

Eviction Notice Stayed for Residents of Black Bear Crossing

by Jennifer Koshan

Tsuu T'ina Nation v. Bearchief, 2008 ABCA 74,

<http://www2.albertacourts.ab.ca/jdb%5C2003%5Cca%5Ccivil%5C2008%5C2008abca0074.pdf>

Black Bear Crossing (“BBC”) consists of 161 units on the former barracks of the Canadian Armed Forces, situated on 940 acres on the northeast corner of the Tsuu T’ina reserve. The residences have been occupied by Tsuu T’ina Band members, as well as those claiming Band membership, since Canadian Forces personnel moved out when the base was decommissioned in 1996. In 1998, four Tsuu T’ina families who had been unable to find affordable housing moved into the unoccupied residences and within a month, most of the BBC units were occupied.

In October 2006, BBC was declared “unfit for human habitation” by Health Canada due to concerns about asbestos and lead paint in the residences. While the occupants of BBC originally evacuated the premises, some later returned when further Health Canada investigations showed that some of the units were fit for habitation.

The Band served an eviction notice, directed at “all Non-Tsuu T’ina Nation Members,” on 29 of the occupants on December 27, 2006, following which four of them initiated an action – the Peshee action -- to establish their right to reside on the reserve. The Peshee action occupants also sought an interim injunction against their eviction.

The Peshee action is based in part upon an Aboriginal right under s. 35 of the *Constitution Act, 1982* to access and live upon the Reserve. The Peshee claimants also challenge the *Indian Act*, R.S.C. 1985, c. I-5 and the Band’s Membership Code as unconstitutional and of no force or effect. This argument derives from the continuing effects of the “marrying out” provisions of the *Indian Act*, notorious provisions under which First Nations women lost their “Indian” status and rights to band membership by marrying non-Indian men. The relevant provisions of the *Indian Act* were amended by Bill C-31 in 1985 following the coming into force of s. 15 of the *Canadian Charter of Rights and Freedoms* which guarantees equality without discrimination on the basis of sex, amongst other grounds. However, the amendment maintains a second generation cut-off, so that while First Nations women who “married out” and their children regain status, the women’s grandchildren do not. The second generation cut-off was recently found to violate s. 15 of the *Charter* in *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, a case now on appeal to the B.C. Court of Appeal.

The questions of status and band membership have been contentious ones amongst bands throughout the country. According to Bonita Lawrence, approximately 100,000 First Nations women and children have regained status since 1985.¹ However, Bill C-31 also separated issues of Indian status and band membership, with control of the latter (including entitlement to residency on reserves) being given to First Nations bands

¹ Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview” (2003) 18(2) *Hypatia* 3 at 14,

through the development of membership codes. Bands contend that they lack resources to house reinstated members, and many see Bill C-31 as undermining their right to decide their own membership as an aspect of self-determination. While cases such as *McIvor* and the *Peshee* action wind their way through the courts, the very real issue of housing for First Nations peoples asserts itself, as it did in *Bearchief*.

Subsequent to the *Peshee* action being commenced, the Band launched its own action in January 2007 against 29 respondents, seeking an order that all non-resident Band members vacate BBC by January 31, 2007 or have writs of possession issued against them. The *Bearchief* decision does not specify the basis of the Band's action. Alberta's *Residential Tenancies Act*, S.A. 2004, c. R-17.1, permits a landlord or owner to apply to the court for an order to recover possession of residential premises and, if the order to vacate is not complied with, a writ of possession will follow without further court order (sections 34 and 35). However, provincial laws of this nature do not apply on First Nations reserves by virtue of the inter-jurisdictional immunity doctrine and s.88 of the *Indian Act* (see *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285). Nevertheless, the concepts of "order for recovery of possession" and a follow-up writ of possession originally derive from the common law, and this is the likely basis of the Band's action.²

The *Peshee* and Band's actions were scheduled to be heard together in special chambers on February 20, 2007, but the Band's action was adjourned when it was revealed that not all 29 respondents had been served with notice of the action. The chambers judge went on to hear the *Peshee* application for an interim injunction at that time.

An interim injunction application requires satisfaction of the following criteria: there must be a serious issue to be tried, there must be irreparable harm if the injunction was not granted, and the balance of convenience must favour granting the remedy (*American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, [1975] A.C. 396, adopted by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). The chambers judge found all three criteria to have been met, and granted the interim injunction preventing the Band from evicting the applicants from BBC pending the outcome of the *Peshee* action. In April 2007, an interim injunction was also granted to a number of respondents in the Band's action, and the *Peshee* and Band's actions were consolidated.

On June 25, 2007, the Alberta Court of Appeal overturned the interim injunction in the *Peshee* action (*Peshee v. Tsuu T'ina Nation*, 2007 ABCA 211, per Justices Côté, Hunt, and Ritter). Although the Court agreed that there was a serious issue to be tried, namely, the constitutionality of the *Indian Act* marrying out provisions, it disagreed that the failure to grant the injunction would result in irreparable harm. Referring to the respondents' affidavits, which asserted "their historical and family ties to the Nation and the Reserve, their sense of community, and the fact that each believes there is no other housing available on the Reserve" (at para. 27), the Court found that they did not establish irreparable harm, as "[a]ll three have lived off the Reserve for large parts of their lives yet appear to have maintained their family, community and cultural links" (at

² I am grateful to Jonnette Watson Hamilton for her guidance on the property law aspects of the case.

para. 28). Further, the Court noted that damages could cover rent and moving expenses. While the Court acknowledged that in some circumstances, loss of residence in and of itself might amount to irreparable harm, it held that such harm was not established on the facts of this case.

The *Bearchief* case dealt with the interim injunction in relation to the respondents in the Band's action. The Band argued that the Court of Appeal should simply apply its own decision in *Peshee* and overturn the injunction. The respondents picked up on the Court's statement in *Peshee* that such applications are "highly fact specific", and contended that their circumstances could be distinguished from those at play in *Peshee*.

The Court of Appeal found that it did not have to decide on the similarity between the two cases, however. This differently composed panel of the Court (Justices Conrad, O'Brien and Watson) held that "an interim injunction in the Band Action is simply not required to prevent eviction of these tenants until the constitutional questions are determined and a final order of eviction is granted" (at para. 17). According to the Court,

before obtaining a final order of eviction the Band will be required to prove, at a minimum, that each person it proposes to evict received a notice of eviction and that each person is a non-member of the Band. To establish this latter point, it will be necessary for a trial judge to deal with the constitutional issues raised by the respondents dealing with their rights of Band membership (at para. 18).

Since the Band could not evict anyone until their membership rights were determined, there was found to be no irreparable harm in the case. This was found to be true for all of the respondents except one (Keewatin), who did not contend that she had a right to Band membership, and thus could be subject to eviction proceedings by the Band before the constitutional issues were determined.

While the case seems to amount to an effective victory for the respondents, the Court did issue one caveat. The Band's original eviction notice was directed at those it perceived to be non-members of the Band. The Court stated that if an eviction notice was directed at *all* BBC residents to permit the Band to tear down all the dwellings, the Band might be able to proceed with eviction before the constitutional issues were determined. This points to a limitation of equality rights litigation: unless claimants can show differential treatment, they will not succeed. Ultimately, then, it may not matter if the respondents in *Bearchief* or the claimants in *Peshee* were wrongfully denied status or Band membership if the Band decides to demolish Black Bear Crossing. While Band membership would entitle them to reside on the Reserve, the shortage of housing that would be exacerbated by the demise of BBC remains a pressing concern.