

Stan Sauerwein

Old Native Leases Turning Carriers Off

This article first appeared in BC Broker magazine in April 2006.

An insurance standoff that has been brewing for more than a year over coverage on older residential developments on First Nations land has come to a head in the Okanagan and Kamloops regions.

Markets to cover pre-existing residential leases to non-Natives living on First Nations land appear to have virtually dried up.

It seems a few companies are willing to comply with all the insurance requirements specified by the wording in leases that were commonly used by the federal government in the past. The 99-year leases have been employed since the early 1970s.

Westbank has become the flashpoint for frustration in this coverage fracas. Because of a progressive development philosophy, the Westbank First Nation (WFN) has created the largest single collection of such leases in Canada. Similar reluctance by insurers to extend this coverage, however, has recently been encountered by the Kamloops Indian Band.

A sizeable slice of property west of Kelowna belongs to the Westbank First Nation. The WFN, first to achieve self-government status in the country, has been developing parts of its reserve lands for residential use for more than three decades. In fact, it has been estimated that 25 percent of the non-Native homeowners residing on First Nation's land in Canada live on WFN property. Approximately 8000 homeowners fit that description in Westbank and the number is rising monthly.

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At issue are the subleases that have been employed by Ottawa. After years of providing coverage, carriers have recently decided not to insure homes on leased reserve land because of an apparent inability to define risks. There are no unresolved concerns when it comes to commercial insurance.

The variety of language in the pre-existing leases used by different First Nations, and a huge list of unanswered questions about risks, has left underwriters nearly as willing to listen to appeals for coverage as nuns would be to sing heavy metal lyrics.

Insurance companies polled on the topic have been circumspect and brokers, even those known to have handled the bulk of this business in the past, refuse to publicly discuss the matter. To call the situation a hot potato may be an understatement.

A company representative, who spoke on the condition of anonymity, says everything boils down to lease language. "Underwriters take risks all day long but they aren't risktakers by their very nature. It's fear of the unknown when it comes to the leases. We want to know whom we are covering. When we ask questions, we aren't getting answers and the legal opinion is wait until it goes to court. Underwriters get kind of excited when they hear that."

So, insurers want the leases rewritten, preferably with one-size-fits-all wording. WFN, which has thousands of pre-existing subleases, contends that request is unreasonable. The general legal counsel for WFN, however, adds that in the WFN case at least, there could be a simple solution.

Westbank residential communities involved are in the Tsinstikeptum Indian Reserve, part of the lands of the WFN. Having achieved self-government, WFN now has full control of its own lands.

For development to occur in the past, individual band members



who had possession of reserve land requested the federal government enter into 99-year leases with developers. Essentially, the band member agreed to suspend occupation of the land for the term in return for payment of prepaid rent.

The resulting “headlease” for each developer allowed subdivision of the land and issuance of “subleases.” Subject to the terms of those subleases, as long as homeowners fulfilled the lease obligations that included things like paying property taxes and getting insurance, they were entitled to occupy the property in the same manner as if they owned a home built on freehold land.

Those lease terms are the rub. According to WFN legal advisors, while homeowners are able to secure coverage for their homes now, their policies do not conform to the language of the old leases in at least three areas.

- The leases call for 30 days’ notice of cancellation, which is not the industry standard.
- They request a Waiver of Subrogation against the sublessor or WFN; insurers feel the sublessor or WFN should be responsible for any loss or damage covered by insurance that may result from the negligence of the sublessor or WFN.
- Finally, the leases specify having Additional Named Insureds added to the policy; this has been determined unacceptable by insurers. “Basically, insurers will not extend a policy that may inadvertently pick up the other activities of the additional insured,” WFN legal counsel states.

“It was a standard form of lease that was used by Canada. The headleases had certain requirements for insurance and that’s Canada-wide with a template preferred by Canada. It’s not unique to WFN. It’s everywhere,” says Kirk Dressler, WFN council secretary.

“With thousands of subleases, for WFN to attempt to modify each one of

them legally and contact the parties involved and get independent legal advice is an administrative nightmare. It’s just not practicable.

“While the solution the insurance companies propose is unreasonable and unrealistic, we propose an alternate solution whereby WFN and the developers involved would waive by letter of agreement, or otherwise, the requirement of certain provisions in the lease. It seems to us this could work and our other lawyers are comfortable with it, but we can’t get a response from the insurance industry. They won’t indicate why or why not that’s acceptable to them. They decline to respond and only say *we don’t want to insure*.

“We’d be willing to relax those provisions to what the insurers consider are a commercially reasonable standard. We’d conform with other leases,” he says.

He adds that insurance coverage is not an issue for new leases, because under the land rules for self-government, the leases reflect those used anywhere else. “We don’t have these old Indian Affairs leases.”

“We want to have rapid development here,” says Dressler. “The modern leases will reflect the commercial reality off the reserve, as well. We don’t want problems obtaining coverage.”

A solution could be simple, but it will require insurance companies to meet with the WFN and talk the matter through. So far, Dressler says, there have been no takers. ▲

Stan Sauerwein is a freelance writer based in Kelowna. Author of 14 books, he specializes in business and travel writing and has publishing credits in magazines and newspapers across North America. Stan is a Professional Member of TWUC, PWAC, CAJ, and FBCW.

Voice: 250 768-9769
www.stoneshoeexpress.com
www.stansauerwein.com