

## **BACKGROUNDER “A TO A” LEASING ON FIRST NATION LANDS**

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**Introduction:** This backgrounder provides information on A to A leasing and the conditions that must be in place in order for Canada Mortgage and Housing Corporation (CMHC) to approve mortgage insurance on lands subject to A to A leases. This is a complex subject matter for which individuals and First Nations must seek legal advice because CMHC and lenders consider each case on its individual merits, as with any application for mortgage insurance. Each case must be considered on its own merits in consultation with First Nation’s lawyers but the Resource Centre is available to assist individual First Nation governments where they consider A to A leasing.

This backgrounder is intended to provide guidance for those considering A to A leases on First Nation lands governed by a land code under the Framework Agreement on First Nation Land Management. The Framework Agreement recognizes First Nation governance authority and establishes a far more effective legislative and land management system than the colonial and outdated Indian Act. Many Framework Agreement First Nation governments and individual members have successfully pursued commercial and residential development far beyond anything that could be imagined under the old Indian Act.

### **The Framework Agreement – Individual Land Holdings and Leasehold Interests**

The Framework Agreement does not establish fee simple ownership of individual parcels of lands. Instead, the Framework Agreement protects the collective ownership of lands and the governance authority of the entire membership over their lands. Most Framework Agreement First Nations have developed at least part of their lands through leasing. Leases, particularly for relatively long terms of 49 to 99 years or even longer, have proven a very effective tool for development of portions of reserve lands for those Framework Agreement First Nations interested in residential and commercial development. In many cases, leases are to non-members and corporations but also to members themselves.

Most leases of Framework Agreement First Nation lands are conventional in the sense that they are well understood leasing arrangements with terminology that is familiar to lawyers, financial institutions and developers. Most of these leases are conventional “A to B leases” meaning that the party named as granting the lease (party A) is different from the party to whom leasehold rights are granted (party B). A to A leasing is an innovation that has been used on some First Nation lands where the first lease is granted by one person (party A) who is both the grantor and grantee of a lease – the lease is from person A to the same person A – as opposed to most leases which are from person A to some other person B.

A to A leasing is typically the first lease (or head lease) put in place on reserve lands where party A granting the lease is the person to whom the lands have been “allotted” as an individual interest recognized by the First Nation government. In some cases, these individual allotments are based on old certificates of possession (an individual allotment referred to in the Indian Act and typically granted back in the days when the First Nation’s lands were administered under the

Indian Act). In other cases, an individual party A may have a more modern allotment or individual interest issued and recognized by the Framework Agreement First Nation under the authority of a land code approved by the membership.

The Framework Agreement does not recognize individual allotments or grants of lands to members in fee simple. The Framework Agreement has been designed from the outset to maintain the connection of individual members to their lands by blocking entirely the risk that fee simple ownership could be lost in the marketplace. Individuals can (subject to any restrictions established in a land code or laws) enter into long term leases of their lands to third parties but this only puts into the marketplace the leasehold interest, not a fee simple interest in land. In addition to this fundamental restriction blocking fee simple sale of lands, the Framework Agreement maintains historic protections under the Indian Act against seizure of lands for debts.

A to A leasing echoes this separation of an individual First Nation member's allotment of land from the marketplace by making it clear that the first lease or head lease of allotted land is not intended to be in the commercial mainstream. Lending institutions and developers look to the terms of the leases subsequent to the A to A lease rather than the head lease if they are to exercise remedies for any defaults under a lease.

#### **A to A leasing – why does CMHC typically become involved?**

The Framework Agreement does not expressly provide for A to A leasing but there is no prohibition against A to A leasing. Unless an individual First Nation blocks A to A leasing in its land code or laws, there is no reason to expect that an A to A lease would be invalid, although to date there have not been any court cases testing out A to A leasing.

No approvals are required from Canada, CMHC or lending institutions before an individual could decide to enter an A to A lease. However, as a practical matter most individuals interested in residential leasehold development will want financing through mortgages of leasehold interests. In addition to the primary developer of land, individuals whether members or non-members, who may want to acquire individual lots on a leasehold basis will also typically need mortgage financing of their leasehold interest. These practical financing considerations will tend to drive the question – has the A to A lease been set up in a way that qualifies the residential development for mortgage financing, including qualifying for CMHC insured mortgage financing?

Currently, CMHC financing assists individuals who do not have a down payment of at least 20% of the value of a leasehold interest. Banks and other financial institutions will require mortgage loan insurance to address the risk that individuals cannot make payments. By acquiring mortgage loan insurance, CMHC steps in when there is a default and so mortgage insurance reduces risks across the very broad Canada wide marketplace.

CMHC already offers lenders three creative loan insurance options to help First Nation members on-reserve buy, build or renovate homes the details of which are described on CMHC's website: loan insurance with Ministerial Loan Guarantee (MLG), loans facilitated through the First Nation Market Housing Fund (FNMHF), and loans for Leasehold Market Housing. CMHC will

typically deal with lenders working with First Nations and members and is developing guidance for lenders on the circumstances under which mortgage insurance for A to A leasing can be approved.

### **A to A Leasing – No Guarantee of Qualifying for Mortgages and CMHC Insurance**

The first consideration which must be raised is the need for financial viability of a borrower and the residential project. A to A leases cannot be cleverly drafted to guarantee that banks will lend money, or that CMHC will insure mortgages, if the borrower cannot qualify for a loan. Similarly, even if an individual has a good credit history, banks can turn down lending requests, and CMHC can refuse insurance, if a project is considered too risky or not financially viable. There can be no guaranteed financing or insurance for any and all A to A leases any more than for any and all conventional A to B leases.

### **A to A Leasing – Other Considerations for Qualifying for Mortgages and CMHC Insurance**

In order to qualify for mortgage financing for A to A leases, the First Nation's land code and laws must not interrupt the effectiveness of leasehold mortgage financing. In fact lenders (under the guidance provided by CMHC) are likely to seek assurances not just that land codes do not prevent or restrict remedies in the event of a default on mortgages but that land codes expressly permit the exercise of remedies for default on lands that will be the subject of A to A leasing. This means for example that lenders will typically look for provisions in land codes which clarify that there is no procedural hurdle (such as a requirement for approval of the membership or Chief and Council before remedies for mortgage default can be exercised). In the language typical of lenders and CMHC, this will often be referred to as ensuring that there is a good safehold and marketable leasehold interest where there is A to A leasing.

Lenders working with CMHC will typically also require that the First Nation's land code include provisions intended to ensure as much as possible that the land code provisions permitting remedies for default on lands that are the subject of A to A leasing will be in place for the long haul. Residential leasehold mortgages typically last for as much as twenty five years and defaults on mortgages may only occur many years in the future, long after leases and mortgages are signed. First Nations will typically need to include provisions in land codes which show that it would be very procedurally difficult to amend or eliminate the provisions intended to promote long term mortgages of leasehold interests.

Lenders acting under CMHC guidance will also typically provide extensive advice on the content of proposed A to A leasing agreements and might require that some of the core provisions of the leasing contracts be recognized or approved within the provisions of land codes. This will likely lead to practical pressures to adopt a fairly standardized format or template for A to A leasing within an individual reserve.....in order to avoid costly examination of individual lease variations and uncertainty regarding availability of insurance for residential areas over time.

Lenders acting under CMHC guidance are also likely to require assurances that A to A leasehold interests can be registered in the First Nations Lands Registry provided for under the Framework Agreement. This might lead to a requirement that the land code or First Nation laws acknowledge that A to A leases and mortgages of leasehold interests on those mortgages can be registered.....and that there will be no extraordinary restrictions on registration (eg First Nation to provide that only regular administrative fees for registration of interest and standard registration procedures will apply.

More technical and detailed information for the consideration of lawyers is provided in the following documents prepared by CMHC (and up to date as of the date of this backgrounder):

**CMHC LEASEHOLD LENDING REQUIREMENTS**

**CMHC POLICY ON TITLE**

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