Actton Super-Save Gas Stations Ltd. v. Eneas: Proper tenure for businesses on reserves

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The BC Supreme Court recently issued a judgment about occupation of reserve land in *Actton Super-Save Gas Stations Ltd. v. Eneas*, 2024 BCSC 743 (*Eneas*). The decision is an important reminder that non-band members seeking to occupy or use *Indian Act* reserve land must have a valid tenure. A non-band member occupying or using reserve land without valid tenure can be subject to eviction on limited notice, as well as prosecution and civil liability in trespass.

Background

In *Eneas,* Actton Super-Save Gas Stations Ltd. (Super Save) operated a gas station on the reserve land of the Penticton Indian Band (also known as the SnPink'tn Indian Band). Mr. Eneas held a Certificate of Possession (CP) on the reserve and, in 1987, he built a gas station on reserve which he later purported to lease to Super Save. The supposed lease was based on a precedent provided by Super Save which did not refer to the fact that the land was on reserve. The federal Crown was not a party to the agreement, and the federal government never approved the lease. The court described the lease as a "buckshee lease", which was legally invalid and unenforceable.

The most recent version of the lease purported to last until 2034; however, at the beginning of 2024, the CP holders told Super Save that they viewed the relationship as "no longer in their interest" and demanded vacant possession. On a without-notice basis, Super Save obtained an interim injunction preventing the defendants from interfering with its business operations at the gas station for 60 days. That order expired.

Super Save applied to extend the injunction, but Justice Morley denied the application. He held that granting the order would amount to allowing a non-band member to occupy reserve land, contrary to the *Indian Act*. Although Penticton Indian Band Council did not enforce its Trespass Bylaws against Super Save, Justice Morley found that this had no bearing on the issue. Super Save was in trespass, regardless of whether the Band Council enforced its bylaws.

Commentary

Reserve land under the *Indian Act* falls within federal jurisdiction. Subsection 28(1) of the *Indian Act* prohibits a non-band member from occupying or using reserve land, unless the Minister issues a tenure. The statutory prohibition in s. 28(1) overrides the court's jurisdiction to issue an order that has the effect of providing occupation of reserve land to a non-member of a band for any duration.

If a First Nation member holds a portion of reserve land under a CP, the member may apply to the federal Minister of Indigenous Services to lease the land to a third party under s. 58(3) of the *Indian Act*. The Minister must consult the band and act in accordance with the Minister's fiduciary duty to the band as a whole. If the Minister decides to issue a lease for a CP holder's land, the lease is between the third party and the federal Crown.

It is important to note that there are multiple systems for the management of First Nation lands. First Nations can opt into the system set out in the *Framework Agreement on First Nation Land Management Act* (*Framework Agreement Act*). If a First Nation opts into the *Framework Agreement Act*, the First Nation can create a land code that provides more flexibility in granting interests in reserve lands. There are other systems under treaties and self-government agreements with First Nations. However, in *Eneas*, the Penticton Indian Band did not opt into the *Framework Agreement Act*, a treaty, or a self-government agreement for land management. The regime under the *Indian Act* therefore applied.

In *Eneas*, Justice Morley acknowledged that, in specific circumstances, a buckshee lease may not give someone a right to occupy the land, but it could give rise to a right to damages if it contains lawful obligations that were not performed. Such a claim for damages might arise in situations where:

- The CP holder represented that they had the authority to convey an interest in reserve land and the non-band member reasonably relied on those representations to their detriment. However, Justice Morley expressed skepticism as to how a corporation in Super Save's position could reasonably believe that it had a valid agreement.
- There is a promise by the CP holder to apply under s. 58(3) of the *Indian Act* and the CP holder breaches this promise (see *D. Sloan Consultants Ltd. v. Derrickson*, 1991 CanLII 368 (B.C.C.A.), 61 B.C.L.R. (2d) 370).
- The non-band member has an argument for unjust enrichment for improvements to reserve land if there is no valid reason for the defendants to keep the value of those improvements.

Since this decision solely related to an application for an interim injunction, Justice Morley did not decide whether damages might be available. However, these potential damages were separate from the relief that Super Save was seeking – an injunction permitting it to continue occupying the gas station on reserve.

Justice Morley refused to grant the requested injunction, relying on the statutory prohibition on non-band members occupying reserve land without a permit or valid lease. He also issued a declaration that Super Save had no right to continue in possession of the gas station and that any continued occupation was in trespass.

Key takeaways

As part of the advancement of economic reconciliation, we see increasing degrees of development on reserve lands in Canada. It is imperative for prospective tenants to make sure they receive a valid tenure before operations begin.

Without a valid tenure, non-band members operating businesses or other projects on reserve land can face eviction on short notice, as well as the prospect of losing out on the value of their investments and even exposure to prosecution for trespass in extreme circumstances. Even if a tenant is confident in their informal relationships, lenders and insurers may be reluctant to extend credit or coverage to on-reserve businesses without proper tenure.

Proper tenure on First Nation lands can take a number of forms, including but not limited to:

- A permit under s. 28(2) of the *Indian Act*;
- A lease under s. 53(1) of the *Indian Act;*
- A lease of CP land under s. 58(3) of the *Indian Act*;
- A right of way under s. 35 of the *Indian Act;*
- "Ancillary" licences or permits under associated statutes like the *Indian Oil and Gas Act,* or regulations like the *Indian Mining Regulations* (except in British Columbia), the *Indian Timber Regulations*, or *Indian Timber Harvesting Regulations;*
- A tenure under a Land Code, for First Nations who are participating in the *Framework Agreement for First Nation Land Management Act;* and
- Where the First Nation has a self-government agreement or modern treaty, a tenure under the applicable First Nation law.

BLG regularly advises clients on matters relating to tenure on reserve lands, including the negotiation of permits, leases and other tenures and commercial agreements. If you have any questions about this topic, please reach out to any of the key contacts below.

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