IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Actton Super-Save Gas Stations Ltd. v. Eneas,* 2024 BCSC 743

Date: 20240502
Docket: S241054
Registry: Vancouver

Between:

Actton Super-Save Gas Stations Ltd.

Plaintiff

And:

Adam Eneas and Sandi Detjen

Defendants

Before: The Honourable Justice Morley

Reasons for Judgment (Interlocutory Injunction Request)

Counsel for the Plaintiff:	M. B. Funt
Counsel for the Defendants:	J. Cytrynbaum A.J.A. Hoekstra
Place and Date of Hearing:	Vancouver, B.C. April 24, 2024
Place and Date of Judgment:	Vancouver, B.C. May 2, 2024

Table of Contents

I. INTRODUCTION AND OVERVIEW

[1] This application raises a fundamental question: Can a court order ongoing occupation of reserve land to a non-member of a band pending trial if that non-member has not obtained a valid interest under the *Indian Act*?

[2] Actton Super-Save Gas Stations Ltd. ("Super Save") operates a gas station at 101 Green Mountain Road on the reserve land of the Penticton Indian Band (also known as the SnPink'tn Indian Band). Adam Eneas is a member of the Band and holds a Certificate of Possession over the lands on which the gas station is built. He originally built the gas station and operated it with his wife, the other defendant Sandi Detjen. Almost thirty years ago, the parties entered into an agreement that purports to be a lease providing that Super Save would operate the gas station in return for payments to Mr. Eneas and Ms. Detjen. The parties have purported to extend the terms of the agreement a number of times, now up to 2035. However, no lease has ever been approved by the Minister responsible for the *Indian Act* under s. 58(3) of that *Act*.

[3] Such an arrangement is often referred to as a "buckshee lease". As I will discuss later, it is well-established that buckshee leases are legally invalid and unenforceable: *Indian Act*, R.S.C., 1985, c. I-5, s. 28(1).

[4] At the beginning of 2024, the defendants 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 has now expired.

[5] Super Save asks me to extend similar terms until their action for breach of the agreement can be heard. The order they seek would prevent the defendants—or any other person having notice of the order—from interfering with Super Save's business operations of the gas station. As counsel for Super Save frankly acknowledged, this would amount to an order that it continue in possession or occupation of reserve land until trial.

[6] I cannot make such an order. It is prohibited by ss. 28 and 29 of the *Indian Act*. These prohibitions are deeply rooted in Canada's constitutional history.

[7] In some circumstances, a buckshee lease could be interpreted as giving rise to a right to damages if it contains lawful obligations that were not performed. Super Save may have a cause of action if, as alleged, the defendants represented that they had the authority to convey an interest in reserve land and Super Save reasonably relied on those representations to its detriment. It may have an argument for unjust enrichment for improvements to the gas station if there is no juristic reason for the defendants to keep the value of these improvements. These allegations are all disputed, but they at least arguably raise a "serious question to be tried" as to whether Super Save could obtain *damages*.

[8] But while Super Save may have a *monetary* remedy against the defendants, it cannot possibly obtain an order for possession or occupation of the land, on either a permanent or interlocutory basis. Were I to give such an order, I would plainly be contradicting the requirements of the *Indian Act*. As a constitutionally-valid statute, the *Indian Act* limits the Court's inherent or equitable jurisdiction.

[9] Since I *cannot* give the injunction sought, I need not consider the three-part test for exercising *discretion* to do so under *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at 334. I have no discretion. Regardless of the *RJR-MacDonald* factors, the application must be dismissed and Super Save must provide the defendants vacant possession after being given an opportunity to remove its chattels.

II. BACKGROUND

[10] It is critical to the legal issues on this application that it involves the occupation of reserve land. It is thus necessary to briefly describe the legal principles that apply.

[11] A fundamental underlying purpose of the *Indian Act* is to "maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any

individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee": *The Queen v. Devereux*, 1965 CanLII 54 (SCC), [1965] S.C.R. 567 at p. 572.[1]

[12] This is made clear by s. 28(1) of the *Indian Act*, which states as follows:

> Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

[13] Justice G. P. Weatherill explained the underlying principles comprehensively in *Ziprick v. Simpson Estate*, 2020 BCSC 401, beginning at para. 70. The rules limiting the ability of a member or a band to create occupation or use rights for non-members are rooted in Canada's constitutional order.

[14] The Royal Proclamation of 1763, in order to prevent the "frauds and abuses" recognized to have been committed in the course of European settlement, forbid British subjects from "making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved [to Indigenous peoples], without our especial leave and Licence for that Purpose [first obtained]" and required that all purchases of Indigenous lands be by the Crown.

[15] At Confederation, s. 91(24) of the *Constitution Act, 1867* placed legislation whose matter was in relation to "lands reserved for Indians" exclusively within the competence of the federal Parliament. The *Indian Act*, enacted shortly afterwards, provides that title to reserve land is vested in the Federal Crown for the use and benefit of the respective bands for which they were set apart. Under the *Indian Act*, only the minister responsible for that Act (now the Minister of Indigenous Services) can grant interests in reserve lands. In doing so, the Minister must act in accordance with a strict fiduciary duty to the band as a whole. Any non-band member occupying

[1] Strictly speaking, a "locatee" is a member of an Indian Band who holds a "Location Ticket", which was the basis of an individual right to possession under early versions of the *Indian Act.* The same principle applies to any other form of allotment of the right to possession to a member, such as a Certificate of Possession under s. 20(5), who are also sometimes loosely referred to as "locatees".

reserve land without being granted an interest is in trespass: *Ziprick* at para. 71, citing *Indian Act*, ss. 20–29, 37–41, 58(3); *The Queen v. Devereux*, 1965 CanLII 54 (SCC), [1965] S.C.R. 567 at 572.

[16] If land is within the area described in a certificate of possession, the member entitled to possession may apply *to the Minister* for a lease to a third party under s. 58(3) of the *Act*. Such a lease must be for the benefit of that member. However, the member's interests are not the only thing the Minister must consider. The band must be consulted and issuing the lease must be consistent with the Minister's fiduciary duty to the band as a whole: *Ziprick* at para. 73, citing *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 1999 CanLII 9388 (FCA), [2000] 2 F.C. 314 (F.C.A.) at paras. 56–57. The lease is *not* between the lessee and the member, but between the lessee and the Federal Crown, as represented by the Minister.

[17] Canadians have come to understand that the *Indian Act* was a vehicle of colonialism and was heavily inflected with racist and paternalistic assumptions. However, Indigenous peoples overwhelmingly rejected the proposal of the 1969 Statement of the Government of Canada on Indian Policy (the "White Paper") to abolish the restrictions on alienation to non-members of reserve land contained in the *Indian Act*: see *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 (*Looking Forward, Looking Back* (1996)) at p. 238. While alienability of land is highly valued in English-derived legal cultures as a means for promoting individual autonomy and economic development, it has the potential to undermine community cohesion and the continued existence of a land base for collective self-government. It was decisively rejected for reserve lands in 1969.

[18] I note parenthetically that the system of land management prescribed by the *Indian Act* is not the only system for creating and transferring interests on reserve land. A prominent example of an alternative is the opt-in system created by the Framework Agreement on First Nation Land Management originally agreed to by 13 First Nations and the federal Minister of Indian Affairs and Northern Development

in 1996 and currently given legal force as federal law by the *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121. In many cases, land codes First Nations create under this regime make it easier to create leasehold interests for non-members, although few if any allow certificate of possession holders to do this completely without restriction. Other regimes exist under treaties and self-government agreements. The important point for the purposes of this application is that all these regimes depend on the relevant First Nation consenting to them. The Penticton Indian Band has never decided to do this. Thus the provisions of the *Indian Act* continue to apply.

[19] As a result, it is not lawful for anyone other than the Minister to create a right to occupy reserve land, and the Minister must do so consistent with the applicable provisions of the *Act*, in this case s. 58(3), and the fiduciary duties of the Crown.

[20] Informal arrangements known as “buckshee leases” exist as a matter of social fact, but they are “illegal and unenforceable”: *Ziprick* at para. 72. At most, an agreement that contains a buckshee lease may create personal obligations between the parties, enforceable in damages. It cannot create a right to occupy reserve land.

Factual Background

[21] Mr. Eneas is the holder of a Certificate of Possession over lands located on the Penticton Reserve #1, which he inherited from his mother. In 1987, he built a gas station on these lands, which he ran first with a partner and then with Ms. Detjen.

[22] In 1995, Mr. Eneas and Ms. Detjen met with William D. Vandekerkhove, the sole director of Super Save, and Jim Allen, its President of Retail. According to Mr. Eneas, the discussion was brief. Super Save had lost its nearby Woodward location. Super Save offered payments if Mr. Eneas and Ms. Detjen would allow Super Save to operate the gas station beginning June 1, 1995. The parties came to a handshake deal.

[23] Mr. Eneas, Mr. Allen and Mr. Vandekerkhove have all provided affidavits about this conversation. These disagree on important points. Because this is an

interlocutory injunction, findings of fact are only relevant to the extent they go to whether the plaintiff has demonstrated a "serious question to be tried". As a result, I do not need to resolve the differences and will assume for present purposes that the plaintiff may be able to establish Messrs. Allen and Vandekerkhove's version of events at trial.

[24] On Messrs. Vandekerkhove and Allen's account, Mr. Eneas represented that he had authority to enter into a lease with them and that they did not need approval of the Penticton Indian Band council. (Although they do not specifically mention this, they imply he made no reference to the need for approval by the federal minister responsible for the *Indian Act*). Mr. Vandekerkhove said he asked Mr. Eneas twice whether Super Save needed to consult with the Penticton Indian Band. He deposes that "Mr. Eneas confirmed that the land was his and his alone to lease". Mr. Allen says Mr. Eneas "repeated several times that the Site was on his land, it was not owned or controlled by the Penticton Indian Band, and that it was his to lease".

[25] Neither Mr. Vandekerkhove nor Mr. Allen say anything about what, if any, due diligence they did about determining legal rights in relation to reserve land. I note that James Kitsul, Super Save's Corporate Counsel is given as the individual to whom any notices or other documents required under the Lease should be provided to when Mr. Eneas or Ms. Detjen were to give any required notice. Mr. Eneas deposes to dealing with a "legal department". If this dispute goes to trial, Super Save will have to explain how it was reasonable for a corporation in Super Save's position to conclude it had an agreement for occupation of reserve land, but I do not need to address this, since I accept that these alleged representations give rise to a "serious question" as to an action for damages.

[26] In any event, it is common ground that even if reliance on these representations were completely reasonable on Super Save's part, this could not give it a present or future right to continued occupation.

[27] Mr. Eneas denies that he ever told Mr. Vandekerkhove or Mr. Allen that an agreement with him and Ms. Detjen would be authorized under the *Indian Act* or that

he would seek approval of a lease from the Minister responsible for the *Indian Act*. He says he was well-aware in 1995, based on his considerable experience, that anyone seeking enforceable legal rights on reserve land requires both the approval of the holder of a Certificate of Possession and a lease from the Minister. He deposes that it was his practice to explain to parties seeking the use of lands over which he held a Certificate of Possession of the difference between a lease that is compliant with the *Indian Act* and buckshee leases and that he has negotiated both. While he does not specifically recall this in the discussion with Mr. Vandekerkhove and Mr. Allen, he emphatically denies making any representation that they were obtaining legally enforceable rights or that he would apply for a lease from the Minister.

[28] In any event, Super Save sent Mr. Eneas and Ms. Detjen a “lease agreement”, which they signed. Mr. Eneas deposes that he saw it as an attempt to “record” the handshake agreement and reviewed it for the financial terms and period of time Super Save could operate the gas bar. Super Save refers to the agreement simply as a “lease”. It refers to Super Save as the “tenant” and Mr. Eneas and Ms. Detjen as the “landlords”.

[29] I note several facts about this document:

a) It does not seem to have been written with a view to the fact that the subject premises were on reserve land. This is mentioned nowhere in the agreement. The lease purports to “demise and lease” the premises. I find that the agreement was based on a precedent Super Save used generally for non-reserve land.

b) The Federal Crown is not a party to the agreement.

c) Super Save has a right to identify the site as a Super Save Gas service station, install gasoline pumps, lighting, blue coloured steel around the canopy, an above ground propane storage taken and remote propane

dispenser and retains the property interest in this equipment and an entitlement to remove it at its cost.

d) There is a severance clause (Clause 19) that provides that if any term or provision of the agreement is invalid or unenforceable, the remainder of the Lease is unaffected and the remainder is enforceable to the fullest extent permitted by law.

e) There is also a complete agreement or "No Other Representations" clause (Clause 26) that provides that the parties agree that they and their servants, agents or employees, "have made no representations, warranties, terms or conditions other than as herein set forth in writing".

f) The cost of replacement of underground storage tanks and lines was split equally.

g) Mr. Eneas and Ms. Detjen were entitled to $2,000 per month plus $.85 cents per litre sold above 200,000 litres of gasoline in a given month.

[30] The original term of the "lease" was for ten years, until May 31, 2005. Under the original agreement, Super Save was entitled to tow extensions, each for five years (i.e., ultimately up to May 31, 2015).

[31] Effective June 1, 2005, the parties entered into a "renewal lease". Part of the agreement was that there would be a third and fourth renewal (from June 2015-May 2020 and from June 2020-May 2025) in return for a commitment by Super Save to remove and replace the underground storage tanks, lines and pumps no later than December 1, 2007. Mr. Vandekerkhove deposes that this term was "non-negotiable for Mr. Eneas".

[32] Under the "renewal lease", Super Save increased the amount of compensation. It also agreed to pay an additional $1,000 per month until it installed new underground tanks.

[33] In subsequent negotiations, the amount of compensation increased further. A 2017 renewal purported to give Super Save the right to two further five-year renewals, the first from June 1, 2025 to May 31, 2030 and the final, sixth renewal, from June 1, 2030 to May 31, 2035. In consideration for this, Super Save agreed to spend up to $80,000 upgrading the convenience store.

Current Dispute

[34] In a letter dated January 17, 2024 to the attention of Mr. Vandekerkhove, Mr. Eneas, Ms. Detjen and John Eneas wrote “to advise that we have decided to take back our gas station operation located on Green Mountain Road [...] as we wish to regain the use and control of our property for our own business plans”. Mr. Eneas requested that Super Save vacate no later than February 25 at midnight, removing all Super Save branding. Mr. Eneas asked to be informed when Super Save would attend to remove its property, which he noted included propane equipment and signage. The letter included an offer to pay $80,000 in recognition of Super Save’s costs to upgrade the convenience store.

[35] Counsel for Super Save wrote back in a letter dated February 8, 2024. The letter set out Super Save’s position on a number of issues. Of importance to this application, Super Save’s counsel stated, “Super Save does not intend to leave the property unless directed by a court of competent jurisdiction”.

[36] On February 12, 2024, counsel for the defendants wrote to counsel for Super Save setting out their position that Super Save was in trespass contrary to the *Indian Act*. This letter demanded vacant possession by February 18, 2024 at noon. The reason for the acceleration of this demand is not entirely clear.

[37] Super Save responded by requesting a 60-day without notice interim injunction application, which was heard and decided by Justice Sharma on February 14, 2024. She ordered that the respondents, their agents and any other person having notice of her order be enjoined and restrained from interfering in any manner with the business operations of Super Save at 101 Green Mountain Road for 60 days.

[38] This action was filed on February 27, 2024.

[39] Justice Sharma's order would have expired shortly before this matter was brought on for hearing. I understand that may have been as a result of availability of counsel. In any event, the defendants have agreed not to take any action until this Court has an opportunity to deliver reasons.

III. DISCUSSION

Do I Have Jurisdiction to Make the Order Sought?

[40] Before I get to the standard test for interlocutory injunctive relief, as set out in *RJR-MacDonald*, I must first ask whether this Court has the authority or jurisdiction to issue the order sought. There is no question that as a court of equity, the Court generally has the authority to enjoin parties on an interlocutory basis to ensure that parties with serious questions to be tried do not suffer irreparable harm as a result of a change in the *status quo* before trial. However, this authority is limited by constitutionally-valid statutes.

[41] Sections 28 and 29 of the *Indian Act* override any jurisdiction of a superior court arising out of equity to issue an injunction that has the effect of providing possession or occupation of unsurrendered reserve land to a non-member of a band for any duration. As the Ontario Court of Appeal put it in *Syrette v. Syrette*, 2012 ONCA 693 at para. 4:

> On the authority of the Supreme Court of Canada's decision in *Derrickson v. Derrickson*, 1986 CanLII 56 (SCC), [1986] 1 S.C.R. 285 and its progeny, neither this court nor the application judge in this case have authority to make any order concerning possession, ownership or disposition of property on a reserve that, like the property at issue here, is governed by the provisions of the *Indian Act*.

[42] The order sought by Super Save in this case clearly concerns the possession of reserve land. It is therefore not an order within the authority of this Court to grant.

[43] Counsel for Super Save conceded that he knew of no other case in Canadian history in which a superior court granted an interlocutory injunction of the type he is conceding in relation to reserve land governed by the *Indian Act*. However, he

pointed to a few cases that he argued were analogous. On inspection, though, they are all quite different.

[44] Super Save cites *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565 [*Brant*] as demonstrating that "nothing in the *Indian Act* ousts the inherent jurisdiction of the Court." But in *Brant*, the order upheld required the defendant band member to transfer certificates of possession as satisfaction of a judgment debt owed *to the band*. The Ontario Court of Appeal had to reconcile s. 29 of the *Indian Act*, which provides that "reserve lands are not subject to seizure under legal process" with s. 89(1), which states, "the real and personal property of an Indian or a band situated on a reserve is not subject to … seizure … or execution at the instance of any person *other than an Indian or a band*". The Court held that "real and personal property of an Indian … situated on a reserve" included a certificate of possession and could therefore was subject to seizure or execution *at the instance of another band member or of the band*: *Brant*, at para. 86.

[45] *Brant* does not assist Super Save for the simple reason that it is not a band member or a band.

[46] Super Save also relies on *M.D. Sloan Consultants Ltd. v. Derrickson*, 1991 CanLII 368 (B.C.C.A.), 61 B.C.L.R. (2d) 370 [*M.D. Sloan*]. In that case, our Court of Appeal upheld a damages award against the holder of a certificate of possession for breach of an agreement with the plaintiff that included, among other things, a buckshee lease. The Court of Appeal was clear that "Having regard to s. 28(1) [of the *Indian Act*] there is no doubt that the arrangement of October 21, 1986, to the extent it dealt with reserve lands, fell within its terms and was void" and that to the extent the plaintiff's claim rested on the validity of the "lease" arrangements "in respect to the use and occupation of the land", they must fail.

[47] Nonetheless, the Court of Appeal in *M.D. Sloan* held that the contractual obligations of the parties were not dissolved in their entirety by virtue of s. 28(1) of the *Indian Act*. Some of the reasons for that conclusion are conceded to be irrelevant to this case. However, Super Save relies heavily on the following passage:

> Mr. Derrickson, as locatee, could at any time have applied to the Minister for a lease from the Crown in favour of Sloan for his benefit and might have been compelled to do so under the principle […] "that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there be no express words to that effect."

[48] In other words, at least in some cases, a contract that appears to be a buckshee lease may be construed as a promise on the part of the band member in possession to apply to the Minister under s. 58(3) of the *Indian Act* for a lease of the reserve land to the promisee. This can be a promise that gives rise to damages without proof that the Minister would have responded favourably.

[49] Critically, though, the remedy in *M.D. Sloan* was in *damages*. It cannot be read as authority for the proposition that a promise to apply for a lease under s. 58(3) is *specifically* enforceable, let alone that a court can order occupation or possession of reserve land in the absence of such a lease. *M.D. Sloan* stands for a narrower proposition: in some cases, what is apparently an illegal buckshee lease can be interpreted as a promise to apply under s. 58(3) and if the promisor breaches this promise, the promisee may be obtain expectation damages.

[50] On the record before me, Super Save would have some problems establishing that the buckshee leases at issue in this case should be construed as the one in *M.D. Sloan* was. But it is unnecessary for me to decide this on this application. Even if the 1995 agreement and its renewals are interpreted that way, the order Super Save seeks is still contrary to the *Indian Act* and therefore not within the jurisdiction of this Court to grant.

[51] The plaintiff also points to *Indigenous Bloom CGT Corp. v. Tseycum First Nation Band*, 2021 BCSC 2554 [*Indigenous Bloom*]. In that case, the plaintiff operated a cannabis dispensary on Tseycum First Nations Band reserve land under a buckshee lease. It sought a number of injunctive orders, none of which would have given it any continuing occupation or possession of reserve land.

[52] Justice Wilkinson found that the plaintiffs had a "serious non-frivolous question to be tried" on some of their claims, but did not have a strong *prima facie* case, as required given the mandatory nature of the injunction: *Indigenous Bloom* at paras. 67–70. This is because she found "the authorities with regard to the unenforceability of buckshee leases on Indian reserves are very much against the claims of the plaintiffs": *Indigenous Bloom* at para. 68. However, she at least implicitly held she had the jurisdiction to grant it as a result of s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: *Indigenous Bloom* at para. 63.

[53] Super Save relies on this holding. However, there is an important *jurisdictional* difference. Super Save asks for a remedy that would effectively deliver it occupation and possession of reserve land. The plaintiff in *Indigenous Bloom* did not.

[54] Super Save points out that the Penticton Indian Band council has decided not to enforce its Trespass Bylaws against Super Save. But this fact has no bearing on the issues before me. In this application, it is Super Save that is seeking the assistance of the Court and that assistance cannot be forthcoming if it does not have a valid lease under s. 58(3) of the *Indian Act*. In the absence of a land code under the Framework Agreement on First Nation Land Management, a treaty or a self-government agreement, a band council cannot, on its own, create a lease of reserve land, let alone one contrary to the will of the holder of a certificate of possession. It certainly cannot do so by inaction. Super Save is *in* trespass, whether the Band council enforces or not.

[55] Finally, at para. 84 of its Written Argument, Super Save says it is not seeking a "proprietary" interest in the lands. But it *is* seeking me to enforce a possessory interest, which is just as forbidden by the *Indian Act*.

[56] Principle, statutory text and precedent all point to the same conclusion: this court's equitable jurisdiction to issue interlocutory injunctions has been displaced to the extent the relief sought involves occupation or possession of reserve land. Since that is exactly what Super Save is asking for, its application must be denied.

IV. CONCLUSION AND ORDER

[57] I therefore dismiss the application.

[58] Because of Super Save's statement that it will not vacate unless directed to do so by a "court of competent jurisdiction", I consider this an appropriate case to make a declaration that the plaintiff has no right to continue in possession of the 101 Green Mountain Road gas station and any continued occupation is a trespass, contrary to s. 30 of the *Indian Act*.

[59] I would expect the parties to attempt to agree on the chattels belonging to Super Save. Once they have done so, Super Save must be given a reasonable opportunity to remove them. The defendants seemed to be open to this in their correspondence. If there are any issues about this, a hearing of up to one hour can be arranged before me.

[60] The defendants were clearly successful on the application. The presumptive cost award would be costs of the application to them in the cause. If either side wishes to rebut this presumption, they may provide me with written submissions of no more than five pages in length within seven days of these reasons and I will provide a schedule for responsive submissions by memorandum. If I do not receive such a submission, then costs will be to the defendants at Scale B in the cause.

"J. G. Morley, J."
The Honourable Justice Morley