

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Glooscap First Nation v. McLellan*, 2022 NSSC 274

**Date:** 20220926

**Docket:** *Kentville*, No. 514791

**Registry:** Kentville

**Between:**

Glooscap First Nation

*Applicant*

v.

Suzie McLellan (Paul)

*Respondent*

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** August 8, 2022 in Kentville, Nova Scotia

**Final Written  
Submissions** August 10, 2022

**Counsel:** Roy Stewart for the Applicant  
Suzie McLellan, represented self

## **Introduction**

[1] The Applicant, Glooscap First Nation (the “Band”), is a “band” under the *Indian Act*, R.S.C. 1985, c.I-5. The council of the Band is the elected governing body of the Glooscap First Nation (the “Band Council”). The Respondent, Suzie McLellan (Paul) is a member of the Band. She resides at 49 Peters Street, Glooscap First Nation, Glooscap 35 Reserve, Hantsport, Hantsport County (the “Property”). In this Application in Chambers, the Band seeks an order declaring that Ms. McLellan is trespassing on the Property, an order requiring her to immediately deliver vacant possession of the Property, and a permanent injunction enjoining her from entering the Property unless duly authorized by the Band Council.

[2] The Band says that the Property, being reserve land, is vested in His Majesty the King in Right of Canada and is held for the use and benefit of the Band. The Band says that there are two statutory requirements for an individual Band member to possess reserve land, neither of which are met by Ms. McLellan. Although she had been residing at the Property pursuant to a residential tenancy agreement with the Band, the Band says that it delivered an eviction notice to her on January 27, 2022, requiring her to vacate the Property by February 24, 2022. Ms. McLellan has

refused to vacate the property. The Band says that Ms. McLellan is therefore not lawfully in possession of the Property and that she is in fact trespassing.

[3] The Band was represented by legal counsel in this proceeding. The Band filed a brief, affidavits and authorities. The Application was originally scheduled to be heard on June 21, 2022. Ms. McLellan attended court on that date and sought an adjournment to give her time to retain legal counsel. At that time, Ms. McLellan acknowledged that she had received the Band's motion materials on May 14, 2022. She advised the Court that she had been in contact with Legal Aid and was waiting for them to give her a list of lawyers and to determine whether they will issue a certificate. She advised the Court that she had also been speaking to the Mi'kmaq Legal Support Network and another lawyer. Ms. McLellan sought an adjournment of a couple of weeks. The Band objected. I granted Ms. McLellan's request for an adjournment with costs to the Band, adjourning the hearing to July 14, 2022. The Court advised Ms. McLellan that her response affidavit and brief were due by July 6, 2022.

[4] On July 14, 2022, Ms. McLellan attended the hearing by phone. She advised the Court that she had COVID-19. She requested a further adjournment. She advised the Court that she obtained a Legal Aid Certificate on approximately June 28, 2022, and since then has contacted 15 law firms who have declined to represent

her. She informed the Court that she only received a list of lawyers from Legal Aid two days previously, and that she had three law firms left to call. The Band's position was that if a brief adjournment was granted to Ms. McLellan so that she could contact the rest of the law firms on the list, it would take no position on the adjournment request. I adjourned the hearing to August 8, 2022, in order to allow Ms. McLellan further time to seek legal counsel, and informed Ms. McLellan that the hearing would go ahead on August 8, 2022, whether or not she had legal counsel. I informed Ms. McLellan that the revised deadline for her response affidavit and brief would be July 29, 2022.

[5] The hearing proceeded on August 8, 2022. Ms. McLellan did not attend. She did not file a response affidavit or brief.

[6] At the end of the hearing on August 8, 2022, I asked the Band to provide me with written submissions regarding its assertion that the *Residential Tenancies Act*, R.S.N.S. 1989, c.401 does not apply to the tenancy agreement between the Band and Ms. McLellan. The Band took the position that the tenancy agreement concerns reserve lands, and that therefore this is a subject-matter that falls within the exclusive legislative authority of Parliament by virtue of s.91(24) of the *Constitution Act, 1867*, which refers to "Lands reserved for the Indians." The Band filed its written submissions on August 10, 2022.

[7] On August 10, 2022 at 2:00 p.m., I held a recorded telephone conference in this matter. Mr. Stewart attended. Court staff left two voice mail messages for Ms. McLellan on the morning of August 10, 2022 to inform her of the telephone conference, but received no response. The purpose of the recorded telephone conference was to discuss whether the Band was required by s.10(2)(a) of the *Constitutional Questions Act*, R.S.N.S. 1989, c.89 to provide notice to the Attorney General of Nova Scotia of the question of the constitutional applicability of the *Residential Tenancies Act* to the Property. After hearing from Mr. Stewart, I directed that the Band provide notice to the Attorney General and adjourned the hearing to September 26, 2022.

[8] The Band provided the Notice of Constitutional Question to the Attorney General of Nova Scotia and to the Attorney General of Canada. Both subsequently informed Mr. Stewart, in writing, that they did not intend to participate in this proceeding.

[9] In order to determine whether the Band is entitled to the relief requested, I will discuss:

1. whether the *Residential Tenancies Act* applies to the tenancy agreement;
2. whether Ms. McLellan is lawfully in possession of the Property; and

3. if not, whether the Band has complied with the requirements of procedural fairness.

### **The Residential Tenancies Act**

[10] I accept the position of the Band that the *Residential Tenancies Act*, a provincial statute, does not apply to the Property. On its face, the *Residential Tenancy Act* appears to apply to any leased residential properties in Nova Scotia: s.3. However, pursuant to s.91(24) of the *Constitution Act, 1867*, Parliament has exclusive legislative jurisdiction over “Lands reserved for the Indians.” The *Residential Tenancies Act*, as it applies to reserve land, including the Property, is therefore in conflict with s.91(24) of the *Constitution Act, 1867* and has no application to the Property: see *Millbrook Indian Band v. Nova Scotia (Northern Counties Residential Tenancies Board)*, 1978 CanLII 2141 at p.181, upheld on other grounds, 1978 CanLII 2156 (NSCA); *Sechelt Indian Band v. British Columbia (Dispute Resolution Officer)*, 2013 BCCA 262 at paras.50-51, leave to appeal to the Supreme Court of Canada refused, 2014 CarswellBC 3132; and *McCaleb v. Rose*, 2017 BCCA 318 at para.14.

**Is Ms. McLellan lawfully in possession of the property?**

[11] Under s.18 of the *Indian Act*, reserve land is presumptively held for the use and benefit of the Band. Under s.20(1) of the *Indian Act*, there are two requirements for an individual Band member to have lawful possession of reserve land: (1) allotment from the Council of the Band, and (2) Ministerial approval of the allotment. See *Cooper v. Tsartlip Indian Band*, 1996 CarswellNat 815 (FCA) at para.11; *McMillan v. Augustine*, 2004 NBQB 160 at para.40; and *Copeau v. Canada (Attorney General)*, 2021 FC 324 at para.20.

[12] I am satisfied, based on the affidavit evidence filed by the Band, that there was no allotment of the property from the Band to Ms. McLellan, and no Ministerial approval of any such allotment.

[13] The Band concedes that, absent an individual right of possession under the *Indian Act*, an individual Band member may occupy a property on reserve land by agreement, such as a tenancy agreement: see *Copeau, supra* at para.20. However, the Band terminated the tenancy agreement with Ms. McLellan. She no longer has the consent of the Band to occupy the property.

[14] Ms. McLellan is therefore not lawfully in possession of the property and is trespassing on the property: see *Joe v. Findlay*, 1981 CarswellBC 35 at para.13. In that case, the British Columbia Court of Appeal wrote as follows at para.7:

[7] That right to squat exercised individually and unilaterally by a band member cannot be sustained by authority. The legal title to the reserve lands vests in Her Majesty the Queen in right of Canada. By virtue of the interpretation of s. 2 and s. 18 of the Indian Act, R.S.C. 1970, c. 1-6, the use and benefit of reserve lands accrues to and comes into existence as an enforceable right (subject to the consent of the Minister of Indian Affairs and Northern Development, hereinafter called the "minister") vested in the entire band for which such reserve lands have been set apart. In that statute "band" is a noun singular in form used with a plural implication and in a context which admits only of a plural use and application. This statutory right of use and benefit, often referred to in the cases as a usufruct (not a true equivalent borrowed from Roman law), is a collective right in common conferred upon and accruing to the band members as a body and not to the band members individually.

**Did Glooscap First Nation comply with the requirements of procedural fairness?**

[15] The right of the Band to possession of the Property, in the absence of a valid allotment, is subject only to a duty of procedural fairness: see *Sayers v.*

*Batchewana First Nation*, 2013 FC 825 at para.26 and *Paul v. St. Mary's First Nation*, 2020 NBQB 160 at para.66.

[16] For a time, Ms. McLellan occupied the Property pursuant to a tenancy agreement with the Band. The tenancy agreement was for a three-year term beginning on December 2, 2015. The Band says that, after the three years, it allowed Ms. McLellan to continue residing at the Property on a month-to-month basis, although the lease agreement states that, after the three-year term, it is “automatically renewed yearly.”



[17] Pursuant to a Band Council Resolution, the Band delivered an eviction notice to Ms. McLellan on January 27, 2022, giving her 30 days' notice to vacate the property by February 24, 2022: Affidavit of Jason MacLeod, paras.27-29 and Exhibits "K" and "L". The Band terminated the tenancy agreement pursuant to section 8.1 of the agreement, which reads as follows:

8.1 that if the rent or part of any rent shall be unpaid 10 days after it becomes due (whether or not the Landlord has formally demanded it) or you breach any of your agreement under this lease, it shall be lawful for the Glooscap First Nation Bard to re-enter the Premises and take possession and upon doing so, your tenancy shall end but without prejudice to the right of action in respect of any prior breach of your agreements under this lease; ...

[18] I am satisfied that the Band met its duty of procedural fairness. The Band repeatedly warned Ms. McLellan, in writing, that acts that it viewed were contrary to the terms of the lease could result in her eviction: see Affidavit of Jason MacLeod, paras.10, 11, 14, 17, 18, 19 and Exhibits "B", "D", "E", "F" and "G").

[19] First, in a letter dated February 2, 2016, Amanda Francis of the Band's Housing and Infrastructure Department informed Ms. McLellan of complaints that an individual who had been banned from the community, Trevor McDonald, had been seen at Ms. McLellan's home on several occasions. The letter warned Ms. McLellan that "if this continues further action will be taken up to and possibly

including eviction from your residence.” Ms. McLellan had agreed, in the tenancy agreement to ensure that this individual would not be at the Property for any reason as he had been banned from the community.

[20] Second, in a letter dated June 23, 2020, Jason MacLeod, the Band’s Housing and Maintenance Officer, informed Ms. McLellan of several formal complaints about her, including that Mr. McDonald had been at the Property, and reminded Ms. McLellan of various sections of the tenancy agreement that she was required to adhere to as a condition of her tenancy. The letter warned her that failure to comply with the lease agreement “will result with Chief and Council taking further action to ensure the peaceful enjoyment of the community.”

[21] Third, Ms. McLellan met with Chief and Council and Mr. MacLeod on July 21, 2020 to discuss community complaints about her tenancy. In a letter dated July 30, 2020, Mr. MacLeod summarized that discussion, and warned Ms. McLellan that “any further violations or lease infractions will force Chief and Council to issue an eviction notice.”

[22] Fourth, in a letter dated October 22, 2020, Mr. MacLeod directed Ms. McLellan to remove an individual from her property and warned her that failure to do so would risk Ms. McLellan’s lease and occupation of the Property.

[23] Fifth, in a letter dated May 6, 2021, Ms. Francis informed Ms. McLellan of community complaints that Ms. McLellan was having various individuals visit the Property in violation of the provincial Health Protection Act Order and warning her that the next corrective action might involve the RCMP.

[24] In addition, Ms. McLellan was invited at least twice, in writing, to contact the Band Office if she had any questions or concerns:

1. In the February 2, 2016, letter from Ms. Francis.
2. In the June 23, 2020, letter from Mr. MacLeod.

Affidavit of Jason MacLeod, paras.11 and 14 and Exhibits “B” and “D”.

[25] At a meeting on January 24, 2022, the Band Council voted to evict Ms. McLellan from the Property for not adhering to the lease agreement, allowing visitors at the Property who have been banned from the community, and causing damage to the Property. The Band delivered the eviction notice to her on January 27, 2022. The eviction notice details numerous violations of various provisions of the lease and states that “[d]espite several warnings, you have taken no steps to remedy your breaches.”

Affidavit of Jason MacLeod, paras.27-30 and Exhibits “K” and “L”

[26] I find that, based on these facts, Ms. McLellan was provided adequate notice of her eviction and an opportunity to be heard.

### **Conclusion**

[27] Ms. McLellan has no right to possess or occupy the Property.

[28] I therefore order as follows:

1. I declare that Ms. McLellan is trespassing by unlawfully occupying the property of Glooscap First Nation at 49 Peters Street, Glooscap First Nation, Glooscap 35 Reserve, Hantsport, Hantsport County, Nova Scotia;
2. I require Glooscap First Nation to immediately prepare and deliver a certified copy of the Order to Ms. McLellan by personal service and by affixing a certified copy of the Order to the front door of the Property;
3. I require Ms. McLellan to deliver vacant possession of the property to Glooscap First Nation by and no later than 5:00 p.m. on October 10, 2022;

4. If Ms. McLellan has not vacated the Property by 5:00 p.m. on October 10, 2022, the RCMP are authorized to enforce this Order and remove Ms. McLellan from the Property; and
5. Effective 5:00 p.m. on October 10, 2022, Ms. McLellan is enjoined from entering the Property unless duly authorized by Glooscap First Nation Band Council.

[29] The parties shall bear their own costs.

Gatchalian, J.