LEASE OF DESIGNATED LANDS

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

AND:

[FIRST NATION],
as represented by the Council

AND:

[LESSEE'S NAME]

For lands in [Reserve Name] Indian Reserve No. [#]

Commencement Date: [Month Day, Year][1]

DRAFTING NOTES:

1. **Not everything within square brackets needs to be filled in, just fields, which are highlighted in grey onscreen. To move between fields, press F11 and ensure that all fields are complete. F11 will also take you to each cross-reference but these do not need to be manually updated as they will be updated in step 3.**

2. **Remove all bolded red drafting language before finalizing the lease.**

[1] If the Commencement Date is contingent (e.g., the lease is the result of a designation under the *Addition of Lands to Reserves and Reserve Creation Act* that will come into effect upon Canada acquiring title to the lands), then this would be removed.

3. **Update all cross-references and the Table of Contents before finalizing the lease by pressing CTR+A to highlight everything and then pressing F9.**

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LEASING – A BACKGROUND

In the beginning…

In order to understand leasing, it helps to understand the nature of the English common law in relation to land. Land ownership stems from 1066 when William the Conqueror invaded England and claimed the Crown to become King. The Crown has the **sovereign title**[2] to all land in the realm (now including Canada).[3]

Upon conquering the vast expanse of England, King William established a feudal system to help him govern it. Keeping some of the land for himself, he divided the rest into large **estates** that he infeudiated (granted) to his supporters. These estates came with inherent rights and obligations attached to them. They gave the owner (the "lord" of the land, or **landlord**) the **exclusive possession** of the estate in exchange for the lord's loyalty to the Crown and a feudal requirement to provide knights for the King's use. This first land tenure was known as a "knight's fee".

Over time, many of these lords subinfeudiated their knight's fee to others, making smaller, subordinate fee estates from which the required knights would be provided. As well, other types of fee estates came to be created, such as the "fee in socage", which required the payment of produce from the soil or rent. In 1660, all types of fee ownership were converted to "free and common socage", now known as "fee simple". A **fee simple estate** is the highest form of private ownership, giving the owner the right of exclusive possession without any ongoing service or rent requirement, subject only to any Crown reservations. A fee simple is not an allodial title. It is a tenurial estate, meaning that the title is held "of the Crown" – the fee simple is a subordinate title to the Crown's allodial title. The practical differences today of a tenurial title and an allodial title are few.

The leasehold estate

While leaseholds (or tenancies) go back to at least the Code of Hammurabi (1754 BC), an English leasehold was not considered to be an **estate in land** until the 1500's. Like a fee simple, a **leasehold estate** is a grant of exclusive possession, during which the landlord remains the legal title holder. Unlike a fee simple, a lease can come with numerous obligations attached to it, predominantly rent and use.

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[2] Also called the radical title (meaning that other titles radiate from it) or allodial title (meaning that it is not dependent upon a superior title). In the Aboriginal law context, it is also referred to as an "underlying title" – the legal title held by the Crown that is burdened by the Aboriginal title.

[3] Although Canada inherited the British system of real property, specific provisions were made for Quebec to retain its civil law system. The notes in this lease template regarding common law real property concepts are specific to the common law provinces only.

A lessee obtains certain implied rights when leasing land, such as: 1) exclusive possession; 2) quiet enjoyment; and 3) an assurance that there will be no derogation from the grant.[4]

There are four basic types of leasehold estates: a fixed-term tenancy[5], a periodic tenancy, a tenancy at will, and a tenancy at sufferance.

This template lease is a form of a **fixed-term tenancy**, the grant of which must meet the "four certainties": parties, property, period, and price. Although the template includes the First Nation, it is clear that the parties to the grant of the leasehold estate are Canada as the initial "Lessor" and the tenant as the initial "Lessee".[6] The property is clearly defined in the definition of "Lands", the period in the definition of "Term", and the price in the definition of "Annual Rent" or "Prepaid Rent".

In the absence of anything to the contrary in a lease, a landlord does not need to provide notice to quit or a demand for possession at the end of a fixed-term tenancy. (This template lease does not contain anything to the contrary.)

A **periodic tenancy** is a leasehold estate existing from month to month or year to year, each party being able to end the tenancy without notice at the end of such month or year (although notice is usually given.)

A **tenancy at will** is a leasehold estate that either party may end at any time by giving reasonable notice. It usually occurs where there is no lease document or when consideration (rent) has not been given.

A **tenancy at sufferance** (or holdover tenancy) is created when a tenant holds over (stays in possession) past the end of the tenancy. The landlord may evict such a tenant at any time without notice. Some argue that a holdover tenant is more likely to be a trespasser in law than a holder of a true estate in land, but it can get more complicated if the landlord accepts rent during this time. To avoid these complications, a landlord should not accept holdover rent. Instead, the landlord should negotiate with the lessee for a new term before the old one is set to expire so as to maintain the landlord's rights to be able to evict the lessee at the end of the term. Under the common law, tenancy at sufferance is not available against the Crown. Some older Crown leases provide holdover rights, but, given their contractual nature, they are more likely to be periodic tenancies during the holdover period than tenancies at sufferance.

Leaseholds vs. licenses

A license can look a lot like a leasehold, but it differs in the key respect that it cannot give the licensee exclusive possession of the land.

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[4] See more in note 47.

[5] Also called a "tenancy for a term certain" or, strangely, a "tenancy for years", even if the tenancy is only for a short time, such as a month.

[6] See also note 9.

As well, leaseholds, because they are estates in land, give rights to tenants "*in rem*", which means that the rights apply to the land and against whichever person holds the legal title at the time that the rights are being enforced rather than against the person who granted the lease. Licenses, however, give rights "*in personam*", which means that they are contractual rights only against the person who issued the license, even if that person no longer owns the land.

Crown land law

In Canada, the *Federal Real Property and Federal Immovables Act* governs how Ministers and the Governor in Council may deal with federal real property (acquisitions, dispositions, leases, and licenses), unless more specific Acts have granted different authorities. Indian reserves are such an exception (under the *Indian Act*), as are lands to be set apart as a reserve (under the *Additions to Reserve and Reserve Creation Act*), lands managed by First Nations (under the *First Nations Land Management Act*), and others.

The Minister of Indigenous Services' authority to grant a lease using this template is found in section 53 of the *Indian Act.*

Nature of a lease

Under the common law inherited from the United Kingdom, a lease was not considered to be a contract, but an estate in land only, which provides the parties with rights and remedies specific to property law. In Canada, the Supreme Court of Canada has held that, although a lease is an estate in land, it is also a contract, which allows a landlord to avail itself of contractual remedies as well.[7]

Although a contract establishes a legal relationship between the parties, it should also be thought of as an agreement between the parties on the allocation of risk. The risk being allocated is that of something going awry. Usually, the party best able to ensure that something does not go awry is the one who bears the risk, but not always; this is part of the negotiation process. A lessee will not usually be completely at risk for all of the risks that it takes on under a lease as it will often purchase insurance (and is sometimes required by a lease to do so) to protect itself from some of these risks.

[7] *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, 1971 CanLII 123 (SCC), [1971] SCR 562.

LEASE OF DESIGNATED LANDS

This lease is made between:[8]

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

(the "**Lessor**")

and:

[FIRST NATION],[9]
a "band" within the meaning of the *Indian Act*, as represented by the Council

(the "**First Nation**")[10]

and:

[LESSEE'S NAME] **[OPTIONAL – If the Lessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Lessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**[11]

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[8] If the Commencement Date is contingent on the happening of an event, and therefore not known when executing the Lease, the Parties may want to add a reference date here to make the Lease easier to refer to in other documents by adding: ", which is dated for reference [Month Day, Year]," after the word "lease".

[9] Ensure that the First Nation's legal name is used here, as can be found in First Nation Profiles. If a First Nation would like to include a name that it uses more often, then you can add: ", also known as [Other Name]," after its official name.

[10] If a First Nation prefers to be referred to by name throughout the Lease, then search and replace on "the First Nation" with the First Nation's short name (e.g., OKIB, Osoyoos, etc.).

[11] At common law, a general partnership, which can only be made up of human persons, cannot hold an interest in land. In that case, one of the partners would be the Lessee. A limited partnership is a creature of statute and its rights are dependent upon its legislation. In BC, it is treated the same as a general partnership in relation to land – the general partner (which could be a person, company or other entity (other than a form of partnership or unincorporated association) would be the Lessee instead of the limited partnership itself.

(the "**Lessee**").

BACKGROUND:[12]

A. The Lands are part of the Reserve, which is held for the use and benefit of the First Nation.

B. The members of the First Nation designated the Lands on [Month Day, Year], which designation was accepted by **[Choose accepting entity and delete the other:** the Governor in Council by PC [#] **OR** Order of the Minister of Indigenous Services**]** on [Month Day, Year] and is registered in the Registry under No. [#].[13]

C. This Lease is a combination of a leasehold estate granted by the Lessor to the Lessee and a contract between the Parties. The First Nation negotiated the business arrangement with the Lessee set out in this Lease and the Parties negotiated the terms and conditions of this Lease.[14]

D. The Lessor is authorized to grant this Lease under subsection 53(1) of the *Indian Act*.

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[12] Recitals are not usually part of a contract, so they cannot create binding obligations. Instead, they are meant to provide background information establishing that required preconditions, such as a designation, have been met or, if necessary, to assist a disinterested party, such as a judge, to understand the parties' intentions in entering into the contract. Any other information that does not achieve either of these purposes should not normally be included.

[13] The Lease must be consistent with the designation. Older designations that use boilerplate language normally should not be relied upon as authority for a new Lease without first investigating the circumstances around the original designation and the information provided at the vote so as to ensure that the designation still legally exists and that the proposed new Lease would be consistent with it.

[14] Only the Lessor and the Lessee are parties to the leasehold interest being created by the grant of the Lease. In Canada, the lease agreement is viewed as both an interest in land (i.e., the leasehold estate) and a contract and the First Nation is a party to a contract between the three Parties. As a result, the Lessor and the Lessee have both property law and contract law rights, obligations, and remedies with respect to each other, while the Lessee and the First Nation have only contract law rights, obligations and remedies with respect to each other. The Lessor has some contractual obligations to the First Nation (e.g., provision of notice) under a Lease but otherwise the Lessor and the First Nation will continue to be in a fiduciary relationship with respect to the Lease and have certain fiduciary duties and remedies, respectively.

First Nations and Lessees sometimes have collateral contracts pertaining to the development of the Premises, such as employment provisions or development bonuses. They could choose to include those matters in the Lease if the provisions were clearly identified as being solely between the First Nation and the Lessee. Alternatively, they may want to keep such matters in a separate agreement so as to avoid having that information in the Registry, but they should turn their minds to the wording in section 1.8.

The "business arrangement" covers general business parameters such as choosing the Lessee and negotiating the rent, term, and use, while the "terms and conditions" would be the legal language of the Lease, even the language related to the business parameters negotiated by the First Nation.

E. The First Nation authorized the execution of this Lease by the signatories for the First Nation, as evidenced by the Band Council Resolution attached as Schedule B.

NOW THEREFORE, for mutual consideration,[15] the Parties agree as follows:

1. INTERPRETATION

1.1 **Definitions** – In this Lease, including the recitals, the following terms have the meanings ascribed to them in this section 1.1:

1.1.1 "**Additional Rent**" means the amounts payable to the Lessor referred to in section 4.9.

OPTIONAL – If option 1 (periodic rent) is chosen in the rent section, then include the following definition of "Annual Rent". Otherwise, delete it.

1.1.2 "**Annual Rent**" means the amounts set out as such in section 4.3.

End of Option.

OPTIONAL – If option 1 (periodic rent) or option 3 (prepaid nominal rent) is chosen in the rent section, then include the following definitions of "Appraisal" and "Appraiser". Otherwise, delete them.

1.1.3 "**Appraisal**" means a written opinion of the Fair Market Rent prepared by an Appraiser in accordance with generally accepted appraisal practices.

1.1.4 "**Appraiser**" means a person who is accredited as an appraiser by the Appraisal Institute of Canada or its successor.

End of Option.

1.1.5 "**Architect**" means a person who is licensed as an architect in the province of [Name of Province].

1.1.6 "**Artifact**" means a burial site, human remains, or an item of archeological or cultural interest.

1.1.7 "**Authority**" means:

[15] A lease must be executed under seal or otherwise contain the exchange of "consideration" (something of value, tangible or intangible). A lease does not need to use the word consideration or identify what it is, but the word is usually included in this opening phrase. The values being exchanged do not need to be equal. For example, a lease that had the "payment" of a single peppercorn was considered valid. In this Lease template, exclusive possession of the Premises is exchanged for Rent.

1.1.7.1 a federal, provincial, municipal, First Nation, or other governmental authority having jurisdiction in respect of the Premises or activities on the Premises; or

1.1.7.2 a utility company lawfully acting under its statutory power.

1.1.8 "**Authorized Uses**" means the uses referred to in section 3.1.

1.1.9 "**Business Day**" means a day that is not a Saturday, a Sunday, a federal or [Name of Province] statutory holiday, National Indigenous Peoples Day, or, with respect to obligations owed by or owing to the First Nation, a day designated by the First Nation as an official holiday on which the First Nation's administrative offices are closed.

1.1.10 "**Codes**" means **[Note: Insert applicable codes. For example, in BC:** the BC Building Code, the BC Fire Code, and all requirements of the *Building Act*, S.B.C. 2015, c. 2, that would be applicable to an Improvement if it were built on fee simple lands in the province of British Columbia (other than the City of Vancouver) owned by a Person other than the Crown.**]**[16]

1.1.11 "**Commencement Date**" means [Month Day, Year].[17]

1.1.12 "**Construction and Environmental Management Plan**" means:

1.1.12.1 plans, design briefs, and construction specifications; and

1.1.12.2 all other documents reasonably required by the Decision Maker relating to the construction, operation, or decommissioning, as the case may be,

of the subject Improvements, which comply with or are consistent with:

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[16] The parties can choose federal or provincial codes or any combination of codes and standards that make sense for the particular development.

[17] This date can be in the past, a practice called backdating, but care should be taken as case law seems to indicate that the Parties should only backdate to a time at which they had come to substantial agreement on the terms of the Lease or else risk it being invalidated.

This date can be a present date, such as a "closing" date on which all Parties execute as of the same date. Another variation is to have the Parties sign separately with the Commencement Date being the day that the final Party signs, which is usually the Lessor. This then requires that the Parties agree in advance that the Lessor can "slipsheet" the date into this definition, and perhaps the definition of Term as well if the Commencement Date would cause the end date to change. (Slipsheeting is a practice where parties agree that one party can change a sheet of a document that would be different from the one that was included within the document that they signed. Written documentation of this agreement should be obtained.)

This date can be in the future, either a specifically chosen date or a date that can be determined by the happening of a certain event. This practice avoids any need to slipsheet.

1.1.12.3 applicable Codes and Laws;

1.1.12.4 an applicable Development Plan; and

1.1.12.5 all terms and conditions of a Decision Maker's determination, including all mitigation measures, timelines, and monitoring, required under an applicable Environmental Review,

and include plans to address how the impacts on the Environment during construction, operation, or decommissioning, as the case may be, of the subject Improvements will be managed, including the management of soil, water, waste, traffic, and fire safety.[18]

1.1.13 "**Contaminant**" means a substance regulated under the Laws of Canada, the First Nation, or the province of [Name of Province] (whether or not the province has jurisdiction in respect of the protection of the Environment as it pertains to the Premises or the occupation or use of the Premises) relating to the protection of the Environment, including, for greater certainty, a toxic substance, deleterious substance, hazardous substance, hazardous waste, hazardous recyclable, ozone-depleting substance, halocarbon, pesticide, and waste.[19]

1.1.14 "**Council**" means the First Nation's "council of the band" within the meaning of the *Indian Act*, and any successor.

1.1.15 "**Decision Maker**" means the Minister, when the Minister is representing the Lessor under this Lease, and, if the First Nation takes over the position of the Lessor under this Lease by operation of law, the Council or a Person designated by the Council.

1.1.16 "**Development Plan**" means a scaled site plan for the Premises, prepared and certified by an Architect or Engineer on the basis that it may be relied upon by each of the Parties, which includes a "North" arrow, title block, drawing scale, date, developer's name and address, reference numbers, and the following features, including their location and dimensions where applicable:

1.1.16.1 Boundary lines, acreage, natural and artificial features, and contiguous property.

1.1.16.2 Roads, parking lots, and driving aisles.

[18] The CEMP is the plan that sets out how the construction of the Improvements and related activities will be managed, which needs to implement all applicable terms and conditions of the Environmental Review process.

[19] This definition attempts to capture not just federal definitions but also definitions set out in provincial law. This does not make provincial law applicable on reserve; it only serves to expand the definition of what is a contaminant.

1.1.16.3 Buildings and structures, including number of units, storeys, floor area, number of rooms, and dimensions of front, side, and rear yards.

1.1.16.4 On-site sanitary sewer connections.

1.1.16.5 Existing and proposed water mains.

1.1.17 "**Engineer**" means a person who is licensed as an engineer in the province of [Name of Province].

1.1.18 "**Environment**" has the meaning given it in the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

1.1.19 "**Environmental Review**" means the environmental review process referred to in section 8.3, whether conducted before or after the Commencement Date.[20]

1.1.20 "**Exempt Project**" means a Project:

1.1.20.1 that is in one of the classes of projects designated under section 88 of the IAA; or

1.1.20.2 for which a Decision Maker is not required to conduct an Environmental Review by section 91 of the IAA,

and includes any similar concepts in an amended, succeeding, or replacement Law.[21]

There are 3 options for the definition of "Fair Market Rent".[22] Choose one and delete the others.

OPTION 1 – If option 2 (prepaid fair market rent) is chosen in the rent section, then delete all definitions of "Fair Market Rent" so that the next definition after "Exempt Project" is "First Nation Fees". End of Option 1.

OPTION 2 – If option 1 (periodic rent) is chosen in the rent section, then use the following:

[20] If an environmental review occurs before the Lease is executed, this will ensure that the terms and conditions in any Ministerial determination will need to be met regardless of when the review occurred.

[21] This definition reflects that the IAA sets up a process to exclude certain projects or classes of projects from the requirement to perform an environmental impact review.

[22] This definition attempts to address certain past court decisions that have discounted the value of reserve lands compared to fee simple lands. Those decisions were based on undefined contractual terms, so the Lease template's more explicit definition should show that the Parties have turned their minds to the discounting factors referred to in those decisions and decided not to apply any discount. See also note 75, as the Parties will wish to ensure that any appraisals accurately assess what the Parties intend for the Lessee to pay as Rent.

1.1.21 "**Fair Market Rent**" means the most probable annual rent that the Premises should bring in a competitive and open market, reflecting all conditions of this Lease and assuming the following conditions:

1.1.21.1 The Lessor and the Lessee are typically motivated, well informed, well advised, and are acting prudently in an arm's length transaction.

1.1.21.2 A reasonable time is allowed for exposure in the open market and the rent represents the normal consideration for the Premises unaffected by undue stimuli or special fees or concessions granted by anyone associated with the transaction.

1.1.21.3 The Premises are owned by the Lessor in fee simple, free of all charges and encumbrances other than those registered in the Registry, and the inalienability or Indian reserve status of the Lands must not be a discounting factor and must not be used as a basis to lower valuation in comparing the Premises to other properties, whether or not such properties are Indian reserve lands.

1.1.21.4 The Lands do not include the Improvements made after the Commencement Date and the contributory value of the Lessee's Improvements must not be taken into account.

End of Option 2.

OPTION 3 – If option 3 (prepaid nominal rent) is chosen in the rent section, then use the following:

1.1.22 "**Fair Market Rent**" means the most probable lump-sum rent that the Premises should bring, for the period from the happening of the event referred to in section 4.7.1 until the end of the Term, in a competitive and open market, reflecting all conditions of this Lease and assuming the following conditions:

1.1.22.1 The Lessor and the Lessee are typically motivated, well informed, well advised, and are acting prudently in an arm's length transaction.

1.1.22.2 A reasonable time is allowed for exposure in the open market and the rent represents the normal consideration for the Premises unaffected by undue stimuli or special fees or concessions granted by anyone associated with the transaction.

1.1.22.3 The Premises are owned by the Lessor in fee simple, free of all charges and encumbrances other than those registered in the Registry, and the inalienability or Indian reserve status of the Lands must not be a discounting factor and must not be used as a basis to lower valuation in comparing the Premises to other properties, whether or not such properties are Indian reserve lands.

1.1.22.4 The Lands do not include the Improvements made after the Commencement Date and the contributory value of the Lessee's Improvements must not be taken into account.

End of Option 3.

1.1.23 "**First Nation Fees**" means the amounts payable to the First Nation referred to in section 4.10.

1.1.24 "**Gross Negligence or Wilful Misconduct**" means an act or failure to act (whether sole, joint, or concurrent) by a Party that was intended to cause or was in reckless disregard of, or wanton indifference to, the harmful consequences to the safety or property of a Person which the Party knew, or should have known, would result from such act or omission, but does not include an act or failure to act that constitutes mere ordinary negligence or occurred in accordance with the express instructions or approval of the relevant other Party.[23]

1.1.25 "**IAA**" means the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1.

1.1.26 "**Improvements**" means the improvements to the freehold, as determined according to the common law, forming part of the Lands from time to time, including any:

1.1.26.1 buildings, structures, works, facilities, infrastructure, and utility services; and

1.1.26.2 equipment, machinery, apparatus, and other such fixtures forming part of an improvement, but excluding Trade Fixtures.

1.1.27 "**Indian Act**" means the *Indian Act*, R.S.C. 1985, c. I-5.

OPTIONAL – If option 1 (periodic rent) is chosen in the rent section, then include the following definition of "Initial Period". Otherwise, delete it.

1.1.28 "**Initial Period**" means the five-year period starting on the Commencement Date and ending on [Month Day, Year].[24]

End of Option.

1.1.29 "**Lands**" means those lands more particularly known and described as:

[Legal Description],

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[23] This definition clarifies the exception set out in the Lessee's indemnities (see article 12). Ordinary *negligence* is the failure to use reasonable care. What is "reasonable" is based on what a person in similar circumstances would do. *Gross negligence* introduces an element of consciousness to the failure to use reasonable care – when one is grossly negligent, one does not simply fail to use reasonable care, one knows or should have known that one is not considering the care one should be taking.

[24] See note 27.

excepting all Minerals[25], and, without derogating from section 2.2, subject to the following interests:

[List interests or enter "nil"].

1.1.30 "**Laws**" means all applicable laws, statutes, regulations, codes, orders, and by-laws of an Authority, as amended or replaced from time to time.

1.1.31 "**Lease**" means this lease agreement, and all Schedules attached to it, as amended from time to time.

1.1.32 "**Minerals**" means ore of metal and every natural substance that can be mined and that:

1.1.32.1 occurs in fragments or particles lying on, above, or adjacent to the bedrock source from which it is derived and commonly described as talus; and

1.1.32.2 is in place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary, or broken rock or float, which, by decomposition or erosion of rock, is found in wash, loose earth, gravel, or sand,

including:

1.1.32.3 coal, petroleum, and other hydrocarbons, regardless of gravity and howsoever and wheresoever recovered;

1.1.32.4 natural gas, methane, coal bed methane, and other gases; and

1.1.32.5 building and construction stone, limestone, dolomite, marble, shale, clay, sand, and gravel.[26]

1.1.33 "**Minister**" means the Minister with responsibility, from time to time, for administering this Lease.

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[25] The common law assumes that, absent anything to the contrary in a lease, a lessee is entitled to exploit the minerals contained within the lands. As such, Minerals are "excepted out" (excluded) from the demise (grant of the leasehold estate) in this Lease template.

If the Premises are on a "surface only reserve", one may wish to remove the reference to Minerals here (and the Minerals definition and section 2.3 regarding extraction) if one is certain that all of the Minerals excluded from the reserve are within the definition of Minerals to be excluded from the demise. However, excluding something from the leasehold which might not form part of the Lands anyway would simply be moot, so this reference could remain if desired.

[26] See note 25.

1.1.34 "**Mortgage**" means a mortgage, debenture, deed of trust, bond, assignment of rents, or any other means by which the Lessee's leasehold interest in the Premises is used as security for a loan.

1.1.35 "**Mortgagee**" means a mortgagee under a valid Mortgage.

1.1.36 "**Party**" means a party to this Lease.

OPTIONAL – If option 1 (periodic rent) is chosen in the rent section, then include the following definition of "Period". Otherwise, delete it.

1.1.37 "**Period**" means, as the case may be:

1.1.37.1 the Initial Period;

1.1.37.2 a five-year period starting on the day following the end of a preceding five-year period; or

1.1.37.3 the last period of the Term, which may be less than five years, starting on the day following the end of the last full five-year period.[27]

End of Option.

1.1.38 "**Person**" includes an individual, partnership, firm, company, corporation, incorporated or unincorporated association or society, co-tenancy, joint venture, syndicate, fiduciary, estate, trust, bank, government, governmental or quasi-governmental agency, board, commission or authority, organization, any other form of entity however designated or constituted, and any combination of any of them.[28]

1.1.39 "**Premises**" means the Lands and Improvements or any part of the Lands and Improvements.

There are 3 options for Prepaid Rent. Choose one and delete the others.

OPTION 1 – If option 1 (periodic rent) is chosen in the rent section, then delete all definitions of "Prepaid Rent". End of Option 1.

OPTION 2 – If option 2 (prepaid fair market rent) is chosen in the rent section, then use the following:

1.1.40 "**Prepaid Rent**" means the amount set out in section 4.5.

End of Option 2.

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[27] ISC policy requires periods to be no longer than 5 years before there is a review of the Fair Market Rent.

[28] First Nations' counsel sometimes want to add "First Nation" and "Council" here, but they are already included. First Nations are at the very least unincorporated associations and Councils are governments. Regardless, the catch-all of "or any other form of entity however designated or constituted" would include both of them.

OPTION 3 – If option 3 (prepaid nominal rent) is chosen in the rent section, then use the following:

1.1.41 "**Prepaid Rent**" means the amount set out in section 4.6.

End of Option 3.

1.1.42 "**Project**":

1.1.42.1 has the meaning given it in section 81 of the IAA;

1.1.42.2 includes any designated activities under section 87 of the IAA; and

1.1.42.3 includes any similar concepts in an amended, succeeding, or replacement Law.[29]

1.1.43 "**Registry**" means the registry with registration jurisdiction over the Lands.[30]

There are 3 options for "Rent".[31] Choose one and delete the others.

OPTION 1 – If option 1 (periodic rent) is chosen in the rent section, then use the following:

1.1.44 "**Rent**" means Additional Rent, Annual Rent, and Fair Market Rent.

End of Option 1.

OPTION 2 – If option 2 (prepaid fair market rent) is chosen in the rent section, then use the following:

1.1.45 "**Rent**" means Additional Rent and Prepaid Rent.

End of Option 2.

OPTION 3 – If option 3 (prepaid nominal rent) is chosen in the rent section, then use the following:

1.1.46 "**Rent**" means Additional Rent, Fair Market Rent, and Prepaid Rent.

End of Option 3.

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[29] Section 81 of the *Impact Assessment Act* defines "project" for the purposes of the Minister's responsibilities under that Act. However, sections 88 and 91 create processes for projects or classes of projects that do not require an environmental impact review under the Act (see the definition of Exempt Project in section 1.1.20).

[30] This will be the Indian Land Registry System during the Minister's administration of the Lease and the First Nations Land Registry System during the First Nation's administration of the Lease under FNLM.

[31] At common law, a landlord has certain rights that are not available under a normal contract, such as a remedy called distraint. Under this Lease template, the Parties are agreeing that certain money payable to the Lessor that is not part of the Annual Rent or Prepaid Rent will be deemed to be Rent so to be able to use these rights for recovery (see notes 71 and 154).

1.1.47 "**Reserve**" means [Reserve Name] Indian Reserve No. [#].

1.1.48 "**Schedule**" means an attachment to this Lease labeled as a Schedule, which forms part of and is integral to this Lease.

OPTIONAL – Include the following if the use of Standards is chosen in the environmental sections offering this choice (see sections 8.6 and 11.3.2). Otherwise, delete it.

1.1.49 "**Standard**" means the amount of a Contaminant, based on the more conservative standard set out in the:

1.1.49.1 *Canadian Environmental Quality Guidelines* established by the Canadian Council of Ministers of the Environment, as amended or replaced from time to time; or

1.1.49.2 laws and published guidelines of the province of [Name of Province],

below which is considered acceptable for the uses to which the particular part of the Premises are being put.[32]

End of Option.

1.1.50 "**Sublease**" means a leasehold interest in the Premises granted by the Lessee to a sublessee, which, for greater certainty, does not include a Mortgage by way of a sublease.[33]

1.1.51 "**Sublessee**" means a sublessee under a Sublease.

1.1.52 "**Substantial Completion**" means the date on which a written certificate by an Architect or Engineer is provided to each of the Lessor and the First Nation certifying to them that:

1.1.52.1 the Improvements are substantially complete in all material respects, in a proper and workmanlike manner, and in accordance with the applicable Development Plan, the applicable Construction and Environmental Management Plan, and applicable Codes and Laws, except for minor deficiencies which, in the opinion of the Architect or Engineer, will not render the Improvements unfit for occupancy;

[32] This definition pulls in the more stringent standard between federal and provincial guidelines for the use of the particular area of lands. Guidelines usually set up different standards for different uses (e.g., an industrial area would be allowed more hydrocarbon contamination than an agricultural area.)

[33] Mortgages of leases can be granted in two ways: by assignment or by sublease. The exclusion here of Mortgages by way of a sublease is to clarify that they are intended to be dealt with solely as Mortgages under the mortgage provisions rather than Subleases under the sublease provisions.

1.1.52.2 all permits for occupancy required by an Authority have been obtained; and[34]

1.1.52.3 the Improvements are ready for occupancy.

1.1.53 "**Taxes**" means a tax imposed by an Authority in relation to the granting of this Lease or the payment of Rent.[35]

1.1.54 "**Term**" means the period starting on the Commencement Date and expiring on [Month Day, Year], unless this Lease otherwise ends early.[36]

1.1.55 "**Trade Fixtures**" means trade fixtures as determined at common law.[37]

1.1.56 "**Trustee**" means a trust company appointed in writing by the First Nation.[38]

1.1.57 "**Unavoidable Delay**" means a delay, stoppage, or interruption resulting from:

1.1.57.1 strike, lock-out, or other labour dispute;

1.1.57.2 material or labour shortage not within the control of the Party;

1.1.57.3 stop-work order issued by an Authority or a court or tribunal of competent jurisdiction, on the condition that such order is not issued as a result of an act or fault of the Party;

1.1.57.4 fire, explosion, or other casualty;

1.1.57.5 pandemic, epidemic, or other widespread illness or disease that results in mandated employee lockdowns or business closures;

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[34] Although very few First Nations have occupancy permit requirements, it may be more likely under FNLM and this Lease template tries to accommodate issues that may arise with a transition to FNLM.

[35] This definition is not meant to cover property taxes, sales taxes, business taxes, etc. Instead, it is meant only to cover taxes that the Lessor is required to collect and remit to a taxing authority, such as GST/HST on certain types of rent payable by the Lessee.

[36] See note 8 regarding the Commencement Date. The term length must be consistent with the designation. The end date could be an actual date, as indicated here, or it could be a date ascertainable by reference to an event, such as "the date on which the Lessee dies". Under the common law, a term can be for any length, provided that it is not perpetual. However, seemingly paradoxically, a lease can contain a provision allowing for perpetual renewal. Also, the Crown may be able to create a perpetual lease, although the benefits of doing so are not obvious.

[37] At common law, fixtures (which are things affixed to land or a building for the betterment of the property rather than for the better use of the thing itself) become part of the property once affixed. This is not true of most trade fixtures (which are fixtures that are particular to the tenant's business), which the common law does not consider to become part of the property upon affixation; therefore, the tenant may remove them at any time during the term. (See more in article 11.)

[38] If the First Nation does not require the Lessee to use insurance proceeds to rebuild the Improvements, then this definition could be deleted. (See section 6.6.)

1.1.57.6 flood, wind, earthquake, or act of God;

1.1.57.7 any Law, on the condition that the application of such Law is not as a result of an act or fault of the Party; or

1.1.57.8 other similar circumstances beyond the reasonable control of the Party and not avoidable by the exercise of reasonable effort or foresight by the Party,

but does not include the inability of the Party to meet its financial obligations under this Lease or otherwise.

1.2 **Form of Definition** – Defined words are capitalized for ease of reference. A defined word may be read as having an appropriate corresponding meaning when it is used in the plural or verb form.

1.3 **Headings** – All headings in this Lease have been inserted as a matter of convenience and for reference only and in no way define, limit, enlarge, modify, or explain the scope or meaning of this Lease or any of its provisions.

1.4 **Extended Meaning**

1.4.1 A word in the singular form may be read in the plural form if the context allows it and a word in the plural form may be read in the singular form if the context allows it.

1.4.2 The words “include”, “includes”, and “including” are to be read as if they are followed by the phrase “without limitation”.

1.4.3 The phrase “this Lease ends” includes an ending by expiration of the Term and an earlier termination. The phrases “earlier termination” and “early termination” include a surrender.

1.4.4 The phrases “on the Lands”, “in the Lands”, or “on the Premises” includes in, on, under, and above such Lands or Premises.

1.4.5 Unless stated otherwise, the construction of Improvements includes the making of alterations to an Improvement.

1.5 **Joint and Several** – If the Lessee is more than one Person, then all of the Lessee’s obligations are joint and several.[39]

[39] “*Joint and several*” means that a responsibility is shared; each party is equally responsible for fulfilling an obligation of the lease and for the consequences of any breach of the lease. If the tenants breach an obligation, then the landlord can sue any or all of the tenants for the breach and collect from any or all of the tenants for the landlord’s damages. This might negate what two unequal tenants in common might expect. A 90% tenant in common might have little to no assets against which a landlord may secure

1.6 **Statutes** – A reference to a statute means that statute and all regulations made under it, all as amended or replaced from time to time.

1.7 **Governing Laws** – This Lease will be governed by and interpreted in accordance with the Laws of Canada and of the province of [Name of Province].[40]

1.8 **Entire Agreement** – This Lease constitutes the entire agreement between the Parties with respect to the subject matter of this Lease and supersedes and revokes all previous discussions, negotiations, arrangements, letters of intent, offers to lease, representations, and warranties. There are no obligations, covenants, agreements, representations, or warranties between the Parties with respect to the subject matter of this Lease other than those explicitly set out in this Lease.[41]

1.9 **Modification** – A modification of this Lease must be in writing and executed in the same manner as this Lease.[42]

1.10 **Consent and Approval** – Unless stated otherwise, when a Party is required to provide consent or approval under this Lease, that consent or approval will not be unreasonably withheld.[43]

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payment of a judgment for damages but a 10% tenant in common may have the funds available. The landlord could execute solely against the 10% owner to collect all of its judgment.

[40] Absent anything in an agreement about legal jurisdiction, it usually will be governed by the laws of the province in which the parties reside. However, if one party is a federal company or a company from another province, then the legal jurisdiction can be uncertain if the parties do not specify the jurisdiction that will apply. Note also that the governing Laws must be "applicable" – this clause does not make applicable that which would not be applicable on its own.

[41] Although the Lessor would not usually have any prior agreements with respect to a proposed Lease, a First Nation might. If the First Nation has other elements of the business deal with the Lessee outside of the Lease, then it may wish to refer to the relevant document(s) here as exceptions or otherwise modify this clause.

[42] Note that an amendment that purports to change the area being leased or the Term of the lease is usually, at common law, considered to be a new lease. Any proposed modification agreement should take this into account by ensuring that the Lessee is liable under the amended lease to the original Commencement Date and not only just from the modification date forward. As well, as the First Nation is usually entitled to the Improvements at the end of the Term, consider if Rent for the extension should then be calculated on the improved value of the Lands rather than the original unimproved value.

[43] Lessees will sometimes wish to add "or delayed" after "unreasonably withheld". The use of a reasonableness qualification intends to establish an external, objective standard – what would the average person do in this situation? – and then hold the parties to that standard. Canada is a unique landlord, particularly with its fiduciary obligations to First Nations, such that it sometimes cannot make decisions as quickly as a commercial enterprise. As such, holding the Lessor to an objective standard of timeliness could raise the risk of a breach of an "unreasonable delay" obligation when Canada is the Lessor.

1.11 **Time is of the Essence** – Time is of the essence in this Lease and time will remain of the essence notwithstanding any extension of time granted to a Party.[44]

1.12 **Severability** – If a part of this Lease is declared or held invalid for any reason, then the invalidity of that part will not affect the validity of the remainder of this Lease, which will continue in full force and effect and be construed as if this Lease had been executed without the invalid part.[45]

1.13 **Survival of Obligations and Rights** – If a part of this Lease states that it survives when this Lease ends, then the survival of that part is only to the extent required for the performance of any continuing obligations and the exercise of any rights pertaining to them.[46]

1.14 **Business Day** – If the date for the occurrence or performance of anything under this Lease falls on a day that is not a Business Day, then the date for its occurrence or performance will be automatically extended to the next Business Day.

2. THE PREMISES

2.1 **Lessee's Rights to the Premises** – The Lessor hereby leases the Premises to the Lessee to have and to hold during the Term for the Authorized Uses, and the Lessee is entitled to quiet enjoyment of the Premises for the Term, under the terms of this Lease.[47]

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[44] "Time is of the essence" is a term of art stemming from case law about the consequences of missing a deadline established in a contract. It does not mean that a party always has to act as quickly as possible. What it means is that when an exact date or period is set out in a lease, it must be strictly met.

[45] Courts have invalidated entire contracts because one part was not valid. Clauses like this stop that from happening, but can sometimes require the parties to renegotiate parts of the contract if an invalidated clause causes other clauses not to work as the parties had anticipated.

[46] Normally, when a contract ends, all parties' rights and obligations cease. Sometimes, parties wish for certain limited rights or obligations to remain for a period afterwards. This clause ensures that the Lessee will not be considered to be continuing as a tenant after the end of the Term when performing any obligations or exercising any rights. See also note 165.

[47] This is the "demise" that grants the leasehold estate to the Lessee, upon which a Lessee obtains certain rights, such as: 1) exclusive possession; 2) quiet enjoyment; and 3) that there will be no derogation from the grant. *Exclusive possession* does not mean that no other person can exercise any rights on the land; it means that a tenant has the right to use the lands to the exclusion of a landlord (subject to any rights retained by the landlord in the lease). *Quiet enjoyment* is primarily an assurance that the landlord will not substantially interfere with the tenant's enjoyment of the property. It usually pertains to blocking access to the property but can be anything preventing the tenant from using the property for its intended purpose. *Non-derogation of the grant* protects a tenant from a landlord's activities upon adjacent lands that might frustrate the purpose for which the grant is made.

2.2 **Subject to Prior Interests and Rights** – This Lease is subject to all valid, existing interests in, and rights in relation to, the Premises, whether or not the Lessee has notice of them.[48]

2.3 **Reservation of Minerals**

2.3.1 The Lessor reserves all Minerals on the Lands and retains the right, subject to reasonable prior notice being provided to the Lessee, to enter the Premises to prospect for, drill for, work, extract, and produce Minerals and to lay pipeline and build such tanks, stations, improvements, and roads as may be reasonably necessary, on the condition that the activity has no material adverse effect on the Authorized Uses.[49]

2.3.2 If there is any interference with the Lessee's rights under this Lease due to the exercise of the Lessor's rights under section 2.3.1 that is less than a material adverse effect on the Authorized Uses, then the Lessor will determine the amount of any compensation and provide notice to the Lessee of such amount. Such interference is not a default of the Lessor's covenant of quiet enjoyment.

2.3.3 If the Lessee disagrees with the compensation determined by the Lessor under section 2.3.2, then the Lessee may, within 60 days of delivery of the notice referred to in section 2.3.2, refer the matter to Federal Court for a review of the determination of compensation. If the Lessee fails to refer the matter to Federal Court within the specified time, then the compensation set out in the Lessor's notice will be final and binding on the Parties.

2.4 **Reservation for Other Interests and Rights**

2.4.1 The Lessor reserves the right to grant other interests in, or rights in relation to, the Premises without compensation to the Lessee, including by way of permit, easement (statutory or otherwise), right-of-way, or other similar interest in, or right in relation to, the Lands, in favour of an Authority or any other Person, as

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[48] There is a legal maxim to the effect that "you cannot give what you do not have". If the Lessor has granted any previous interests on the Premises, then the Lessor does not have the full bundle of rights normally associated with ownership to give to the Lessee. Known encumbrances are intended to be listed in the definition of "Lands". Because the Registry is not infallible, on very rare occasions, there may be interests of which the Lessor is unaware. This clause leaves that risk with the Lessee, although the doctrine of mistake may void the Lease if the Lessee is deprived of substantially what it bargained to receive by the unknown interest. Again, it is highly unlikely for there to be an unknown interest on the Premises as there is usually visible infrastructure that accompanies any interest.

[49] At common law, when property is leased, it is presumed to include the minerals, so this express reservation in the Lease template rebuts that presumption. (See also note 25). Although Canada retains a right to work the Minerals during the Term, any such work must not have any "material adverse effect" on the Lessee's use of the Premises. At the drafting stage, some Lessees might raise concerns about what constitutes "material" or even wish for the material qualifier to be removed so that the Minerals work cannot have *any* adverse impact on the use of the Premises, but such a strict qualification may render the reservation useless.

long as the grant of interest or right has no material adverse effect on actual or potential use of the Lands for the Authorized Uses.[50]

2.4.2 Prior to granting an interest or right under section 2.4.1, the Lessor will provide the Lessee with information about the proposed interest or right to give the Lessee an opportunity to provide any comments respecting any material adverse effects the proposed interest or right may have on the actual or potential use of the Lands for the Authorized Uses.

2.4.3 On notice being delivered by the Lessor, the Lessee will promptly sign and provide to each of the Lessor and the First Nation the necessary documentation to subordinate the Lessee's right and interest in the Premises under this Lease to an interest or right granted in accordance with this section 2.4.[51]

2.5 **Access** – The grant of this Lease does not grant the Lessee any rights of access over any other lands of the Lessor. The Lessee will secure and maintain legal access (be it by public or private road, water, air, or otherwise) to and from the Premises.[52]

3. USE OF THE PREMISES

3.1 **Authorized Uses** – The Lessee will not use the Premises for any purposes except for the following purposes:

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[50] Absent any lease terms to the contrary, once a landlord grants a lease, the landlord has transferred all of its rights in the property to the tenant, other than the right of reversion (that residual interest that protects the landlord's right to title). As such, the landlord would not be allowed to grant any interests in the property to other parties, such as utilities, and the utilities would need to obtain their rights from the tenant. The problem arising from that, however, is that the tenant can only grant interests that end when the lease ends and utilities usually need longer or more stable tenure. That being said, the Lessor can be limited in the term lengths it can grant too by restrictions in the designation.

The Lessor's grant of an interest cannot have a "material adverse effect" on the Lessee's use of the Premises. See previous note for more on "material adverse effect". Mostly, this clause is used for giving interests to utilities, which are usually on the Lands at the request of the Lessee and the interest benefits the Lessee's development.

[51] A subordination agreement will cause the new instrument to have priority over the Lease as if it existed before the Lease was granted. This will mean that the utility will not need to also obtain a separate interest from the Lessee to obtain the rights that it needs.

[52] At common law, absent a clause like this, some tenants can have rights of access over other lands owned by the same landlord. Canada, as Lessor, is often an owner of other adjacent reserve lands and could also own other adjacent federal non-reserve lands, so it would not want access to be presumed. Lessees should secure 28(2) permits from the Minister for access over First Nation roads and otherwise ensure that they have access rights if ingress and egress (the point at which they would come and go) is onto private lands, provincial highways, other federal lands, etc.

As a result of this clause, a lands officer need not obtain from a proposed Lessee evidence that the Lessee has access rights in advance of granting the Lease, but it is usually good practice to discuss the issue in case it is the Minister who will be asked to issue access rights.

- [List the Uses][53]

3.2 **Nuisance** – Except as required by the construction, repair, rebuilding, replacement, or removal of Improvements, the Lessee will not cause, permit, or suffer a nuisance on the Premises.[54]

3.3 **Waste**[55]

3.3.1 The Lessee will not cause, permit, or suffer any waste of the Premises.

3.3.2 The Lessee will not cause, permit, or suffer the removal of sand, gravel, topsoil, or other constituent material of the Lands, except as required by the clearing and construction permitted in this Lease and any Law, in which case, such removal will not constitute waste.

3.4 **Garbage** – The Lessee will not cause, permit, or suffer garbage or debris to be placed or left at the Premises, except as is reasonably necessary in accordance with the Authorized Uses.

3.5 **No Vacating or Abandoning the Premises** – The Lessee will not vacate or abandon the Premises without the prior consent of each of the Lessor and the First Nation. The Lessee will be considered to be in possession and control of the Premises from and after the Commencement Date, even though construction of proposed Improvements may not have commenced, and will, at its cost, secure the Premises during such time as would a reasonably prudent owner in occupation.[56]

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[53] These must be consistent with the designation.

[54] The Parties should turn their minds to the type of business to be carried on at the Premises to consider if any ongoing operations might be considered to be a nuisance to neighbouring lands and, if so, whether any conditions on the Lessee's use of the Premises might be appropriate to lessen any potential nuisance. Even if a Lease allows for activity that might be considered to be a nuisance, the Lessee still owes neighbours a duty not to commit a nuisance on the neighbours' enjoyment of their properties and accordingly the Lessee can be sued in tort by such neighbours.

[55] *Waste* is an unreasonable or improper use of property that causes lasting damage to a landlord's reversion or lasting detrimental changes to the nature of the property. The template Lease frames the restriction as "cause, permit or suffer" because the Lessee has exclusive possession of the Premises and is, therefore, in the best position of any Party to ensure that only authorized Persons are on the Premises conducting authorized activities. *Cause* is performing an act oneself or having it performed at one's direction, *permit* is authorizing someone else to commit an act, and *suffer* is allowing someone to commit an act without enforcing one's right to stop such person from committing it.

[56] *Vacating* is a temporary lack of occupancy while *abandoning* is a lack of occupancy with an intention (express or implied) not to return. For example, a tenant who is vacant may still keep the utilities running so as to maintain the property, but a tenant who has abandoned likely would not do anything to continue to maintain the property. The "no abandonment" restriction ensures that the custodial presence of the Lessee will likely prevent any damage to the Premises. The "no vacancy" restriction ensures that the Lessee will continuously operate a business at the Premises.

3.6 **Inspection**

3.6.1 The Lessee will provide each of the Lessor and the First Nation with reasonable access to inspect the Premises, including conducting site assessments, audits, and other tests on, and investigations of, the Premises. Except in the case of an emergency, reasonable notice will be provided to exercise this right of access. If the inspection is in response to a default of this Lease, or if, in the process of inspecting the Premises, a default is discovered or confirmed, then the Lessor's reasonable expenses under this section 3.6.1 are Additional Rent and the First Nation's reasonable expenses under this section 3.6.1 are First Nation Fees.[57]

3.6.2 During the last 12 months of the Term and as long as the Lessee's use and enjoyment of the Premises are not unreasonably interfered with, the First Nation may:

3.6.2.1 display signs on the Premises advertising the Premises for lease; and

3.6.2.2 on reasonable notice being provided to the Lessee, allow prospective lessees and their advisors access to the Premises so that they may inspect or perform any reasonable assessments of the Premises, however, the Lessee may require its representative to attend such inspection or assessment.[58]

3.7 **Artifacts** – If an Artifact is unearthed or discovered on the Premises, then the Lessee will:

3.7.1 promptly notify the First Nation;

3.7.2 cease further activity that could affect the Artifact;

3.7.3 take reasonable measures to protect the Artifact;

3.7.4 comply with the direction of an Authority and the reasonable requirements of the First Nation in relation to the handling of the Artifact; and

3.7.5 if there are no First Nation or federal Laws relating to the handling of such an Artifact, at the written direction of the First Nation, comply with the requirements

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The definition of Premises includes any part of the Premises, which means that the Premises would not need to be vacated in their entirety for a breach of this clause to have occurred. As such, the First Nation and Lessee should consider if they want vacancy to be a default for a particular development. For example, some retail Lessees will want the ability to vacate a space temporarily. So too would a Lessee renting out residential space.

[57] Expenses related to a default would normally be recoverable, but expenses incurred in advance of the discovery of the default may not, so this clause allows these advance expenses to be considered the same as if the default was already known.

[58] This clause helps First Nations to shorten the time between tenants if they wish to find a new Lessee to take over the Premises at the end of the Lease.

in the laws of the province of [Name of Province] relating to the protection of heritage objects or sites such as the Artifact, to the extent possible, even if such laws are not applicable on the Premises.[59]

3.8 **Survey Monuments** – If a legal survey monument is disturbed, damaged, or destroyed during the Term, then the Lessee will ensure that it is replaced by a licensed surveyor to the satisfaction of the Surveyor General of Canada.[60]

3.9 **Representations about the Premises and their Use**[61]

3.9.1 The Premises are leased to the Lessee on an "as is – where is" basis.

3.9.2 Without limiting section 1.8, the Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:[62]

3.9.2.1 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

3.9.2.2 issues of title, encumbrances affecting title, and matters contained within the Registry;

3.9.2.3 access to and from the Premises; and

3.9.2.4 the suitability of the Premises for the Lessee.

3.9.3 The Lessee represents and warrants that:

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[59] As provincial law with respect to artifacts may not apply on reserve, the First Nation should consider if it wishes Lessees to comply with these laws anyway to the extent possible (as the Lease template is currently drafted) or if the First Nation would like Lessees to comply with the First Nation's "reasonable requirements" only or some other conditions (e.g., some First Nations may have established archaeological protocols that they wish to apply by contract and can be added here).

[60] It is an offence under the *Canada Lands Surveys Act* to willfully or inadvertently damage or remove a survey monument. This clause allows for an easier remedy than a prosecution under that Act.

[61] At common law, a tenant takes a property subject to any defects existing at the time, if there are no explicit or implicit conditions or warranties that it is fit for the purpose for which it will be used. This article helps to clarify that there are no such implied conditions or warranties in this Lease.

[62] A *representation* is a statement of fact relied on by the receiving party that induced that party to enter into a contract. It normally occurs before the contract is executed, but may be repeated in the contract as well. A misrepresentation may entitle the aggrieved party to rescind the contract, which means that the contract would be set aside. The aggrieved party may also be entitled to damages to put it back into the position that it would have been in had the contract never been entered into.

A *warranty* is a statement of fact contained in a contract. If it is not true, then the receiving party has a claim for breach of contract.

3.9.3.1 prior to the Commencement Date, it inspected the Premises, including conducting all investigations that it deemed prudent regarding the matters referred to in sections 3.9.2.1 - 3.9.2.3; and

3.9.3.2 it is satisfied that the Premises are suitable for its intended uses and that those uses are within the Authorized Uses.

3.10 **Others Performing the Lessee's Obligations** – The Lessee may allow any Person to perform any of the Lessee's obligations in this Lease, but in doing so the Lessee will ensure performance of such obligations by such Person and it in no way affects the Lessee's obligation to perform.[63]

4. RENT

4.1 **Payments** – All payments made by the Lessee to the Lessor under this Lease will be:

4.1.1 paid in Canadian dollars;

4.1.2 made payable to the Receiver General for Canada;

4.1.3 paid without any prior demand, set-off, deduction, or abatement; and

4.1.4 accompanied by applicable Taxes.[64]

4.2 **Outstanding Amounts** – The Lessor may apply payments received against outstanding amounts owed to it by the Lessee under this Lease in the Lessor's sole discretion.[65]

There are 3 options for the payment of rent. Choose one and delete the others.

OPTION 1 – If the rent is periodic, then use the following and choose either sub-option A (annual) or B (monthly):

4.3 **Annual Rent**

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[63] Sometimes Lessees wish to have Sublessees fulfil some of their obligations and ask for changes to the Lease (e.g., have Sublessees obtain insurance, perform environmental assessments, pay taxes, etc. instead of the Lessee). Although the Lessor and the First Nation may maintain contractual relations with Sublessees through a direct agreement, they primarily maintain a business relationship with the Lessee and expect the Lessee to perform its obligations. The Lessee can allow (and require) Sublessees to perform any of the Lessee's obligations under their Sublease, but the Lessee will always remain responsible to the Lessor and the First Nation for their fulfilment.

[64] See Delivery (article 13) for more on the payment of Rent.

[65] The only time that this would have much practical effect is if the Lessee owed money for Annual Rent and for something that was not considered to be Rent (e.g., Taxes) and only paid a partial amount to the Lessor. In that case, the Lessor may want to apply the payment to the Taxes portion first so as to utilize its common law remedies to collect Rent on the remainder.

Sub-option A: Annual payments:

4.3.1 The Lessee will pay Annual Rent to the Lessor in the following amounts, plus applicable Taxes, on or before [Month Day]:

4.3.1.1 in the Initial Period, an amount of $[Amount] per year; and

4.3.1.2 in each subsequent Period, the greater of the Annual Rent paid in the previous Period or Fair Market Rent.[66]

Sub-option B: Monthly payments:

4.3.2 The Lessee will pay Annual Rent to the Lessor in the following amounts, plus applicable Taxes, on or before the [Day (e.g. 1st)] day of each month:

4.3.2.1 in the Initial Period, an amount of $[Amount] in 12 monthly installments of $[Amount]; and

4.3.2.2 in each subsequent Period, the greater of 1/12th of the Annual Rent paid in the previous Period or 1/12th of Fair Market Rent.

End of Sub-options

4.3.3 The Lessee has no right to a refund of Annual Rent from the Lessor or the First Nation if this Lease ends early.

4.4 **Fair Market Rent Determination** – The process to determine Fair Market Rent is as follows:[67]

4.4.1 No later than 90 days and no more than 120 days before the beginning of a Period, the Lessee will obtain an Appraisal (the "**Lessee's Appraisal**") to determine Fair Market Rent for that Period and provide a copy of it to each of the Lessor and the First Nation. The Lessee's choice of Appraiser (the "**Lessee's Appraiser**") and terms of reference for the Appraisal must be approved of in advance by each of the Lessor and the First Nation. The Lessee's Appraisal

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[66] This is a "ratchet clause" – rent can go up with market increases, but it will not fall with market declines. It is common in leases on reserve, but not universal. Although this could represent a bonus for First Nations in declining markets, in a long-term declining market it can cause Annual Rent to become uneconomic for a Lessee. In that case, the Parties may choose to renegotiate the Annual Rent for at least that Period to provide relief to the Lessee if they wish to maintain a good long-term commercial relationship.

[67] This is one method for determining Fair Market Rent. The Parties can consider others but some models, such as a CPI adjustment, do not usually approximate Fair Market Rent. These provisions are an alternative dispute resolution model that do not allow the issue to go to court, which is expensive, adversarial, and time-consuming.

The First Nation should consider if it wants to retain the option to be directly involved in the rent determination process (as is set out in the template Lease) or leave it solely to Canada.

must state that it can be relied on by all Parties. The cost of the Lessee's Appraisal will be borne by the Lessee.

4.4.2 Within 120 days of delivery of the Lessee's Appraisal, the Lessor or the First Nation may obtain an Appraisal using the same terms of reference used for the Lessee's Appraisal (the "**Second Appraisal**"), a copy of which such Party will promptly provide to each of the other Parties. The Second Appraisal must state that it can be relied on by all Parties. If a Second Appraisal is not obtained in such time, then Fair Market Rent will be the amount determined in the Lessee's Appraisal.

4.4.3 If the Fair Market Rent determined in the Lessee's Appraisal is:

4.4.3.1 equal to or higher than in the Second Appraisal, then Fair Market Rent will be the amount determined in the Lessee's Appraisal and the cost of the Second Appraisal will be borne by the Party who obtained it;

4.4.3.2 no more than 15.0% lower than in the Second Appraisal, then Fair Market Rent will be the amount determined in the Second Appraisal and the cost of the Second Appraisal will be borne by the Party who obtained it; or

4.4.3.3 more than 15.0% lower than in the Second Appraisal, then the Appraiser of the Second Appraisal (the "**Second Appraiser**") and the Lessee's Appraiser will promptly discuss the two appraisals so as to jointly determine Fair Market Rent within 60 days of delivery of the Second Appraisal to the Lessee and Fair Market Rent will be the jointly determined amount. If the jointly determined amount is closer to the amount determined in the Second Appraisal than to the amount determined in the Lessee's Appraisal (or where the differences between them are equal), then the cost of the Second Appraisal and the costs for the work of both Appraisers under this section 4.4.3.3 will be borne by the Lessee (any amount of which already paid by the Party who obtained the Second Appraisal will become payable by the Lessee as Additional Rent or First Nation Fees, as the case may be). Otherwise, the cost of the Second Appraisal will be borne by the Party who obtained it and each Party will bear its costs for the work of its own Appraiser under this section 4.4.3.3.[68]

When Fair Market Rent is determined under this section 4.4.3, the Lessee and the Party who obtained the Second Appraisal will promptly notify the other Party of such amount.

[68] The potential imposition of these costs on the Lessee: 1) encourages the Lessee to ensure that it obtains a reasonable initial appraisal; and 2) aligns with the idea that costs of dispute resolution are usually borne by the party who loses the dispute.

4.4.4 If the Appraisers are unable to jointly determine Fair Market Rent within the period set out in section 4.4.3.3, then the Lessee and the Party who retained the Second Appraiser will agree upon a third, independent Appraiser to promptly review the two Appraisals and determine Fair Market Rent, which determination is final and binding on the Parties. If such determination is closer to the amount determined in the Second Appraisal than to the amount determined in the Lessee's Appraisal (or where the differences between them are equal), then the cost of the Second Appraisal, the costs for the work of both Appraisers under section 4.4.3.3, and the costs for the work of the third Appraiser under this section 4.4.4 will be borne by the Lessee (any amount of which already paid by the Party who obtained the Second Appraisal will become payable by the Lessee as Additional Rent or First Nation Fees, as the case may be). Otherwise, each Party will bear its costs for its own Appraisal, its costs for the work of its own Appraiser under section 4.4.3.3, and 50% of the costs for the work of the third Appraiser under this section 4.4.4. When Fair Market Rent is determined under this section 4.4.4, the Lessee and the Party who obtained the Second Appraisal will promptly notify the other Party of such amount.

4.4.5 If the Lessee fails to comply with section 4.4.1 in the time allowed, then the Lessor may at any later time obtain an Appraisal and determine Fair Market Rent based on the valuation in the Appraisal, which determination is final and binding on the Parties. When Fair Market Rent is determined under this section 4.4.5, the Lessor will promptly notify the Lessee and the First Nation of such amount and provide a copy of the Appraisal. The cost of the Appraisal will become payable by the Lessee as Additional Rent.

End of Option 1.

OPTION 2 – If rent is prepaid at fair market value, then use the following:

4.5 **Prepaid Rent**

4.5.1 The Lessee paid Prepaid Rent of $[Amount] to the Lessor on the Commencement Date.

4.5.2 The Lessee has no right to a refund of any Prepaid Rent from the Lessor or the First Nation if this Lease ends early.

End of Option 2.

OPTION 3 – If rent is prepaid and nominal, then use the following:

4.6 **Prepaid Rent** – The Lessee paid Prepaid Rent of $1 for the Term to the Lessor on the Commencement Date, the receipt and sufficiency of which are hereby acknowledged by each of the Lessor and the First Nation.

4.7 **Payment of Fair Market Rent if the Lessee is not Beneficially-owned by the First Nation**

4.7.1 If the Lessee who executed this Lease ceases to be 100% beneficially-owned by the First Nation, or if a new Person becomes the Lessee who is not 100% beneficially-owned by the First Nation, then the Lessee will promptly notify the Lessor of this event and Fair Market Rent is due upon the happening of such event and payable on the terms of this section 4.7 and section 4.8.

4.7.2 Within 15 days of Fair Market Rent being determined under section 4.8, the Lessee will pay such amount, applicable Taxes, and interest accrued from the date Fair Market Rent became due.[69]

4.8 **Fair Market Rent Determination** – The process to determine Fair Market Rent is as follows:[70]

4.8.1 Within 90 days of the happening of an event referred to in section 4.7.1, the Lessee will obtain an Appraisal (the "**Lessee's Appraisal**") to determine Fair Market Rent for the period from the happening of such event to the end of the Term and provide a copy of it to each of the Lessor and the First Nation. The Lessee's choice of Appraiser (the "**Lessee's Appraiser**") and terms of reference for the Appraisal must be approved of in advance by each of the Lessor and the First Nation. The Lessee's Appraisal must state that it can be relied on by all Parties. The cost of the Lessee's Appraisal will be borne by the Lessee.

4.8.2 Within 120 days of delivery of the Lessee's Appraisal, the Lessor or the First Nation may obtain an Appraisal using the same terms of reference used for the Lessee's Appraisal (the "**Second Appraisal**"), a copy of which such Party will promptly provide to each of the other Parties. The Second Appraisal must state that it can be relied on by all Parties. If a Second Appraisal is not obtained in such time, then Fair Market Rent will be the amount determined in the Lessee's Appraisal.

4.8.3 If the Fair Market Rent determined in the Lessee's Appraisal is:

4.8.3.1 equal to or higher than in the Second Appraisal, then Fair Market Rent will be the amount determined in the Lessee's Appraisal and the cost of the Second Appraisal will be borne by the Party who obtained it;

4.8.3.2 no more than 15.0% lower than in the Second Appraisal, then Fair Market Rent will be the amount determined in the Second Appraisal and the cost of the Second Appraisal will be borne by the Party who obtained it; or

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[69] This clause used to be an option that FN's chose if they wished to help protect their potential revenue generating abilities on the Lands. It is now a requirement under ISC's policy.

[70] See note 67.

4.8.3.3 more than 15.0% lower than in the Second Appraisal, then the Appraiser of the Second Appraisal (the "**Second Appraiser**") and the Lessee's Appraiser will promptly discuss the two appraisals so as to jointly determine Fair Market Rent within 60 days of delivery of the Second Appraisal to the Lessee and Fair Market Rent will be the jointly determined amount. If the jointly determined amount is closer to the amount determined in the Second Appraisal than to the amount determined in the Lessee's Appraisal (or where the differences between them are equal), then the cost of the Second Appraisal and the costs for the work of both Appraisers under this section 4.8.3.3 will be borne by the Lessee (any amount of which already paid by the Party who obtained the Second Appraisal will become payable by the Lessee as Additional Rent or First Nation Fees, as the case may be). Otherwise, the cost of the Second Appraisal will be borne by the Party who obtained it and each Party will bear its costs for the work of its own Appraiser under this section 4.8.3.3.

When Fair Market Rent is determined under this section 4.8.3.3, the Lessee and the Party who obtained the Second Appraisal will promptly notify the other Party of such amount.

4.8.4 If the Appraisers are unable to jointly determine Fair Market Rent within the period set out in section 4.8.3.3, then the Lessee and the Party who retained the Second Appraiser will agree upon a third, independent Appraiser to promptly review the two Appraisals and determine Fair Market Rent, which determination is final and binding on the Parties. If such determination is closer to the amount determined in the Second Appraisal than the amount determined in the Lessee's Appraisal (or where the differences between them are equal), then the cost of the Second Appraisal, the costs for the work of both Appraisers under section 4.8.3.3, and the costs for the work of the third Appraiser under this section 4.8.4 will be borne by the Lessee (any amount of which already paid by the Party who obtained the Second Appraisal will become payable by the Lessee as Additional Rent or First Nation Fees, as the case may be). Otherwise, each Party will bear its costs for its own Appraisal, its costs for the work of its own Appraiser under section 4.8.3.3, and 50% of the costs for the work of the third Appraiser under this section 4.8.4. When Fair Market Rent is determined under this section 4.8.4, the Lessee and the Party who obtained the Second Appraisal will promptly notify the other Party of such amount.

4.8.5 If the Lessee fails to comply with section 4.8.1 in the time allowed, then the Lessor may at any later time obtain an Appraisal and determine Fair Market Rent based on the valuation in that Appraisal, which determination is final and binding on the Parties. When Fair Market Rent is determined under this section 4.8.5, the Lessor will promptly notify the Lessee and the First Nation of such amount and provide a copy of the Appraisal. The cost of the Appraisal will become payable by the Lessee as Additional Rent.

End of Option 3.

4.9 **Additional Rent** – The Lessee will pay to the Lessor as Additional Rent, no later than 30 days after notice from the Lessor has been delivered, the amount of:

4.9.1 Additional Rent referred to in a provision of this Lease; or

4.9.2 any other expenses reasonably incurred by the Lessor, before or after this Lease ends, due to, in whole or in part, a failure of the Lessee to perform or observe its obligations in this Lease,

plus an administration fee of 15% of such amount.[71]

4.10 **First Nation Fees** – The Lessee will pay to the First Nation as First Nation Fees, no later than 30 days after notice from the First Nation has been delivered, the amount of:

4.10.1 First Nation Fees referred to in a provision of this Lease; or

4.10.2 any other expenses reasonably incurred by the First Nation, before or after this Lease ends, due to, in whole or in part, a failure of the Lessee to perform or observe its obligations in this Lease,

plus an administration fee of 15% of such amount. First Nation Fees will be paid in Canadian dollars, accompanied by any applicable Taxes, and without any set-off, deduction, or abatement.[72]

4.11 **Arrears to Bear Interest** – If Rent or First Nation Fees are not paid when due, or any other time interest is stipulated to be due, then the Lessee will pay the Lessor or the First Nation, as the case may be, interest on the unpaid amount at the prime lending rate established by the Bank of Canada plus 5% per annum, calculated quarterly and compounded semi-annually, from the date that such unpaid amount is due until the date that the payment is received. This interest provision does not relieve the Lessee from its obligation to pay Rent and First Nation Fees at the time and in the manner specified in this Lease and will not

[71] This clause does two things: 1) it deems monies spent by the Lessor arising from a breach of a provision of the Lease to be Rent (so as to benefit from common law remedies concerning rent – see notes 31 and 154); and 2) it sets an administration fee of 15% of those monies to be paid as well. The idea of an administration fee is that a landlord has internal costs that are not easily quantifiable as expenses specifically related to the breach (e.g., salary time of employees dealing with the issue). The concept is not usually an issue, but the 15% figure is something that Lessees sometimes wish to negotiate.

[72] This clause mimics the Lessor's clause. As it is for the benefit of the First Nation, it cannot deem monies owed to be Rent because only a landlord may charge Rent.

prejudice or affect the remedies of the Lessor and the First Nation under this Lease or otherwise.[73]

4.12 **Survival of Sections** – Sections 4.9 – 4.11 survive when this Lease ends.[74]

5. IMPROVEMENTS

5.1 **Existing Improvements** – The Parties confirm that the Improvements on the Lands at the Commencement Date are identified in Schedule A of this Lease.[75]

5.2 **Ownership of Improvements During the Term** – Improvements constructed during the Term will not be the property or liability of the Lessor or the First Nation during the Term, on the condition that the Lessee will not remove any such Improvements without the prior consent of the First Nation, in its sole discretion, however, this limitation does not prohibit the Lessee from repairing, rebuilding, or replacing, in whole or in part, Improvements in accordance with the terms of this Lease.[76]

5.3 **Ownership of Trade Fixtures** – Trade Fixtures installed during the Term will not be the property or liability of the Lessor or the First Nation during the Term. Any such Trade Fixtures may be removed from the Premises during the Term without the consent of the Lessor or the First Nation, on the condition that any damage

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[73] Interest is commonly set out in contracts. The interest rate is often negotiated. This rate was chosen to be sufficiently high so as to discourage late payments, but not so high as to constitute a penalty.

[74] Normally, when a lease ends, all of the terms pertaining to the lease end with it. Sometimes, parties wish for certain rights or obligations to exist beyond the end of the lease as personal, contractual terms between them for a limited time. Administration fees and interest on outstanding Rent and fees should continue accruing until paid.

[75] Unless some sort of participatory rent is negotiated, rent usually reflects the value of a property at the time the lease was granted. Often there are not any Improvements to the Premises at the time of the grant, but, if there are, then they might contribute to a higher Rent and should be set out in the schedule. This is particularly valuable information if an Appraiser must determine periodic Fair Market Rent, as a future Appraiser will not know what the Premises looked like at the time of the Lease grant without any guidance. Even if a Lessee will be tearing down any pre-existing Improvements to construct new ones, the value of the Premises is its improved state at the time of the grant and the First Nation would normally want Rent for that improved value. If, however, the demolition of the pre-existing Improvements is a cost to bring the Premises to its highest and best use, then the First Nation may wish to consider who should bear this cost in its negotiations with the Lessee.

[76] The common law holds that any improvements made to land immediately become the property of the owner (landlord), no matter who constructs them. However, the common law also allows parties to sever the legal title to the improvements from the legal title to the land so that the improvements may be the property of the tenant (or others) instead. Usually, when improvements are severed, the tenant has the right to remove them at its pleasure, but this is always negotiable and in this template Lease the default is that the Improvements may not be removed without the First Nation's consent, *acting reasonably* (see section 1.10). The First Nation may want to consider adding to this clause that it can withhold consent in its absolute discretion if it is concerned about having the Improvements remain at the end of the Lease and does not want to argue over the reasonableness of that decision).

caused to the Premises by removing such Trade Fixtures will be promptly rectified.[77]

5.4 **Requirements to Construct, Operate, or Remove**

5.4.1 The Lessee will not construct, operate, or remove any Improvements, except for those related to an Exempt Project, or modify the Premises in anticipation of such construction, operation, or removal, without first having:[78]

5.4.1.1 obtained all applicable building permits, approvals, and authorizations for such construction, operation, or removal under section 5.5;

5.4.1.2 obtained the Decision Maker's written determination under an Environmental Review that the applicable Project pertaining to such construction, operation, or removal may proceed; and

5.4.1.3 obtained the Decision Maker's written confirmation that an applicable Construction and Environmental Management Plan to implement such Project complies with the applicable Environmental Review.

5.4.2 The Lessee will not construct, operate, or remove any Improvements related to an Exempt Project, or modify the Premises in anticipation of such construction, operation, or removal, without first having obtained all applicable building permits, approvals, and authorizations for such construction, operation, or removal under section 5.5. For greater certainty:

5.4.2.1 the Lessee is still required to submit appropriate information under section 8.3.3 for the Decision Maker to determine if such construction, operation, or removal constitutes an Exempt Project; and

5.4.2.2 sections 8.3.4 - 8.3.7, 8.4, and 8.5 do not apply to such construction, operation, or removal.

5.5 **Authority Authorization** – The Lessee will apply to all appropriate Authorities for all applicable building permits, approvals, and authorizations necessary for the Lessee to construct, operate, or remove any Improvements.[79]

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[77] This clause is a corollary to the previous one. If any changes are made to the previous clause, then the First Nation should consider if it wishes similar changes to this clause.

[78] This clause limits all construction activities until certain approvals are obtained. The *Impact Assessment Act* would not normally allow the Minister to grant a lease prior to determining if a project would have significant adverse environmental effects. However, the grant of a Lease using this template would not contravene the IAA because this clause does not allow the Lessee to alter the Premises until a determination is made under the IAA.

[79] This clause is drafted so as to capture not just a First Nation that may be regulating construction or zoning on reserve, but any other authority (e.g., Fisheries and Oceans Canada, if a fish-bearing water body will be affected, or provincial authorities with respect to elevators, etc.).

5.6 **Construction Compliance**

5.6.1 Once the requirements of section 5.4 have been met in relation to proposed Improvements, the Lessee will ensure that such Improvements are **[OPTIONAL – the First Nation to determine if there should be a time element to completing construction, such as:** promptly**]** constructed in a proper and workmanlike manner in accordance with:

5.6.1.1 applicable Codes, Laws, building permits, approvals, and authorizations;

5.6.1.2 any applicable Development Plan and Construction and Environmental Management Plan; and

5.6.1.3 the terms and conditions, including all mitigation measures, timelines, and monitoring, required by an applicable determination made under an Environmental Review.[80]

OPTIONAL – Include the following section if a time element such as "promptly" is NOT used in section 5.6.1:

5.6.2 Except as may be specifically set out in this Lease, the Lessee will not be required to commence construction of any Improvements within any period of time, even after the requirements of section 5.4 have been met with respect to such Improvements, on the condition that, once construction of the Improvements has commenced, such construction will be pursued to completion with commercially reasonable diligence in accordance with this Lease and, without limiting the generality of the foregoing, no Improvements under construction will be left unfinished in an unsafe, unsightly, or uneconomic condition.

End of Option.

5.7 **Security for Construction** – The Lessee will, prior to constructing any Improvements, provide to the First Nation, concurrently with the applicable certified Construction and Environmental Management Plan, written evidence that a performance bond, letter of credit, or other similar security has been obtained in an amount at least equal to 50% of the estimated cost of the work, including all labour and material in connection with the work. Such security must be in a form satisfactory to the First Nation with sureties, if required, approved of by the First Nation.[81]

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[80] The First Nation should consider if it wants improvements to be constructed within a certain time. Absent a time requirement, the lands could sit vacant for a longer period than anticipated, affecting projected tax revenues and employment opportunities.

[81] This clause is a matter to be determined by a First Nation and a Lessee. The risk to be managed here is that the Improvements will not be constructed, which may impact First Nation property tax revenues as

5.8 **Substantial Completion** – Improvements must not be occupied until they are Substantially Complete. Substantial Completion may occur in respect of portions of the Improvements.[82]

5.9 **Drawings and Plans**[83]

5.9.1 The Lessee will promptly provide to each of the Lessor and the First Nation reproducible as-built or record drawings, certified by an Architect or Engineer that applicable Codes and Laws have been met, of all completed Improvements and any completed substantial alterations.

5.9.2 The Lessee will maintain an updated chronological record of all finalized Construction and Environmental Management Plans relating to the Premises. Within 30 days of a request by the Lessor or the First Nation, the Lessee will provide the requesting Party with a copy of the updated chronological record and copies of such plans for any year identified by the requesting Party.

5.10 **Repair & Maintenance** – The Lessor and the First Nation have no obligation to maintain or repair any Improvements. Subject to section 5.12, the Lessee will repair and maintain the Premises as would a prudent owner, keeping the Premises in good order and condition in all respects consistent with their age and nature.[84]

OPTIONAL – Add the following section if the Lessee will be required to get regular engineering reports to assist in determining what repair and maintenance needs exist:

5.11 **Report of Engineering Firm** - To assist the Lessee with its obligations under section 5.10, the Lessee will obtain from a reputable, independent professional engineering firm, at least every five years during the Term, a building condition report with respect to each building forming part of the Improvements that sets out the items requiring repair or replacement, appropriate timelines for

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well as the look and commercial value of the neighbourhood. Security is a secondary method of dealing with the issue of non-completion. The other is section 5.6.1 *if* the FN has chosen a time requirement, a breach of which would allow a default notice to be sent. The First Nation could choose to remove this security clause if it wishes to rely solely on section 5.6.1 instead.

[82] As occupation is not allowed until Substantial Completion, this clause provides further assurance that the Lessee will complete construction of the Improvements, which reduces the risk of accidents arising from people being in unsafe or hazardous Improvements.

[83] Having a record of the Improvements is particularly useful to the First Nation toward the end of the lease if it is considering having some of the Improvements remain. It is also useful to inspectors if something goes awry on the Premises.

[84] This clause has two functions, both of which are in keeping with the net lease / no cost clauses (sections 15.3 and 15.4). It states that the Lessor and the First Nation have no responsibility to maintain or repair the Improvements. The Lessee does not have absolute discretion to determine maintenance and repair; instead, this clause requires the Lessee to maintain and repair based on the objective standard of the reasonable owner, subject to allowances for normal wear and tear.

completing such repairs and replacements, and the estimated cost to complete each such item. The Lessee will promptly provide a copy of such report to each of the Lessor and the First Nation and promptly carry out such repairs and replacements in accordance with the timeline set out in such report. To avoid duplication, such report will not be required if one is required on a regular basis under applicable Codes or Laws.[85]

End of Option.

5.12 **Damage to, or Destruction of, Improvements** – If any Improvements are damaged or destroyed during the Term, then:

5.12.1 the Lessee will promptly notify each of the Lessor and the First Nation;

5.12.2 this Lease will not end;

5.12.3 there will be no reduction or postponement of Rent; and

There are two options for the remainder of this section 5.12. Choose one and delete the other.

OPTION 1 – Use the following language if the Lessee will be required to rebuild with substantially similar Improvements after damage or destruction:

5.12.4 within a reasonable time after such damage or destruction, the Lessee will repair, rebuild, or replace the Improvements with such other Improvements that are, to the extent possible, to a standard at least substantially equal in quality of material and workmanship to the original Improvements and, when considered together with the balance of the Improvements on the Premises, must not, in the reasonable opinion of the First Nation, materially diminish the economic value of the Premises.[86]

End of Option 1.

OPTION 2 – Use the following language if the Lessee will have discretion (subject to Laws, zoning, and an Environmental Review) to determine what, if any, Improvements to construct after damage or destruction:

5.12.5 within a reasonable time after such damage or destruction, the Lessee will repair, rebuild, or replace the Improvements with such other Improvements as the Lessee deems necessary or expedient, including:

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[85] If the First Nation has no interest in the Improvements at the end of the Lease, then it may not care about their condition during the Term, unless it would like this clause to keep an eye on any potential safety issues.

[86] This clause applies to any Improvements, no matter who built them. Even though the Lessee might be leasing the Premises with pre-existing Improvements, it is the Lessee's responsibility to repair and rebuild them. This option requires substantially equal Improvements upon rebuild.

5.12.5.1 Improvements that are substantially similar to those that were damaged or destroyed; or

5.12.5.2 Improvements that differ in any of their size, use, form, and character from those that were damaged or destroyed,

on the condition that:

5.12.5.3 any damaged or destroyed Improvements will not be left in an unsafe or unsightly condition;

5.12.5.4 the Lessee will repair, rebuild, or replace any Improvements that are reasonably necessary in order to facilitate access to and use of any other portions of the development situate on the Premises; and

5.12.5.5 rebuilt or replacement Improvements must be constructed to a standard that is at least substantially equal in quality of material and workmanship to the original Improvements and, when considered together with the balance of the Improvements on the Premises, must not, in the reasonable opinion of the First Nation, materially diminish the economic value of the Premises.[87]

End of Option 2.

6. INSURANCE[88]

6.1 **Errors and Omissions Insurance** – The Lessee will provide evidence to the First Nation that errors and omissions insurance, with minimum limits of $1,000,000 per occurrence and annual aggregate, is obtained with respect to the design work of the Architects or Engineers for proposed Improvements estimated to be valued at more than $250,000.[89]

6.2 **Construction Insurance** – From the earlier of the date upon which construction of an Improvement starts or the date upon which stockpiling construction materials on the Premises in anticipation of such construction starts through until Substantial Completion of the Improvement, the Lessee will ensure that the following insurance is obtained and maintained to the extent that coverage is not available under the insurance required in section 6.3:[90]

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[87] This clause differs from the previous option in that it gives the Lessee discretion as to what to rebuild.

[88] It would be beneficial for a Lessee to discuss the insurance requirements with its insurer before signing the Lease to ensure that policies are available at a price that works for the project.

[89] This is a type of professional liability insurance for the work of Architects and Engineers. As the work of these professionals relates to the quality of the Improvements, this is primarily a First Nation issue.

[90] Standard insurance does not usually cover any construction-related activities, so separate construction insurance is required during such period.

6.2.1 "Wrap up" commercial general liability insurance against claims for bodily injury (including death), personal injury, and property damage arising in connection with the use of the Premises for construction, which must:

6.2.1.1 be written on a commercial general liability basis with liability limits of at least $5,000,000 per occurrence (or any higher amount that the Lessor or the First Nation reasonably requires, by providing notice to the Lessee before construction begins); and[91]

6.2.1.2 include each of the Lessor and the First Nation as additional insureds.[92]

6.2.2 Builders risk construction insurance to cover "all risks" of physical damage to, or loss of, the Improvements (including goods and materials to be incorporated in the Improvements while in storage at the site or in transit to it), which must:

6.2.2.1 be written in an amount at least equal to such Improvements' full replacement value, plus no less than 25% of budgeted "soft costs";

6.2.2.2 include the First Nation as a named insured;[93]

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[91] As many Leases are for quite long Terms, the ability of the Lessor and First Nation to set higher insurance amounts over time is crucial for adequate risk coverage. For example, from a lease granted 50 years ago, the time value of money has increased about 10 times, which means that 50 years from now, if inflation changed at similar rates, the current $5M insurance coverage requirement should be $50M to have a similar effect.

The amount of coverage is negotiable. The Lessor and the First Nation should give consideration to the riskiness of the activities to be performed on the Premises when setting the amount. They should also consider the likelihood of the Lessee being able to pay in the absence of insurance or insufficient insurance (e.g., the provincial government or provincially-guaranteed entities may not need to obtain insurance given the low likelihood of non-payment).

A "per occurrence" limit is the maximum that an insurer will pay for all claims relating to a single insured event. Often, policies will also impose an annual "aggregate", which is the maximum total amount that an insurer will pay for all liability claims during the policy period, usually a year. As such, more than one insured event occurring in a policy period could come close to or exhaust the aggregate amount such that a subsequent event might not have the per occurrence amount available for recovery. In that case, the insured would need to obtain new insurance to meet the minimum per occurrence limit in the Lease. Most commercial policies have aggregate amounts but, apparently, First Nation-controlled entities can obtain insurance without aggregate caps.

[92] The Crown would not normally be liable to third parties under provincial occupier's liability legislation, but Canada's *Crown Liability and Proceedings Act* requires the Crown to be liable to the same extent as any other person in a relevant province. Even under provincial legislation, it is unlikely that the Lessor would face any liability due to its lack of possession of the property during the Term. However, to protect against any such risk, which is a standard protection obtained by landlords, the Lessee must obtain and maintain liability insurance that includes protections for the Lessor and the First Nation. The Lessee can require Sublessees to obtain this insurance in its place – see section 3.10 – but it remains an obligation that the Lessor or the First Nation can enforce against the Lessee if it is not in place.

[93] Property insurance is for the benefit of the First Nation, assuming that the First Nation has any interest in the Improvements at the end of the Term. If it does not, then the First Nation might consider removing

6.2.2.3 to prevent the First Nation from becoming a co-insurer, include either a stated amount co-insurance endorsement or confirm that no co-insurance applies; and[94]

6.2.2.4 include reasonable coverage for flood and for earthquake (for properties located in earthquake zones classified as high to extreme by the Institute for Catastrophic Loss Reduction or its successor).[95]

The insurance may allow for full or partial occupancy of the Improvements prior to completion of construction and allow for the testing and commissioning of equipment installed as part of the Improvements.

6.3 **Liability & Property Insurance** – Subject to section 6.2, the Lessee will ensure that the following insurance is obtained and maintained during the Term and for any period the Lessee is on the Premises to remove Improvements and Trade Fixtures under section 11.2:

6.3.1 Commercial general liability insurance against claims for bodily injury (including death), personal injury, and property damage arising in connection with the use of the Premises, which must:

6.3.1.1 be written on a commercial general liability basis with liability limits of at least $[Amount] per occurrence (or any higher amount that the Lessor or the First Nation reasonably requires, by providing notice to the Lessee); and[96]

6.3.1.2 include each of the Lessor and the First Nation as additional insureds.[97]

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the property insurance requirement, but, if it does, then it may want to consider having some type of insurance to ensure cleanup of partially destroyed Improvements. As with liability insurance, the First Nation may wish to consider the likelihood of the Lessee being able to pay to rebuild in the absence of insurance or insufficient insurance.

[94] *Co-insurance* is an arrangement by which insureds self-insure for a proportion of losses, usually for a reduced policy premium. A co-insurance clause is usually included in property policies to ensure that insureds purchase sufficient insurance. For example, a co-insurance provision may provide that if the insured does not purchase insurance equal to at least 80% of the value of the insured property, then the insured is responsible for a proportionate share of the loss, even if the loss is within the value of insurance actually purchased. A *stated amount co-insurance endorsement* is a rider waiving co-insurance.

[95] This type of insurance is usually an exclusion from a standard property insurance policy, so it can be covered under its own policy or as a rider on a standard policy. If a Lessee wishes to change or delete this requirement, then the First Nation will want to consider if it is appropriate for the particular type of development on the particular lands.

[96] See note 91.

[97] See note 92.

6.3.2 Property insurance to cover "all risks" of physical damage to, or loss of, the Improvements, which must:

6.3.2.1 be written in an amount at least equal to the Improvements' full replacement value;

6.3.2.2 include the First Nation as a named insured;[98]

6.3.2.3 to prevent the First Nation from becoming a co-insurer, include either a stated amount co-insurance endorsement or confirm that no co-insurance applies;[99]

6.3.2.4 include reasonable coverage for flood and for earthquake (for properties located in earthquake zones classified as high to extreme by the Institute for Catastrophic Loss Reduction or its successor); and[100]

6.3.2.5 include by-laws coverage and sewer backup coverage.[101]

6.3.3 Equipment breakdown insurance against the explosion of pressure vessels, mechanical or electrical breakdown of machinery and equipment, air conditioning or refrigeration equipment, and miscellaneous apparatus (and production machinery where applicable), which must:

6.3.3.1 be written on a repair or replacement basis in an amount at least equal to the full replacement value of the Improvements housing the equipment and any adjacent or ancillary Improvements in which the Lessee's interest is insurable; and

6.3.3.2 include the First Nation as a named insured.[102]

6.3.4 Other insurance reasonably required from time to time by the Lessor or the First Nation and that a prudent owner of the Premises might reasonably obtain.[103]

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[98] See note 93.

[99] See note 94.

[100] See note 95.

[101] *By-laws coverage* protects against changes in by-laws (including zoning) since initial construction that would cause different, potentially more expensive or less economically viable, construction in rebuilding than was allowed originally. *Sewer backup coverage* protects against problems caused by sewer or septic systems. If a Lessee wishes to change or delete these requirements, then the First Nation will want to consider if it is appropriate for the particular type of development.

[102] This type of insurance is usually an exclusion from a standard property insurance policy, so it can be covered under its own policy or as a rider on a standard policy. The First Nation might consider if it is necessary for a particular development.

[103] Given the often long-term nature of leasing on reserve, it is not possible to know the changes that may occur in the insurance industry over a Lease Term. This clause gives the Lessor and the First Nation

6.4 General Insurance Provisions

6.4.1 Every insurance policy required under this Lease in which the Lessor or the First Nation is an additional or named insured must:

6.4.1.1 contain an agreement by the insurer that it will not cancel the policy without first giving such Party at least 30 days prior notice;[104]

6.4.1.2 contain a clause to the effect that a release from liability entered into prior to any loss will not affect the right of such Party to recover;[105]

6.4.1.3 contain a waiver of subrogation by the insurers against such Party;[106]

6.4.1.4 contain a provision that the policies will not be invalidated by any act, omission, or negligence of any Person that is not within the knowledge or control of such Party;[107]

6.4.1.5 include features customarily included by prudent owners in the province of [Name of Province] in:

6.4.1.5.1 property insurance for improvements similar to the Improvements; and

6.4.1.5.2 liability insurance for the type of business carried on by the Lessee on the Premises;

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some flexibility to require further insurance if that insurance is what a reasonable landlord in similar circumstances would require.

[104] The amount of notice is negotiable. The insurer usually wishes to have the same notice period for both the insured and the additional insureds, which can often be a shorter period, such as 15 days.

[105] This clause ensures that the Lessor and the First Nation can rely on the wording of the insurance policy and not on the activities of the Lessee that are unknown to them. For example, the Lessee releases a contractor for any damage that the contractor may make to the Premises during its work. The contractor then negligently performs its work, causing extensive damage to the property. The insurer then refuses to pay out under the policy because of the Lessee's release (because the Lessee gave up the insurer's rights of subrogation – see note 106). With this clause, however, the insurer would still pay out to the First Nation under the property insurance.

[106] *Subrogation* is the process by which an insurer takes over the position that an insured would have had to sue a person for the damage caused to the insured. That is, the insurer pays the insured the insurance proceeds, but then sues the person who caused the damage in the hopes of recovering the payout to the insured. A *waiver of subrogation* is a clause in the insurance policy where the insurer waives its rights of subrogation against certain persons, in this case the Lessor and the First Nation. Therefore, if the Lessor or the First Nation causes damage to the Lessee, then the insurer would still pay out and not sue the Lessor or the First Nation to recover the monies paid out.

[107] In terms of risk allocation, it would seem unfair for an insured (in this case, the Lessor or the First Nation) to lose coverage because of something done or omitted to be done by someone over whom that insured person had no control. However, standard policies may limit coverage regardless of an insured's knowledge of the actions of another insured, so this clause ensures that those limitations do not apply to the policies required under this Lease.

6.4.1.6 include features reasonably required by such Party; and

6.4.1.7 not include any non-standard, special, or unusual exclusions or restrictive endorsements without first getting the written consent of such Party.

6.4.2 The Lessee will not do anything, or permit or suffer anything to be done, on the Premises that might cause the insurance policies required by this Lease to be invalidated or cancelled.[108]

6.4.3 The Lessee will:

6.4.3.1 on the Commencement Date, provide certificates evidencing every insurance policy that is required at that time by this Lease to each Party who is required to be an insured under such policy;

6.4.3.2 from time to time when an insurance policy is required under this Lease, provide certificates evidencing such policy to each Party who is required to be an insured under such policy; and

6.4.3.3 prior to an insurance policy required under this Lease expiring, provide to each Party insured under such policy a certificate of renewal or other evidence satisfactory to such Party that the insurance has been renewed or replaced.[109]

6.4.4 Upon request by the Lessor or the First Nation, the Lessee will provide to such Party whichever of the following is requested:

6.4.4.1 a written statement, prepared and signed by a qualified insurance professional, confirming that the insurance policies obtained for the benefit of such Party satisfy the requirements of this Lease; and[110]

6.4.4.2 a certified copy of each requested insurance policy.[111]

6.5 **Release of Insured Claims** – The Lessee releases the Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees,

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[108] Although most insureds will not likely lose coverage when acting within the law, which is already a requirement under section 7.1 of the Lease, this clause aims to make the Lessee's insurance requirements Lease requirements.

[109] This clause assists the Lessor and First Nation in monitoring the Lessee's insurance obligations.

[110] Lessees can sometimes obtain insurance without letting the insurer know about the Lease or its requirements. This clause helps to ensure that someone in the insurance industry has reviewed the insurance obtained against the Lease requirements to determine its adequacy.

[111] Copies of policies are not required as a matter of course, but only upon request by the Lessor or First Nation. Initial policies are usually obtained and then sometimes only certificates of renewal. This clause requires a "certified copy" of a policy, meaning that it is prepared by the insurer and is not merely a photocopy of the insured's policy document.

agents, contractors, subcontractors, and other legal representatives from all liability for loss (including economic loss), damage, and injury (including loss, damage, and injury arising out of the negligent acts or omissions of any of them) in any way caused by or resulting from any of the perils or injury against which it has covenanted in this Lease to insure.[112]

6.6 **Payment of Loss under Insurance** – The insureds to whom money is payable under an insurance policy required to be obtained under sections 6.2.2, 6.3.2, or 6.3.3 will ensure that:

6.6.1 notwithstanding the terms of such policy, such money is directed to be paid to the Trustee; and

6.6.2 the Trustee uses such money first for the repair, replacement, or rebuilding of the Improvements for which such money was paid, against certificates of the Architect (or such other Person as the First Nation and the Lessee may agree upon) who is in charge of such repair, replacement, or rebuilding.[113]

6.7 **Cancellation of Insurance** – The Lessee will promptly notify each of the Lessor and the First Nation if an insurance policy under which such Party is an insured is:

6.7.1 cancelled or threatened to be cancelled, and promptly provide evidence of a certificate of renewal or other evidence satisfactory to such Party that the insurance has been renewed or replaced before the cancellation of such policy; or

6.7.2 suspended, and promptly provide evidence to such Party that the policy has been reinstated or replaced.

6.8 **Payment of Insurance Premiums** – If a policy's insurance premium is not paid when due, then the Lessor or the First Nation (if such Party is an insured under such policy) may pay the premium or obtain any insurance that such Party

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[112] In keeping with the Lessor's and First Nation's desire for this to be a cost-free lease (see sections 15.3 and 15.4) and the waiver of subrogation (section 6.4.1.3), the Lessee is required to release any claims that it may have against each of them for any peril for which it is required to obtain insurance. That is, as the Lessee has control over the Premises and the Lessor or the First Nation would only be there because of their activities related to inspecting the Premises or curing defaults, the risk of those activities causing any damage should be borne by the Lessee, by way of its insurance.

[113] This clause directs insurance monies to be paid to a Trustee so as to lessen the likelihood of a Lessee not fulfilling its obligations to rebuild. It is solely for the benefit of the First Nation as it only applies to property insurance. If the First Nation has no interest in the Improvements or does not wish this added protection for rebuilding, then this clause could be removed, in which case the definition of "Trustee" should also be removed.

deems necessary, in such Party's sole discretion, the cost of which is payable by the Lessee as Additional Rent or First Nation Fees, as the case may be.[114]

7. LAWS / TAXES / SERVICES

7.1 Laws

7.1.1 The Lessee will comply with all Laws regarding this Lease, the Premises, and activities on the Premises and will require all those for whom the Lessee is responsible in law to comply with all Laws regarding this Lease, the Premises, and activities on the Premises.[115]

7.1.2 The Lessee will promptly provide to each of the Lessor and the First Nation copies of any notice that it receives from an Authority requiring something to be done, or stop being done, on the Premises. Once the matter under the notice has been resolved to the Authority's satisfaction, the Lessee will promptly provide reasonably satisfactory evidence to each of the Lessor and the First Nation.

7.1.3 On request from the Lessor or the First Nation, the Lessee will either promptly provide to such Party reasonably satisfactory information from an Authority about the Lessee's compliance with Laws or promptly arrange for written authorization to allow such Party to receive information from an Authority about the Lessee's compliance with Laws.

7.1.4 To the extent that the *[Name of Provincial Law Related to Fire Services]* does not apply to the Premises or to the activities carried out on the Premises under this Lease, the Lessee will ensure that the Premises are inspected with the same frequency as required under that Act by a Person qualified under that Act to conduct such inspections. That Person will prepare an inspection report, which must include recommended actions resulting from the inspection. The Lessee will promptly provide the inspection report to each of the Lessor and the First

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[114] Although it is more likely that Canada as Lessor may issue a default notice rather than choose to pay unpaid premiums, the First Nation may wish to utilize this section if it becomes the Lessor under FNLM.

[115] This clause requires everyone on the Premises because of the Lease to comply with all "applicable" Laws. The question of applicability is sometimes difficult to determine. Certainly, federal and First Nation laws that do not conflict are applicable. Provincial law (and subordinate municipal law) may apply on reserve if it does not offend the doctrines of *paramountcy* or *interjurisdictional immunity*. These are complex concepts for the purposes of these notes. Basically, those provincial/municipal laws that relate to the use of land are unlikely to apply, while those that relate to activities occurring on land are likely to apply, provided that they do not conflict with federal or First Nation laws. For example, municipal zoning law would not apply on reserve, because it regulates how land can be used, but provincial worker safety law likely would apply on reserve (provided the employer was not being federally regulated in that regard), because it regulates the business owner-worker relationship.

The Lessee is always responsible to the Landlord for the activities of those performing the Lessee's obligations on the Premises during the Term (see section 3.10). If a subtenant or invitee is in breach of a Law on the Premises, then the Lessor and the First Nation are able to address the problem directly with the Lessee and have the Lessee remedy the breach.

Nation, comply with the recommended actions in the inspection report, and notify each of the Lessor and the First Nation of such compliance when completed.[116]

7.2 **Taxes**[117]

7.2.1 Without limiting the generality of section 7.1, the Lessee will promptly pay all applicable taxes (including property taxes), trade licences, rates, levies, duties, and assessments of any kind, together with all applicable charges, penalties, and interest imposed by an Authority, regarding the Lands, the Improvements, the sales, transactions, or business on the Premises, the occupation of the Premises by any Person, or the payment of Rent or other amounts payable by the Lessee.

7.2.2 Without relieving or modifying the obligation of the Lessee to comply with section 7.2.1, the Lessee may, at its expense, contest or appeal the validity or amount of any tax, trade licence, rate, levy, duty, assessment, charge, penalty, or interest referred to in section 7.2.1, on the condition that the Lessee promptly commences any proceedings to contest or appeal such validity or amount, continues the proceedings with all due diligence, and does not cause a charge, encumbrance, or claim to be made against the Premises.

7.2.3 On request by the Lessor or the First Nation, the Lessee will provide to such Party official receipts of an Authority, or other proof satisfactory to such Party, evidencing payment of applicable taxes, trade licences, rates, levies, duties, assessments, charges, penalties, and interest.

7.3 **Services**[118]

7.3.1 The Lessee will provide, secure, and maintain all services, utilities, and facilities required from time to time for the use of the Premises.

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[116] Because fire safety is an area where some or all of provincial fire safety legislation may not apply on reserve and because there is no applicable federal regulation, this clause requires fire safety testing at similar intervals to equivalent developments off-reserve. If fire safety testing would not be required off-reserve for the proposed development/use under the lease being negotiated, then the Parties may wish to delete this clause.

[117] This clause does not use the defined term Taxes, as that term is defined to mean taxes that are applicable to the payment of certain rent, such as GST/HST. The interest of a landlord in the payment of these other taxes in this clause usually is to avoid the attachment of any tax debts to the underlying property interest. Although this would not occur on reserve, the non-payment of taxes is often an indicator of financial troubles, which could signal possible Lease breaches currently or in the future, or could lead to the loss of the Lessee's leasehold interest to satisfy outstanding debts.

[118] In keeping with the Lessor's and First Nation's desire for this to be a cost-free Lease (see sections 15.3 and 15.4), this clause reiterates that they are not responsible to provide any utilities to the Premises. It also requires the Lessee to provide/secure and maintain utility services. Some Lessees may wish to delete this latter requirement to leave it to their discretion as to how utilities will be brought onto the Premises and who will be responsible for them. Consideration should be given to the type of development being proposed and the potential risk that subtenants may not be able to obtain all services without the cooperation of the Lessee.

7.3.2 The Lessor and the First Nation have no obligation to provide, secure, or maintain any services, utilities, and facilities to or on the Premises.[119]

7.3.3 The interruption of a service, utility, or facility referred to in section 7.3.1 will not be considered a disturbance of the Lessee's right to enjoyment of the Premises or relieve the Parties from their respective obligations in this Lease.[120]

8. ENVIRONMENT

There are two options for the next section. Choose one and delete the other.

OPTION 1 – If the uses are likely to raise significant environmental issues (such as manufacturing, recycling, heavy industry, or residential developments treating their own waste), then use the following:

8.1 Compliance with Environmental Laws

8.1.1 The Lessee will not use the Premises to generate, manufacture, refine, treat, transport, store, handle, transfer, produce, or process any Contaminants, except as may be reasonably required for the Authorized Uses and in compliance with Laws related to the protection of the Environment.

8.1.2 The Lessee will not carry out operations or activities, or construct, operate, or decommission any Improvements, that in the reasonable opinion of the Lessor or the First Nation materially increase the risk of liability to such Party (whether directly or indirectly) as a result of the application of Laws related to the protection of the Environment.[121]

8.1.3 If the Lessor or the First Nation reasonably determines that the promulgation of, or the amendment to, a Law related to the protection of the Environment has materially increased the probability or extent of such Party's liability under such Law with respect to the Authorized Uses, then the Lessee is responsible to each of the Lessor and the First Nation for such potential liability and the Parties will, if

[119] Some First Nations do supply some services, so the First Nation and Lessee would want to modify this to fit their circumstances.

[120] Although the interruption of services will not disrupt the Lease in any way, it may in some circumstances be considered an Unavoidable Delay, which can push back some deadlines under the Lease (see section 10.8).

[121] If the Lessor or First Nation reasonably (meaning, that it is objectively what anyone in similar circumstances would do) determines that a new activity on the Premises, or a change to environmental protection laws as it applies to present activities, has changed its risk exposure, then such Party can require the Lessee to stop such activities on the Premises.

a Party reasonably considers it necessary, negotiate an amendment to this Lease to better reflect this assumption of such potential liability by the Lessee.[122]

End of Option 1.

OPTION 2 – If the uses are unlikely to raise significant environmental issues (such as office, retail, or residential developments connected to waste services), then use the following:

8.2 **Compliance with Environmental Laws** – The Lessee will not use the Premises to generate, manufacture, refine, treat, transport, store, handle, transfer, produce, or process any Contaminants, except as may be reasonably required for the Authorized Uses and in compliance with Laws related to the protection of the Environment.

End of Option 2.

8.3 **Environmental Review Process**

8.3.1 As a "designated project", as defined in the IAA, has its own process under the auspices of a different federal authority than the Minister, sections 8.3.2 - 8.3.7, 8.4, and 8.5 do not apply to a designated project, and any similar concept in any amended, succeeding, or replacement Law.[123]

8.3.2 Sections 8.3.3 - 8.3.7 only apply to the Decision Maker's environmental review process with respect to a Project and do not limit the processes or powers of any other federal authority with assessment responsibilities for such Project.[124]

8.3.3 If the Lessee considers that a proposed Project is an Exempt Project, then it will provide the Decision Maker (and, if the Minister is the Decision Maker, then also the First Nation) sufficient information about the proposed Project for the Decision Maker to determine if the Project is an Exempt Project. If the Decision Maker determines that the proposed Project is an Exempt Project, then further

[122] This relates to the previous section. Rather than requiring the Lessee to change its activities on the Premises, the Lessee will be responsible for any increased risk to the Lessor and the First Nation and the Parties will negotiate new provisions to reflect this, if necessary.

[123] The IAA defines "designated projects", which do not require a review by the Minister of ISC but instead require a significant review by the Minister of Environment and Climate Change. Pending a decision by the Minister of ECC, the Act contains a statutory ban on a proponent's activities on federal lands.

[124] A Project may require more than one determination under IAA (e.g., the Minister's determination with respect to the development generally and a permit by a different Minister (such as Fisheries and Oceans) for the impact on a fish habitat. Generally, the processes are combined, but this clause indicates that the Minister's commitments in this clause do not bind other federal authorities.

review of such Project is not required and sections 8.3.4 - 8.3.7, 8.4, and 8.5 do not apply to such Project.[125]

8.3.4 The Lessee will provide the Decision Maker (and, if the Minister is the Decision Maker, then also the First Nation) all information about a proposed Project reasonably required by the Decision Maker, including:

8.3.4.1 an environmental site assessment of the environmental condition of the Premises affected by such Project, stating that it may be relied upon by all Parties;

8.3.4.2 a Development Plan consistent with the Project; and[126]

8.3.4.3 an environmental review report of such Project,

to enable the Decision Maker to determine the environmental effects of such Project:

8.3.4.4 as the Decision Maker may by Law be required to make; or

8.3.4.5 in the reasonable discretion of the Decision Maker, if the First Nation takes over the position of the Lessor under this Lease by operation of law and no Law requires a determination.[127]

8.3.5 If the Decision Maker is not reasonably satisfied with any information provided under section 8.3.4, then the Decision Maker will notify the Lessee of each inadequacy (and, if the Minister is the Decision Maker, provide a copy of such notification to the First Nation). The Lessee will ensure that the inadequacies are addressed to the reasonable satisfaction of the Decision Maker, which revised information the Lessee will provide to the Decision Maker (and, if the Minister is the Decision Maker, then also to the First Nation.)

8.3.6 If the Decision Maker determines that the Project may proceed, then the Lessee will:

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[125] ISC's process is to review all proposed Projects to determine if they require an environmental impact review or not. At this stage, they would confirm if a Project is indeed an Exempt Project, which is not then subject to further review.

[126] Usually there is one Development Plan for the entire Premises, but there can be Development Plans for phases of development if ISC's Environmental Officer believes that doing so would not amount to Project splitting.

[127] When a First Nation takes over the positon of landlord under the *First Nations Land Management Act*, the First Nation or the Council is not currently required by the *Impact Assessment Act* to make a determination of the Project's environmental impact. This clause accounts for the possibility that legislation in the future may require such a determination. If not, then the First Nation may wish, for policy reasons and at its discretion, to make such a determination.

8.3.6.1 ensure that implementation of the Project, including site preparation, construction, operation, and decommissioning, complies with all terms and conditions, including all mitigation measures, timelines, and monitoring, required by the Decision Maker's determination; and

8.3.6.2 provide the Decision Maker (and, if the Minister is the Decision Maker, then also the First Nation) with evidence, to the reasonable satisfaction of the Decision Maker, of compliance with such terms, conditions, mitigation measures, timelines, and monitoring.[128]

8.3.7 If the Decision Maker determines that the Project may not proceed, then:

8.3.7.1 the Decision Maker will provide reasons for such determination to the Lessee (and, if the Minister is the Decision Maker, provide a copy of such reasons to the First Nation); and

8.3.7.2 subject to such appeals as may be permitted by law, the Lessee releases the Lessor, the Decision Maker, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives for the Lessee's inability to use the Premises as anticipated.[129]

8.4 Construction and Environmental Management Plan

8.4.1 The Lessee will provide the Decision Maker (and, if the Minister is the Decision Maker, then also the First Nation) with a Construction and Environmental Management Plan for the implementation of each Project.

8.4.2 The Decision Maker will review the Construction and Environmental Management Plan to confirm if it meets the requirements of the applicable Environmental Review. If further information is required, then the Decision Maker will notify the Lessee (and, if the Minister is the Decision Maker, provide a copy of such notification to the First Nation) and the Lessee will provide such additional information to the Decision Maker (and, if the Minister is the Decision

[128] This clause requires compliance with the mitigation measures identified in the determination of a Project under an Environmental Review. Breaching this section not only gives rise to the usual remedy of issuing a notice of default, but for the most part it would also be a breach of the similar section 5.6 there is also an ability to issue a stop work order or obtain an injunction (see section 10.6).

[129] Previously, the Lease template was drafted so that an Environmental Review had to occur before the Lease would be granted. This caused some difficulties with phased developments or where the development would occur at the Sublease level and was unknown when the head lease was to be granted. As the IAA would not otherwise allow the Minister to issue the Lease, an environmental process was built in to ensure that there could be no Project activity without an Environmental Review. However, this increases the riskiness for the Lessee as the Lessee would not know when the Lease is granted if the anticipated Project is environmentally viable; if it is not, then the Lessee may need to significantly alter its plans for the Premises, which could affect the profitability of the Lease. This release language acknowledges that riskiness. Despite the release, the Lessee is still able to challenge the Minister's *Impact Assessment Act* determination under a judicial review for a potential lack of reasonableness.

Maker, then also to the First Nation). This process will continue until the Decision Maker confirms in writing that the Decision Maker is reasonably satisfied that the Construction and Environmental Management Plan meets the requirements of the applicable Environmental Review.

8.4.3 The Lessor, the Decision Maker, the First Nation, and the Council do not owe, individually or in any combination, a duty of care to the Lessee (and any Sublessee, any Mortgagee, and any other Person deriving from the Lessee, directly or indirectly, an interest in, or right in relation to, the Premises) because of their respective reviews of any Construction and Environmental Management Plan, as such reviews are solely for their respective benefits. The Lessee releases the Lessor, the Decision Maker, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives from any liability associated with their reviews of, and the Lessee's implementation of, a Construction and Environmental Management Plan. This section 8.4.3 survives when this Lease ends.[130]

8.5 **Environmental Bond** – The Lessee acknowledges that a Decision Maker may require security for the decommissioning of a Project as a mitigation measure in a determination under an Environmental Review of such Project. If such security is required, then the Lessee will provide the Lessor or the First Nation, as the case may be, with security (such as an environmental bond, letter of credit, or other security) reasonably acceptable to such Party, in terms and amount, for the decommissioning of such Project. The Lessee will provide the security to such Party promptly after notification and the security must remain a paid up, valid security until the completion of the decommissioning of the Project, whether that is before or after this Lease ends.[131]

There are 2 options for the next section. Choose one and delete the other.[132]

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[130] This clause intends to notify the Lessee and any third parties that they cannot rely on the Decision Maker's review of the CEMP and need to perform their own due diligence.

[131] This clause allows the Environmental Review Process to require environmental security as part of the mitigation requirements of a Project. The bond is intended as a safety net for projects expected to need more significant remediation at the end of the Project. The amount required is not addressed within legislation, but instead is driven by the size and scope of the project. There are two elements to be decided: how much security is appropriate; and what type of security should be provided? The ISC Environment Officer, working closely with the project proponent, and the First Nation determines what amount is required. The project proponent determines and identifies what form (e.g., letter of credit, performance bond, sinking fund) it can utilize to provide the security. Consideration should be given to extending the security beyond the Term to account for decommissioning requirements that may last beyond the Term.

[132] As provincial environmental legislation relating to contamination likely does not apply on reserve, there are two choices for any contamination of the Premises during the Term. The first requires clean-up to Standards references – what is an acceptable level of contamination for that type of use of lands? – and the second is a strict liability regime where full cleanup is always required. In both cases, Lessees sometimes want to limit responsibility to their own actions or those entitled to be on the Premises, but, as the Lessee has exclusive possession of the Premises during the Term, it is the Party in the best position

OPTION 1 – If remediation is to be to the level set out in the Standards, then use the following:

8.6 **Contaminants** – If the Premises are exposed to a Contaminant in an amount that may cause levels of the Contaminant on the Premises to exceed its Standard, then the Lessee will:

8.6.1 promptly notify the Lessor, the First Nation, and any appropriate Authority of the exposure, ensuring that the notice includes details relating to the exposure, including the time and extent of the exposure, the remedial action taken prior to providing the notice, the remedial action that the Lessee intends to take in order to contain or rectify the exposure, and any Persons observed who appeared to have caused or who were in the vicinity of the exposure;

8.6.2 promptly take all remedial action necessary to reduce the Contaminant on the Premises to a level that is at or below its Standard and to fully rectify the effects of the exposure off the Premises, both on and off the Reserve, in compliance with all Laws and all reasonable requests of the Lessor and the First Nation;

8.6.3 provide each of the Lessor and the First Nation with an environmental site assessment report (which is reasonably satisfactory to each of them and which states that it may be relied upon by all Parties) evidencing the results of the Lessee's activities under section 8.6.2; and

8.6.4 undertake such further activities as each of the Lessor and the First Nation may reasonably require for the Lessee to reduce the Contaminant on the Premises to a level that is at or below its Standard and to fully rectify the effects of the exposure off the Premises, both on and off the Reserve, based on the report referred to in section 8.6.3.

End of Option 1.

OPTION 2 – If remediation is to be to the condition existing at the Commencement Date, then use the following:

8.7 **Contaminants** – If the Premises are exposed to a Contaminant, then the Permittee will:

8.7.1 promptly notify the Lessor, the First Nation, and any appropriate Authority of the exposure, ensuring that the notice includes details relating to the exposure, including the time and extent of the exposure, the remedial action taken prior to providing the notice, the remedial action that the Lessee intends to take in order

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to ensure that the Premises do not become contaminated. This clause puts the responsibility on the Lessee to pursue its remedies against the polluter rather than transfer that responsibility to the Lessor or the First Nation.

to contain or rectify the exposure, and any Persons observed who appeared to have caused or who were in the vicinity of the exposure;

8.7.2 promptly remove all such Contaminant from the Premises and take all remedial action necessary to fully rectify the effects of the exposure off the Premises, both on and off the Reserve, in compliance with all Laws and all reasonable requests of each of the Lessor and the First Nation;

8.7.3 provide each of the Lessor and the First Nation with an environmental site assessment report (which is reasonably satisfactory to each of them and which states that it may be relied upon by all Parties) evidencing the results of the Lessee's activities under section 8.7.2; and

8.7.4 undertake such further activities as each of the Lessor and the First Nation may reasonably require for the Lessee to remove all such Contaminant from the Premises and to fully rectify the effects of the exposure off the Premises, both on and off the Reserve, based on the report referred to in section 8.7.3.

End of Option 2.

8.8 **Environmental Representations and Warranties** – The Lessee represents and warrants to each of the Lessor and the First Nation that:

8.8.1 the Lessee's operations on the Premises do not involve the location, storage, incorporation, or manufacture of Contaminants, except in accordance with this Lease; and

8.8.2 the Lessee, its affiliates, and their respective directors and senior officers have not been prosecuted for any offences, or received any orders or administrative, monetary, or other similar penalties, under any law related to the protection of the Environment.[133]

8.9 **Survival of Section 8** – This section 8 survives when this Lease ends.[134]

9. ASSIGNMENTS, MORTGAGES & SUBLEASES

9.1 Assignments

9.1.1 The Lessee may not assign its interest in this Lease without the consent of each of the Lessor and the First Nation, in their discretion, and no assignment is valid

[133] This clause requires the Lessee to identify if it or any relevant Persons have been in violation of any environmental protection laws. If any of them have, then this section could be deleted, but the Lessor and the First Nation may want to assess what occurred and determine if any additional clauses or security might be warranted to protect themselves from any future violations. If this section is deleted, then see note 194.

[134] This clause ensures that the obligation to remove Contaminants will continue beyond the Term.

until the proposed assignee has entered into an Assignment Consent Agreement, substantially in the form attached as Schedule C, with any changes as may be agreed to by the Parties and the assignee.[135]

9.1.2 An assignment of the Lessee's interest in this Lease will not relieve or discharge the Lessee from any of its obligations in this Lease, unless the Party benefitting from such an obligation has agreed, in writing, to release the Lessee from it.[136]

9.2 **Mortgages**

9.2.1 Although the Lessee may Mortgage its interest in this Lease without the consent of the Lessor and the First Nation, no Mortgage is valid until the proposed Mortgagee has entered into a Mortgage Acknowledgement Agreement, substantially in the form attached as Schedule D, with any changes as may be agreed to by the Parties and the Mortgagee.[137]

9.2.2 The Lessee will ensure that any Mortgage does not conflict with the terms of this Lease and, by complying with such Mortgage, the Lessee will not be in default of this Lease.

9.2.3 If the Lessee defaults on an obligation in a Mortgage, then the Lessor or the First Nation may cure the default under the Mortgage on the Lessee's behalf and all expenses incurred by such Party to cure such default are payable by the Lessee as Additional Rent or First Nation Fees, as the case may be.

9.2.4 If the Lessee defaults on an obligation in this Lease, then:

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[135] Section 54 of the *Indian Act* allows for an assignment of a leasehold interest in designated lands with the "approval of the Minister". As such, the Lessor's consent to any assignment of a Lease on designated lands is required. The First Nation's consent is not statutorily required, so it can negotiate with the Lessee if it will have a consent requirement or not. The Lessee and the assignee will execute an assignment agreement assigning the Lessee's interest in the Lease to the assignee, which is not valid until consent has been obtained and an Assignment Consent Agreement is executed. This agreement is necessary to ensure that the Lessor and the First Nation will be able to enforce *in personam* (see introduction) obligations against the assignee.

[136] Under the common law, a tenant remains responsible for every obligation in a lease for the entire term of the lease, even when it assigns its leasehold estate to another person. A landlord's consent does not relieve a tenant from its lease obligations; instead, the assignment gives the landlord two parties (the tenant and the assignee) against which the landlord may enforce the lease obligations. For this reason, original tenants often want to be relieved from any further obligations after the date of assignment, but landlords are often reluctant to provide such relief. This is a choice completely within the discretion of the landlord. The common law situation is reiterated here in this template Lease, but also provides a similar situation (by way of contract rather than by the common law) for the First Nation to the extent that it is possible to do so by contract.

[137] The Mortgage Acknowledgement Agreement establishes a contractual relationship between the Mortgagee, the Lessor and the First Nation that recognizes the Mortgagee's right to take over the Lessee's interest in the Lease under certain circumstances.

9.2.4.1 any default notice issued by a Party under section 10 will not be valid for any purpose unless and until a copy of such notice is also provided to all Mortgagees of valid Mortgages;

9.2.4.2 a Mortgagee of a valid Mortgage may cure or cause to be cured a default of this Lease on behalf of the Lessee within the time period specified in this Lease or in the applicable default notice, whichever is greater, from the date of delivery of the notice to the Mortgagee; and

9.2.4.3 if the Mortgagee notifies each of the Lessor and the First Nation within the cure period that the Mortgagee has taken or intends to take formal proceedings to enforce its Mortgage and protect its position, then:

9.2.4.3.1 the Mortgagee will have sufficient time to pursue such proceedings to their conclusion, acting expeditiously, to enforce its Mortgage and protect its position;

9.2.4.3.2 once such proceedings are commenced, the Lessor and the First Nation will not exercise any of their respective remedies (except for their respective rights to cure in accordance with sections 10.2.4 and 10.5.3), on the condition that the Mortgagee actively prosecutes such proceedings to their conclusion; and[138]

9.2.4.3.3 if, upon the conclusion of such proceedings, the rights of the Lessee have been released to the Mortgagee or foreclosed or sold, then, on the condition that all previous defaults under this Lease that are capable of being cured have been fully cured, the Mortgagee or, subject to section 9.2.6, the purchaser will become the Lessee.[139]

9.2.5 Notwithstanding anything contained in this Lease, all obligations to construct Improvements in this Lease will not apply to a Mortgagee of a valid Mortgage during a period in which the Mortgagee is exercising its rights under section 9.2.4.3.

9.2.6 A Mortgagee may exercise all of its rights and remedies with respect to this Lease and the Lessee's leasehold interest in the Premises, including the right to sell or assign the Lease or to appoint a receiver of the Lessee or a receiver of the Premises (either by appointment under a security instrument or by an

[138] This clause gives comfort to a Mortgagee that a Lease will not be cancelled without any notice to it so that it will have time to protect its interests. If contemplating terminating a Lease, consider delivery dates under this subsection and the Mortgage Acknowledgement Agreement to determine the date upon which termination is first available.

[139] No matter how a new entity comes to take over the Lessee's interest in the leasehold, the consent of the Lessor and the First Nation will be required.

appointment by a court order) and take possession and administer the Premises (including with respect to the collection of rents and realizing any other rights or benefits of the Lessee in respect of the Premises), on the condition that, if the Mortgagee exercises any such power of sale or assignment, then the sale or assignment will not be valid without the consent of each of the Lessor and the First Nation and until the proposed assignee has entered into an Assignment Consent Agreement, substantially in the form attached as Schedule C, with any changes as may be agreed to by the Parties and the assignee.[140]

9.2.7 The Lessee will not surrender any part of this Lease or the Premises, and the Lessor and the First Nation will not accept any such surrender, without the prior written consent of each Mortgagee of a valid Mortgage.[141]

9.2.8 Notwithstanding any other provisions of this Lease, a Mortgagee will not be responsible for the Lessee's obligations in this Lease, including any requirement to take out or maintain insurance or any requirement to indemnify, unless and until either:

9.2.8.1 the Mortgagee becomes the Lessee by obtaining an order absolute of foreclosure in respect of this Lease or by taking an assignment of this Lease, and then only for the period in which the Mortgagee is the Lessee; or

9.2.8.2 the Mortgagee is in possession of the Premises (through the exercise of its default remedies or otherwise), and then only for the period in which the Mortgagee is in possession of the Premises, and the Mortgagee will not be considered to be in possession of the Premises as a result of the appointment of a receiver of the Lessee by a court or with court approval of the actions of such a receiver.[142]

9.2.9 The Lessee will give each Mortgagee of a valid Mortgage reasonable notice of a dispute commenced in court under section 14.1.

9.2.10 The First Nation and the Lessee will give each Mortgagee of a valid Mortgage reasonable notice of an arbitration of a dispute under section 14.2 and each such Mortgagee will have the option of participating in the arbitration proceedings if such Mortgagee, acting reasonably, considers that such proceedings may affect the security of its Mortgage or the value of such security.

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[140] This clause reiterates the Mortgagee's common law rights to the Premises but requires the Mortgagee to comply with the assignment provisions (section 9.1) in the Lease.

[141] The surrender of the leasehold would negate the Mortgagee's security, which is the Lessee's interest in the leasehold, so the Mortgagee would want to ensure that the Lease is not surrendered while any debts remain outstanding.

[142] This clause ensures that the Mortgagee only has Lessee obligations when in possession or when it has foreclosed the Lessee's interest.

9.2.11 For greater certainty, this section 9.2 does not apply to a mortgage of a Sublease, which does not require consent of the Lessor or the First Nation, or entering into a Mortgage Acknowledgment Agreement, to be valid.

There are 4 options for the Sublease sections. Choose one and delete the others.

OPTION 1 – If consent is NOT required for subleases and the Lessor and First Nation would NOT like a contractual relationship with Sublessees, then use the following:[143]

9.3 **Subleases** – Although the Lessee may sublet the Premises without the consent of the Lessor and the First Nation:

9.3.1 the term of a Sublease must end at least one day before the end of the Term;

9.3.2 a Sublease must be consistent with the terms of the Lease; and

9.3.3 a Sublease must include a term that it is subordinate to this Lease and that it will automatically terminate when this Lease ends.

End of Option 1.

OPTION 2 – If consent is NOT required for subleases but the Lessor and First Nation would like a contractual relationship with Sublessees, then use the following:[144]

9.4 **Subleases**

9.4.1 The Lessee may sublet the Premises without the consent of the Lessor and the First Nation.

9.4.2 The term of a Sublease must end at least one day before the end of the Term.

9.4.3 A Sublease must be consistent with the terms of this Lease.

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[143] This option does not establish any contractual relationship between the Lessor/First Nation and the Sublessees. In such case, all enforcement will be solely against the Lessee, who would need to enforce against the appropriate Sublessee. The other options with direct contractual relationships with Sublessees maintain this right, but also allow the Lessor/First Nation to enforce certain obligations against the Sublessees directly.

[144] This option requires all Subleases (which are only leases granted by the Lessee to Sublessees and not any sub-level of lease below the Sublease) to execute a Sublease Acknowledgement Agreement, which is a unilateral contract for the benefit of the Lessor and the First Nation. Using a unilateral contract format avoids the Lessor and First Nation having to sign a myriad of sublease consent agreements. The Sublease Acknowledgement Agreement contains direct obligations from a Sublessee to the Lessor and the First Nation that they may enforce directly against the Sublessee instead of, or as well as, any enforcement that they may take against the Lessee.

9.4.4 A Sublease must include a term that it is subordinate to this Lease and that it will automatically terminate when this Lease ends.

9.4.5 A Sublease is not valid until the Sublessee has entered into a Sublease Acknowledgment Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the Sublessee.

9.4.6 An assignment of a Sublease is not valid until the proposed assignee has entered into a Sublease Acknowledgment Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the assignee.

End of Option 2.

OPTION 3 – If consent is required for subleases (e.g., where required by the Designation or when rent is nominal), then use the following:[145]

9.5 **Subleases**

9.5.1 The Lessee will not sublet the Premises without the consent of each of the Lessor and the First Nation.

9.5.2 The term of a Sublease must end at least one day before the end of the Term.

9.5.3 A Sublease must be consistent with the terms of this Lease.

9.5.4 A Sublease must include a term that it is subordinate to this Lease and that it will automatically terminate when this Lease ends.

9.5.5 A Sublease is not valid until it has received the consent of each of the Lessor and the First Nation and the Sublessee has entered into a Sublease Consent Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the Sublessee.

9.5.6 An assignment of a Sublease is not valid until the proposed assignee has entered into a Sublease Consent Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the assignee.

OPTIONAL – Include the following section if Subleases require fair market rent:

9.5.7 A Sublease must require the payment of fair market rent. The Lessee will promptly and diligently collect such rent. The Lessee will pay as Additional Rent

[145] This option requires all Subleases (which are only leases granted by the Lessee to Sublessees and not any sub-level of lease below the Sublease) to execute a Sublease Consent Agreement, which is a bilateral contract similar to the Sublease Acknowledgement Agreement but with the addition of a consent requirement and signature of the Lessor and First Nation.

any difference between the fair market rent required by this section 9.5.7 and the amount of rent actually received if fair market rent is not charged and diligently collected. Fair market rent means the most probable rent that the subleased portion of the Premises should bring in a competitive and open market, reflecting all conditions of this Lease and the Sublease and assuming the following conditions:

9.5.7.1 The Lessee and the Sublessee are typically motivated, well informed, well advised, and are acting prudently in an arm's length transaction.

9.5.7.2 A reasonable time is allowed for exposure in the open market and the rent represents the normal consideration for the subleased portion of the Premises unaffected by undue stimuli or special fees or concessions granted by anyone associated with the transaction.

9.5.7.3 The subleased portion of the Premises are owned by the Lessor in fee simple, free of all charges and encumbrances other than those registered in the Registry, and the inalienability or Indian reserve status of the Lands must not be a discounting factor and must not be used as a basis to lower valuation in comparing the subleased portion of the Premises to other properties, whether or not such properties are Indian reserve lands.

9.5.7.4 The subleased portion of the Premises do not include Improvements made after the date on which the Sublease begins and the contributory value of the Sublessee's Improvements must not be taken into account.

9.5.8 By January 31st on each year of this Lease, the Lessee will provide the First Nation with a statutory declaration setting out for the previous year of the Lease the rent required under each Sublease, the date upon which such rent was required, the rent actually received and the date of such receipt.[146]

End of optional language.

End of Option 3.

OPTION 4 – If Sublessees are to have non-disturbance rights, then use one of the following options: [147]

Option 4A – Use if sublease consent is NOT required:

[146] This clause assists in the First Nation if it wishes to monitor the fair market rent requirement (assuming the designation states that Canada will not monitor such requirement. Otherwise, redrafting would be needed).

[147] This option replicates either of the previous Sublease Consent or Sublease Acknowledgement sections but adds non-disturbance rights.

9.6 **Subleases**

9.6.1 The Lessee may grant Subleases without the consent of the Lessor and the First Nation.

9.6.2 A Sublease is not valid until the Sublessee has entered into a Sublease Non-Disturbance Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the Sublessee.

9.6.3 A Sublease is not valid unless it is substantially in the form attached as Schedule F, with any changes as may be agreed to by the Parties and the Sublessee.

9.6.4 An assignment of a Sublease is not valid until the proposed assignee has entered into a Sublease Non-Disturbance Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the assignee.

End of Option 4A.

Option 4B – Use if sublease consent is required:

9.7 **Subleases**

9.7.1 A Sublease is not valid until it has received the consent of each of the Lessor and the First Nation and the Sublessee has entered into a Sublease Consent and Non-Disturbance Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the Sublessee.

9.7.2 A Sublease is not valid unless it is substantially in the form attached as Schedule F, with any changes as may be agreed to by the Parties and the Sublessee.

9.7.3 An assignment of a Sublease is not valid until the proposed assignee has entered into a Sublease Consent and Non-Disturbance Agreement, substantially in the form attached as Schedule E, with any changes as may be agreed to by the Parties and the assignee.

End of Option 4B.

End of Option 4.

9.8 **Registration** – The Lessee will ensure that all assignments of its interest in this Lease, Mortgages, Subleases, and interests in land granted by it under this Lease are submitted to the Registry in a registerable form promptly after execution. The Lessee will require that any tenancies or other interests in land granted by any Sublessee be submitted to the Registry in a registerable form promptly after execution.

10. REMEDIES

10.1 Insolvency[148]

10.1.1 Each of the following is considered to be an event of insolvency:

10.1.1.1 The Lessee makes an assignment for the benefit of creditors or otherwise starts proceedings under any bankruptcy or insolvency laws.

10.1.1.2 A receiver (including a receiver-manager, interim receiver, trustee, liquidator, and other custodian) of the Lessee's interest in the Premises is appointed, other than by a Mortgagee who has entered into a Mortgage Acknowledgement Agreement under section 9.2.1.

10.1.1.3 The Lessee is declared or becomes bankrupt or insolvent.

10.1.1.4 If the Lessee is a corporation or limited partnership, an application, petition, certificate, or order is made or granted to wind-up or dissolve the Lessee, voluntarily or not.

10.1.2 The Lessee will promptly provide notice to each of the Lessor and the First Nation of the happening of any of the events in section 10.1.1.

10.1.3 An event of insolvency is conclusively deemed to be an incurable default of this Lease and, upon such default, the Lessor may take advantage of any legal and equitable remedies available, including, without providing a default notice, declaring the Term ended and claiming prospective losses, by providing a termination notice to the Lessee, with a copy to the First Nation and each Mortgagee of a valid Mortgage.

10.2 Defaults on Obligations Owed to the Lessor[149]

10.2.1 If the Lessee defaults on an obligation owed to the Lessor in this Lease, then the Lessor may provide a default notice to the Lessee, with a copy to the First Nation and each Mortgagee of a valid Mortgage.

10.2.2 If the default is of an outstanding Rent payment and the Lessee does not cure such default within 15 days after the default notice is delivered, then the Lessor may take advantage of any legal and equitable remedies available, including

[148] This clause defines types of insolvency and allows the Lessor to cancel the Lease without notice should they occur. It should be noted, however, that the ability to cancel the Lease may be precluded by bankruptcy and insolvency legislation.

[149] As the Lessor and the First Nation have different rights under the template Lease stemming from their different legal positions of landlord versus contracting party, respectively, the process for addressing defaults is different for each of them.

commencing an action for specific performance or by declaring the Term ended and claiming prospective losses, by providing a termination notice to the Lessee, with a copy to the First Nation and each Mortgagee of a valid Mortgage.[150]

10.2.3 If the default is not of an outstanding Rent payment and if such default:

10.2.3.1 can reasonably be cured within 30 days after the default notice is delivered and the Lessee fails to cure such default within the 30 days; or

10.2.3.2 cannot reasonably be cured within 30 days after the default notice is delivered and the Lessee does not begin to cure such default within the 30 days to the reasonable satisfaction of the Lessor or continue to cure such default with due diligence after beginning to cure,

then the Lessor may take advantage of any legal and equitable remedies available, including by commencing an action for specific performance or by declaring the Term ended and claiming prospective losses, by providing a termination notice to the Lessee, with a copy to the First Nation and each Mortgagee of a valid Mortgage.[151]

10.2.4 If a default is not cured within the time allowed in this Lease, or is not being diligently cured under section 10.2.3.2, then the Lessor may, with unrestricted access to the Premises, cure it in the Lessor's sole discretion, and the Lessor's expenses related to such curing are Additional Rent. If the Lessor begins to cure

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[150] The non-payment of Rent has the shortest rectification period because the payment of money can be arranged quickly and a longer period could encourage late payment on a regular basis.

At common law in Canada, a landlord has three mutually exclusive remedies for default:

1) Insist on performance of the lease terms and sue for rent or damages on the basis that the lease remains in force.
2) Terminate the lease and take possession of the property. The landlord would then be able to sue for rental arrears and for damages, including foregone rent, subject to a duty to mitigate.
3) Advise the tenant that the landlord will re-enter the premises and let the property "on the tenant's behalf" and hold the tenant liable for any deficiency in rent for the balance of the term.

All are specifically preserved in this broad wording. An example of the third remedy is set out in section 10.4 (regarding vacating or abandoning) but is still otherwise caught by the broader wording here for any other breach. However, now that the Supreme Court of Canada has modified the traditional second remedy to allow for prospective losses, subject to a duty to mitigate, there is little benefit to using the third remedy.

An attempted termination will not always be successful as the courts have equitable jurisdiction to grant a tenant relief from forfeiture.

[151] Defaults other than in the payment of Rent fall into two categories: those that can "reasonably" (an objective standard of what most people would be able to do) be rectified in 30 days or less and those that reasonably need more than 30 days to rectify. If the former, then the deadline to cure is strictly 30 days. If the latter, then the Lessee must both begin to cure within 30 days and diligently pursue curing to completion within a reasonable period. See previous note regarding remedies.

the default, then the Lessor will have no obligation to continue to cure it to completion and the Lessor is not liable for any losses or expenses suffered as a result by the Lessee, any Sublessee, or any Person deriving an interest directly or indirectly from the Lessee.[152]

10.2.5 At the Lessor's sole discretion, copies of default notices and termination notices provided under this section 10 may be provided to any Sublessees, any other Person deriving an interest directly or indirectly from the Lessee's rights in this Lease, and any Authority.[153]

10.3 **Additional Lessor Remedy for Unpaid Taxes, Additional Rent, and Interest** – The Lessor may recover Taxes, Additional Rent, and interest due to the Lessor as if they were unpaid rent at common law.[154]

10.4 **Additional Lessor Remedy for Vacating or Abandoning** – Subject to the provisos set out in section 3.5, if the Premises are vacated or abandoned without the consent of each of the Lessor and the First Nation, then, upon providing a default notice in accordance with section 10.2 and expiry of the applicable cure period, the Lessor may:

10.4.1 enter the Premises as the agent of the Lessee, by reasonable force if required, without being liable for any loss or damage caused by the entry or the use of force, except to the extent that such loss or damage is caused by or contributed to by the Lessor's Gross Negligence or Wilful Misconduct;

10.4.2 let the Premises as the agent of the Lessee and at the Lessee's risk;

10.4.3 receive rent for the letting; and

10.4.4 apply such rent to any expenses incurred by the Lessor in the entry and letting of the Premises and to any money owing to the Lessor under this Lease in such proportions and order of priority as is determined by the Lessor in the Lessor's sole discretion.[155]

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[152] The Lessor may, instead of cancelling the lease under subsection 10.2.3, want to cure the default and charge the expenses back to the Lessee as Additional Rent. This clause gives the Lessor some flexibility in choosing to cure a default. If, for example, the Lessor starts to cure a default but finds out in the process that the expense to do so is going to be more than it had anticipated, then the Lessor could stop curing the default, still claim its expenses from the Lessee as Additional Rent, and then exercise a different remedy (because remedies are cumulative – see section 10.7).

[153] The Lessor may wish to (although it is not obliged to) give notices to other parties, such as Sublessees, which may have rights to cure the headlease under their Subleases.

[154] *Distraint* is the common law remedy available only to a landlord that allows it to enter a leased property to seize and sell a tenant's assets located on the property to satisfy an outstanding rent obligation. This clause has the Parties agreeing on what will constitute Rent for the purposes of this remedy.

[155] This is a rarely used provision as taking on the role of agent for the Lessee comes with some added risk. "Let" and "letting" mean the actions of leasing.

10.5 **Defaults on Obligations Owed to the First Nation**[156]

10.5.1 If the Lessee defaults on an obligation owed to the First Nation in this Lease, then the First Nation may provide a default notice to the Lessee, with a copy to the Lessor.

10.5.2 If such default:

10.5.2.1 can reasonably be cured within 30 days after the default notice is delivered and the Lessee fails to cure such default within the 30 days; or

10.5.2.2 cannot reasonably be cured within 30 days after the default notice is delivered and the Lessee does not begin to cure such default within the 30 days to the reasonable satisfaction of the First Nation or continue to cure such default with due diligence after beginning to cure,

then, as the First Nation may not terminate this Lease as a remedy, the First Nation may take advantage of any other legal and equitable remedies available, including commencing an action for specific performance.

10.5.3 If a default is not cured within the time allowed in this Lease, or is not being diligently cured under section 10.5.2.2, then the First Nation may, with unrestricted access to the Premises, cure it in the First Nation's sole discretion, and the First Nation's expenses related to such curing are First Nation Fees. If the First Nation begins to cure the default, then the First Nation will have no obligation to continue to cure it to completion and the First Nation is not liable for any losses or expenses suffered as a result by the Lessee, any Sublessee, or any Person deriving an interest directly or indirectly from the Lessee.

10.6 **Additional Lessor and First Nation Remedy for Breaches of Sections 5.4 and 5.6 – Stop Work Orders and Injunctions**[157]

10.6.1 If section 5.4 or 5.6 is breached, then, in addition to any other remedy available to the Lessor or the First Nation:

10.6.1.1 each such Party may issue a "stop work order", which such Party is entitled to post in conspicuous locations on the Premises, and the Lessee will ensure that all unauthorized work on the Premises ceases;

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[156] This clause mimics the Lessor's default clause, except that termination is not an option for the First Nation because that is a right that is exclusive to a landlord with respect to the leasehold estate.

[157] Stop work orders off-reserve have a legislative underpinning that will have ramifications for third parties. Absent a similar First Nation by-law, the ramifications of an order under a Lease will be contractual, although some third parties may respect the orders regardless.

10.6.1.2 the Lessee will promptly remediate any damage to the Premises arising from such breach that is not otherwise permitted, approved of, or authorized, as required by sections 5.4 and 5.6; and

10.6.1.3 each such Party is entitled to obtain an injunction from a court of competent jurisdiction against the continuation of such breach, the Party's costs of which (including legal costs on a solicitor and own client basis) are, contingent upon success of the injunction application, Additional Rent or First Nation Fees, as the case may be.

10.6.2 The Lessor and the First Nation will notify each other of their actions under this section 10.6.

10.7 **Remedies are Cumulative** – Notwithstanding any part of this Lease that provides a specific remedy, all remedies under this Lease or at law may be exercised at the same time and the exercise of one remedy does not preclude the exercise of any other remedy.[158]

10.8 **Unavoidable Delay** – A default of this Lease will not be a default if it was due to, caused by, or materially contributed to by Unavoidable Delay, on the condition that the Party claiming the benefit of Unavoidable Delay promptly:

10.8.1 provides the other Parties with notice of the Unavoidable Delay;

10.8.2 in good faith and in a commercially reasonable manner puts itself in a position to carry out the terms of this Lease notwithstanding the Unavoidable Delay; and

10.8.3 carries out the terms of this Lease once the Unavoidable Delay has ceased.[159]

10.9 **Curing of Defaults by Others** – The curing of a default of this Lease by or on behalf of a Person other than the Lessee will be construed as a curing of that default by the Lessee.

11. END OF LEASE

11.1 **Surrender of Premises** – Subject to section 11.2:

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[158] This is a standard and important clause because there are certain clauses that have specific remedies (e.g., interest, right to re-let, etc.) and those should not necessarily limit other remedies. For example, the remedy of interest should be allowed to co-exist with the remedy to cancel. Charging interest should not disallow the Lessor's right to terminate the Lease. However, this clause would not allow a Party to "double dip" remedies so as to obtain more than its actual loss or exercise remedies that are incompatible with each other. For example, the Lessor cannot both distrain for Rent by selling Lessee assets and cancel the Lease.

[159] This clause provides a Party some leeway in meeting its obligations to the extent that a breach occurs due to an Unavoidable Delay (a defined term that mostly refers to an activity outside that Party's control). However, there are limits to the provision (that is, prompt notice must be given to claim the benefit of it and prompt, good faith, and commercial reasonable actions must be taken to rectify the breach).

11.1.1 when this Lease ends, the Lessee will peaceably surrender and yield up the Premises to the Lessor and the First Nation, as to their respective interests, in the condition required by the terms of this Lease; and

11.1.2 all Improvements, and all Trade Fixtures not already removed at that time, will be the property of the Lessor and the First Nation, as to their respective interests, absolutely, free of all encumbrances and for no compensation.[160]

11.2 **Removal of Improvements and Trade Fixtures**[161]

11.2.1 If, within 90 days:

11.2.1.1 of the end of the Term; or

11.2.1.2 after the report referred to in section 11.3.1 is issued if this Lease ends early,

the First Nation notifies the Lessee that the Improvements and Trade Fixtures described in such notice are to be removed from the Premises, then the Lessee will promptly remove them and will leave the remainder of the Premises in good and substantial repair and condition and free from all debris to the reasonable satisfaction of the First Nation.

11.2.2 If the Lessee does not promptly remove the Improvements and Trade Fixtures as required under section 11.2.1, then the First Nation may remove and dispose of them in the First Nation's sole discretion and return the Premises to a good and substantial repair and condition and free from all debris, and the First Nation's expenses related to such work are First Nation Fees. The First Nation is not

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[160] This clause does a few things. First, it requires the Lessee to *surrender and yield up* (give) possession to the Lessor and the First Nation "as to their respective interests". This quoted phrase reflects the unique nature of the Crown-Indigenous reserve relationship: the Crown is entitled to legal possession as legal title holder but the First Nation is entitled to physical possession under the *Indian Act*. Although some might argue that the First Nation is not entitled to possession until the designation is removed, the Crown and First Nations have usually treated designated lands that are not subject to third party interests as lands in the possession of the First Nation. For example, when a lease ends and the tenant "hands over the keys", it is often to a First Nation representative and not one from the Crown.

Secondly, this clause requires the Lessee to give the Premises back "in the condition required by the terms of this Lease", which refers back to how the Improvements are to be kept (e.g., sections 3.3, 3.4, 5.10, 11.2, 11.3, and 11.4).

Thirdly, this clause requires all Improvements to be left on the Lands, subject to section 11.2 (which allows the First Nation to give notice to the Lessee to remove some or all of the Improvements and Trade Fixtures). If the First Nation and the Lessee negotiate in advance that the Lessee must remove all Improvements and Trade Fixtures at the end of the Term, then this section would be amended to not be subject to section 11.2 (which itself would be deleted).

[161] This clause gives the First Nation some added flexibility in order to assess the condition of the Improvements to determine if it wants any removed, although it is always better to do this during the last part of the Term if possible.

liable for any losses or expenses suffered as a result by the Lessee, any Sublessees, and any other Person on the Lands deriving an interest directly or indirectly from the Lessee.

11.3 Environmental Assessment and Contaminant Removal

11.3.1 Within 8 months before the expiration of the Term, or within 90 days after the earlier termination of this Lease, the Lessee will complete a sufficient environmental site assessment to establish the environmental condition of the Premises at that time and will provide each of the Lessor and the First Nation with a report (which is reasonably satisfactory to each of them and which must state that it may be relied upon by all Parties).

There are 2 options for the next section. Choose one and delete the other.

OPTION 1 – If remediation is to be to the level set out in the Standards, then use the following:

11.3.2 By the end of the Term, or within 90 days after the report referred to in section 11.3.1 is issued if this Lease ends early, the Lessee will remove from the Premises, to the reasonable satisfaction of each of the Lessor, the First Nation and any Authority, all Contaminants on the Premises in excess of their applicable Standard.[162]

End of Option 1.

OPTION 2 – If remediation is to be to the condition existing at the Commencement Date, then use the following:

11.3.3 By the end of the Term, or within 90 days after the report referred to in section 11.3.1 is issued if this Lease ends early, the Lessee will, subject to its obligations relating to the Improvements under this section 11, remediate the Premises to their environmental condition prior to the Commencement Date, including removing from the Premises, to the reasonable satisfaction of each of the Lessor, the First Nation, and any Authority, all Contaminants brought onto the Premises during the Term.[163]

End of Option 2.

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[162] This clause requires remediation to the levels considered acceptable for the type of use to which the Lands were used during the Term. The First Nation should consider what future uses it may wish to use the Lands for after the Lease.

[163] This clause requires remediation to the original state of the Premises, subject to the Lessee's obligations to leave Improvements in a certain state under section 11.1. If the Lands are contaminated prior to the Lease and the development will actually be removing and remediating that contamination, then the parties may wish to clarify a different standard.

11.4 **Securing the Premises** – When this Lease ends, the Lessee will promptly secure the Premises to the reasonable satisfaction of the First Nation so that the Premises do not pose a danger to any Person.[164]

11.5 **Access after Lease Ends** – The Lessee is entitled to access the Premises when this Lease ends only at the reasonable times and on the reasonable conditions set by the First Nation and only to be able to perform any of the Lessee's obligations that survive after this Lease ends. Such access will not be construed as providing any rights of possession to the Premises.[165]

11.6 **Survival of Section 11** – This section 11 survives when this Lease ends.[166]

12. INDEMNITIES[167]

12.1 **Lessee's Indemnities** – The Lessee will indemnify and hold harmless the Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives (each being an "**Indemnified**") from and for any claims, demands, actions, suits, and other proceedings, judgments, damages, penalties, fines, costs (including reasonable legal fees, on a solicitor and own client basis, and reasonable consultant and expert fees), liabilities, losses, and sums paid in settlement of any claims that arise during or after the Term and are in any way based upon, arise out of, or are connected with:

12.1.1 a breach of any of the Lessee's obligations in this Lease;[168]

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[164] Securing the Premises might depend on what the First Nation will be doing with them next. If the First Nation is going to begin using the Premises right away, then securing might only mean locking the doors as the Lessee leaves and handing over the keys. But, if the Premises will sit unused, it might be necessary to fence off areas to secure them.

[165] This clause clarifies that when the Lease ends, it ends. The Lessee has no rights that can extend beyond the end of the Lease, only some specific obligations as set out in the Lease. The First Nation will be required to act reasonably in allowing the Lessee access to the Premises to meet those obligations and not frustrate the Lessee in trying to meet its obligations or else risk releasing the Lessee from those obligations entirely.

[166] As many of the obligations in this article arise after the end of the Lease, this clause is needed to preserve them beyond the Term.

[167] An *indemnity* is an agreement by A to compensate B for any losses that B suffers because of claims of C against B due to certain identified actions or omissions.

[168] Usually, a landlord would sue a tenant for damages arising from the tenant's breach of the lease rather than sue on an indemnity related to the breach. However, the landlord may sometimes be precluded from suing on the breach by a waiver of, or acquiescence in, the breach. This clause allows the Lessor to claim over against the Lessee for any loss suffered by the Lessor arising from a third-party claim against the Lessor related to the Lessee's breach.

12.1.2 an injury to, or death of, a Person on the Premises during the Term, other than a Person on the Premises under a right or interest granted by the Lessor under section 2.2 or 2.4;[169]

12.1.3 damage to, or loss of, property by a Person in any way due to the use of the Premises during the Term;[170]

12.1.4 the Decision Maker reviewing a Construction and Environmental Management Plan;[171]

12.1.5 the Decision Maker determining under an Environmental Review that a Project may not proceed; or[172]

12.1.6 the Indemnified curing or attempting to cure a default of this Lease,[173]

but not if due to the Gross Negligence or Wilful Misconduct of such Indemnified, unless such negligence or misconduct involves a peril against which the Lessee is obligated to obtain and maintain insurance.[174]

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[169] Although the Lessor should be covered for this type of loss under the Lessee's insurance (subsections 6.2.1 and 6.3.1), the insurance may be insufficient and this clause could be relied upon to make up the shortfall.

[170] Some of this would also be covered by insurance and this clause could be relied upon to make up the shortfall. Some non-insured issues may also fall under this clause (such as nuisance). Although the likelihood of a successful claim by a non-party against the Lessor is low, this is still a risk that should be borne by the Lessee and not the Lessor as the Lessee is the only party able to ensure that a nuisance does not arise from the Premises.

[171] The Parties have drafted the review provisions so as to put third-parties (such as Sublessees) on notice that the Lessor is not reviewing plans for their benefit and have attempted to preclude any third-party claims (e.g., section 8.4.3). However, in case they have not been successful in that regard, this clause puts that risk on the Lessee, as the Lessee is ultimately responsible for the design, construction, and maintenance of the Improvements.

[172] Although it is highly unlikely that the Lessor owes any third-party a duty of care with respect to the Lessor's determination under an Environmental Review, any risk of liability is borne by the Lessee by this clause.

[173] If, in curing or attempting to cure a default the Lessor causes damage to a third party, such as a Sublessee, then the Lessee should bear this risk because the Lessor would not have been on the Premises if the Lessee had not breached the Lease or had rectified its own breach as required.

[174] This portion limits the indemnity so that the Lessee will not be required to indemnify the Indemnified if the Indemnified's loss arose due to the "Gross Negligence or Wilful Misconduct" (a defined term) of the Indemnified or those acting on the Indemnified's behalf, unless the loss arises because of something for which the Lessee was required to maintain insurance.

The risk allocation theory here is that the Indemnified will be doing something with respect to the Premises only as a result of a Lease being in place, so would not have acted at all (let alone negligently) or failed to act but for the existence of the Lease. As such, in keeping with the no cost to the Lessor/First Nation paradigm of the lease (see sections 15.3 and 15.4), the Lessee should bear this risk. Whenever the Indemnified is acting, or should be acting, under the Lease, the template has the Indemnified assume only the risk associated with any wanton disregard for the impacts of its actions or omissions (i.e., Gross

12.2 **Survival of Section 12** – This section 12 survives when this Lease ends.[175]

13. DELIVERY

13.1 General Requirement

13.1.1 All notices, requests, demands, consents, and approvals to be provided under this Lease, which must be in writing, all other documents to be provided under this Lease, and all Rent and First Nation Fees to be paid will be delivered in accordance with this section 13 to the following addresses:

To the Lessor:

Director, Lands and Economic Development
Indigenous Services Canada
[Regional Office]
[Regional Office's Address]

Fax: [#]

Email: [Email]

To the First Nation:

[First Nation]
[First Nation's Address]

Fax: [#]

Email: [Email]

To the Lessee:

[Lessee's Name]

Negligence or Willful Misconduct), provided that the loss does not arise from an insured peril, in which case the risk is passed on to the insurer.

Some Lessees want the Indemnified to be responsible for any negligence or misconduct and not merely *gross* negligence or *willful* misconduct. Based on the no-cost paradigm, the assumption by the Indemnified of responsibility for Gross Negligence and Willful Misconduct is already an assumption of some risk and potentially some cost in contrast to this paradigm. Also, in terms of the practical effect of this clause, the highest likelihood of loss arises from the first three elements of the list and not the last three. The first three elements are all within the control of the Lessee, so the Lessee, by not breaching the Lease, is in the best position to ensure that the Indemnified will not be in a position to utilize the indemnity. The last three elements are more likely to require actions by the Indemnified, however, the Parties have already, within the sections pertaining to these issues, determined that the Lessee and not the Indemnified should bear any risk associated with these issues.

[175] This clause protects the ability of the Lessor and the First Nation to pursue claims arising after the end of the Lease.

[Lessee's Address]

Fax: [#]

Email: [Email]

13.1.2 If the postal service is interrupted or threatened to be interrupted, then any notice, request, demand, consent, or approval will only be sent by means other than mail.

13.2 **Date of Delivery**

13.2.1 Rent and First Nation Fees will not be considered to be delivered until actually received by the Lessor and the First Nation, respectively.[176]

13.2.2 If a question arises as to the date on which a notice, request, demand, consent, approval, or document provided under this Lease is delivered, then it will be conclusively deemed to have been delivered:

13.2.2.1 if sent by fax or email, the day of transmission if transmitted before 3:00 p.m. [Time zone] time, otherwise, the next day;

13.2.2.2 if sent by mail, on the sixth day after the notice was mailed; or

13.2.2.3 if sent by means other than fax, email, or mail, the day it was received.

13.3 **Change of Contact Information** – A Party may change its contact information by informing the other Parties of the new contact information and the change will take effect on the effective date set out in the notice or 30 days after the notice is delivered, whichever is later.

14. DISPUTE RESOLUTION

14.1 **Disputes Involving the Lessor** – A dispute arising under this Lease involving the Lessor that is not resolved by negotiation will be resolved by referral, in the first instance, to the Federal Court or any replacement or successor court having jurisdiction. If the Federal Court refuses jurisdiction or does not determine the dispute, then a Party to the dispute may refer it to any other court that has

[176] When a lease is silent on where rent is to be paid, the common law holds that it is the tenant's obligation "to seek out the landlord" for payment. If rent is stipulated to be paid at a specific location, then the common law presumption holds that it is paid when it is posted, not when it is received, leaving the landlord usually bearing the burden of it being lost along the way. This clause rebuts that presumption so that rent will not be considered paid until actually received.

jurisdiction and the Parties may exercise any other right or remedy that they have under this Lease or otherwise.[177]

14.2 **Disputes Not Involving the Lessor**[178] – A dispute arising under this Lease solely between the Lessee and the First Nation, including when the First Nation takes over the position of the Lessor under this Lease by operation of law, will be resolved as follows:[179]

14.2.1 Negotiation: The Party that wishes a dispute to be resolved will provide a dispute notice to the other Party to the dispute. Each such Party will promptly designate a senior representative to attempt in good faith to resolve the dispute by negotiation.

14.2.2 Mediation: If negotiation does not resolve the dispute within 15 days of delivery of the dispute notice, then either Party may provide a mediation notice to the other Party. The Parties will then promptly appoint a qualified, impartial, and experienced mediator, the cost of which will be paid equally by both Parties. If the Parties cannot agree on a mediator within 15 days of delivery of the mediation notice, then the mediator will be appointed by the [Name of Provincial Arbitration Centre] (or its successor, or a similar body if neither is available). Within 10 days of appointment of a mediator, each Party will provide the mediator and each other with a written statement of its position about the dispute and summary of the arguments supporting its position. The mediator will meet with the Parties in the mediator's sole discretion in an attempt to resolve the dispute. The Parties will provide any additional information requested by the mediator. The mediator may hire experts, the cost of which will be paid equally by both Parties unless the mediator orders a different division.

14.2.3 Arbitration: If the dispute is not resolved within 30 days of the appointment of a mediator, then, on application by a Party to the dispute, the dispute may be referred to a single arbitrator and determined by arbitration administered by the [Name of Provincial Arbitration Centre] (or its successor, or a similar body if neither is available). The decision of the arbitrator is final and binding on both

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[177] Under the *Federal Court Act*, the Federal Court has "original, concurrent jurisdiction" with provincial superior courts in certain matters, such as claims of relief against the Crown or claims arising under Crown contracts, which would include a lease. However, it has "exclusive jurisdiction" where certain parties agree that the Federal Court will determine a matter between them, such as this Lease. Referral to Federal Court is the standard ISC dispute resolution model for leases rather than arbitration, as some Lessees request.

[178] This is merely a suggested model for the First Nation and the Lessee to consider. They may change or replace it as they see fit.

[179] A First Nation may take over the position of Lessor under FNLM, self-government agreement, or treaty. Under that situation, the First Nation would not want to be bound to use the Federal Court, and the Federal Court might not have jurisdiction in any event. Instead, the relationship between the First Nation (under both its original rights and obligations and those assumed upon assumption of lease management jurisdiction) and the Lessee will continue to be governed by section 14.2.

Parties. The cost of the arbitrator will be paid equally by both Parties unless the arbitrator orders a different division.

15. MISCELLANEOUS

15.1 **Deemed Conditions and Covenants** – All agreements, terms, conditions, covenants, provisions, duties, and obligations to be performed or observed by the Lessee under this Lease for the benefit of the Lessor are conclusively deemed to be conditions as well as covenants.[180]

15.2 **No Presumption** – There will be no presumption that an ambiguity in a term of this Lease is to be interpreted in favour of any particular Party.[181]

15.3 **Absolute Net Lease for the Lessor** – This Lease is to be an absolute net lease for the Lessor. Except as otherwise explicitly set out in this Lease, the Lessor will not be responsible during the Term for any costs, charges, and expenses arising from or relating to the Premises, the use or occupancy of the Premises, the business carried out on the Premises, or any of the Lessee's obligations in this Lease.[182]

15.4 **No Cost to the First Nation** – Except as otherwise explicitly set out in this Lease, the First Nation will not be responsible during the Term for any costs, charges, and expenses arising from or relating to the Premises, the use or occupancy of the Premises, the business carried out on the Premises, or any of the Lessee's obligations in this Lease.[183]

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[180] A *covenant* is a promise to do or not do something with respect to a property, the failure of which allows the other party to sue for damages. A *condition* is a contingency that must be met, the failure of which allows the other party to take back the property right granted (in this case, the leasehold interest).

The Parties can agree to delete this clause and leave it open to determining which clauses give rise to an action in damages upon breach and which clauses provide a right of termination upon breach. Alternatively, the Parties can (and likely should) discuss which result should arise from each clause and set them out here. In both of these cases, the Parties should turn their mind to the wording of the default and termination provisions (article 10) as they currently are written as if all clauses are conditions.

The Lessee's obligations to the First Nation should not be conditions, as the First Nation's remedies are limited to claiming damages.

[181] There are two presumptions in the common law that are being precluded here: 1) that an ambiguous standard form contract is construed in favour of the non-drafter; and 2) that an ambiguous agreement with a First Nation is construed in favour of a First Nation. There likely is only a low risk that either of these presumptions might be considered in interpreting this template Lease, but they should be precluded because all Parties have an ability to obtain proper advice and representation and to influence the final terms executed by the Parties.

[182] This clause is one of the central paradigms of the template Lease – that the Lessor will bear no costs arising from the lease (other than its own costs in administering it). The phrase "absolute net lease" is a term of art completely relieving a landlord from any financial obligations for the lands. The second sentence essentially paraphrases that concept.

[183] This clause for the First Nation mimics the Lessor's but without the leasehold reference.

15.5 **Binding on Successors** – This Lease will be for the benefit of and be binding upon each Party's respective heirs, successors, executors, administrators, assigns, and other legal representatives.[184]

15.6 **No Waiver** – No condoning, excusing, or overlooking of a default of this Lease will operate as a waiver by, or otherwise affect the respective rights of, the other Parties in respect of a continuing or subsequent default. A waiver must be in writing and no waiver will be inferred from anything done or omitted to be done by a Party.[185]

15.7 **No Assumption of Responsibility** – No consent or approval, or absence of consent or approval, by the Lessor or the First Nation will in any way be an assumption of responsibility or liability by such Party for any matter subject to or requiring such Party's consent or approval.[186]

15.8 **Not a Joint Venture** – Nothing in this Lease will be construed as creating a relationship of agency, partnership, joint venture, or other such association between any of the Parties.[187]

There are 3 options for the Lessee's authority. Choose one and delete the others.

OPTION 1 – If the Lessee is an individual, then delete both of options 2 and 3 and ensure that an affidavit of execution (see end of Lease) accompanies the Lease. End of Option 1.

OPTION 2 – If the Lessee is a corporation, then use the following:

15.9 **Corporate Authority** – The Lessee represents and warrants that the Lessee:

15.9.1 has all necessary authority to enter into this Lease and to perform all of the obligations contained in this Lease;

15.9.2 is a corporation duly incorporated under the laws of the province of [Name of Province], is not a reporting company, and is a valid and subsisting company in good standing with the [Name of Province] corporate registry; and

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[184] This is a standard and important clause for the benefit of all Parties as it ensures that rights and obligations will continue to exist to the end of the Term without interruption by death (e.g., His Majesty or an individual Lessee), succession (e.g., His Majesty or a corporate amalgamation), or assignment (on the terms of the Lease).

[185] It is vitally important to know if a Lessee has been excused from a Lease or contractual obligation, so this clause requires that a waiver of any obligation must be in writing. It also requires *each* waiver to be in writing so that new breaches of the same nature as a previously waived breach will require their own waiver in writing.

[186] This clause clarifies that consent is an administrative issue within the Lease and not one that transfers any liability for having provided consent.

[187] This clause clarifies that each Party is representing its own interests and none are combined into a joint venture for any purpose.

15.9.3 will remain in good standing with the [Name of Province] corporate registry.[188]

End of Option 2.

OPTION 3 – If the Lessee is a limited partnership, then use the following:[189]

15.10 **Authority** – The Lessee represents and warrants that the Lessee:

15.10.1 has all necessary authority to enter into this Lease and to perform all of the obligations contained in this Lease;

15.10.2 is the general partner of a limited partnership formed under the laws of the province of [Name of Province];

15.10.3 is a corporation duly incorporated under the laws of the province of [Name of Province], is not a reporting company, and is a valid and subsisting company in good standing with the [Name of Province] corporate registry; and

15.10.4 will remain in good standing with the [Name of Province] corporate registry.

End of Option 3.

15.11 **Counterpart Execution** – This Lease may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party, such Party will promptly provide a copy of its originally executed Lease to the other Parties.[190]

The Parties have executed this Lease on the dates indicated below.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Minister of Indigenous Services

_____

[Name]

[188] If a company is registered in another province, then you may wish to state that it is registered extra-provincially in the province in which the Premises are located and cite its registration number.

[189] This is the format for BC. It may be different in other provinces.

[190] Counterpart execution allows parties to sign different physical documents. The best practice is to have each party sign four originals. Each party would then keep one original and send an original to each other party so that, in the end, each party has an original signature for all parties. Usually, each party e-mails a PDF of its signature page to the other parties with the originals to follow by mail or courier.

Date signed by the Lessor:_____

EXECUTED in the presence of:	)	**[FIRST NATION]**, as represented by the Council
	)	
	)	
	)	
	)	
_____	)	_____
Witness as to the First Nation's authorized signatories	)	[Name]
	)	_____
	)	[Name]
	)	
	)	Date signed by the First Nation:_____
	)	
	)	I / We have authority to bind the First Nation
	)	
EXECUTED in the presence of:	)	**[LESSEE'S NAME]**
	)	**If the Lessee is a limited partnership, they sign as:**
	)	
	)	**[LESSEE'S NAME]**, general partner of **[NAME OF LIMITED PARTNERSHIP]**
	)	
Witness as to the Lessee's authorized signatory	)	
	)	_____
	)	[Name]
	)	[Title]
	)	
	)	Date signed by the Lessee:_____
	)	
	)	I have authority to bind the Lessee
	)	

SCHEDULE A

IMPROVEMENTS EXISTING AT COMMENCEMENT DATE[191]

When preparing the lease, ISC must assess the status of the Improvements existing on the Lands at the Commencement Date and make a determination as to what information should appear in this schedule. There are two options. Use one and delete the other.

OPTION 1 – If there are no Improvements on the Lands, then use the following:

None.

End of Option 1.

OPTION 2 – If there are pre-existing Improvements on the Lands, then list them below:

- ….
-

End of Option 2.

[191] See section 5.1.

SCHEDULE B

BAND COUNCIL RESOLUTION

WHEREAS:

A. We have negotiated a “Lease of Designated Lands” to be entered into between His Majesty the King in right of Canada, [First Nation], and [Lessee's Name], to which this resolution is to be attached as a schedule; and

B. The terms used in this resolution that are defined in the Lease have the same meaning as in the Lease.

BE IT RESOLVED that the Council, on behalf of [First Nation]:

A. has read and understood the Lease terms;

B. has been advised by the Lessor to receive independent legal and financial advice about the Lease before executing it and to continue to obtain such advice about the First Nation’s rights and obligations throughout the Term of the Lease;

OPTIONAL – Include the following if the lease stems from a general designation.

C. to the extent required by the policies or customs of the [First Nation], has consulted with the [First Nation] membership regarding the Lease and has obtained its consent to the Lease;

End of optional language.

D. consents to the execution of the Lease on its terms; and

E. authorizes any two members of the Council to execute the Lease on behalf of the First Nation.

CARRIED at a duly convened and conducted meeting on _____, 20___.

Quorum for the Council is _____ members.

Chief	
Councillor	Councillor
Councillor	Councillor
Councillor	Councillor
Councillor	Councillor
Councillor	Councillor

SCHEDULE C[192]

ASSIGNMENT CONSENT AGREEMENT

This agreement commences on [Month Day, Year] and is made between:

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

[192] Only the fields (highlighted in gray) are to be filled in. The non-gray square bracketed "[ ]" material and black optional material in this schedule is to be determined at the time that the scheduled agreement is being used.

For consideration when executing an Assignment Consent Agreement: If the Lessee is to be released from its future obligations arising after the date of the consent, then an article would need to be added to that effect. The Lessor is under no obligation to release the Lessee as, at common law, the Lessee's obligations to the Lessor are for the entire Term, regardless of any assignment (see note 136). The Lessee and the Assignee may agree between them that the Assignee will be solely responsible after the date of the consent, but that is a bilateral agreement between them only. Their remedies would be to bring third party claims against each other in any claim that the Lessor would bring against one or both of the Lessee and the Assignee.

(the "**Lessor**")

and:

[FIRST NATION],
a band within the meaning of the *Indian Act*, as represented by the Council

(the "**First Nation**")

and:

[LESSEE'S NAME] [OPTIONAL: If the Lessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Lessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the Business Corporations Act, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP],** registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Lessee**")

and:

[ASSIGNEE'S NAME] [OPTIONAL: If the Assignee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Assignee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Assignee**")

(collectively the "**Parties**").

BACKGROUND

A. The Lessor leased certain lands in the Reserve to the Lessee, by way of a lease to which the First Nation is a Party and which is dated [Month Day, Year] and registered in the Registry under No. [#] (the "**Lease**").

B. The Lessee wants to assign its right and interest in the Lease to the Assignee by entering into an assignment agreement (the "**Assignment**"), **[OPTIONAL:** a copy of**]** which is attached as Schedule "A" to this agreement.

C. Under the Lease, the Assignment is not valid without the consent of each of the Lessor and the First Nation and without the Parties entering into this agreement.

NOW THEREFORE, in consideration of the representations, warranties, obligations, covenants, and agreements in this agreement, the Parties agree as follows:

1. CONSENT, COVENANTS & REPRESENTATIONS

1.1 Consent

1.1.1 Each of the Lessor and the First Nation hereby consent to the Assignment.

1.1.2 The assignment of the Lessee's interest in the Lease under the Assignment will not relieve or discharge the Lessee from any of its obligations or liabilities under the Lease.[193]

1.2 Covenants and Representations of Assignee

1.2.1 The Assignee covenants with each of the Lessor and the First Nation to observe and perform all of the obligations in the Lease to be observed or performed by the Lessee from and after the date of the assignment of the Lease.

1.2.2 Except as explicitly set out in this agreement, the Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:

1.2.2.1 the terms of the Lease;

1.2.2.2 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

1.2.2.3 issues of title, encumbrances affecting title, and matters contained within the Registry;

1.2.2.4 access to and from the Premises; and

1.2.2.5 the suitability of the Premises for the Assignee.

[193] See section 9.1.2.

1.2.3 The Assignee makes the same representations and warranties to each of the Lessor and the First Nation that the Lessee made in the Lease, with the Commencement Date meaning the effective date of the Assignment.[194]

1.2.4 The Assignee represents and warrants to each of the Lessor and the First Nation that the person or persons signing this agreement on the Assignee's behalf have the authority to bind the Assignee to this agreement.

1.2.5 The Assignee's delivery information is as follows:

[Assignee's Name]
[Assignee's Address]

Fax: [#]

Email: [Email]

2. GENERAL

2.1 **No Merger** – The Lease will survive the execution of this agreement and will not merge in this agreement.

2.2 **Definitions** – A term not defined in this agreement but defined in the Lease has the same meaning as in the Lease.

2.3 **Headings** – All headings are for convenience and reference only. They are not to be used to define, limit, enlarge, modify, or explain the scope or meaning of a provision.

2.4 **Binding on Successors** – This agreement will enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators, successors, assigns, and other legal representatives.

2.5 **Counterpart Execution** – This agreement may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party,

[194] If the Lessee was unable to give the representations and warranties concerning certain environmental issues and section 8.8 was removed from the Lease, then consider adding it back here as a representation and warranty from the Assignee.

For consideration when executing an Assignment Consent Agreement: If the Assignee is unable to make the same representations and warranties as the Lessee, then give consideration to any increased risk and modify the Lease if necessary to address that risk.

such Party will promptly provide a copy of its originally executed agreement to the other Parties.[195]

The Parties have executed this agreement as of the date first written above.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Minister of Indigenous Services

[Name]

EXECUTED in the presence of:	)	**[FIRST NATION]**, as represented by the Council
Witness as to the First Nation's authorized signatories	)	[Name]
	)	[Name]
	)	I / We have authority to bind the First Nation
EXECUTED in the presence of:	)	**[LESSEE'S NAME]** **If the Lessee is a limited partnership, they sign as:** **[LESSEE'S NAME]**, general partner of **[NAME OF LIMITED PARTNERSHIP]**
Witness as to the Lessee's authorized signatory	)	[Name]

[195] See note 190.

	)	I have authority to bind the Lessee
	)	

EXECUTED in the presence of:	)	**[ASSIGNEE'S NAME]**
	)	**If the Assignee is a limited partnership, they sign as:**
		[ASSIGNEE'S NAME], general partner of **[NAME OF LIMITED PARTNERSHIP]**
Witness as to the Assignee's authorized signatory	)	
	)	[Name]
	)	
	)	I have authority to bind the Assignee
	)	

SCHEDULE “A” TO AN ASSIGNMENT CONSENT AGREEMENT

(*attach [a copy of] the Assignment*)

SCHEDULE D[196]

MORTGAGE ACKNOWLEDGMENT AGREEMENT

This agreement commences on [Month Day, Year] and is made between:

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

(the "**Lessor**")

and:

[FIRST NATION],
a band within the meaning of the *Indian Act*, as represented by the Council

(the "**First Nation**")

and:

[LESSEE'S NAME] [OPTIONAL: If the Lessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Lessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Lessee**")

and:

[MORTGAGEE'S NAME] [OPTIONAL: If the Mortgagee is a corporation, bank, or financial institution, then type a comma after the Mortgagee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. For example: , a bank under the *Bank Act*, S.C. 1991, c. 46 **End of option]**

(the "**Mortgagee**")

[196] Only the fields (highlighted in gray) are to be filled in. The non-gray square bracketed "[ ]" material and black optional material in this schedule is to be determined at the time that the scheduled agreement is being used.

(collectively the "**Parties**").

BACKGROUND:

A. The Lessor leased certain lands in the Reserve to the Lessee, by way of a lease to which the First Nation is a Party and which is dated [Month Day, Year] and registered in the Registry under No. [#] (the "**Lease**").

B. **[Set out all assignments and modifications of the Lease and modify definition if necessary.]**

C. The Lessee wants to mortgage its interest in the Lease to the Mortgagee by way of the mortgage (the "**Mortgage**"), **[OPTIONAL:** a copy of**]** which is attached as Schedule "A" to this agreement.

D. Under the Lease, the Mortgage is not valid until the Mortgagee has entered into this agreement.

NOW THEREFORE, in consideration of the representations, warranties, obligations, covenants, and agreements in this agreement, the Parties agree as follows:

1. THE MORTGAGE

1.1 Representations and Warranties

1.1.1 The Lessor and the First Nation each represent and warrant to the Mortgagee that the Lease has not been modified or assigned, except as set out in Recital B.

1.1.2 The Lessor and the First Nation each represent and warrant that, to the best of such Party's knowledge but with no investigation on its part, the Lessee is not in default of any obligations owed to such Party under the Lease.

1.1.3 Except as explicitly set out in this agreement, the Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:

1.1.3.1 the terms of the Lease;

1.1.3.2 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

1.1.3.3 issues of title, encumbrances affecting title, and matters contained within the Registry; and

1.1.3.4 access to and from the Premises.

1.1.4 The Mortgagee represents and warrants to each of the Lessor and the First Nation that the person or persons signing this agreement on the Mortgagee's behalf have the authority to bind the Mortgagee to this agreement.

1.2 **Default of Mortgage** – If the Mortgagee gives the Lessee a notice of default under the Mortgage, then the Mortgagee will provide notice of such default to each of the Lessor and the First Nation and any such Party may cure the default on behalf of the Lessee.[197]

1.3 **Rights and Obligations of the Mortgagee**

1.3.1 Except as set out in this agreement, the Mortgage is subject and subordinate to the Lease and to the Lessor's and the First Nation's rights under the Lease.[198]

1.3.2 The Mortgagee will ensure that the Mortgage does not conflict with the Lease or, by the Lessee complying with the Mortgage, cause the Lessee to default on the Lease.

1.3.3 The Mortgagee will have all the rights and obligations of a Mortgagee set out in section 9.2 of the Lease as terms of this agreement between the Parties.

1.3.4 The Lessor will provide the Mortgagee with a copy of a default notice provided by the Lessor to the Lessee under the Lease and the Mortgagee may cure the default within the period specified in the notice on behalf of the Lessee.

1.3.5 The Lessor will provide the Mortgagee with a copy of a termination notice provided by the Lessor to the Lessee under the Lease.

1.3.6 The Mortgagee will promptly file a discharge in the Registry when the Lease is no longer subject to the Mortgage.

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[197] Although the Lessor and the First Nation have a right to cure a default in a Mortgage, there is usually little benefit to the Lessor in doing so. There may be some benefit to a First Nation if the Lessee is a First Nation entity, but even then it is a rather circular benefit.

[198] At common law, a mortgage of a fee simple estate operates to transfer the legal interest in the land to the lender while the mortgage remains outstanding but allows the former owner to remain in possession. Provincial land titles systems have modified this so that the mortgage is only a charge on the owner's title. Despite this change, much of a lender's common law rights to enforce its security remain, or have been incorporated into statute law.

At common law, a mortgage of a leasehold estate is created by the tenant assigning its leasehold interest to the lender or by subleasing its leasehold interest to the lender, except for the last day of the term, which is held in trust for the Mortgagee. This has not been changed by provincial lands titles legislation. Mortgages of leases on reserve are registered in the Registry as "mortgages" rather than as the type of method used to effect the mortgage (i.e., an assignment or a sublease). Most mortgages of leaseholds tend to be subleases.

2. GENERAL

2.1 Delivery

2.1.1 Delivery under this agreement is to be made in accordance with this section 2.1 to the following addresses:

To the Lessor:

Director, Lands and Economic Development
Indigenous Services Canada
[Regional Office]
[Regional Office's Address]

Fax: [#]

Email: [Email]

To the First Nation:

[First Nation]
[First Nation's Address]

Fax: [#]

Email: [Email]

To the Lessee:

[Lessee's Name]
[Lessee's Address]

Fax: [#]

Email: [Email]

To the Mortgagee:

[Mortgagee's Name]
[Mortgagee's Address]

Fax: [#]

Email: [Email]

2.1.2 If a question arises as to the date on which a delivery is made, it will be conclusively deemed to have been made:

2.1.2.1 if sent by fax or email, the day of transmission if transmitted before 3:00 p.m. [Time zone] time, otherwise, the next day;

2.1.2.2 if sent by mail, on the sixth day after the notice was mailed; or

2.1.2.3 if sent by means other than fax, email, or mail, the day it is received.

2.1.3 If the postal service is interrupted or threatened to be interrupted, then delivery will only be made by means other than mail.

2.1.4 A Party may change its contact information by informing the other Parties of the new contact information and the change will take effect on the effective date set out in the notice or 30 days after the notice is delivered, whichever is later.

2.2 **Definitions** – A term not defined in this agreement but defined in the Lease has the same meaning as in the Lease.

2.3 **Headings** – All headings are for convenience and reference only. They are not to be used to define, limit, enlarge, modify, or explain the scope or meaning of a provision.

2.4 **Binding on Successors** – This agreement will enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators, successors, assigns, and other legal representatives.

2.5 **Counterpart Execution** – This agreement may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party, such Party will promptly provide a copy of its originally executed agreement to the other Parties.[199]

The Parties have executed this agreement as of the date first written above.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Minister of Indigenous Services

_____

[Name]

[199] See note 190.

EXECUTED in the presence of:	)	**[FIRST NATION]**, as represented by the Council
	)	
	)	
	)	
	)	
Witness as to the First Nation's authorized signatories	)	[Name]
	)	
	)	[Name]
	)	
	)	I / We have authority to bind the First Nation
	)	
EXECUTED in the presence of:	)	**[LESSEE'S NAME]**
	)	**If the Lessee is a limited partnership, they sign as:**
	)	**[LESSEE'S NAME]**, general partner of **[NAME OF LIMITED PARTNERSHIP]**
Witness as to the Lessee's authorized signatory	)	[Name]
	)	
	)	I have authority to bind the Lessee
EXECUTED in the presence of:	)	**[MORTGAGEE'S NAME]**
	)	
	)	
Witness as to the Mortgagee's authorized signatory	)	[Name]
	)	
	)	I have authority to bind the Mortgagee
	)	

SCHEDULE "A" TO A MORTGAGE ACKNOWLEDGEMENT AGREEMENT

(*attach a copy of the Mortgage*)

SCHEDULE E[200]

There are 4 options for this Schedule. Use one and delete the others.

OPTION 1 – If Option 1 was chosen in the Subleases section, then delete this Schedule in its entirety and remove it from the Table of Contents. End of Option.

OPTION 2 – If Option 2 was chosen in the Subleases section, then use the following:

SUBLEASE ACKNOWLEDGMENT AGREEMENT

To:[201] **HIS MAJESTY THE KING IN RIGHT OF CANADA** (the "**Head Lessor**")

and:

[FIRST NATION] (the "**First Nation**")

From: **[SUBLESSOR'S NAME] [OPTIONAL: If the Sublessor is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessor's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Sublessor**")

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[200] Only the fields (highlighted in gray) are to be filled in. The non-gray square bracketed "[ ]" material and black optional material in this schedule is to be determined at the time that the scheduled agreement is being used. Only red optional material is to be considered when creating the Lease.

[201] This is a unilateral contract, which means that it does not have to be executed by the other parties to the contract in order for them to take the benefit of it. As such, it is structured as a contract document from the Lessee and Sublessee to the Lessor and First Nation.

and:

[SUBLESSEE'S NAME] OPTIONAL: If the Sublessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Sublessee**")

(collectively the "**Parties**").

Regarding: [Land Description] (the "**Subleased Premises**")

BACKGROUND

A. The Head Lessor leased certain lands in the Reserve to the Sublessor, by way of a lease to which the First Nation is a Party and which is dated [Month Day, Year] and registered in the Registry under No. [#] (the "**Head Lease**").

B. **[Set out all assignments and modifications of the Lease and modify definition if necessary.]**

C. The Sublessor granted a sublease of the Subleased Premises to the Sublessee (the "**Sublease**"), **[OPTIONAL:** a copy of**]** which Sublease is attached as Schedule "A" to this agreement.

D. Under the Head Lease, the Sublease is not valid without this agreement being entered into for the benefit of the Head Lessor and the First Nation.

NOW THEREFORE, in consideration of the representations, warranties, obligations, covenants, and agreements in this agreement, the Sublessor and the Sublessee agree with the Head Lessor and the First Nation as follows:

1. COVENANTS OF THE SUBLESSOR AND THE SUBLESSEE

1.1 Required Lease Terms

1.1.1 The Sublessor and Sublessee each represent, warrant, covenant, and agree that the Sublease contains the following terms:[202]

1.1.1.1 The term of the Sublease will end at least one day before the end of the Head Lease Term.[203]

1.1.1.2 The Sublease is expressly subject and subordinate to the Head Lease and to the rights of the Head Lessor and the First Nation under the Head Lease.

1.1.1.3 The Sublease is consistent with the Head Lease and, in the event of conflict between the terms of the Head Lease and the terms of the Sublease, the terms of the Head Lease will govern.

1.1.2 If the Sublease does not expressly contain the terms required by section 1.1.1, then such terms are hereby conclusively deemed to form part of the Sublease, which such terms will prevail over other terms of the Sublease, from time to time, to the extent of any conflict.[204]

1.1.3 Without limiting section 1.1.1 of this agreement:

1.1.3.1 the Sublessee will comply with all Laws regarding the Sublease, the Subleased Premises, and any activity on the Subleased Premises;

1.1.3.2 the Sublessee will develop the Subleased Premises in accordance with the Sublease and all environmental, use, and other development conditions and restrictions contained in, or arising from, the Head Lease and applicable to the Subleased Premises;[205]

1.1.3.3 the Sublessee waives any statutory or common law rights that it may have allowing the Sublessee to keep the unexpired term of the

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[202] These are required under ISC's Leasing policy.

[203] At common law, a sublease must end at least a day before the lease, otherwise the sublessor has no "remainder" and the sublease operates as an assignment instead.

[204] The Lessor does not review Subleases, even when consent is required, for substantive content. The review is administrative to determine that the prerequisites in the Lease, if any, have been met and that the document is capable of being registered in the Registry. As such, the Lessor is unaware if there is any conflict between the Lease and a Sublease, so this clause protects the Lessor's interest by eliminating any such conflict.

[205] This clause replicates the construction standards requirements in the Lease and allows the Lessor and the First Nation to enforce them directly against a Sublessee instead of, or as well as, against the Lessee.

Sublease or remain in occupation of any part of the Subleased Premises if the Head Lease ends before the expiration of the Term;[206]

1.1.3.4 on request from the Head Lessor or the First Nation, the Sublessee will promptly provide such Party written authorization to receive information from an Authority about the Sublessee's compliance or non-compliance with Laws regarding the Sublease, the Subleased Premises, or any activity on the Subleased Premises; and[207]

1.1.3.5 each of the Head Lessor and the First Nation may enter the Subleased Premises at any time during reasonable hours for the purpose of ensuring compliance with the terms of this agreement and the Head Lease, including, without limitation, the implementation of any terms and conditions, including all mitigation measures, timelines, and monitoring, required by a determination under an Environmental Review applicable to the Subleased Premises.[208]

1.2 **Release and Indemnity** – The Sublessee releases the Head Lessor, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives (the "**Releasees**") from all liability for loss (including economic loss), damage, and injury (including loss, damage, and injury arising out of the negligent actions or omissions of any Releasee) in any way caused by or resulting from:

1.2.1 any of the perils or injury against which the Sublessor has covenanted in the Head Lease to insure in relation to the Subleased Premises;

1.2.2 the Decision Maker determining under an Environmental Review that a Project proposed for the Subleased Premises should not proceed; or

1.2.3 the Head Lessor or the First Nation curing or attempting to cure a default under section 10 of the Head Lease in relation to the Subleased Premises,

and will indemnify and hold harmless the Releasees from any:

1.2.4 claims, demands, actions, suits, and other proceedings;

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[206] Provincial law and equity legislation (statutory rights) may not apply on reserve, but the courts' equitable jurisdiction (common law rights) may, so this clause indicates that the Sublessee will not seek relief from forfeiture against the Lessor if its Sublease terminates because of the early termination of the Lease. If it wishes to address this risk, then Option 4 would be more suitable as it provides non-disturbance rights.

[207] This clause replicates the ability to receive information about compliance with Laws in the Lease and allows the Lessor and the First Nation to enforce the provision directly against a Sublessee instead of, or as well as, against the Lessee.

[208] This clause replicates the access provisions in the Lease and allows the Lessor and the First Nation to enforce them directly against a Sublessee instead of, or as well as, against the Lessee.

1.2.5 judgments, liens, penalties, fines, and damages;

1.2.6 costs (including, but not limited to, solicitor-client costs, consultant fees, and expert fees), liabilities, and losses (including economic losses); and

1.2.7 sums paid in settlement of any matter,

of any kind, because of, or in connection with, the matters referred to in sections 1.2.1 - 1.2.3.[209]

1.3 **Representations and Warranties**

1.3.1 The Sublessor represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessor's behalf have the authority to bind the Sublessor to this agreement.

1.3.2 The Sublessee represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessee's behalf have the authority to bind the Sublessee to this agreement.

1.3.3 Except as explicitly set out in this agreement, the Head Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:

1.3.3.1 the terms of the Head Lease and the Sublease;

1.3.3.2 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

1.3.3.3 issues of title, encumbrances affecting title, and matters contained within the Registry;

1.3.3.4 access to and from the Premises and the Subleased Premises; and

1.3.3.5 the suitability of the Subleased Premises for the Sublessee.

2. GENERAL

2.1 **Registration** – The Sublessee will promptly submit a copy of this agreement to the Registry after it has been executed.

2.2 **Definitions** – A term not defined in this agreement but defined in the Lease has the same meaning as in the Lease.

[209] This clause replicates most of the Lessor's releases and indemnities in the Lease.

2.3 **Headings** – All headings are for convenience and reference only. They are not to be used to define, limit, enlarge, modify, or explain the scope or meaning of a provision.

2.4 **Binding on Successors** – This agreement will enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators, successors, assigns, and other legal representatives.

2.5 **Counterpart Execution** – This agreement may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party, such Party will promptly provide a copy of its originally executed agreement to the other Parties.[210]

IN WITNESS WHEREOF the Sublessor and Sublessee have executed this agreement for their benefit and for the benefit of the Head Lessor and the First Nation as of [Month Day, Year].

EXECUTED in the presence of:	)	**[SUBLESSOR'S NAME]**
	)	**If the Sublessor is a limited partnership, they sign as:**
	)	**[SUBLESSOR'S NAME]**, general partner of **[NAME OF LIMITED PARTNERSHIP]**
Witness as to the Sublessor's authorized signatory	)	[Name]
	)	I have authority to bind the Sublessor
EXECUTED in the presence of:	)	**[SUBLESSEE'S NAME]**
	)	**If the Sublessee is a limited partnership, they sign as:**
		[SUBLESSEE'S NAME], general partner of **[NAME OF LIMITED PARTNERSHIP]**
Witness as to the Sublessee's authorized signatory	)	
	)	[Name]

[210] See note 190.

)
) I have authority to bind the Sublessee
)

SCHEDULE "A" TO A SUBLEASE ACKNOWLEDGEMENT AGREEMENT

(*attach a copy of the Sublease*)

End of Option 2.

OPTION 3 – If Option 3 was chosen in the Subleases section, then use the following:

SUBLEASE CONSENT AGREEMENT[211]

This agreement commences on [Month Day, Year] and is made between:

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

(the "**Head Lessor**")

and:

[FIRST NATION],
a band within the meaning of the *Indian Act*, as represented by the Council

(the "**First Nation**")

and:

[SUBLESSOR'S NAME] [OPTIONAL: If the Sublessor is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessor's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No.

[211] Other than this being a bilateral contract rather than a unilateral contract and containing a required consent to the sublease, the comments in notes 202 - 210 are the same here.

X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Sublessor**")

and:

[SUBLESSEE'S NAME] [OPTIONAL: If the Sublessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Sublessee**")

(collectively the "**Parties**").

BACKGROUND

A. The Head Lessor leased certain lands in the Reserve to the Sublessor, by way of a lease to which the First Nation is a Party and which is dated [Month Day, Year] and registered in the Registry under No. [#] (the "**Lease**").

B. **[Set out all assignments and modifications of the Lease and modify definition if necessary.]**

C. The Sublessor has granted a sublease of the Subleased Premises to the Sublessee (the "**Sublease**"), **[OPTIONAL:** a copy of**]** which Sublease is attached as Schedule "A" to this agreement.

D. Under the Head Lease, the Sublease is not valid without the consent of each of the Head Lessor and the First Nation and without the Parties entering into this agreement.

NOW THEREFORE, in consideration of the representations, warranties, obligations, covenants, and agreements in this agreement, the Parties agree as follows:

1. SUBLEASE CONSENT

1.1 **Consent** – Each of the Head Lessor and the First Nation hereby consent to the Sublease.

2. COVENANTS OF THE SUBLESSOR AND THE SUBLESSEE

2.1 Required Lease Terms

2.1.1 The Sublessor and Sublessee each represent, warrant, covenant, and agree that the Sublease contains the following terms:

2.1.1.1 The term of the Sublease must end at least one day before the end of the Head Lease Term.

2.1.1.2 The Sublease must be expressly subject and subordinate to the Head Lease and to the rights of the Head Lessor and the First Nation under the Head Lease.

2.1.1.3 The Sublease must be consistent with the Head Lease and, in the event of conflict between the terms of the Head Lease and the terms of the Sublease, the terms of the Head Lease will govern.

OPTIONAL – Include the following section if Subleases require fair market rent:

2.1.1.4 The Sublease rent must be at least at fair market value, which means the most probable rent that the Subleased Premises should bring in a competitive and open market, reflecting all conditions of the Head Lease and the Sublease and assuming the following conditions:

2.1.1.4.1 The Sublessor and the Sublessee are typically motivated, well informed, well advised, and are acting prudently in an arm's length transaction.

2.1.1.4.2 A reasonable time is allowed for exposure in the open market and the rent represents the normal consideration for the Subleased Premises unaffected by undue stimuli or special fees or concessions granted by anyone associated with the transaction.

2.1.1.4.3 The Subleased Premises are owned by the Head Lessor in fee simple, free of all charges and encumbrances other than those registered in the Registry, and the inalienability or Indian reserve status of the Lands must not be a discounting factor and must not be used as a basis to lower valuation in comparing the Subleased Premises to other properties, whether or not such properties are Indian reserve lands.

2.1.1.4.4 The Subleased Premises do not include Improvements made after the date on which the Sublease begins and the contributory value of the Sublessee's Improvements must not be taken into account.

End of Optional language.

2.1.2 If the Sublease does not expressly contain the terms required by section 2.1.1, then such terms are hereby conclusively deemed to be part of the Sublease, which such terms will prevail over other terms of the Sublease, from time to time, to the extent of any conflict.

2.1.3 Without limiting section 2.1.1 of this agreement:

2.1.3.1 the Sublessee will comply with all Laws regarding the Sublease, the Subleased Premises, and any activity on the Subleased Premises;

2.1.3.2 the Sublessee will develop the Subleased Premises in accordance with the Sublease and all environmental, use, and other development conditions and restrictions contained in, or arising from, the Head Lease that are applicable to the Subleased Premises;

2.1.3.3 the Sublessee waives any statutory or common law rights that it may have allowing the Sublessee to keep the unexpired term of the Sublease or remain in occupation of any part of the Subleased Premises if the Head Lease ends before the expiration of the Term;

2.1.3.4 on request from the Head Lessor or the First Nation, the Sublessee will promptly provide such Party written authorization to receive information from an Authority about the Sublessee's compliance with Laws regarding the Sublease, the Subleased Premises, or any activity on the Subleased Premises; and

2.1.3.5 each of the Head Lessor and the First Nation may enter the Subleased Premises at any time during reasonable hours for the purpose of ensuring compliance with this agreement and the terms of the Head Lease, including, without limitation, the implementation of any terms, conditions, or mitigation measures identified in an Environmental Review of a Project on the Subleased Premises.

2.2 **Release and Indemnity** – The Sublessee releases the Head Lessor, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives (the "**Releasees**") from all liability for loss (including economic loss), damage, and injury (including loss, damage, and injury arising out of the negligent actions or omissions of any Releasee) in any way caused by or resulting from:

2.2.1 any of the perils or injury against which the Sublessor has covenanted in the Head Lease to insure in relation to the Subleased Premises;

2.2.2 the Decision Maker determining under an Environmental Review that a Project proposed for the Subleased Premises should not proceed; or

2.2.3 the Head Lessor or the First Nation curing or attempting to cure a default under section 10 of the Head Lease in relation to the Subleased Premises,

and will indemnify and hold harmless the Releasees from any:

2.2.4 claims, demands, actions, suits, and other proceedings;

2.2.5 judgments, liens, penalties, fines, and damages;

2.2.6 costs (including, but not limited to, solicitor-client costs, consultant fees, and expert fees), liabilities, and losses (including economic losses); and

2.2.7 sums paid in settlement of any matter,

of any kind, because of, or in connection with, the matters referred to in sections 2.2.1 - 2.2.3.

2.3 **Representations and Warranties**

2.3.1 The Sublessor represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessor's behalf have the authority to bind the Sublessor to this agreement.

2.3.2 The Sublessee represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessee's behalf have the authority to bind the Sublessee to this agreement.

2.3.3 Except as explicitly set out in this agreement, the Head Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:

2.3.3.1 the terms of the Head Lease and the Sublease;

2.3.3.2 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

2.3.3.3 issues of title, encumbrances affecting title, and matters contained within the Registry;

2.3.3.4 access to and from the Premises and the Subleased Premises; and

2.3.3.5 the suitability of the Subleased Premises for the Sublessee.

3. GENERAL

3.1 **Definitions** – A term not defined in this agreement but defined in the Lease has the same meaning as in the Lease.

3.2 **Headings** – All headings are for convenience and reference only. They are not to be used to define, limit, enlarge, modify, or explain the scope or meaning of a provision.

3.3 **Binding on Successors** – This agreement will enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators, successors, assigns, and other legal representatives.

3.4 **Counterpart Execution** – This agreement may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party, such Party will promptly provide a copy of its originally executed agreement to the other Parties.

The Parties have executed this agreement as of the date first written above.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Minister of Indigenous Services

_____
[Name]

EXECUTED in the presence of:)
)
)
)
)

_____
Witness as to the First Nation's authorized signatories

[FIRST NATION], as represented by the Council

_____
[Name]

_____
[Name]

I / We have authority to bind the First Nation

EXECUTED in the presence of:)
)
)

[SUBLESSOR'S NAME]

If the Sublessor is a limited partnership, they sign as:

[SUBLESSOR'S NAME], general partner of **[NAME OF LIMITED PARTNERSHIP]**

Witness as to the Sublessor's authorized signatory) [Name]
)
)
)
)

I have authority to bind the Sublessor

EXECUTED in the presence of:) **[SUBLESSEE'S NAME]**
)

If the Sublessee is a limited partnership, they sign as:

[SUBLESSEE'S NAME], general partner of **[NAME OF LIMITED PARTNERSHIP]**

Witness as to the Sublessee's authorized signatory)

) [Name]
)
)
)

I have authority to bind the Sublessee

SCHEDULE "A" TO A SUBLEASE CONSENT AGREEMENT

(*attach a copy of the Sublease*)

End of Option 3.

OPTION 4 – If Option 4 was chosen in the Subleases section, then use the following:

SUBLEASE [OPTIONAL: Include if Option 4B was chosen in the Subleases section: CONSENT AND] NON-DISTURBANCE AGREEMENT[212]

This agreement commences on [Month Day, Year] and is made between:

HIS MAJESTY THE KING IN RIGHT OF CANADA,
as represented by the Minister of Indigenous Services

(the "**Head Lessor**")

and:

[FIRST NATION],
a band within the meaning of the *Indian Act*, as represented by the Council

(the "**First Nation**")

and:

[SUBLESSOR'S NAME] [OPTIONAL: If the Sublessor is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessor's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

[212] Other than the non-disturbance rights, the comments in notes 202 - 210 are the same here.

(the "**Sublessor**")

and:

[SUBLESSEE'S NAME] [OPTIONAL: If the Sublessee is a corporation, limited partnership, society, utility or municipality, then type a comma after the Sublessee's Name and include the statute under which the entity received its authority and its incorporation number, if applicable. Corporate example: , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345 **Limited Partnership example:** , incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57; Incorporation No. X12345, as general partner of **[NAME OF LIMITED PARTNERSHIP]**, registered under the *Partnership Act*, R.S.B.C. 1996, c. 348; Registration No. Y12345 **End of option]**

(the "**Sublessee**")

(collectively the "**Parties**").

BACKGROUND:

A. The Head Lessor leased certain lands in the Reserve to the Sublessor, by way of a lease to which the First Nation is a Party and which is dated [Month Day, Year] and registered in the Registry under No. [#] (the "**Head Lease**").

B. **[Set out all assignments and modifications of the Head Lease and modify definition if necessary.]**

C. The Sublessor wants to sublease a portion of its interest in the Head Lease to the Sublessee by way of the proposed sublease (the "**Sublease**"), **[OPTIONAL:** a copy of**]** which is attached as Schedule "A" to this agreement.

D. Under the Head Lease, the Sublease is not valid until the Sublessee has entered into this agreement.

NOW THEREFORE, in consideration of the representations, warranties, obligations, covenants, and agreements in this agreement, the Parties agree as follows:

1. COVENANTS OF THE SUBLESSOR AND THE SUBLESSEE

1.1 **Compliance** – The Sublessor and Sublessee each represent, warrant, covenant, and agree that:

1.1.1 the Sublessee will comply with all Laws regarding the Sublease, the Subleased Premises, and any activity on the Subleased Premises;

1.1.2 the Sublessee will develop the Subleased Premises in accordance with the Sublease and all environmental, use, and other development conditions and restrictions contained in, or arising from, the Head Lease that are applicable to the Subleased Premises;

1.1.3 subject to section 2 of this agreement, the Sublessee waives any statutory or common law rights that it may have allowing the Sublessee to keep the unexpired term of the Sublease or remain in occupation of any part of the Subleased Premises if the Head Lease ends before the expiration of the Term;

1.1.4 on request from the Head Lessor or the First Nation, the Sublessee will promptly provide such Party written authorization to receive information from an Authority about the Sublessee's compliance with Laws regarding the Sublease, the Subleased Premises, or any activity on the Subleased Premises;

1.1.5 each of the Head Lessor and the First Nation may enter the Subleased Premises at any time during reasonable hours for the purpose of ensuring compliance with the terms of this agreement and the Head Lease, including, without limitation, the implementation of any terms, conditions, or mitigation measures identified in an Environmental Review of a Project on the Subleased Premises; and

1.1.6 the Sublessor and Sublessee will not modify the Sublease without the prior written consent of each of the Head Lessor and the First Nation.[213]

1.2 **Release and Indemnity** – The Sublessee releases the Head Lessor, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives (the "**Releasees**") from all liability for loss (including economic loss), damage, and injury (including loss, damage, and injury arising out of the negligent actions or omissions of any Releasee) in any way caused by or resulting from:

1.2.1 any of the perils or injury against which the Sublessor has covenanted in the Head Lease to insure in relation to the Subleased Premises;

1.2.2 the Decision Maker determining under an Environmental Review that a Project proposed for the Subleased Premises should not proceed; or

1.2.3 the Head Lessor or the First Nation curing or attempting to cure a default under section 10 of the Head Lease in relation to the Subleased Premises,

and will indemnify and hold harmless the Releasees from any:

1.2.4 claims, demands, actions, suits, and other proceedings;

[213] As the non-disturbance rights allow the Sublease to become a direct tenancy between the Lessor and the Sublessee, the Lessor and the First Nation will require the Sublease to be in a form satisfactory to them (Schedule F) and to not change from that form without their consent. See note 215.

1.2.5 judgments, liens, penalties, fines, and damages;

1.2.6 costs (including, but not limited to, solicitor-client costs, consultant fees, and expert fees), liabilities, and losses (including economic losses); and

1.2.7 sums paid in settlement of any matter,

of any kind, because of, or in connection with, the matters referred to in sections 2.2.1 - 2.2.3.

1.3 **Representations and Warranties**

1.3.1 The Sublessor represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessor's behalf have the authority to bind the Sublessor to this agreement.

1.3.2 The Sublessee represents and warrants to each of the Head Lessor and the First Nation that the person or persons signing this agreement on the Sublessee's behalf have the authority to bind the Sublessee to this agreement.

1.3.3 Except as explicitly set out in this agreement, the Head Lessor, the Minister, the First Nation, the Council, and their respective officials, servants, employees, agents, contractors, subcontractors, and other legal representatives have not made any representations or warranties with respect to:

1.3.3.1 the terms of the Head Lease and the Sublease;

1.3.3.2 the condition of the Premises, including the Premises' compliance with Laws and the presence of Contaminants on the Premises;

1.3.3.3 issues of title, encumbrances affecting title, and matters contained within the Registry;

1.3.3.4 access to and from the Premises and the Subleased Premises; and

1.3.3.5 the suitability of the Subleased Premises for the Sublessee.

2. NON-DISTURBANCE RIGHTS

2.1 **Right to Cure and Non-Disturbance –** If a Head Lease default occurs, then the Head Lessor will give notice of the default to the Sublessee, and:

2.1.1 if the default is capable of being remedied by the Sublessee, then the Sublessee has the right to remedy the default within the same period afforded the Sublessor under the Head Lease; and

2.1.2 if the default is not capable of being remedied by the Sublessee, and the default did not arise from an act or omission of the Sublessee, a subtenant of the

Sublessee, any other person on the Subleased Premises because of the Sublessee's rights under its Sublease, or any other person for whom the Sublessee is responsible in law, then the Sublessee has the rights set out in section 2.2 of this agreement.[214]

2.2 **Attornment and New Lease**

2.2.1 If the Head Lessor terminates the Head Lease and the Sublessee has rights arising from section 2.1.2 of this agreement, then, subject to section 2.2.2 of this agreement:

2.2.1.1 the Sublessee and the Head Lessor will attorn[215] to each other upon all the terms, conditions, covenants, and agreements contained in the Sublease, except as may be modified by this agreement,[216] and will attorn to the continued rights of the mortgagee of any then existing mortgage of the Sublease;

2.2.1.2 if requested by the Sublessee and there is no outstanding mortgage of the Sublease (or, if a mortgage exists, the mortgagee has consented), the Head Lessor, the First Nation, and the Sublessee will enter into a new lease for the balance of the term of the Sublease upon all the terms, conditions, covenants, and agreements contained in the Sublease, except as may be modified by this agreement ("**New Lease**");

2.2.1.3 if a mortgage of the Sublease existed prior to the termination of the Head Lease and the Head Lessor, the First Nation, and the Sublessee enter into a New Lease, then:

2.2.1.3.1 the Sublessee will grant a new mortgage of the New Lease to the mortgagee of the Sublease, unless alternate financing arrangements are made by the Sublessee to the satisfaction of such mortgagee; and

2.2.1.3.2 if required by the New Lease, the Head Lessor, the First Nation, and the Sublessee will provide consent or enter into any other agreement with the mortgagee of the New Lease as may be required by the New Lease.

---

[214] This clause provides the Sublessee with a right to notice of Lease default, a right to cure, and a right to non-disturbance if the Sublessee cannot cure.

[215] *Attorn* means to agree to the transfer to a new landlord-tenant relationship.

[216] Even though the Lessor and First Nation have reviewed the Sublease, not all provisions may be acceptable should the Lease end, so the Parties may, rather than imposing the changes wanted by the Lessor or the First Nation on the Sublease right away, provide in this agreement for changes that are required when the Lease/Sublease end.

2.2.2 The obligations of the Head Lessor to attorn to the Sublessee as tenant on the terms, conditions, covenants, and agreements contained in the Sublease and for the Head Lessor and First Nation to enter into a New Lease on such terms, conditions, covenants, and agreements, both as may be modified by this agreement, is subject to the Sublessee having remedied all defaults of the Head Lease that pertain to the Subleased Premises (except for defaults of the Sublessor that are not capable of being remedied by the Sublessee).

2.3 **Modifications**[217]

2.3.1 The terms, conditions, covenants, and agreements contained in the Sublease during the attornment are conclusively deemed to include all of the rights and obligations of the First Nation as if the First Nation had been a party to the Sublease to the same extent of the First Nation's rights and obligations under the Head Lease, *mutatis mutandis*, and the Parties agree to attorn to each other on that basis. A New Lease must include the First Nation as a party to the same extent as set out in this section 2.3.1.[218]

2.3.2 [Include others as necessary]

OPTIONAL: Include the following if the Head Lease requires the consent of the Head Lessor and First Nation to any Subleases (Option 4B in Subleases section):

3. CONSENT

3.1 **Consent to Sublease**

3.1.1 Each of the Head Lessor and the First Nation hereby consent to the Sublease.

End of Option.

4. GENERAL

4.1 **Delivery**

4.1.1 Delivery under this agreement is to be made in accordance with this section 4.1.1 to the following addresses:

To the Head Lessor:

Director, Lands and Economic Development
Indigenous Services Canada
[Regional Office]

[217] See note 215.

[218] As the Sublease will be a bilateral agreement, this clause is required to bring the First Nation into the attorned Sublease arrangement with the Lessor and Sublessee.

[Regional Office's Address]

Fax: [#]

Email: [Email]

To the First Nation:

[First Nation]
[First Nation's Address]

Fax: [#]

Email: [Email]

To the Sublessor:

[Sublessor's Name]
[Sublessor's Address]

Fax: [#]

Email: [Email]

To the Sublessee:

[Sublessee's Name]
[Sublessee's Address]

Fax: [#]

Email: [Email]

4.1.2 If a question arises as to the date on which a delivery is made, it will be conclusively deemed to have been made:

4.1.2.1 if sent by fax or email, the day of transmission if transmitted before 3:00 p.m. [Time zone] time, otherwise, the next day;

4.1.2.2 if sent by mail, on the sixth day after the notice was mailed; or

4.1.2.3 if sent by means other than fax, email, or mail, the day it is received.

4.1.3 If the postal service is interrupted or threatened to be interrupted, then delivery will only be made by means other than mail.

4.1.4 A Party may change its contact information by informing the other Parties of the new contact information and the change will take effect on the effective date set out in the notice or 30 days after the notice is delivered, whichever is later.

4.2 **Definitions** – A term not defined in this agreement but defined in the Lease has the same meaning as in the Lease.

4.3 **Headings** – All headings are for convenience and reference only. They are not to be used to define, limit, enlarge, modify, or explain the scope or meaning of a provision.

4.4 **Binding on Successors** – This agreement will enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators, successors, assigns, and other legal representatives.

4.5 **Counterpart Execution** – This agreement may be executed in one or more counterparts, each of which is considered to be an original but all of which together constitute one and the same document. Upon execution by a Party, such Party will promptly provide a copy of its originally executed agreement to the other Parties.[219]

The Parties have executed this agreement as of the date first written above.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Minister of Indigenous Services

_____
[Name]

EXECUTED in the presence of:	)	**[FIRST NATION]**, as represented by the Council
_____	)	_____
Witness as to the First Nation's authorized signatories	)	[Name]
	)	_____
	)	[Name]
	)	I / We have authority to bind the First Nation

[219] See note 190.

	)	_____
	)	
EXECUTED in the presence of:	)	**[SUBLESSOR'S NAME]**
	)	
	)	**If the Sublessor is a limited partnership, they sign as:**
		[SUBLESSOR'S NAME], general partner of **[NAME OF LIMITED PARTNERSHIP]**
		_____
Witness as to the Sublessor's authorized signatory	)	[Name]
	)	
	)	I have authority to bind the Sublessor
	)	
EXECUTED in the presence of:	)	**[SUBLESSEE'S NAME]**
	)	
	)	
		_____
	)	[Name]
_____	)	
Witness as to the Sublessee's authorized signatory		I have authority to bind the Sublessee

SCHEDULE "A" TO A SUBLEASE [OPTIONAL: Include if Option 4B was chosen in the Subleases section: CONSENT AND] NON-DISTURBANCE AGREEMENT

(*attach a copy of the Sublease*)

SCHEDULE F

FORM OF SUBLEASE

(*attach the form of Sublease*)

Ensure that the form of Sublease complies with ISC Leasing Policy:

- The term of a Sublease must end at least one day before the end of the Head Lease Term.
- The Sublease must be consistent with the terms of the Head Lease.
- The Sublease must include a term that it is subordinate to the Head Lease and that it will automatically terminate when the Head Lease ends.
- Sublease rent can be any amount if the Head Lease rent is fair market value. If rent under the Head Lease is for less than fair market value (e.g., nominal rent to a First Nation entity), then Sublease rent is to be fair market rent.

End of Option 4.

OPTIONAL – When an individual executes the Lease or any of the Schedules on that individual's own behalf, then include the following right after the signatures:

AFFIDAVIT OF WITNESS[220]

I, _____ (*name)*, of _____ (*name of city, town, village, etc. where you live*), _____ (*name of province where you live*), make oath and say:

1. I saw _____ sign the lease.

2. I know the person referred to in paragraph 1 and I believe that that person is at least [age of majority in Province] years old.

3. I am the person who signed my name as witness on the lease and I am at least [age of majority in Province] years old.

SWORN before me in the _____)
of _____, in the)
Province of _____)
this _____ day of _____, 20___)
)
_____)
A Notary Public in and for the Province)
of _____)
or a Commissioner for taking Oaths.)
)
_____)
Address)
_____)
Telephone # / Fax #)
_____)
Notary's Authority)
)

_____
Witness

** Must be signed by a person who is not a party to the lease.

[220] If an individual signs the Lease or any of the scheduled documents as a Party (rather than as a respresentative), then the Registry requires an Affidavit of Witness to be executed.

OPTIONAL: If a CILA and/or CIFA is required, then use the following:

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, _____, of the _____ (city, town, village, etc.) of _____, in the Province of _____, DO HEREBY CERTIFY AS FOLLOWS:

1. I am a member in good standing with the Law Society of _____ (*Province*) and am entitled to practice as a lawyer in _____ (*Province*).

2. I have been retained in my professional capacity by [First Nation] (the "**First Nation**") to act as legal counsel to advise the First Nation with respect to the legal nature and effect of a proposed lease between His Majesty the King in right of Canada, the First Nation, and [Lessee's Name] of [Legal Description] for a term of [#] years (the "**Legal Advice**").

3. I provided an overview of the Legal Advice at a duly convened and conducted meeting of the First Nation's Band Council held at _____ (*location*) on _____ (*date*).

4. I attended an information meeting for members of the First Nation on _____ (*date*) between the hours of _____ and _____ at _____ (*location*) and provided an overview of the Legal Advice.

DATED at the _____ (city, town, village, etc.) of _____, in the Province of _____, this _____day of _____, 20____.

_____

Barrister and Solicitor

CERTIFICATE OF INDEPENDENT FINANCIAL ADVICE

I, _____, of the _____ (city, town, village, etc.) of _____, in the Province of _____, DO HEREBY CERTIFY AS FOLLOWS:

1. I am a member in good standing of the _____ Institute of Chartered Accountants and qualified to practice as a Chartered Accountant in the Province of _____.

2. I have been retained in my professional capacity by [First Nation] (the "**First Nation**") to advise the First Nation with respect to the financial nature and effect of a proposed lease between His Majesty the King in right of Canada, the First Nation, and [Lessee's Name] of [Legal Description] for a term of [#] years, including but not limited to the costs and risks to the First Nation in obtaining rents from sublessees beneficially through a First Nation entity as opposed to those costs and risks from a fair market rent head lease between the Lessor and an arm's-length lessee (the "**Financial Advice**").

3. At a duly convened and conducted meeting of the First Nation's Band Council held at _____ (*location*) on _____ (*date*), I provided the First Nation with the Financial Advice and was able to answer questions about the Financial Advice.

4. At an information meeting for members of the First Nation on _____ (*date*) between the hours of _____ and _____ at _____ (*location*), I provided an overview of the Financial Advice and was able to answer questions about the Financial Advice.

DATED at the _____ (city, town, village, etc.) of _____, in the Province of _____, this _____day of _____, 20____.

_____ _____

Witness CHARTERED ACCOUNTANT

End of Option.