



# HIAWATHA FIRST NATION LAND CODE

Community Meeting #2 – 22 March 2021

# Today's Presentation

## Interests and Rights Relating to HFN Land

1. Pre-existing Interests and Rights
2. Creation of new Interests, Rights and Licences
3. Land Rights of Holders of Interests and Licences
4. Expropriation
5. Residency and Access Rights
6. Important Upcoming Dates
7. Q&A



# What should a Land Code Accomplish?



01

## **Transfer land management to the First Nation**

Transfer ISC's administrative functions with respect to reserve land to First Nation governance structures and provide them with complete and workable rules and powers under which they will operate, capable of implementation within the context of HFN's human and financial resources.



02

## **Establish the rules for making decisions, land laws**

Provide substantive and procedural rules for decision-making and the enactment of land-related laws by the Council and the community. The rules should be complete, legally sound, and enforceable in courts of law.



03

## **Improve community life and facilitate development**

Provide rules, processes and governance institutions to promote a prosperous, respectful and vibrant community, to guide and control community development – residential, commercial and industrial – for the benefit of all, and to protect the environment.

# 1. Pre-existing Interests and Rights <sup>1/4</sup>

## On the day that the new land code comes into effect:

- 44 Sections of the Indian Act relating to the management of reserve land and revenues from those lands will no longer apply - the Land Code will apply instead
- Lands will no longer be managed by ISC staff – Hiawatha's Council and the land management bodies created under the Land Code will take over this responsibility
- Hiawatha land transactions will be transferred from the Indian Lands Registry System (the "ILRS") to a new land register in the First Nations Land Registry System (the "FNLRs"), used exclusively for First Nations with a land code

# 1. Pre-existing Interests and Rights 2/4

On the day that the new land code comes into effect (cont'd):

- The Hiawatha FNLRS register will be **pre-populated** with all existing registered interests in reserve land – CP's, registered leases, licences and permits – recorded on that date in the ILRS
  - The rights of the owners of “grandfathered” interests and licences will continue to be enforceable before and after the conversion
  - Any unregistered interests – **allotments by custom**, for example – will be protected: if they can be proven, they will be added to the new register in the same way as pre-existing registered interests
- **Change:** Any transactions involving interests and rights and licences (whether pre-existing or created under the Land Code) must follow the rules and procedures set out in the Land Code as well as any land laws enacted under the Code, including resource revenue sharing laws
- **Change:** No interest in land is enforceable unless it is registered in the FNLRS, and an earlier registration prevails over a later conflicting registration

# 1. Pre-existing Interests and Rights <sup>3/4</sup>

## New Land Code provisions:

- Pre-existing rights protected

### Prior interests and rights

9.01 Interests and other rights in Hiawatha First Nation land held by citizens pursuant to the *Indian Act* or pursuant to the custom of the Hiawatha First Nation on the coming into force of this Land Code are continued, subject to the provisions of this Land Code and land laws enacted under it governing the transfer, assignment or leasing of interests or rights in First Nation land and the generation of revenue from natural resources.

- All rights must be registered in the FNLRS to be enforceable

### Enforceability

9.10 An interest, right in or licence relating to Hiawatha First Nation Land, including a charge, mortgage or pledge of a lease or licence in accordance with section 9.07, and a transfer, disposition, release, surrender, cancellation or revocation thereof, shall be unenforceable unless evidenced by an instrument in writing registered or recorded in the First Nations Land Registry or such other registration system as Council may specify by land law adopted with community consultation as provided in section 5.07.

# 1. Pre-existing Interests and Rights 4/4

## **Scenario:**

Alan has a CP for a parcel of Hiawatha reserve land. On a Saturday after the coming into effect of the Land Code, Alan sells the CP to Brendan for \$500, who gives him \$100 cash as a deposit and a cheque for the balance. They sign a transfer agreement which Brendan registers in the FNLRS on the following Monday. On Wednesday, the bank notifies Alan that Brendan's cheque was returned NSF. Even worse, Charles has come forward and is offering Alan \$600 for the land. Can Alan sell to Charles?

## **Applying the Land Code: section 9.01**

- Alan's CP will be pre-populated in the Hiawatha register in the FNLRS at the time the Hiawatha Land Code comes into effect
- As soon as Brendan registers the transfer from Alan, the FNLRS will record Brendan as the owner
- After Brendan's registration, Alan has no capacity to sell to Charles. Alan will have to pursue Brendan for payment

## 2. Creation of Interests, Right and Licences <sup>1/3</sup>

**Under the draft Land Code, Council can create the following kinds of interests, rights and licences in HFN Land:**

- Community purpose certificate
- Certificate of allocation to a citizen for residential purposes
- Lease for the exclusive use and occupation of Community Land
- A licence granting a right to harvest, use or extract natural resources from HFN land
- A transfer of an interest, right or licence of a deceased citizen to the person entitled at law
- A transfer in exchange for other land of Community land
- *Izhitwaawin* site designations

### Creation of interests and licences by Council

9.03 Subject to this Land Code, Council may by resolution create and grant the following interests, rights in or licences relating to land:

- (a) a community purpose certificate reserving the use or creating an easement, right of way or licence in Community Land for community works;
- (b) a certificate of allocation granting to a citizen or citizens jointly or in common the right of exclusive use and occupation of a parcel of Hiawatha First Nation Land, with any appurtenant easement or right of way, for residential purposes;
- (c) a lease granting to any person the right of exclusive use and occupation of a parcel of Community Land for a specified term;
- (d) a licence granting to any person a right to harvest, use or extract and appropriate natural resources found within specified First Nation land;
- (e) a transfer of the interest, right or licence of a deceased citizen to the person who is entitled at law to the interest, right in or licence relating to that land;
- (f) a transfer of Community Land in exchange for other land in accordance with PART 15; and
- (g) an *izhitwaawin* site designation.



## 2. Creation of Interests, Right and Licences (2/3)

### Community Consultation

- Any grant of an interest, right or licence in HFN land for a term exceeding 25 years must be enacted with prior community consultation (i.e. a community meeting)

### Terms and Conditions

- Council may attach terms or conditions (e.g. loan repayment, environmental mitigation) to any grant of an interest, right or licence

#### Community consultation

5.07 Council shall consult with the First Nation's eligible voters in a community meeting prior to enacting any of the following:

- (a) a grant or disposition of an interest, right in or licence relating to community land by the First Nation to a person other than a citizen for a term exceeding 25 years;
- (b) a law to govern expropriation procedure or any particular expropriation for community purposes pursuant to PART 14;
- (c) a land law which creates an offence punishable under the *Criminal Code*;
- (d) any land law or class of land law that Council, by resolution, declares to be subject to community consultation.

#### Conditional grant

9.04 An interest, right in or licence relating to First Nation land granted by Council may be subject to the satisfaction of terms or conditions specified in the grant.

## 2. Creation of Interests, Right and Licences (3/3)

### Scenario:

Hiawatha's new economic development entity, Zhooniya Makak LP, has a new business plan to establish a solar farm on HFN Community Land. How can ZMLP obtain an interest for this purpose?

### Applying the Land Code: **sections 5.07, 9.03 and 9.04**

- Council **cannot grant a certificate of allocation** to ZMLP because: 1) ZMLP is not a citizen and therefore cannot hold a CA; and 2) CAs are for residential purposes only
- Council may grant to ZMLP a **lease** for the exclusive possession and use of a parcel of Community Land for the solar farm
- Council may include **terms and conditions** on the lease
- If the lease will be for a **period longer than 25 years**, Council must hold a **community meeting** to consult the citizens on land law granting such lease

# 3. Land Rights of Holders of Interests and Licences <sup>1/4</sup>

## CP and CA Holder Rights

A holder of a CP or CA may:

- Transfer their interest to another citizen;
- Grant a licence or lease for the use or occupation of all or part of the CA or CP;
- Transfer the CP or CA to HFN for cancellation

### Certificates of possession or allocation

9.05 A citizen in possession of Hiawatha First Nation land pursuant to a certificate of possession or certificate of allocation may:

- (a) devise, transfer or assign all of the interest evidenced by the certificate to any other citizen;
- (b) grant to any person a lease, or licence authorizing the use and occupation of the land or any part thereof in accordance with the terms of the original certificate of possession or allocation and subject to this Land Code and any applicable land laws; or
- (c) transfer the certificate of possession or certificate of allocation to the Hiawatha First Nation for cancellation.

### Transfer for cancellation

9.06 A certificate of possession or certificate of allocation may be transferred to the Hiawatha First Nation for cancellation

# 3. Land Rights of Holders of Interests and Licences 2/4

## Scenario:

David is a citizen of HFN and currently lives in a house on HFN land for which he has a certificate of allocation. Recently, David was offered the job of a lifetime in British Columbia and plans to take the job. David's brother Edward lives nearby but has been looking for a house on HFN Lands. David's best friend, Frederick, is also interested in living on reserve because, while he is not a citizen of HFN, his children are. What can David do with his certificate of allocation?

## Application of the Land Code: **section 9.05**

- David could **sell or transfer** the certificate of allocation and all the rights that go with that certificate to his brother Edward (or another citizen)
- Alternatively, David could keep the certificate of allocation and give Frederick a **lease** of the house
- Either way, David will need to **register** the transfer or lease in the FNLRS
- Same result if David has a certificate of possession (pre-Land Code terminology) instead of a certificate of allocation (Land Code terminology)

# 3. Land Rights of Holders of Interests and Licences <sup>3/4</sup>

## Borrowing Rights

- **Section 9.07** provides that leases and licences may be used as security to obtain a loan from a lender (i.e. a bank).
- **Section 9.02** provides that certain Indian Act provisions which protect HFN land from seizure continue to apply, meaning that if a lease or licence is pledged as security and the borrower defaults on the loan, the lender may seize the lease or licence but not the land itself

### Leases and licences may be pledged

9.07 A leasehold interest in or licence relating to Hiawatha land may be subject to charge, mortgage or pledge.

### Indian Act provisions continued in force

9.02 In accordance with the *Framework Agreement*, sections 29 and 87 and subsections 89(1), 89(1.1) and 89(2) of the *Indian Act*, as amended from time to time, continue to apply to Hiawatha First Nation land.

# 3. Land Rights of Holders of Interests and Licences 4/4

## Scenario:

Grant (a citizen of HFN) would like to start a pizzeria on HFN Land. He needs land and he needs financing. How can Grant go about opening his pizzeria?

## Application of the Land Code: **ss. 9.02, 9.03, 9.07**

- Grant would need to obtain a **lease** of Community Land from Council
- If there is a comprehensive land use plan, Grant would be limited to Community Land which is **zoned** for Commercial Use
- Once Grant has been granted a lease, he may use that lease as security in obtaining a business loan from the bank to help with his start-up costs.
- If Grant is unable to make his loan payments and defaults on his business loan, the bank may seize the lease – but the land will remain reserve land.

# 4. Expropriation

(1/4)

**Part 14 of the Land Code provides Council with a limited power to expropriate HFN land in extraordinary circumstances.**

Council **may not** exercise its power to expropriate unless:

- The interest, right or licence is necessary for community works
- Good faith efforts have been made to negotiate an agreement with the owner of the interest
- Community consultation is held (see also **section 5.07(b)**)
- Fair compensation is paid to the owner

## Expropriation where necessary for community works

14.01 Subject to section 14.06, where Council determines by resolution that

- (a) the acquisition of all or part of an interest, right in or licence relating to Hiawatha First Nation Land, or any improvement, use or structure thereon, is necessary for community works; and
- (b) the Hiawatha First Nation has made a good faith effort to acquire the interest, right or licence or part thereof from the owner or occupant by mutual agreement but no agreement has been reached and, in the opinion of Council, it is unlikely that a mutual agreement can be reached;

the Council may, after serving the owner of the interest, right or licence with a notice of expropriation in accordance with the procedural rules to be enacted under section 14.05 of this Land Code, enact a land law, with community consultation and in accordance with the *Framework Agreement* and this Part, expropriating the interest, right in or licence or part thereof.

## Compensation

14.02 The First Nation shall be liable to pay fair compensation to the person legally entitled to an interest on expropriation, based on the heads of compensation set out in the *Expropriation Act*, including, where part of an interest, right or licence is expropriated, compensation for the value of the expropriated portion of the interest, right in or licence and for the severance damage to the remaining portion of the interest, right or licence.

## 4. Expropriation (2/4)

The definition of “community works” is set out in **section 1.02(j)**

- (j) “community works” means any uses of land and any facilities or services deemed by Council to be for the benefit of the Hiawatha First Nation community, and includes services operated, provided or delivered to or for the benefit of citizens by the Hiawatha First Nation or by a person or body authorized to do so on behalf of the Hiawatha First Nation by a land law;



## 4. Expropriation <sup>(3/4)</sup>

### **Scenario One:**

To give Grant's pizza place better visibility, Council wants to take down some of the brush on a small corner of the neighboring parcel of reserve land, which Hubert holds under a certificate of possession. Council has approached Hubert about clearing the brush, but Hubert has refused. Could Council expropriate that corner of Hubert's land in order to clear out the brush?

### **Application of the Land Code: s. 14.01 and s. 1.03(j)**

- Council cannot expropriate Hubert's CP land because Grant's commercial use is not a "community work" essential for the benefit of HFN.

## 4. Expropriation <sup>(4/4)</sup>

### **Scenario Two:**

Council has determined that a new fire hydrant is needed along Sopers Lane for the benefit of the HFN community. Council has determined that, for engineering reasons, the fire hydrant must be installed on land which Kevin holds by CP. Council has requested Kevin's permission and offered compensation, but Kevin has refused. What can Council do?

### **Application of the Land Code: Part 14**

- Council must have exhausted all other reasonable options for locating the fire hydrant **[14.01(a)]**
- Council must conduct good faith negotiations with Kevin for the purchase of the land needed for the hydrant **[14.01(b)]**
- If the negotiations fail, Council may acquire the necessary part of Kevin's land by enacting a land law with community consultation **[14.01]**
- Kevin must be paid fair compensation for the part of his land which has been acquired **[s. 14.02]**

# 5. Residency and Access Rights 1/6

## Right of Residency

Section 11.01 of the Land Code sets out who has a right to live on HFN land:

- A citizen
- A child, spouse, or grandchild of a citizen who is residing with the citizen
- A person with a lease that expressly includes residency
- A person authorized to reside by a land law or other law
- An invitee of one of the above persons

### Right of residence

11.01 The following persons may reside on Hiawatha First Nation Land:

- (a) a citizen, and residing with the citizen, the spouse, child or grandchild of the citizen and any person who is in the care and custody of the citizen pursuant to the custom of Hiawatha First Nation or by order of a court of competent jurisdiction;
- (b) a tenant pursuant to a lease which expressly includes a right of residence;
- (c) a person authorized to reside on Hiawatha First Nation land by a land law or any other law of the Hiawatha First Nation or by applicable laws in respect of family homes and matrimonial interests; and
- (d) an invitee of a person described in subsections (a), (b) or (c), other than an invitee of a person described in subsections (a), (b) or (c) barred from entering or residing on Hiawatha First Nation land by a resolution of Council.

# 5. Residency and Access Rights 2/6

## Right of Access

Section 11.02 of the Land Code sets out who has a right to access HFN land:

- Any person with a right to reside on HFN land
- A person with a lease, right or licence permitting access to HFN land
- A person authorized to access HFN land by a land law or other law
- An invitee of one of the above persons

### Right of Access

11.02 The following persons have a right of access to Hiawatha First Nation land:

- (a) a person entitled to reside on Hiawatha First Nation land pursuant to section 11.01;
- (b) a person entitled to access Hiawatha First Nation land pursuant to an interest, right or licence;
- (c) a person authorized by a resolution of Council, a land law or other law of the First Nation to access Hiawatha First Nation land; and
- (d) an invitee of a person described in subsections (a), (b) or (c), other than an invitee of a person described in subsections (a), (b) or (c) barred from entering or residing on Hiawatha First Nation land by a resolution of Council.

# 5. Residency and Access Rights 3/6

## Public Access

- Certain land, such as roads, are “public access lands” and may be accessed by any person

### Use of public access lands

- 11.03 Any person may use public access lands including public roads in accordance with applicable laws.

## Trespass

- If a person who does not have a right to reside or a right of access enters upon or uses HFN land, they may be prosecuted for trespass

### Trespass

- 11.04 Any person, who resides on, enters on, uses or remains on Hiawatha First Nation land, except in accordance with a right of residence described in section 11.01, or a right of access or use described in sections 11.02 or 11.03, is guilty of an offence.

### Civil remedies

- 11.05 All civil remedies for trespass are preserved.

# 5. Residency and Access Rights 4/6

## **Scenario One:**

Debra is an HFN citizen and lives in a leased house on HFN Land. Recently her father (who is not a citizen) took ill, and he can no longer live alone in Toronto. Can Debra's father live with Debra in her home on the reserve?

## **Application of Land Code: s. 11.01**

- Since Debra has a lease, she is entitled to reside on HFN Lands and her father is also entitled to reside with her as an “invitee”
- Same rules apply if Debra has a certificate of possession or certificate of allocation.

# 5. Residency and Access Rights 5/6

## **Scenario Two:**

Edna is an HFN citizen and single parent to two children who are not citizens. They live in Edna's home on HFN Land which she occupies under a certificate of allocation. Edna is concerned that if something happened to her, her children might lose the right to reside in her home. What options are open to Edna?

## **Application of Land Code: s. 11.01**

- Edna can create a lease of her home and grant it to herself and her children as joint tenants.
- Edna will need to register the lease in the FNLRS.

# 5. Residency and Access Rights 6/6

## **Scenario Three:**

Leonard lives in Peterborough and is not a HFN citizen but frequently visits friends on the reserve. Recently, Leonard was spotted taking wild lilac trees from roadside ditches on HFN Land. Is Leonard authorized to be on HFN land?

## **Application of Land Code: ss. 11.01 and 11.02**

- Leonard may be an invitee of his friends who reside on the reserve and so can lawfully be on their lands and use the public access areas of the reserve to get to those lands
- However, unless Leonard has obtained a permit for harvesting the lilacs, he is not entitled to access HFN Community Lands or take resources from those lands, and may be prosecuted for trespass.



# Important Upcoming Dates

## **Saturday, April 17 at 10:00AM – Community Meeting #3**

- Dispute Resolution, Enforcement & Summary of Advantages

## **Saturday, May 15 (Proposed) – Ratification Vote**

# Questions?

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## Thank you!

