



DEVLIN GAILUS
BARRISTERS AND SOLICITORS

DEVELOPMENT ON RESERVE LAND

PRACTICAL & LEGAL CONSIDERATIONS

556 Herald Street
Victoria, BC, Canada V8W 1S6

Telephone: 250.361.9469
Facsimile: 250.361.9429
www.devlingailus.com

Reply to: John W. Gailus
Mobile: 250.514.9955
E-mail: john@devlingailus.com

A solicitor, acting for a developer, lessee, permittee, assignee or mortgagee faces an entirely different legal regime when dealing with reserve lands. Developing and acquiring legally enforceable interest on land in a reserve is substantially different from dealing with lands located off reserve.

1. Lands Reserved for Indians

The essential starting point for any discussion is the Constitution. Section 91(24) of the *Constitution Act, 1867* provides that "Indians and Lands Reserved for Indians" are a federal responsibility. As a result, the federal government has enacted the *Indian Act* (the "Act") to carry out its constitutional responsibility. The Department of Indian Affairs and Northern Development (also known as Indian and Northern Affairs Canada, or "INAC") was created to administer the Act.

The Act provides the following definition of "reserve":

"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band...

Reserves are federal lands. As a result, the application of provincial laws to reserve land is limited. However, reserves are not federal enclaves completely beyond the reach of provincial law. To be found inapplicable, the provincial law must be found to affect "Indianness", and to "regulate Indians as Indians" or "Indians in relation to core values of their society". Provincial laws that do not affect Indians in this way, such as traffic laws, will apply to reserves subject to any inconsistency with federal law.

Unfortunately, the analysis does not end here. Section 88 of the Act also provides that, subject to the Act and any treaty or other federal statute, all laws of general application from time to time in force in a province are applicable to Indians. However, section 88 does not say that provincial laws of general application are applicable to lands reserved for Indians. Therefore, this provision allows provincial laws to apply to Indians, but not to reserve lands.

Adding another level of complexity, if both provincial and federal laws could validly apply to reserve lands, the doctrine of federal paramountcy applies, giving priority to the federal legislation.

Given all of the above, the provisions of statutes and local bylaws normally applying to land in the province such as the *Land Title Act*, *Real Estate Act*, the *Strata Property Act*, *Residential Tenancy Act*, *Manufactured Home Tenancy Act* and the *Builders Lien Act* do not apply on reserve land.¹ To the extent that they regulate the use of reserve lands contrary to those principles, they will not apply to those lands. There may be federal legislation or band bylaws that need to be examined. If there are no federal provisions or band bylaws that apply to the reserve land (as is the case of strata property) then those things must be dealt through contractual provisions between the parties of the development. In spite of the general non-applicability of provincial and municipal land-use regulations, any large scale development on the reserve will likely involve discussions with provincial or local government, particularly in areas such as highway access, utilities and services. If the First Nation does not have a municipal service agreement with its neighbouring municipality, that municipality may want to have a significant say over the type and scale of development on reserve.

Under s. 83, bands may pass assessment and property taxation bylaws. These are not published in the Gazette. A variety of other bylaws applying to non-Indians may also be passed by bands under s. 81, including zoning and bylaws to regulate “construction, repair and use of buildings whether owned by the band or by individual members of the band.” Therefore, before any development is planned for reserve lands, copies of these bylaws should be obtained from the band or INAC for review.

2. Obtaining an Interest in Reserve Lands

The *Act* contemplates three ways in which a non-band member may derive an interest in reserve lands – by sale, by lease and by permit.

Before reserve lands can be sold, they must first be absolutely surrendered by the First Nation to the federal Crown, thereupon ceasing to be reserve lands. Absolute surrenders are now extremely rare and are only used for land exchanges, where the First Nation will receive replacement land for addition to their reserve.

Permits tend to be for a short duration and generally do not involve construction of improvements. Therefore, most non-Indians acquiring an interest in reserve lands do so pursuant to a lease.

The federal Crown, not the First Nation has legal title to reserve lands and as a result legal capacity to contract with third parties for the use of reserve land. The lack of legal power of First Nations to dispose of reserve lands is reflected in s. 28(1) of the *Act*, which provides that,

28(1) ...a deed, lease contract, instrument, document or agreement of any kind, whether written or oral, by which a band or member of a band purports to permit

¹ One possible exception to this rule is found in the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53, which allows a First Nation to enact regulations that harmonize its approval processes with the local authority.

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.

As is evident, any agreement by which a First Nation, or a member of the band purports to allow a third-party to occupy reserve land is *void ab initio*.

Reserve lands which may be leased to non-Indians or non-band members for development purposes fall into two categories:

1. Designated lands: lands held in common that are designated according to ss.37 to 41 of the Act, and leased in accordance with s.53(1) of the Act; and
2. Certificate of Possession Lands: lands that are in the lawful possession of an individual band member may be leased in accordance with s. 58 (3) of the Act.

The process of obtaining a lease over reserve lands differs depending on whether the land is held by the First Nation collectively or by an individual member.

3. Obtaining a Lease for Designated Lands

Section 37(2) of the Act provides:

37(2) Lands in a reserve shall not be leased or an interest in them granted until they have been surrendered to Her Majesty pursuant to s. 38(2) by the band for whose use and benefit in common the reserve was set apart.

Therefore, in order to acquire a leasehold interest on a reserve from the band, the land must first be surrendered or designated for lease under section 38(2) of the Act, which states,

38(2) A band may, conditionally or unconditionally, designate by way of a surrender that is not absolute, any right or interest of a the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

This process involves the band membership taking part in a referendum to determine whether they wish to lease (or in limited circumstances, sell) a portion of their reserve. The designation process can take anywhere from several months to over a year to complete. All designations require a double majority of band members and the approval of the Governor in Council.²

Once designation has been obtained, the potential lessee should review the designation documents to ensure that the designation is valid and was affected in complete conformity with the Act. The designation should contain a correct description of the land

² For an initial designation vote there is a requirement that 50% of the eligible electors, whether they live on or off reserve, vote, and of those over 50% vote in favour of the designation. There are provisions in the Act for a second vote, if the first vote fails to have a quorum, but has a majority of electors voting in favour of the proposal.

designated as well as a clear statement of any qualifications or conditions attached to the designated.

Designated lands may then be leased under section 53 of the Act by the Minister on behalf of the band. Section 53 of the Act provides:

53 The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

- (a) manage or sell absolutely surrendered lands; or
- (b) manage, lease or carry out any transaction affecting designated lands.

The matter of leasing of the lands is left with the Minister unless the First Nation has adopted a land code under the *First Nations Land Management Act*. Reserve lands falling under this legislation are discussed later. In the context of leases on reserves, the Minister has delegated his authority to the Manager of Lands at INAC in the BC Regional office. There is also a Lands Officer who is responsible for managing the lands issues of various bands.

Several cases have established that the Minister has a fiduciary obligation to act in the best interests of the Band when leasing lands that are the subject of a designation or surrender.³ Although the lease is entered into with Her Majesty, the First Nation may influence the terms and conditions included in the lease by imposing conditions on the designation. Any conditions imposed by the First Nation in a designation must be incorporated into the lease.

INAC leases tend to have certain commonalities. They tend to be triple net leases, with numerous consents required from the Minister. There are indemnities required of the lessee and extensive insurance requirements. Anyone seeking to acquire a leasehold interest in reserve should be aware that the procedure may be lengthy and frustrating. For any significant development, INAC will require an appraisal, environmental assessment, surveys and conceptual drawings will need to be approved prior to lease execution.

Although the Minister issues leases under the Act, it is up to the First Nation and lessee to negotiate all the necessary business terms. Once the parties have reached the essentials of the agreement, INAC provides a draft lease for review. Before executing the lease a section 53(1) lease, INAC will require a Band Council Resolution ("BCR") from the First Nation requesting the Minister to execute the lease.

Mortgages of lease also require Ministerial consent. Much has been made about the immunity from seizure enjoyed by Indian bands. However, it is important to note that this immunity does not extend to valid third party interests. Section 89 provides:

³ *Guerin v. R.*, [1984] 2 S.C.R. 335.

89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Thus, once a property interest is granted to a third party it enters the commercial mainstream and is subject to similar rules as off-reserve interests.

4. Obtaining a Lease for Certificate of Possession Lands

There is an important distinction between designated lands and Certificate of Possession (CP) lands and it is the reason why most development on reserve is on designated land. Section 89(1.1) of the *Act* expressly permits a leasehold interest in designated lands to be mortgaged, but does not address a lease of CP lands. On the one hand, the designation procedure is complex and time-consuming, so leases of CP lands may be easier. On the other hand, the disadvantage of CP lands is the absence of any explicit provision permitting mortgage over the lands, restricting the lessee's ability to get financing. Nonetheless, many financial institutions are either blind to this risk or willing to take such a risk.

A CP grants an exclusive right to possess a parcel of reserve land to a band member. A CP holder may occupy the land without interference, sell or devise their right of possession to another band member, lease their interest to a non-band member, or develop their land with the consent of the First Nation and the Minister.

A CP holder, also called a "locatee", may request that the Minister, under section 58(3), lease that land to a third party. Section 58(3) states:

58(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

These CP lands do not first have to be designated. In addition, consent from the band council to a locatee lease is usually required.⁴ INAC's current policy is to require that, if a lease is for a term less than 49 years, it will seek the concurrence of the band council. If a lease has a term for longer than 49 years, INAC's policy is that it must be approved by a majority of electors present at a meeting called to discuss the proposed lease arrangement.

If someone wishes to lease lands from an individual member of a First Nation who claims to be the holder of an interest in reserve lands, he should search the Indian Land

⁴ *Tsartlip Indian Band v. Canada* [2000] 2 FC 314 (C.A.)

Registry first to confirm that the person is, in fact, in lawful possession of the land in question. To obtain such a right to lawful possession, it must have been allotted to the person by the council of the band under s. 20(1) of the Act and approved by the Minister.

INAC will require that the applicant for a lease of locatee lands complete a detailed application form and provide an appraisal, environmental assessment and conceptual plans. A survey may also be required. Similar to a lease for designated lands, before executing a section 58(3) lease, INAC will require a Locatee Consent and a BCR requesting that the Minister execute the lease.

5. Obtaining a Permit to Use Indian Lands

Permits have been commonly issued for the purpose of granting rights to graze livestock on reserve lands or extracting items such as sand, gravel, clay and other non-metallic material from reserve lands. Permits are also used to access rights or for utilities rights of way ancillary to a development.

Section 28(2) of the Act provides,

28. (1) 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.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Permits tend to be short-term and temporary. However, a permit need not specify an exact end date, as long as the end of the period is capable of ascertainment so that it does not constitute a grant in perpetuity. With the exception of utilities, permits tend not to be used for any permanent improvements.

6. First Nations Land Management Act Lands

A few First Nations self-manage their reserve lands, such as the Sechelt under the *Sechelt Indian Band Self-Government Act* and other First Nations covered by the *First Nations Land Management Act* (the "FNLMA"). The Act provisions discussed above do not apply to these First Nations as they have adopted their own land management codes under those acts. Local First Nations which are covered by the FNLMA include the Tsawout, Songhees, T'souke and Beecher Bay First Nations. To our knowledge, of these First Nations, only Tsawout First Nation has enacted a Land Code.

Interests in these reserve lands are subject to the provisions of the relevant land code governing transfers and leases. In accordance with the provisions of the land code, the band councils may make laws respecting interests in reserve lands including laws for zoning, granting new interests and environmental assessment. The relevant codes and bylaws should be consulted for guidance on how to secure an interest in those lands. However, it is important to note that some provisions of the *Act*, like the restrictions on mortgaging reserve lands, continue to apply.

The current treaties being negotiated under the BC Treaty Process are beyond the scope of this paper, but it is safe to say that any lands provided to a First Nation, including their reserve lands, will no longer be subject to the *Act*.

7. Indian Lands Registration

Most interests in reserve lands are not registered in the provincial land title system but in the federal Indian Lands Registry System ("ILRS"). Currently, the provincial land registry has refused to accept registration of reserve lands so long as those lands retain their status as lands governed by s. 91(24) of the *Constitution Act, 1867*, unless the extremely complex, costly and time-consuming procedure of Part 24 of the *Land Title Act* is followed. In addition, INAC has refused to make application to register title to reserve lands in the provincial Land Title Office, even where the First Nation requests it, claiming that they require federal authorizing legislation to permit reserve lands to be brought within a provincial land title system.

Although registration in the provincial land title system is not usually a practical option, legal interests in reserve lands may be registered in the ILRS. Accordingly, anyone interested in acquiring an interest in reserve lands should first confirm the status of the land involved and attempt to determine whether there are other interests which may affect the lands.

Unlike the Torrens land title system, the ILRS is a notice registry only; it does not provide the safeguards of a Torrens system, meaning there may be unregistered interests that may affect the leases, permits or mortgages. Therefore, the onus is on the person doing the search to trace the history of the interest in question back to the original designation or Certificate of Possession. Similarly, there is no system of priority established in the legislation. Fortunately, the ILRS is now available electronically and accessible via the INAC website. Any solicitor interested in accessing the website needs to deal with INAC and set up a user name and password. The service is free.

The ILRS is maintained by INAC in Ottawa. However, documents are usually submitted to the BC Regional Office, which arranges for registration in Ottawa. A few First Nations have powers delegated to them by the Minister under ss.53 and 60 of *the Act* to manage their lands and, in such cases, documents may be sent to them for registration. Similarly, FNLMA First Nations are responsible for setting up their own registry.

8. Common Issues that Arise

In many circumstances, third parties occupy reserve land without the benefit of a lease or permit from the Minister. There are several Manufactured Home Parks on Vancouver Island that operate without the benefit of ministerial approval. With the absence of a formal lease agreement and no protection from residential tenancy legislation, the occupancy of these individuals is essentially at the sufferance of the First Nation or the locatee, as the case may be. This poses significant challenges for the solicitor advising these third parties.

The British Columbia Supreme Court has grappled with this issue, trying to graft principles of equity to disallow a First Nation or locatee from evicting tenants from reserve, notwithstanding the clear language of the *Act*.⁵ That however, does not address the security of the third party's tenure. Although not foolproof, one option that the writer has exercised is to attack the issue head-on, to explicitly address the issue of section 28 in the *Act*, having both parties agree beforehand that in the event there is a dispute, neither party will rely on the infirmity in section 28 to void their contract. Unfortunately, this is an imperfect fix in the face of the clear language of a statute. Under most circumstances, notwithstanding the challenges that it may present, a lease or permit executed by the Minister is the preferred option.

⁵ See for *Ziprick v. Braunfel Engineering & Construction Ltd.*, [1994] B.C.J. No. 312 (S.C.); *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 61 B.C.L.R. (2d) 370 (C.A.); *Terbasket v. Harmony Coordination Services et al.* [2003] B.C.J. No. 28, 2003 BCSC 17