord shall have the right to enter upon the Leased Property enter upon the Leased Property to examine, inspect and show the Premises for purposes of leasing, sale or financing, to provide services or make repairs, replacements, changes or alterations as provided for in this Lease or for other reasonable purposes that do not interfere with the Tenant's ability to carry out regular farming operations and to take such steps as the Landlord may deem necessary for the safety, improvement or preservation of the Premises. The Landlord shall give reasonable Notice to the Tenant prior to such entry (other than in the case of an emergency or apprehended emergency), but no such entry shall constitute a re-entry by the Landlord or an eviction or entitle the Tenant to any abatement of Rent.

18. ASSIGNMENT AND SUBLETTING

18.1 The Tenant shall not assign, sublet, or mortgage the Tenant's interest in this Lease, nor grant any licence or part with possession of the Leased Property or transfer any other right or interest under this Lease without the Landlord's prior written consent, such consent shall not be unreasonably withheld.

18.2 The Tenant shall not assign, sublet, or mortgage the Tenant's interest in this Lease, nor grant any licence or part with possession of the Leased Property or transfer any other right or interest under this Lease in the Event of Default.

18.3 In the event of any transfer or assignment of any of the Tenant's interest in this Lease, the Tenant shall pay to the ___[First Nation] and/or [Locatee]___ an Assignment Fee of \$____. The Assignment Fee would be due and payable upon the Landlord's written consent permitting such an assignment.

18.4 Every assignment, sub-lease, and mortgage shall be registered in the Indian Lands Registry.

It is important that all transfers of leasehold interests be in the best interests of the First Nation or, where relevant, the locatee.

Therefore, the lease should provide that the lessee will not assign, sublease or mortgage the lease without the prior written consent of the Minister or the Minister's delegate.

For sub-leases, mortgages, and assignments the lease should provide that the consent of the Minister will not be unreasonably withheld.

The lessee should only be charged an assignment fee if the lease specifically provides for such a fee. It is improper for a First Nation or locatee to make their consent to a transfer conditional upon payment by a lessee of any sums to the First Nation or any individual, unless authorized in the lease agreement.

To approve for a transfer, the lease must be in good standing, and the lessee cannot be in default under any of its terms or conditions.

Every assignment, sub-lease or mortgage must be registered in the Indian Lands Registry. The assignment, sub-lease or mortgage must be drafted in a form suitable for registration.

A lease document subletting part of the lands held under a headlease, must refer to the headlease. That reference must include the description of land held under the headlease. The portion to be sublet must be accurately and clearly defined by a Registration Plan or a CLSR survey

Note that under a sublet or assignment of a lease, a tenant is not released from its obligations under the lease unless the agreement expressly provides such a release.

Note it is in the interest of the original Tenant and the Landlord to ensure that any necessary inspections or investigations (re site conditions, environmental status) is conducted prior to the assignment.

19. SURRENDER

19.1 Upon the expiration or other termination of the Term, unless extended or renewed, the Tenant shall immediately quit and surrender possession of the Lease Property in substantially the condition in which the Tenant is required to maintain the Leased Property excepting only reasonable wear and tear, and upon surrender, all interest of the Tenant in the Leased Property shall cease.

20. EVENTS OF DEFAULT

20.1 Upon the occurrence of any of the following events (an "Event of Default"):

(a) the Tenant fails to pay any Rent or other sums due hereunder when due, and such Rent or other sums are not paid within thirty (30) days after notice is given by the Landlord of such non-payment;

(b) the Tenant has breached any of its obligations in this Lease and, if such breach is capable of being remedied and after Notice from the Landlord the Tenant fails to remedy such breach within thirty days; or if such breach cannot reasonably be remedied within thirty days, the Tenant fails to commence to remedy such breach within such thirty days;

(c) the Tenant or any person or corporation bound to perform the obligations of the Tenant hereunder either as guarantor or indemnifier or as one of the parties constituting the Tenant takes any steps or suffers any order to be made for its winding up or other termination of its corporate existence or becomes insolvent or commits an act of bankruptcy or becomes bankrupt;

(d) the Tenant abandons the Premises during the Term without the Landlord's written consent, or the Tenant does or permits anything causing cancellation or threat of cancellation of the

"Cancellation" refers to the process for ending a lease before the conclusion of its stated term, because the lessee fails to comply with their obligations under the lease. In this directive, the terms "cancellation" and "termination" are used interchangeably.

The *Indian Act* contains no specific provision to cancel leases. The framework for cancelling leases is included as part of the mandatory terms and conditions contained in every standard lease agreement or the departmentally approved equivalent. Cancelling a lease is a significant step, with important legal consequences. The cancellation must be managed very carefully, and, where there is any uncertainty, the regional office of the Department of Justice should be consulted. Certain events will trigger the cancellation of a lease, including failure by the lessee to pay, failure to perform or observe covenants set out in the lease, or a change of corporate control of the lessee. Cancellation is not automatically the appropriate response to a lessee's failure to perform their obligations under a lease. The region and the First Nation should determine the appropriate course of action, and alternative remedies should always be considered. For example, depending on the circumstances, the department may elect to re-let the land as agent for the lessee, or to perform covenants for, and at the expense of, the lessee.

If, after discussions with the First Nation and consultation with the Department of Justice, the decision is made to cancel a lease, the region should deliver to the lessee notice of the default. The notice should require the lessee to correct the default within the time frame set out in the lease. If the lease does not contain such a time frame, the notice must allow the lessee a reasonable time to cure the default.

Landlord's insurance on the Premises; then the Landlord may, at its option:

(I) be entitled to the full amount of the current month's and the next three months' installments of Rent which shall immediately become due and payable and the Landlord may immediately distrain for the same, together with any arrears then unpaid;

(II) re-enter the Leased Property after giving the Tenant sixty (60) days notice and take possession and re-let the Leased Property on behalf of the Tenant or otherwise as the Landlord in its discretion may determine including, without limitation the right to:

(i) take possession of the Tenant's crops sown and growing, and any equipment or other property on the Leased Property;

(ii) store such property at the expense and risk of the Tenant;

(iii) sell or otherwise dispose of such property in such manner as the Landlord sees fit; and

(iv) make alterations to the Premises to facilitate the re-letting;

(v) after giving the Tenant sixty (60) days notice, seize and sell any crops sown and then growing, any equipment or other property of the Tenant on the Leased Property and may apply the proceeds thereof to all Rent to which the Landlord is then entitled under this Lease;

(vi) terminate this Lease by giving the Tenant 60 (60) days prior written notice of the termination; and remove and sell the Tenant's crops sown and growing, any equipment or other property of the Tenant therefrom.

Pursuant to the notice provisions of standard lease documents, the Notice of Default must be signed by the departmental official who is authorized by the *Delegation of Authority Instrument* to sign on behalf of the Minister. Therefore, a Notice of Default may not be valid if signed by a Lands Officer.

First Nation Not to Commence Proceedings: All lease cancellations must be initiated and conducted by DIAND. Where a First Nation has delegated authority under s. 53 or s. 60, actions to recover overdue rent may not be started without prior consultation with the department. A First Nation may send a letter advising the lessee that the rent is in arrears, and requesting payment of overdue amounts. However, the department must send the Notice of Cancellation to initiate the cancellation proceedings.

As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor for leasing, and is usually provided for by the lessee's accounting method. If the lessee is to remove improvements at the expiration or cancellation of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which they will revert to the Crown, and the Crown may remove them at the lessee's expense.

Consider whether contamination constitutes a "default" such that it may prejudice other rights under the lease, as well as which party should bear responsibility for environmental risk.

22. NOTICE

22.1 Any demand, notice, direction or other communication to be made or given hereunder (in each case, "Communication") shall be in writing and shall be made or given by personal delivery, by courier, by facsimile transmission, or sent by registered mail (charges prepaid), addressed as follows:

in the case of the Landlord: _____

in the case of the Tenant: _____

or to such other address or facsimile number as any party may, from time to time, designate in accordance with this Section.

22.2 A Communication will be considered to have been given or made on the day that it is delivered in person or by courier, or sent by facsimile or, if mailed, seventy-two (72) hours after the date of mailing. If the postal service is interrupted or substantially delayed, any Communication will only be delivered in person or by courier, or sent by facsimile

24. ENTIRE AGREEMENT

This Agreement and the Attachments hereto constitute the entire agreement between the parties and it supersedes all prior or contemporaneous negotiations, commitments, agreements (written or oral) and writings between Licensor and Licensee with respect to the subject matter hereof. All such other negotiations, commitments, agreements and writings will have no further force or effect, and the parties to any such other negotiation; commitment, agreement or writing will have no further rights or obligations there under.

25. OBLIGATIONS AS COVENANTS

All of the provisions of this Lease are to be construed as covenants and agreements.

26. SEVERABILITY

Should any provision of this Lease be, or become, invalid, void, illegal or unenforceable, it shall be considered separate and severable from the remaining provisions of this Lease, which shall remain in force and be binding as though the provision had never been included.

27. TIME OF THE ESSENCE

Time shall be of the essence hereof.

28. FORCE MAJEURE

In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any term, covenant, or act required hereunder by reason beyond the control of the party affected, including, without limitation, strikes, lock-outs, labor disputes, the enactment, amendment or repeal of any Applicable Laws, the shortage or unavailability of labour or materials, failure of power, riots, insurrection, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease, then performance of such covenant or act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. This provision should not relieve the Tenant of its obligation to pay rent when due.

32. RELATIONSHIP OF THE PARTIES

The parties hereto expressly disclaim any intention to create, and nothing in this Lease shall be construed to constitute the Landlord and the Tenant as partners, joint venturers or members of a joint or common enterprise, and neither of the parties hereto shall have any authority to act for or to assume any obligation or responsibilities on behalf of the other except as otherwise expressly provided herein.

ⁱ Standard contract clauses should be reviewed carefully with particular attention paid to clauses addressing: the description of property; tenant assignment or sublet; permissible uses of the land; ownership of any leasehold improvements; allocation of environmental risk; provisions re insurance, indemnity, dispute resolution; tenant selfhelp; events of default, notice requirements, a process for termination; and party names and party signature blocks

ⁱⁱ If a right of renewal is granted, it must be exercised before the expiry of the lease and must be exercised strictly in the manner provided for in the lease, or the right will lapse. A renewal must not extend the total term of a locatee lease beyond 49 years, because a locatee lease cannot extend beyond 49 years without a First Nation vote. The Department of Justice should be consulted on any renewal clause.

ⁱⁱⁱ Consideration is the benefit that the lessor receives in exchange for the granting of a lease. Consideration must appear in every lease, and it can be monetary, "in kind," "in service" or any of the preceding in combination. "In kind" consideration gives the lessor the same benefit received by the lessee, such as the lease of one parcel in exchange for the lease of a second parcel. Consideration "in service" involves the provision of a service in exchange for granting the lease. Monetary consideration must be payable in legal tender of Canada. Non-monetary consideration should be clearly specified, setting out, for example, the exact percentage of a crop to be received, and when and where it is to be delivered.