SUPREME COURT OF CANADA

CITATION: McDiarmid Lumber Ltd. *v.* God's Lake First Nation, [2006] 2 S.C.R. 846, 2006 SCC 58

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BETWEEN:

God's Lake First Nation a.k.a. God's Lake Band
Appellant
and
McDiarmid Lumber Ltd.
Respondent
- and -
Attorney General of Canada, Assembly of First Nations and Manitoba Keewatinook Ininew Okimowin
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 76)	McLachlin C.J. (Bastarache, LeBel, Deschamps, Charron and Rothstein JJ. concurring)
DISSENTING REASONS: (paras. 77 to 150)	Binnie J. (Fish and Abella JJ. concurring)

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v.

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Indexed as: McDiarmid Lumber Ltd. *v.* God's Lake First Nation

Neutral citation: 2006 SCC 58.

File No.: 30890.

2006: April 20; 2006: December 15.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for manitoba

Aboriginal law — Property situated on reserve — Exemption from seizure — Creditor of Indian band attempting to garnish funds in off-reserve financial institution — Funds paid to band by federal government pursuant to Comprehensive Funding Arrangement — Whether funds exempted from seizure by virtue of s. 89 or s. 90(1)(b) of Indian Act — Whether funds notionally "situated on a reserve" — Whether funds paid to band pursuant to "treaty or agreement" — Meaning of word "agreement" in s. 90(1)(b) of Indian Act — Indian Act, R.S.C. 1985, c. I-5, ss. 89, 90(1)(b).

The appellant Indian band resides on an isolated reserve in northern Manitoba. It has adhered to Treaty No. 5 with the federal government and, in exchange for the extinguishment of claims, the Crown agreed, *inter alia*, to provide annual grants and to maintain schools. The band is entirely funded by the federal government under a Comprehensive Funding Arrangement ("CFA") pursuant to which funds for various programs are deposited monthly into the band's account in a financial institution in Winnipeg. The respondent company sued the band to obtain payment for construction materials and services it had supplied for projects on the reserve. The parties entered into a consent judgment, but the band was unable to pay. The company served a notice of garnishment on the Winnipeg financial institution. The band moved to set aside the garnishment order on the ground that these were CFA funds that were exempt from seizure under ss. 89 or 90(1)(*b*) of the *Indian Act*. The Master released from garnishment the portion of those monies that he found were CFA funds, but set aside the sum of $125,000. The motions judge concluded that the CFA was an "agreement" under s. 90(1)(*b*) of the Act and that the funds were therefore "deemed always to be situated on a reserve" and were exempt from seizure. The Court of Appeal set aside that decision, holding that s. 89 did not apply, as the funds

were not "situated on a reserve", nor were they deemed to be situated on a reserve under s. 90, because they were not paid pursuant to an agreement ancillary to Treaty No. 5.

Held (Binnie, Fish and Abella JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Deschamps, Charron and Rothstein JJ.: The CFA funds were not situated on a reserve, and the immunity from seizure granted by s. 89 of the *Indian Act* accordingly does not apply. The expression "situated on a reserve" in s. 89 is to be given its plain and ordinary meaning and is subject to common law and statutory *situs* rules. The location of the bank account is objectively easy to determine: it is located off-reserve at the Winnipeg financial institution. This approach to interpretation is overwhelmingly supported in the case law and by the fact that when Parliament wished to depart from the physically situate test for personal property, it did so expressly, as in s. 90(1)(*b*) of the *Indian Act*, which suggests that other provisions of the Act addressing location should not be interpreted according to a "notional" test. [3] [11] [13] [18-21]

Section 90(1)(*b*) of the *Indian Act* does not extend the immunity from seizure to the CFA funds, because the band has not demonstrated that the disputed funding is protected by virtue of its relationship to treaty obligations. The word "agreement" in s. 90(1)(*b*) should not be construed broadly as extending to any agreement between the government and Indians that confers benefits or "public sector services" benefits, but should be confined to property that enures to Indians pursuant

to agreements that are ancillary to, or that flesh out, treaty obligations of the Crown. [1] [25] [27] [73]

The history of s. 90(1)(*b*) supports a narrow interpretation of the word "agreement". For decades, Parliament's approach to Indian property was a paternalistic one under which virtually all property that could be traced to treaties with or gifts from the Crown was exempt from seizure. In 1951, Parliament revised the *Indian Act*, signalling an intention to encourage Indian entrepreneurship and self-government. This new approach is consistent with an intention to confine protection from seizure to benefits flowing from treaties. To exempt property broadly would be inconsistent with self-sufficiency, because it would deprive Indian communities of credit, which is a cornerstone of economic development. But to eliminate all protection would neglect the persistent concerns about exploitation. These potentially conflicting policy considerations suggest that Parliament wanted to provide limited protection for treaty entitlements while not interfering with the ability of Indians to achieve great economic independence. Given that our Constitution also grants a special place to treaty obligations, Parliament's decision to distinguish between treaty and non-treaty property in the statutory scheme is not one that the Court can or should disturb. [37] [40] [55] [66-67]

The rules of statutory interpretation also lead to the conclusion that the word "agreement" in s. 90(1)(*b*) must be interpreted narrowly. Pursuant to the "associated meaning" principle, which functions as an aid to ascertaining Parliament's intention, the words "treaty" and "agreement", being linked, take colour from one another, which limits the scope of the broader term "agreement" such that it is as supplementary to the narrower term "treaty". Furthermore, it is presumed that

Parliament avoids superfluous or meaningless words. If "agreement" were to be interpreted broadly to cover all types of agreements between Indians and the government, then the word "treaty" would have no role to play. Lastly, the word "agreement" in s. 90(1)(*b*) must be read narrowly, because the *Indian Act*'s exemption provisions not only create limited exceptions to the general rule that the provincial credit regimes will apply to Indian property, but also limit the ability of aboriginal peoples to access credit, which is a significant deterrent to financing business activity on-reserve. [31] [34-39] [42]

Here, the record does not permit the Court to make a determination about the precise relationship between the CFA funds and the Crown's treaty obligations. The CFA funds in the case at bar are blended, and if parts of them relate to treaty obligations, they have not been segregated by either the Crown or the band. While any portion of the CFA funds that flows directly from treaty obligations is entitled to protection under s. 90(1)(*b*), the band has failed to discharge its onus to establish the connection between funds it claims were protected and the Crown's treaty obligations. [76]

Per Binnie, Fish and Abella JJ. (dissenting): The CFA between the band and the Crown is a "treaty or agreement" pursuant to s. 90(1)(*b*) of the *Indian Act* so that funds flowing to the band under the CFA should be exempt from garnishment. Because the CFA is an agreement to provide on-reserve essential public services, s. 90(1)(*b*) places those CFA funds given by the federal Crown to a band under ss. 87 and 89 protection. Without this protection, seizure of CFA monies would inevitably impair the band's capacity to deliver these essential services to its members. Section 90(1)(*b*) also protects the interest of taxpayers in ensuring that funds

transferred by Parliament to a band for housing, education, infrastructure, health and welfare, are used for the designated purposes, and not, as here, diverted to other purposes chosen by the band. [77] [79] [83] [87]

The outcome of the appeal turns on whether s. 90(1)(*b*) truly requires the CFA to be "ancillary" to a "treaty" at all. While the word "agreement" in s. 90(1)(*b*) draws its meaning from context, that context has little to do with treaties, but rather forms part of a larger legislative initiative taken to protect and encourage the survival of reserves as liveable communities and to ensure that public monies "given" to an Indian band for essential public services on the reserve are used for the intended purposes. Only a purposeful as opposed to restrictive reading of s. 90(1)(*b*) will accomplish that objective. If a narrow interpretation of s. 90(1)(*b*) is adopted, only the more economically developed bands served on the reserve by a deposit-taking financial institution will paradoxically receive their CFA funds free from the threat of attachment and execution. [81] [90] [108] [134] [141]

Section 90(1)(*b*) should apply as much to bands dispossessed of their traditional lands without a treaty as to those with whom treaties were made. CFAs for education, housing, health and welfare are intimately linked to enabling Indians to continue on their lands and are in the nature of government to government transfer payments. The purpose of these agreements is to provide the same essential services to Aboriginal communities as are provided to other Canadians by their provincial, territorial and municipal governments. If s. 90(1)(*b*) is narrowly construed to cover only funds transferred to Indian bands by the federal Crown pursuant to agreements that "flesh out" treaty terms, bands without treaties would not obtain the same protection from attachment and seizure as treaty bands. This would mean that

s. 90(1)(*b*) would operate inequitably among bands in relation to the same types of CFA funding for the same essential on-reserve services. Such a lack of equity ought not to be attributed to Parliamentary intent in the absence of very clear language. In addition, even among the treaties, the enumerated benefits vary greatly and it should not be concluded that Parliament intended that monies could be garnisheed in the case of some Indian reserves but not others. To the extent the exemption in s. 90 is seen as part of the purchase price for the cession of land, it makes little difference to the dispossessed whether dispossession occurred by agreement or not. The narrow interpretation of s. 90(1)(*b*) would result in a checkerboard of exemptions and non-exemptions across the country determined by the vagaries of the treaty- making process rather than rational legislative policy. [95] [103] [106] [116] [121] [123-124] [128]

The expenditures of the appellant band council show that its spending priorities are different from the CFA priorities. If the garnishee is successful there will not be enough CFA money left to pay for essential public services. This means either band members will live in the "third world conditions" described in the *Report of the Royal Commission on Aboriginal Peoples* (1996) ("RCAP"), or the federal government will step in at some stage to fund the delivery of the essential services it had already funded under the CFA but which funds were diverted to other priorities determined by the band council. The first alternative is to perpetuate what RCAP calls a national embarrassment. The other alternative is for the public to pay twice. Neither is palatable public policy. Parliament cannot have intended an interpretation of s. 90(1)(*b*) that creates such a Hobson's choice. [85] [149]

A public sector services funding approach, which would exclude commercial dealings but include CFA funds provided by the federal government for health, education, housing, welfare and infrastructure, is consistent with the text, context and purpose of the relevant provisions of the *Indian Act* for the following reasons. Firstly, the text of s. 90(1)(*b*) does not qualify the term "agreement" but is part of a legislative package which bears the impress of the Crown's obligations to native peoples generally. Secondly, the suggested approach would avoid tying the exemption to the historical anomalies created by the treaty-making process. Thirdly, it puts the focus on the reserve where the needs of the band are to be met rather than on where the federal funds voted by Parliament for that purpose happen to be on deposit — in this case, off-reserve. Fourthly, it avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a deposit-taking financial institution. [132-133] [135-139]

To impose an onus on the band to prove which parts of CFA funding on deposit at any particular time "flesh out" treaty commitments of the Crown and which parts of CFA funding do not, is a burden they cannot discharge, given the deposit of blended monthly payments which are not segregated on a project by project basis. The objective of predictability and certainty in economic relations between First Nations and non-aboriginal people is better served by a categorical denial of execution and garnishment of CFA funds whether those funds are parked at a financial institution on or off the reserve. [145-146]

Cases Cited

By McLachlin C.J.

Applied: *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. Lewis*, [1996] 1 S.C.R. 921; **distinguished:** *Williams v. Canada*, [1992] 1 S.C.R. 877; **referred to:** *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v. McCraw*, [1991] 3 S.C.R. 72.

By Binnie J. (dissenting)

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Sturgeon Lake Indian Band v. Tomporowski Architectural Group Ltd.* (1991), 95 Sask. R. 302; *Royal Bank of Canada v. White Bear Indian Band*, [1992] 1 C.N.L.R. 174; *Young v. Wolf Lake Indian Band* (1999), 164 F.T.R. 123; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Greyeyes v. The Queen*, [1978] 2 F.C. 385; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, aff'g (1989), 58 D.L.R. (4th) 117, aff'g (1984), 15 D.L.R. (4th) 321; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, aff'd [1965] S.C.R. vi; *Peace Hills Trust Co. v. Moccasin* (2005), 281 F.T.R. 201, 2005 FC 1364; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37.

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An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ord[i]nance Lands, S.C. 1868, c. 42.

An Act to amend the Indian Act, S.C. 1906, c. 20.

An Act to amend the Indian Act, S.C. 1938, c. 31, s. 2.

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35(3).

Financial Administration Act, R.S.C. 1985, c. F-11, ss. 32, 34.

Indian Act, R.S.C. 1886, c. 43.

Indian Act, R.S.C. 1927, c. 98, ss. 94B, 108.

Indian Act, R.S.C. 1985, c. I-5, ss. 87, 88, 89, 90.

Indian Act, S.C. 1951, c. 29, ss. 88, 89.

Indian Act, 1876, S.C. 1876, c. 18.

Indian Act, 1880, S.C. 1880, c. 28.

Trust and Loan Companies Act, S.C. 1991, c. 45.

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Philp and Hamilton JJ.A.) (2005), 192 Man. R. (2d) 82, 340 W.A.C. 82, 251 D.L.R. (4th) 93, 8 C.B.R. (5th) 244, 50 C.L.R. (3d) 17, [2005] 2 C.N.L.R. 155, [2006] 1 W.W.R. 486, [2005] M.J. No. 29 (QL), 2005 MBCA 22, allowing an appeal

from a decision of Sinclair J. (2004), 186 Man. R. (2d) 31, [2004] 3 C.N.L.R. 192, [2004] M.J. No. 281 (QL), 2004 MBQB 156, dismissing an appeal against an order issued by Senior Master Lee. Appeal dismissed, Binnie, Fish and Abella JJ. dissenting.

George J. Orle, Q.C., and *Daryl A. Chicoine*, for the appellant.

James A. Mercury and *Betty A. Johnstone*, for the respondent.

Graham R. Garton, Q.C., and *John S. Tyhurst*, for the intervener the Attorney General of Canada.

Jack R. London, Q.C., and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

P. Michael Jerch and *Louis Harper*, for the intervener Manitoba Keewatinook Ininew Okimowin.

The judgment of McLachlin C.J. and Bastarache, LeBel, Deschamps, Charron and Rothstein JJ. was delivered by

THE CHIEF JUSTICE —

1. Introduction

1 The appeal concerns the scope of ss. 89 and 90 of the *Indian Act*, R.S.C. 1985, c. I-5. These provisions, designed to prevent the erosion of property belonging to Indians *qua* Indians, confer immunity from seizure by creditors. The question on this appeal is whether ss. 89 and 90 extend this immunity to funds provided under individualized Comprehensive Funding Arrangements ("CFAs") between the federal government and aboriginal bands.

2 The case at bar involves band funds that have been deposited in an off-reserve account pursuant to a CFA between the God's Lake Band and the federal government. As part of a "co-management" approach to governance, the CFA funds are designed to be spent exclusively for certain designated purposes. One of these purposes — namely, on-reserve education — appears closely related to the Crown's obligations under Treaty No. 5 (1875), to which the band adhered in 1909. Others seem only indirectly related to such obligations. Still others seem to fall entirely outside the treaty obligations. The respondent, a creditor of the band that has obtained a consent judgment and garnishment order, is seeking to seize the funds.

3 I conclude that the funds in question are not protected directly by s. 89 of the *Indian Act*, which protects only property situated on a reserve. Nor, in my opinion, did the band discharge its burden of establishing protection under s. 90(1), which immunizes from seizure funds given "under a treaty or agreement". Accordingly, I would dismiss the appeal.

2. Issues

4 The appeal raises two issues:

1. How should the location of a banking debt be determined for the purposes of s. 89(1)? Is the debt protected because it is notionally on reserve?

2. Do the words "personal property . . . given to Indians or to a band under a treaty or agreement between a band and Her Majesty" in s. 90(1)(*b*) apply to the funds provided under the CFA in the case at bar?

3. The Statute

5 Under s. 89 of the *Indian Act*, property situated on a reserve is protected from seizure. Under s. 90, other property may be deemed to be so situated for the purposes of taxation or seizure. The provisions read:

> **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.
>
> (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.
>
> **90.** (1) For the purposes of sections 87 and 89, personal property that was
>
> (*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
>
> (*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

The provisions were initially adopted, in almost identical form, as ss. 88 and 89 in the *Indian Act* reforms of 1951 (S.C. 1951, c. 29).

4. Judicial History

6 Senior Master Lee of the Court of Queen's Bench of Manitoba found that there was a strong likelihood that some of, if not all, the attached monies had been received pursuant to a CFA. He stated that the monies were for essential services on the reserve and were "clearly in keeping with the public policy behind the development of the protection afforded pursuant to ss. 89 and 90 of *The Indian Act*". He rejected arguments regarding *situs* under the *Trust and Loan Companies Act*, S.C. 1991, c. 45. After verification of the portion of the monies received under the CFA, Senior Master Lee ordered $518,838.55 released from garnishment. $125,000 was set aside pending the resolution of the issues before us.

7 On appeal, Sinclair J. of the Court of Queen's Bench first asked whether the funds were "property situated on a reserve" and thus protected from seizure by s. 89 of the *Indian Act*. He rejected the common law natural meaning approach to *situs* in favour of a connecting factors test aimed at identifying a discernible nexus between the property in question and the Indian occupation of reserve land. He identified and considered seven factors: the nature of the CFA; the purpose of the funds provided; the location of the recipient band under the CFA; the location of the account into which the funds were deposited; the location of expenditures from the fund; the intended beneficiaries or recipients of payment from the fund; and the importance of the fund

to the band's ability to occupy the reserve. Sinclair J. concluded that the funds constituted Indian property closely related to Indian occupation of reserve land and that they ought to be protected from seizure. He held:

> . . . I am satisfied that there is more than a discernable nexus between the funds and the Band's ability to occupy its reserve. The connecting factors in this case are quite strong. That causes me to conclude that the funds are protected from seizure pursuant to s. 89 of the *Indian Act* regardless of s. 90.
>
> ((2004), 186 Man. R. (2d) 31, 2004 MBQB 156, at para. 83)

Sinclair J. went on to consider whether the funds were also protected by s. 90 of the *Indian Act*. He concluded that the CFA was an "agreement" within the meaning of s. 90, rejecting the view expressed in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 134-42, *per* La Forest J., that for an agreement to come within s. 90, it must be connected to a treaty. Turning to the CFA at issue, Sinclair J. found that

> while it seems clear that the agreement between the Band and Canada was intended in part to allow Canada to fulfill its treaty obligations (for health and education for example), for the most part, the CFA covers areas of funding not mentioned in Treaty No. 5. [para. 87]

Being unable to say what portion of the CFA related to the treaty obligation made "no difference" given the broad meaning he accorded to the word "agreement" in s. 90. He concluded:

> I am of the view that the CFA reflects the federal government's responsibilities for Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act 1867*. Such an agreement, therefore, is covered by s. 90 of the *Indian Act*. As such, the funds deposited in the Band's bank account at Peace Hills were deemed always to be situated on an Indian Reserve and therefore not attachable. [para. 87]

8 The Manitoba Court of Appeal, *per* Scott C.J.M. and Philp J.A., allowed the appeal, finding that neither s. 89 nor s. 90 of the *Indian Act* applied to the garnished funds: (2005), 192 Man. R. (2d) 82, 2005 MBCA 22. On s. 89, the court rejected the view that the CFA funds received by the band and deposited in the Winnipeg bank were personal property situated on a reserve. The court held that the motions judge had erred in applying a multi-factored "discernible nexus" test to determine whether the property was on the reserve, and in his evaluation of the factors that tied the band's accounts to the reserve. While the provisions of the Act were to be liberally interpreted in favour of Indians, *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161, at paras. 13-15, made clear that the words "situated on a reserve" in s. 87 should be given their ordinary and common sense meaning and that they do not include "notional situation" on a reserve. The only notional *situs* of personal property for the purposes of ss. 87 and 89 was found in the statutory deeming provisions of s. 90.

9 After reviewing the case law, the court determined that it would be inappropriate to apply a highly contextual test to determine the *situs* of personal property that may be subject to seizure. Even if such a test were applied, however, Scott C.J.M. and Philp J.A. found that the location of the funds in Winnipeg would be determinative:

> We conclude, as did Côté, J.A., in the *Enoch Indian Band* decision, that whether one applies the common law *situs* principles or the *Williams* connecting factors test, the funds on deposit at Peace Hills were not property situated on a reserve. The funds were not exempt from garnishment by the plaintiff by virtue of s. 89 of the *Act*. [para. 91]

10 The court then turned to s. 90. It held that the governing authority was *Mitchell*, which restricted the scope of s. 90(1)(*b*) to personal property that enures to Indians through the discharge by Her Majesty of her treaty or ancillary obligations. It followed that the motions judge's broad reading of "agreement" in s. 90 was untenable. The only question was whether the CFA was ancillary to Treaty No. 5. The court noted that the CFA, for the most part, dealt with areas not covered by Treaty No. 5. There was "no evidence that established an explicit connection between the band's treaty rights and the CFA" (para. 126), and the importance of the funds to the band's viability did not change the agreement's nature.

5. Analysis

5.1 *Determining Location Under Section 89(1)*

11 Section 89(1) of the *Indian Act* provides that "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". The question is whether the expression "situated on a reserve" is to be given its plain meaning and subjected to the common law and statutory *situs* rules, or whether it has a more abstract meaning unique to the *Indian Act*.

12 The band relies on *Williams v. Canada*, [1992] 1 S.C.R. 877. In that case, the issue was whether unemployment insurance benefits received by an Indian were "situated" on the reserve for the purposes of exemption from taxation under the *Indian Act*. The Court, *per* Gonthier J., found that the *situs* for this purpose was on the

reserve, having regard to "a number of potentially relevant connecting factors" relating to the transaction and the parties involved (p. 893). Gonthier J., in *obiter*, suggested that the same approach would apply to seizures.

13 There is no dispute that under traditional common law approaches and the terms of the *Trust and Loan Companies Act*, the debt at issue here is located off-reserve at the Winnipeg bank branch. The question, therefore, is what approach applies to seizures — the concrete approach of the common law, or the multi-factored notional approach applied to taxation in *Williams*.

14 The band argues that the *Williams* approach better reflects the broader purpose of this protective provision of the *Indian Act*. That purpose, it submits, is to protect assets of Indians *qua* Indians where to permit seizure would neglect the realities of the aboriginal community in question or the options available to the parties. This is particularly true, the band contends, if a link to on-reserve activities is established.

15 Despite its evident appeal, this submission does not withstand scrutiny. Principle, policy and jurisprudence stand against it.

16 First, *Williams* is distinguishable. It was based on a different section of the *Indian Act* and referred to a different kind of property. At issue was s. 87, which accords an exemption from taxation for "personal property of an Indian or a band situated on a reserve". The exemption was permitted in *Williams*, because "the benefits, intangible personal property, were effectively on the reserve at the time of taxation": *Union of New Brunswick Indians*, at para. 12 (emphasis added).

17 As Scott C.J.M. and Philp J.A. note, the Court in *Williams* used a "connecting factors" approach to determine the location of "something that is neither tangible personal property nor a chose in action" (para. 59). It makes sense to adopt a highly fact-specific form of analysis with respect to the location of a *transaction*, such as the provision of benefits, for taxation purposes. In this case, however, as Scott C.J.M. and Philp J.A. point out:

> [W]e are not concerned with where a transaction is located for the purposes of taxation. We are concerned with the garnishment of the band's funds that are deposited in bank accounts at the Winnipeg branch of Peace Hills. The law is well settled that a bank deposit constitutes a debt owing by the bank to its customer. Gonthier, J., reasoned in *Williams*, it is "not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax . . . would amount to the erosion of the entitlements of an Indian . . .". On the other hand, the place where a debt may be enforced has everything to do with the seizure of a debt. [Emphasis added; para. 60.]

18 Adopting the contextual form of analysis developed for cases — such as one involving a taxation transaction — where the location is objectively difficult to determine does not mean that the ordinary sense of "location" should be changed where — as is true of the bank account in the case at bar — the location is objectively easy to determine.

19 Second, the cases overwhelmingly support a concrete common law interpretation. In *Union of New Brunswick Indians*, writing for the majority of this Court, I confirmed the view of Iacobucci J. in *R. v. Lewis*, [1996] 1 S.C.R. 921, that "on the reserve" is to be given "its ordinary and common sense" meaning throughout the *Indian Act*:

> The Court had earlier stated at p. 955 [of *Lewis*] that the phrase should be given the same construction wherever it is used throughout the *Indian Act*. The phrase "situated on a reserve" should be interpreted in the same way. The addition of the word "situated" does not significantly alter the meaning of the phrase in the circumstances of this case . . . .
>
> The only qualification the case law admits to the rule that s. 87 catches only property physically located on a reserve is the rule that where property which was on a reserve moves off the reserve temporarily, the court will ask whether its "paramount location" is on the reserve. [paras. 13-14]

The Court of Appeal in the case at bar found this statement to have "foreclosed the existence of a discernible nexus test that would modify the requirement of s. 87 (and of s. 89) that property must be physically located on a reserve" (para. 34). I agree.

20 Third, this view is supported by the fact that when Parliament wished to depart from the physically situate test for personal property, it did so expressly by statutory language. Thus, s. 90 provides that personal property given to Indians by the Crown under treaty obligations or purchased by moneys appropriated by Parliament for the benefit of Indians "shall be deemed always to be situated on a reserve". The existence of a deeming provision of this kind suggests that other provisions addressing location should not be interpreted according to a "notional" test.

21 I agree with the Court of Appeal that the funds in the Winnipeg bank account were not "situated on a reserve". Accordingly, the exemption granted by s. 89 of the *Indian Act* does not apply.

5.2 *The Exemption Under Section 90(1) of the Indian Act*

22 Section 90(1) of the *Indian Act* reads as follows:

> **90.** (1) For the purposes of sections 87 and 89, personal property that was
>
> (*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
>
> (*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,
>
> shall be deemed always to be situated on a reserve.

Is the deposited money at issue in this case covered by this deeming provision, and thus protected from garnishment, because of its source in an "agreement" with the Crown?

23 The appellant band is a 1909 adherent to Treaty No. 5, concluded at Norway House in 1875. In exchange for the extinguishment of claims, the Crown agreed, *inter alia*, to protect traditional activities on the surrendered land, provide annual grants, and maintain schools. In the case at bar, the funds in question were provided through a CFA under which funds are to be delivered to the band's off-reserve bank account on a monthly basis. The motions judge found that the band has "almost no independent sources of funding for its financial needs other than those provided by the federal government" (para. 5). The parties disagree about both the proper interpretation of the word "agreement" in s. 90(1) and the proper characterization of the CFA.

24 The question is one of statutory interpretation. What is the meaning of "agreement" in s. 90(1)(*b*)? Does it extend to any agreement between the government

and an Indian band? Or is it confined to particular types of agreements, and if so, what types of agreements?

25 Precedent, principle and policy all suggest that Parliament's intent was that the word "agreement" in s. 90(1)(*b*) should not be accorded a broad meaning, but should instead be confined to agreements ancillary to treaties.

5.2.1 Precedent

26 This Court has already considered the meaning of "agreement" in s. 90(1)(*b*) and concluded that it should be restricted to agreements that flesh out commitments of the Crown to Indians in the treaty context of the surrender of their homelands: *Mitchell*, at pp. 124, 131 and 134. The band would have us overrule *Mitchell*. It is not the practice of this Court to reverse its previous decisions in the absence of compelling reasons to do so: *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1352-53; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 777-78; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 43. In this case, as will be discussed more fully below, no such reasons emerge. On the contrary, *Mitchell* appears to have been correctly decided.

27 The Court confirmed in *Williams* that the purpose of the exemptions in ss. 87, 88 and 89 of the *Indian Act* "was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize" (p. 885). The purpose is to protect what the Indian band was "given" in return for the surrender of Indian lands. The exemptions are tied to the reserve lands and the Indians' ability to

preserve their lands against outside intrusion and diminishment. As Gonthier J. stated in *Williams*, "the purpose of the sections was not to confer a general economic benefit upon the Indians" (p. 885). For example, they do not exempt from seizure or taxation contractual arrangements in the commercial mainstream that amount to normal business transactions, but only "property that enures to Indians pursuant to treaties and their ancillary agreements": *Mitchell*, at p. 138. Only the latter is protected by s. 90(1)(*b*).

28 To achieve this purpose, Parliament sought to ensure that the entitlements of Indians under treaties were not defined in a way that was unduly narrow or technical. La Forest J. reasoned that "[i]t must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown": *Mitchell*, at p. 124. The word "agreement" in the provision thus served to ensure that agreements that fulfil treaty obligations are treated as such.

29 In reaching this conclusion, the Court relied on the principle of associated meaning, discussed more fully below. Although La Forest J. did not refer to that principle expressly, he used the vocabulary traditionally associated with it and determined that "the terms 'treaty' and 'agreement' in s. 90(1)(*b*) take colour from one another": *Mitchell*, at p. 124.

5.2.2 The Principle of Associated Meaning

30 It is a fundamental principle of statutory interpretation that when two or more words linked by "and" or "or" serve an analogous grammatical and logical

function within a provision, they should be interpreted with a view to their common features: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 173. This principle is known as the principle of associated meaning or *noscitur a sociis*. It is based on the idea that "[t]he meaning of a term is revealed by its association with other terms: *it is known by its associates*": *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195 (emphasis in original). As explained by Bastarache J. in *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at paras. 66-71, applying the principle enables courts to understand the "immediate context" of the statutory words whose meaning is in dispute.

31 Applying this principle may result in the scope of the broader term being limited to that of the narrower term: *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.). The question in *Goulis* was whether a bankrupt who had failed to reveal the existence of certain commercial property to his trustee in bankruptcy had "concealed" the property within the meaning of s. 350 of the *Criminal Code*, R.S.C. 1970, c. C-34, which provided:

> **350.** Every one who,
>
> (*a*) with intent to defraud his creditors,
>
> (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
>
> (ii) removes, conceals or disposes of any of his property
>
> . . .
>
> is guilty of an indictable offence . . . .

32 Although the term "conceals" in subpara. (ii) could be understood broadly to include a failure to disclose, Martin J.A. relied on the associated word principle to justify his adoption of a narrower meaning:

> In this case, the words which lend colour to the word "conceals" are, first, the word "removes", which clearly refers to a physical removal of property, and second, the words "disposes of", which, standing in contrast to the kind of disposition which is expressly dealt with in subpara. (i) of the same para. (*a*), namely, one which is made by "gift, conveyance, assignment, sale, transfer or delivery", strongly suggests the kind of disposition which results from a positive act taken by a person to physically part with his property. In my view the association of "conceals" with the words "removes" or "disposes of" in s. 350(*a*)(ii) shows that the word "conceals" is there used by Parliament in a sense which contemplates a positive act of concealment. [p. 61]

Having identified the shared feature of the three linked words as a physical act of some sort, Martin J.A. then used this feature to narrow the range of possible meanings of "conceal".

33 This Court applied the principle of associated meaning to similar effect in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031. It had been alleged that s. 13(1)(*a*) of Ontario's *Environmental Protection Act*, which targeted a contaminant that "causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it", was unconstitutionally vague. The majority of the Court, *per* Gonthier J., stated:

> [A]s I observed in *Nova Scotia Pharmaceutical Society* . . . legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found . . .". Thus, it is significant that the expression challenged by CP as being vague . . . appears in s. 13(1)(*a*) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal

> threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause *injury or damage* to property or to plant or animal life (s. 13(1)(*b*)), cause *harm or material discomfort* (s. 13(1)(*c*)), *adversely affect* health (s. 13(1)(*d*)), *impair* safety (s. 13(1)(*e*)), render property or plant or animal life *unfit for use* by man (s. 13(1)(*f*)), cause *loss* of enjoyment of normal use of property (s. 13(1)(*g*)), or *interfere* with the normal conduct of business (s. 13(1)(*h*)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(*a*) EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment. [Emphasis in original; para. 64.]

Thus, the Court relied on a shared feature of the paragraphs of s. 13(1) of the Act to narrow the broad ambit of s. 13(1)(*a*).

34 The principle of associated meaning must be considered in the context of all relevant sources of legislative meaning: see Sullivan, at p. 175, citing *R. v. McCraw*, [1991] 3 S.C.R. 72. As with all rules of interpretation, the principle functions as an aid to ascertaining the intention of the legislature. Where the legislature links two concepts, ambiguity in one of them may be resolved by having regard to the other. As a result, a broad provision may be read more narrowly. This "immediate context" of the disputed words is important, but is just one factor among many that should be considered in examining the different contexts of a disputed provision: *Marche*, at para. 66; Sullivan, at pp. 260-62.

35 In *Mitchell*, this Court applied the principle of associated meaning to clarify the meaning of "agreement" in s. 90(1)(*b*) of the *Indian Act*. La Forest J. echoed the language of Martin J.A. in the earlier case of *Goulis*, at p. 61, stating that

"the terms 'treaty' and 'agreement' . . . take colour from one another" (p. 124). In my view, the Court did not err in applying this principle.

5.2.3 The Presumption Against Tautology

36 It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

37 If "agreement" is interpreted broadly to cover all types of agreements between Indians and the government, the word "treaty" has no role to play. Treaties are special and particularly solemn agreements, but they are agreements nonetheless. This supports the view taken in *Mitchell* that "agreement" in s. 90(1)(*b*) should be read more narrowly as supplementing "treaty".

5.2.4 The Strict Construction of Exceptions and the Protection of Rights

38 The provincial credit regimes shape an important part of economic life in Canada. They are designed, almost by necessity, to apply universally. The provisions at issue in the case at bar serve to interfere with that scope. They act to carve out certain forms of Indian property from under the applicable credit regime, but leave others in. In short, they establish specific exceptions to the general rule that the provincial credit regime will apply to Indian property.

39 The wording of the provisions makes clear that Parliament did not seek to exempt Indian property in a broad sense. Instead, specific criteria were set out to describe the features of property that Parliament wanted to exclude from the credit regimes established by the provinces. Given the importance of access to the credit economy, and given Parliament's choice to create only limited exceptions to its application, it is not for the courts to adopt a reading of the statute that distorts that choice. Courts should be hesitant to find exceptions where they are not explicit, particularly when their effect is to materially affect the rights of citizens under statute or common law. The exceptional effect of the provisions at issue here is limited by the precise wording Parliament used and the underlying purpose that the provision serves. It should not be read more broadly than necessary to give meaning to the words and to give effect to Parliament's purpose.

40 The fact that the effect of the provisions is to suspend the rights of both creditors and debtors provides further support for a narrow interpretation of the exceptions. Provincial credit regimes create important and enforceable rights for the debtors and creditors who are governed by them. They enable debtors to leverage assets and creditors to take measured risks. They are the modern incarnation of the panoply of rules of credit developed at common law. It is against this backdrop that the exceptions created by the *Indian Act* provisions must be understood.

41 In the absence of express language, it is not the place of courts to read the *Indian Act* exceptions in such a way that would transform them into significant forms of interference with the applicable provincial regime and rights thereunder. Subject to the constraints established by the Constitution, it is for Parliament to make policy choices of that nature. Particularly in the case of a credit regime, courts have a

responsibility to ensure a degree of certainty and predictability in the law and to approach the task of statutory interpretation with restraint.

5.2.5 Limiting Access to Credit

42 A further reason that the word "agreement" in s. 90(1)(*b*) should be read narrowly is that the section limits the ability of aboriginal peoples to access credit. This conclusion was reached by the Royal Commission on Aboriginal Peoples ("RCAP"). In its report, RCAP noted the difficulties that aboriginal peoples have in gaining access to capital, and listed a number of barriers that contribute to this problem: see *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2, *Restructuring the Relationship*, at pp. 906-31. Among the barriers listed, the *first* barrier identified was the restrictions imposed by the *Indian Act*. RCAP described these barriers as follows at pp. 906-7: "The *Indian Act* contains certain provisions that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral. These provisions serve as a significant deterrent to financing business activity on-reserve." RCAP considered a number of ways to overcome these barriers, including abolishing the restrictions in the *Indian Act*. Although this Court clearly cannot abolish the *Indian Act* restrictions, the concern about limited access to credit resulting from these restrictions is yet another reason that the word "agreement" in s. 90(1)(*b*) should be read narrowly.

5.2.6 Sections 90(2) and 90(3)

43 Further support for the view that s. 90(1)(*b*) should be interpreted narrowly comes from ss. 90(2) and 90(3) of the *Indian Act*. The subsections read:

> (2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.
>
> (3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

44 These subsections are difficult to reconcile with an expansive reading of "treaty or agreement". If ministerial consent is required for *every transaction* that deals with property deemed to be situated on reserve by subs. (1), a broad interpretation of "treaty or agreement" could result in significant delays in the delivery of needed programs and services to band members.

45 My colleague, Binnie J., disagrees. He suggests that, in cases involving a CFA, the agreement itself will constitute ministerial consent for the transaction (para. 141). If the agreement directs funds to be used for a particular purpose, and those funds are indeed used for that purpose, I agree that the agreement itself may constitute ministerial consent for "the transaction". If, however, an agreement does not specify how funds are to be spent, or it does so, but the funds are not put to the proper use, I do not agree that the agreement itself would constitute ministerial consent for "the transaction". If this Court were to adopt a broad interpretation of "treaty or agreement", the result would be litigation about whether the agreement itself constitutes ministerial consent, followed by delays in the delivery of needed programs and services in those cases where the agreement did not constitute ministerial consent.

This is yet another reason that this Court should be cautious about adopting a broad interpretation of "agreement" in s. 90(1)(*b*).

5.2.7 The History of Section 90(1)(*b*)

46 It is often helpful to consider the history of a provision in assigning meaning to a disputed term. The events and debates surrounding the adoption of the provision may provide insight into Parliament's purpose.

47 The *Indian Act* seizure exemptions have a long history. The current provision, adopted in 1951 as s. 89 of the *Indian Act*, replaced s. 108 of the *Indian Act*, R.S.C. 1927, c. 98, which in turn was preceded by similar provisions in the 1906, 1886 and 1880 Acts. Section 108 and its predecessors made no reference to property given under a "treaty" or "agreement". Instead they protected from seizure "presents given to Indians or non-treaty Indians", "annuities or interest on funds" and "moneys appropriated by Parliament, held for any band of Indians", as well as related property purchased with those funds. The 1850 *Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* also protected "annuities and presents" and associated property (S. Prov. C. 1850, 13 & 14 Vict., c. 74, s. VIII).

48 The scope of these protections was broad. Basically, any monies or gifts from the government to Indians appear to have been covered. By contrast, the words adopted in 1951 and retained to the present are more circumscribed; what is protected is a particular type of money or gifts — personal property which was purchased by the government and personal property "given to Indians or to a band under a treaty or

agreement between a band and His Majesty". The change in the language used by Parliament is striking.

49 Why did Parliament in 1951 abandon the former approach of exempting certain kinds of property, in favour of an approach that based the exemption on whether the property was given under a treaty or agreement? The record reveals no definitive answer. What it does reveal, however, is a change in philosophy after 1951.

50 The 19th century exemption provisions were born of a fear that Indians and their lands and property were subject to exploitation by others. The aim was thus to provide broad protection for their property. The Preamble of the 1850 legislation is revealing:

> . . . it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation . . . .

This concern with the protection of Indians from those who might take advantage of them and divert funding provided by the Crown is consistent with broad protection against seizure. The section of the 1850 Act setting out the exemption notes that the provision of support was directed at "the common use and benefit" of Indians and "the encouragement of agriculture and other civilizing pursuits among them" (s. VIII).

51 The paternalism of the 19th century continued to animate many Indian policies and social and political attitudes well into the 20th century. By the 1930s and

1940s, however, other values had also become important. Increasingly, there was a realization that the paternalistic model that had been in place was no longer entirely appropriate. Self-determination and self-government had emerged as an aspiration, if not a reality, and bands were beginning to embark on projects to improve their economic situation.

52 The role of the federal government in supporting different forms of development was also changing. In 1938, s. 94B of the 1927 *Indian Act*, which enabled the federal government to introduce a "revolving loan fund" for aboriginal communities, was enacted (S.C. 1938, c. 31, s. 2). The words of the Minister of Mines and Resources in Parliament reflect some change in old attitudes:

> The second point involved is really a new departure in Indian administration. It is the creation of what is popularly called a revolving fund. . . . As it stands at present the Indians are, and of course will remain even under this legislation, the wards of the government. At present parliament appropriates certain moneys year by year for Indian welfare work. But these votes of money are expended the same as any other vote, and consequently are looked upon more in the way of grants or gifts . . . . One of the things that has impressed itself on my mind in the brief period I have had to do with Indian administration is the need to develop a spirit of self-reliance and independence in our Indian wards. My reading of the story of the relation between governments and Indians in Canada leads me to the conclusion that the expectation originally was, and indeed is still largely entertained, that the Indians will in course of time become absorbed into the ordinary citizenship of the country, and cease to be wards . . . . I must confess that I think in the past our attitude has often not been conducive to the achievement of that very desirable end. [Emphasis added.]
>
> (*House of Commons Debates*, vol. III, 3rd Sess., 18th Parl., May 30, 1938, at pp. 3349-50)

53 These changing attitudes were reflected in the work of the Special Joint Committee on the *Indian Act*, struck in 1946 in response to an increasing sense of a

need to modernize Indian policy. The participation of Indians in the Second World War and a growing concern for human rights following that conflict had drawn the attention of the public and of Parliament to the conditions faced by Indians: see R. G. Moore, *The Historical Development of the Indian Act* (2nd ed. 1978), at p. 132. The Committee's unprecedented consultative reach in the Indian community revealed the degree to which the needs of Indians varied from region to region and according to socio-economic conditions which were often unique to particular communities. The final report in 1948 made a series of recommendations "designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves": Special Joint Committee of the Senate and the House of Commons on the Indian Act, *Minutes of Proceedings and Evidence*, Issue No. 5, at p. 187, Fourth Report, June 22, 1948. The recommendations addressed electoral rights, increased funding to communities and the end of Indian-specific alcohol regulation, and revealed a new focus on accession to full citizenship and some form of greater self-government at the band level.

54 Yet tension between the old ways and the new remained. Two of the final report's recommendations capture this tension. On the one hand, the Committee asked that "financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members" (p. 187). On the other hand, the Committee urged that the new Act include "provisions to protect from injustice and exploitation such Indians as are not sufficiently advanced to manage their own affairs" (p. 187).

55 The adoption of the revised *Indian Act* in 1951, and of the present s. 90(1)(*b*), was born of this tension. Indians were to be encouraged to manage their own

affairs and enter into commercial arrangements for their own betterment and economic advantage. This was incompatible with exemption from seizure of virtually all property that could be traced to government gifts and funds. At the same time, it was felt that basic protection from exploitation by others in society was still required. This was consistent with maintaining protection for funds flowing from treaty obligations, as well as for property situated on reserves. Minister Walter Edward Harris recognized the tension in Indian policy more generally:

> The problem is to maintain the balance of administration of the Indian Act in such a way as to give self-determination and self-government as the circumstances may warrant to all Indians in Canada, but that in the meantime we should have the legislative authority to afford any necessary protection and assistance.
>
> (*House of Commons Debates*, vol. II, 4th Sess., 21st Parl., March 16, 1951, at p. 1352)

56 The record does not reveal precisely why Parliament chose to define the exemption from seizure in what is now s. 90(1)(*b*) in terms of funds given under a "treaty" or "agreement". It is therefore not possible to say that the history of the provision dictates a particular approach. However, what can be said is that the use of these terms is consistent with the recognition in 1951 that Indians should be encouraged to take steps toward greater self-governance and participation in economic enterprise.

57 Against this background, why did Parliament not content itself with personal property given under a "treaty"? Why did it add the word "agreement"?

58 As already discussed, La Forest J. in *Mitchell* identified an important reason: "It must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown" (p. 124). Thus, "agreement" includes supplementary or ancillary agreements that describe the treaty obligations in greater detail. These are still treaty obligations, in the sense that they merely make more precise the obligations imposed by the treaty. On this view, the word "agreement" was added to ensure that personal property given pursuant to a treaty would be protected. Creditors would not be able to argue that property conferred in fulfillment of the treaty was not protected because the obligation was not expressly spelled out in the original treaty.

59 An alternative explanation is that "agreement" was added to cover those agreements between the federal government and treaty and non-treaty Indians providing funds for "basic" or "essential" public services. My colleague, Binnie J., prefers a variant of this alternative explanation, which he calls the "public sector services approach". Under this approach, s. 90(1)(*b*) is construed to protect monies provided by the federal government to Indian bands for education, housing, health and welfare and other similar government-type essential services on reserve (para. 129). Funding provided under CFAs would be wholly protected (para. 146).

60 Binnie J. suggests that this broader interpretation of "treaty or agreement" is justified for several reasons. First, it is justified, he suggests, because it avoids the differential treatment of treaty and non-treaty Indians, by protecting all "public sector services" funding, regardless of whether it is ancillary to a treaty. Given that non-treaty Indians had property protections under the older and much broader seizure

provisions, this justification for a broader reading of "treaty or agreement" seems appealing at first blush. However, on further reflection, it seems much more likely that Parliament actually intended to single out property related to treaty entitlements for special treatment under s. 90(1)(*b*). Why? It seems to me that the answer may lie, at least in part, in the finality of the treaty-making process. Parliament may have intended to give special protection to property given under a treaty, because this property was considered to be unique, in the sense that, under most treaties, it represented the complete package of property that would be given to the band(s) in return for the surrender of Indian lands, and the extinguishment of possible claims. (This is not to say, that the package given to a band in exchange for the surrender of lands was fair or just.) As La Forest J. noted in *Mitchell*, at p. 124, the word "given" in s. 90(1)(*b*) "can be taken as a distinct and pointed reference to the process of cession of Indian lands".

61 Although this was perhaps not in the contemplation of Parliament in 1951, in retrospect, there seems to be a good reason for the differential treatment of treaty Indians and non-treaty Indians. It is open to the Crown to include provisions intended to protect the particular band in any funding agreements that it makes with the band. As was put to us in argument, the CFAs themselves often have numerous provisions to ensure that the monies are used to provide the benefits and the services that they are intended to cover. If the band is not using the money in that way, there is often a provision for a third-party manager to step in to remedy the problem. Different bands have different needs and desires. It may be best to let the federal government and the particular band determine what protective provisions will govern the funds in question, rather than imposing a "one size fits all" solution to protection from garnishment that may not suit the needs and desires of the band in question.

62 Second, Binnie J. suggests that his broader reading of "treaty or agreement" is justified because, unlike the *Mitchell* interpretation of "treaty or agreement", it would not adversely affect bands, like the God's Lake Band, that do not have on-reserve banking facilities. There are two problems with this justification. The first problem is that it fails to consider that, even if there is no deposit-taking financial institution on the God's Lake Reserve, it was open to the God's Lake Band to deposit its funding in financial institutions on other reserves. The funds would then have been protected, by virtue of s. 89 of the *Indian Act*. As Gonthier J. noted in *Williams*, at p. 887, "under the *Indian Act*, an Indian has a choice with regard to his personal property. . . . Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian." The second problem is that this justification runs counter to the reasoning of this Court in *Union of New Brunswick Indians*, at paras. 37-42, in which, writing for the majority, I rejected the argument that the tax exemption in s. 87 of the *Indian Act* should be given an expansive scope, so as to protect property that Indians are obliged to purchase off the reserve for their needs on the reserve.

63 Third, Binnie J. suggests that his broader reading of "treaty or agreement" is justified because, unlike the *Mitchell* interpretation of "treaty or agreement", it would not result in the differential treatment of treaty Indians, *inter se*, resulting from the "vagaries of the treaty-making process" (para. 124) and "serendipitous differences in the wording of the treaties" (para. 92). If, as I conclude, it seems likely that Parliament actually intended to protect only treaty entitlements, it is reasonable to assume that Parliament contemplated and accepted the differential treatment of treaty Indians, as it would logically flow that treaty Indians would receive different levels of

protection, depending on the property "given" under the particular treaty. If Parliament now feels that treaty Indians (or, for that matter, treaty Indians and non-treaty Indians) should be treated equally under s. 90(1)(*b*), it is open to it to amend the *Indian Act* to so provide.

64 In my view, the key difficulty with the approach advocated by Binnie J. is that it would require the courts to engage in political decision-making. Absent statutory language or relevant constitutional imperatives, it is not the place of the judicial system to determine which elements of public spending relate to "essential services" and which do not. The purpose of the exemption provisions is neither to confer a "general economic benefit" on aboriginal communities or to nurture a particular model of public expenditure.

65 In addition, my colleague's approach would require courts to draw a line between "public sector services" agreements (which are included under s. 90) and those with "a more commercial orientation" (which are not included under s. 90) (paras. 129-30). This would involve difficult issues of interpretation, and is likely to lead to expensive and time-consuming litigation. Binnie J. attempts to circumvent this problem, by finding that all funds provided under a CFA are protected under s. 90(1)(*b*). The difficulty with this solution is that it would result in a sweeping extension of the protections that have up to now been conferred on the property of Indians. In a constitutional democracy, the task of extending the law in this manner falls properly to the legislature, as the elected branch of government, not the courts.

66 To sum up, the record does not disclose precisely why Parliament chose to replace the pre-1951 categories of protected property with protection based on

whether the property had been given pursuant to a "treaty" or "agreement" with the Crown. Nor does it disclose precisely why the word "treaty" was supplemented with "agreement". However, Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties. Exempting property broadly would be inconsistent with self-sufficiency because it would deprive Indian communities of a cornerstone of economic development: credit. Eliminating all protection would neglect the persistent concerns about exploitation. These documented and potentially conflicting policy considerations suggest that Parliament wanted to provide limited protection for treaty entitlements while not interfering with the ability of Indians to achieve great economic independence. This supports the restricted meaning of "agreement" in s. 90(1)(*b*) adopted by this Court in *Mitchell*.

67 Indian bands may be the recipients of property under treaty obligations. They may also receive property in their capacity as partners in policy implementation, as representatives of local interests, or as administrators of public spending destined to improve conditions in Indian communities. All of this funding may be important, but the *Indian Act* singles out treaty funding as representing a different kind of property that benefits from special protections. The legislative protection acts to preserve the basic treaty patrimony of the band for present and future generations. Given that our Constitution also grants a special place to treaty obligations, Parliament's decision to distinguish between treaty and non-treaty property in the statutory scheme is not one that the Court can or should disturb.

68 The position of Indians in Canada has greatly changed. Many bands have achieved a substantial degree of economic independence. Aboriginal owned and operated commercial enterprises are common across the country. Other bands, however, remain substantially dependent on federal revenues. Often, bands rely on a mix of government and self-generated revenues. Some of the government revenues provided to aboriginal peoples represent basic treaty entitlements and their modern counterparts or equivalents. Despite this different environment, Parliament has chosen not to repeal or reform the *Indian Act* provisions at issue, and so the case before us requires that we give them meaning 55 years after their introduction. By not reforming the *Indian Act* despite these new funding arrangements and evolving socio-economic and political conditions, Parliament has signalled its intent to maintain the distinction between those funds that give effect to treaty obligations and those that serve other ends. The task of the courts is to give effect to that intention.

5.2.8 Conclusion on the Meaning of "Agreement"

69 Textual, historical and policy considerations all support the conclusion of this Court in *Mitchell* that the word "agreement" in s. 90(1)(*b*) of the *Indian Act* should not be construed broadly as extending to any agreement between the government and Indians that confers benefits, or any agreement between the government and Indians that confers "public sector services" benefits. Rather, it should be understood in the sense of an arrangement that fleshes out treaty obligations of the Crown.

70 I note, for the sake of clarity, that modern land claims agreements (e.g., the *Nisga'a Final Agreement* (1999)) are protected under the *Mitchell* interpretation of "treaty or agreement". This conclusion flows logically from s. 35(3) of the

Constitution Act, 1982, which provides that "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired". This serves to mitigate, in some small measure, the exclusion of non-treaty Indians from s. 90 protection. Non-treaty Indians that are not currently protected under s. 90 may acquire protection in the future, if their band negotiates a land claims agreement with the federal government.

5.3 *Is the CFA at Issue Protected by Section 90(1)(b) of the Indian Act?*

71 Is the CFA at issue here an "agreement" that expressly, or by necessary implication, gives effect to the Crown's treaty obligations? This question is complicated for two reasons.

72 First, the fund created by the CFA is blended and is thus difficult to characterize for the purposes of applying s. 90(1)(*b*). It is a pool of money provided for several different purposes, reflecting the reach of the modern welfare state. It includes funds provided by the federal government in order to enhance the self-sufficiency and living standards of the band in a wide range of areas. If parts of the fund relate to treaty obligations, these have not been segregated by either the Crown or the band.

73 The solution of the law where blended funds are concerned is usually to require the party claiming protection to segregate or trace the protected portion of the fund from unprotected portions. The same rationale applies to parties claiming protection under the *Indian Act*, but this brings us to the second complication in this case. The record in the case at bar does not permit us to delineate the extent of the

Crown's treaty obligations to determine whether, and to what extent, some of the funds may flow directly from those obligations. At the Court of Queen's Bench, Sinclair J. made reference to the Crown's treaty obligation in respect of education, but he failed to engage in an analysis of the relationship, if any, between the treaty obligation and the pool of funds in question. Given his reasoning that s. 90(1)(*b*) provided broad protection, this determination was unnecessary. Under the proper interpretation of the provision set out above, however, it would be determinative of the issues before us.

74 It is clear that any portion of the CFA funds that flows directly from treaty obligations is entitled to protection under s. 90(1)(*b*). The manner in which the Crown has decided to discharge its obligations under treaties does not alter the degree to which Parliament has decided to protect funds spent for that purpose. To put it another way, there is no magic in the label CFA. The *Indian Act* confers protection on property flowing from treaty obligations, and the onus is on the party claiming the protection to establish that the property it claims to be protected falls within that category. On the findings of the courts below, that burden was not discharged.

75 Funds given pursuant to treaty obligations will be protected under s. 90(1)(*b*). The nature and extent of those obligations should be determined according to the interpretive principles that this Court has set out in the past, and with due regard to the particular historical context of the relationship between the Crown and the band in each case. The fact that the Crown provides funding for general public services, however, does not alter the fundamental treaty relationship that is the focus of these provisions. The underlying purpose of this statutory protection, as noted by La Forest J. in *Mitchell*, is not to improve socio-economic conditions but instead to protect the treaty property of Indians *qua* Indians. In all cases, the burden will be on the band to

demonstrate that disputed funding is protected by virtue of its relationship to treaty obligations.

6. Conclusion

76 The record before us does not permit us to make a determination about the precise relationship between the funds in question and the treaty obligations of the Crown. As it is the burden of the band to demonstrate this connection, we cannot find that s. 90(1)(*b*) operates in this case to protect the funds. Accordingly, the appeal is dismissed with costs.

The reasons of Binnie, Fish and Abella JJ. were delivered by

77 BINNIE J. (dissenting) — I have read the reasons of the Chief Justice and I agree with much of her analysis. I disagree, however, with the narrowness of her interpretation of the words "treaty or agreement between a band and Her Majesty" in s. 90(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5. In my view, the Comprehensive Funding Arrangement ("CFA") between the God's Lake Band and Her Majesty is such an "agreement", and it follows that funds flowing to the band from Her Majesty under the CFA should be exempt from garnishment.

78 The *Indian Act* is a law of general application to Indians and lands reserved for Indians across Canada. I believe Parliament intended s. 90(1)(*b*) to operate equitably to all Indian bands, and should not be given an interpretation that favours treaty bands over non-treaty bands, and those with certain types of provision in their treaties over others. The *Indian Act* should be taken to reflect rational public policy,

equitably administered, rather than a vehicle to perpetuate the anomalies of an on-again off-again treaty making process with a dodgy record that stretches back more than 250 years. If Parliament had intended such an inequitable result it could have said so in clear language. It did not do so, and I do not believe the Court should impose such a discriminatory result by a process of restrictive interpretation.

79 There is another important purpose served by s. 90(1)(*b*). It protects the interest of taxpayers in ensuring that funds appropriated by Parliament and transferred under an agreement with an Indian band are used for the designated purposes, and not, as here, diverted to other purposes chosen by the band council.

80 Having regard to both aspects, I would allow the appeal.

I. Overview

81 I agree with the Chief Justice that the word "agreement" in s. 90(1)(*b*) draws its meaning from context, but its proper context is broader than its juxtaposition (disjunctively) with the word "treaty", although that juxtaposition itself suggests "agreement" means something *different* from a treaty, and thus favours a broader not a more restrictive meaning of "agreement".

82 My colleague's argument that native reserves would benefit by greater access to credit in the market economy is an attractive concept for those bands in a position to take advantage of it, but Parliament must be taken to be aware of the realities of life on most reserves. There is the attractive concept, but then there is the reality. The God's Lake Reserve lies 1,037 kilometers northeast of Winnipeg. No

conventional roads or railways link God's Lake to the rest of the province. The reserve is accessible only by air or by winter ice road after freeze-up. Sinclair J. found that local employment is limited to band government or its subsidiaries and small entrepreneurs, e.g., grocery stores ((2004), 186 Man. R. (2d) 31, 2004 MBQB 156, at para. 79). The band is entirely funded by the federal government through the annual CFA (para. 5). For the appellant, the prospect of significant participation in the off-reserve economy is likely as remote as their geographic location.

83 Of much greater immediacy is the need to protect the integrity of funds appropriated by Parliament for CFA disbursement. Parliament should be taken to intend to avoid making Canadian taxpayers pay twice over for delivery of the CFA services. The Attorney General of Canada acknowledges in his factum "the valid concern that garnishment of the funds in [the band's] accounts could lead to hardship or a loss of its capacity to deliver essential services". The small community of God's Lake, consisting of fewer than 1,300 people, accounts for 10 percent of all tuberculosis cases in Manitoba (*House of Commons Debates*, vol. 135, No. 176, 1st Sess., 36th Parl., February 8, 1999, at p. 11602). Only about 10 percent of the homes on the reserve have basic sewer systems. I agree with the Attorney General of Canada that CFA services are essential. Being essential, Parliament can be taken to be aware that, if garnishment of CFA funds is to be permitted, at some point the government will feel obliged to step in with more funds to ensure their continuance even if it means paying twice.

84 Quite apart from, and in addition to, the respondent's claim, the appellant's banker, Peace Hills Trust, asserts priority for $1,668,872 in respect of various lines of credit obtained by the band council outside the CFA framework. The record discloses

that the total non-CFA debt run up by this band council is about $3 million. When this is compared with total annual CFA funding at the relevant time of $7,354,404, it demonstrates the scale of the public policy dilemma.

85 In making these observations, I do not suggest the band council's priorities were bad or wasteful. The details of those expenditures are not before us. My point is simply that the band council priorities seem to be different from the CFA priorities, and by permitting garnishment of CFA funds, the Court enables the band council to substitute its spending priorities for those of the CFA. Public funds set aside for CFA priorities will now be diverted to payment of debts run up by the band council outside the CFA framework. I appreciate the fact that if the band succeeds here it will on this occasion both have its cake and eat it too, but at least potential creditors of the appellant and other bands would be put on notice that CFA funds are not now or in future to be available for garnishment or execution.

86 My colleague points out, correctly, that the Crown can endeavour to protect CFA funds from diversion by contractual means. The Chief Justice writes:

> It is open to the Crown to include provisions intended to protect the particular band in any funding agreements that it makes with the band. As was put to us in argument, the CFAs themselves often have numerous provisions to ensure that the monies are used to provide the benefits and the services that they are intended to cover. If the band is not using the money in that way, there is often a provision for a third-party manager to step in to remedy the problem. [para. 61]

The problem, as will be discussed, is that such "protections" were included in *this* band's CFA and a "third-party manager" *was* put in place "to remedy the problem" but all of these contractual protections were circumvented by the band council. It incurred

non-CFA debts it had no money to pay for, then consented to judgment in favour of the respondent which led to the seizure of the CFA funds. The result of the Court's decision today is that the band council was able simply to walk around the CFA contractual provisions designed to prevent this from happening.

87 Placing s. 90(1)(*b*) in the broader context of the *Indian Act* as a whole, and Parliament's legislative assumption of responsibilities for Indian bands under s. 91(24) of the *Constitution Act, 1867*, I conclude for the reasons that follow that s. 90(1)(*b*) places under ss. 87 and 89 protection monies given by the federal Crown to Indians or a band, whether or not under treaty, pursuant to an agreement to provide on-reserve essential public services including housing, education, infrastructure, health and welfare. The CFA is such an agreement.

II. The Absence of On-Site Banking Facilities

88 Opinions may differ, of course, as to whether exemption from execution and garnishment is ultimately to the benefit of Indian bands, who thereby may have difficulty in providing security and establishing credit worthiness in a market economy. (There is no doubt that exemption from *taxation* is a benefit.) These exemptions have been a feature of successive *Indian Acts* since before Confederation, as my colleague describes in some detail. The question before us is not the wisdom of the exemptions in ss. 87-90 but the scope of their intended application.

89 Section 90 "deems" certain personal property of Indians (including bank accounts) to be located on a reserve despite the fact that according to ordinary legal rules governing *situs* they are located elsewhere.

90 The God's Lake Band is too poor and its reserve too remote to attract a branch of a deposit-taking financial institution. If it were rich enough to have an on-site branch, the CFA deposit would constitute a debt located on the reserve and thus a form of personal property exempt from seizure or execution under s. 89 of the *Indian Act*. One of the recommendations of the Royal Commission on Aboriginal Peoples ("RCAP") was to improve the access of bands to on-reserve banking facilities: see *Report of the Royal Commission on Aboriginal Peoples* (1996) ("*RCAP Report*"), vol. 2, *Restructuring the Relationship*, at p. 911. Although the Chief Justice suggests that her conclusion will empower Indian bands to pursue economic opportunities, the reality is that as a result of today's decision only the more fortunate and economically developed bands, the handful of bands served on site by a deposit-taking financial institution, will receive their CFA funds free of taxation (s. 87) and "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" (s. 89(1)). The less advantaged bands will have their off-reserve funds subject to taxation and seizure. My colleague suggests (at para. 62) that a band council could avoid the impact of the narrow interpretation of s. 90(1)(*b*) by making use of the handful of on-reserve banking branches elsewhere in the province. It is possible, of course, that some of the over 50 bands in Manitoba will move their banking to the three or so reserves which do have on-site banking, thereby circumventing the "access to capital" rationale favoured by the Chief Justice, but this proposal doesn't address the fundamental problem in this case. Band councils which (as here) want to use the CFA income stream as collateral for other loans and priorities will now have little incentive to make on-reserve banking arrangements that if made would frustrate achievement of their non-CFA objectives.

III. Unnecessary Entrenchment of Anomalies

91 If, as the Chief Justice holds, s. 90(1)(*b*) applies only to treaties and agreements that "flesh out commitments of the Crown" (para. 26), an interpretation which is the most restrictive and least generous to band members of all those under consideration, further anomalies are presented. For example, in the present case my colleague acknowledges that CFA funding directed to education would be exempt from garnishment because such monies can be construed as "fleshing out" Treaty No. 5 (1875). But equivalent CFA funding to a treaty-less band in British Columbia would not be similarly protected because in that case the monies could not be attributed to a treaty or an ancillary agreement fleshing out a treaty. This is not equitable treatment. Nor would it be rational legislative policy.

92 Then, too, what is to be made of serendipitous differences in the wording of the treaties? Treaty No. 6 (1876), for example, obliges the Crown to keep a medicine chest on the reserve. Leaving aside the question of what the "medicine chest" clause means in 2006, it is difficult to identify any legislative purpose that would be served by protecting payments for on-reserve medical services in the case of Treaty No. 6 bands but not Treaty No. 5 bands (because Treaty No. 5 does not mention a medicine chest) or medical services provided on reserves to bands that have no treaty at all.

93 What about the east coast "peace and friendship" treaties that had fewer benefits than the post-Confederation numbered treaties, and vastly fewer benefits than the modern comprehensive land claims settlements (which are included in the

definition of "treaty" under s. 35(3) of the *Constitution Act, 1982*)? I do not agree with my colleague that entrenchment of such disparities for the purposes of taxation, seizure and garnishment was in the contemplation of Parliament when it enacted s. 90(1)(*b*).

94 The Chief Justice argues that her restrictive interpretation fosters self-reliance, self-government and economic development. In fact, however, the opposite is more likely to be true. A band concerned about such matters as taxation seizure and garnishment would be better off letting the government provide services directly to the reserve rather than attempting to provide the public services themselves through CFA funding. In the latter case, the monies (unlike direct government services) may be intercepted off-reserve by creditors.

95 I am in respectful agreement with Sinclair J. who concluded that the CFA reflects the responsibilities assumed by the Crown under laws in relation to Indians and lands reserved for Indians enacted under s. 91(24) of the *Constitution Act, 1867* (para. 87). The responsibilities accepted by the Crown are not limited to *treaty* Indians. Indian bands have been recognized as possessing greater or lesser powers in the nature of self-governing institutions since the 1869 amendments (S.C. 1869, c. 6) to *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ord[i]nance Lands*, S.C. 1868, c. 42. This legislation predated even the initial phase of Treaty No. 5 negotiations. The adhesion of the God's Lake Band on August 6, 1909 also post-dated passage of the *Indian Act, 1876*, S.C. 1876, c. 18. These early enactments not only recognized exemptions from taxation seizure and execution, as noted by the Chief Justice, but also acknowledged that to a large extent Indian bands could, should and would continue to govern themselves. The trouble was (and is) that dispossession from much of their

traditional economic base and subsequent changes in the economy have left most band governments too few resources to be self-sufficient. CFA funding is in the nature of government to government transfer payments, covering essential services such as education, housing, health and welfare. These are matters that were characterised in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 134-35, as the type of program targeted by s. 90(1)(*b*). If, as *Mitchell* holds, a primary purpose of the *Indian Act* is to protect reserves and its members from economically induced dispossession, why should s. 90(1)(*b*) not be interpreted as applicable to *all* reserves to achieve that objective?

96 All of the members of our Court in *Mitchell* agreed with the *Nowegijick* principle "that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36): La Forest J., at p. 142, and Dickson C.J., at pp. 107-8. It is not necessary to resort to the *Nowegijick* principle in this case as I reach my conclusion based on ordinary principles of statutory construction, but *Nowegijick* certainly reinforces the conclusion I have reached.

IV. Facts

A. *Treaty No. 5*

97 In 1909, the God's Lake First Nation adhered to Treaty No. 5 which covers much of what is present day Manitoba and parts of northwestern Ontario. The Indian signatories to the treaty surrendered more than a hundred thousand square kilometers of land in two stages. In the first phase (1875), the Crown accepted the surrender of

the southern prairie lands of Manitoba by the Saulteaux (or Chippewa) and Swampy Cree First Nations. The surrender was considered "essential" to the westward expansion of non-aboriginal Canadians, as Alexander Morris, then Lieutenant-Governor of the North-West Territories, Manitoba and Kee-wa-tin, wrote at the time:

> This treaty [the Winnipeg Treaty, Number Five], covers an area of approximately about 100,000 square miles. The region is inhabited by Chippewas and Swampy Crees. The necessity for it had become urgent. The lake is a large and valuable sheet of water, being some three hundred miles long. The Red River flows into it and the Nelson River flows from it into Hudson's Bay. Steam navigation had been successfully established by the Hudson's Bay Company on Lake Winnipeg. . . . Moreover, until the construction of the Pacific Railway west of the city of Winnipeg, the lake and Saskatchewan River are destined to become the principal thoroughfare of communication between Manitoba and the fertile prairies in the west. . . .
>
> For these and other reasons, the Minister of the Interior reported "that it was essential that the Indian title to all the territory in the vicinity of the lake should be extinguished so that settlers and traders might have undisturbed access to its waters, shores, islands, inlets and tributary streams." [Emphasis added.]
>
> (A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They were Based, and Other Information Related Thereto* (2000), at pp. 143-44, originally published in 1880.)

At the second stage, between 1908 and 1909, the surrender of more northerly lands in Manitoba as well as some areas of northwestern Ontario were negotiated with a number of other Cree First Nations, including the God's Lake Band, as well as bands at Split Lake, Nelson House, Norway House, Cross Lake, Fisher River, Oxford House, and Island Lake.

98 In exchange for the surrender of the aboriginal interest in these vast lands "Her Majesty the Queen" agreed to set aside certain reserves and undertook as well,

among other things, to provide for the maintenance of schools on reserves, the right to pursue hunting and fishing throughout the unoccupied lands surrendered in the treaty, to provide farming and carpentry tools to families and bands, to provide seeds for planting, to provide cattle to each band, an amount of $500 per annum for ammunition and twine for nets to be divided among all Indians covered by the treaty and an annual grant of five dollars for each Indian person covered by the treaty (Treaty No. 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians, 1875 and 1909).

B. *The God's Lake Reserve*

99 The God's Lake Band presently has inadequate resources to achieve financial independence in a market economy. Its CFA funds are administered according to the budget and the terms of the CFA, which is co-managed by Haugen Morrish Angers Chartered Accountants, who were appointed by the federal government. The co-manager is required to approve all proposed spending in order to ensure compliance with the CFA (Sinclair J., at para. 6). The funds are transferred by Indian and Northern Affairs Canada to the band's financial institution (Peace Hills Trust Company) in Winnipeg.

100 Under the CFA, the band is restricted to spending its money in specific budget areas which for convenience I would collect under the following headings:

Education

Instructional services formula

Low cost special education

Student transportation services

Guidance and counselling

Post-secondary education

Administration of post-secondary education

Schools operation and management

Teaching/Residences/Group homes operation and management

Special education

First Nations & Inuit career promotion and awareness program

First Nations & Inuit science and technology program

First Nations & Inuit student summer employment opportunities program

First Nations & Inuit youth work experience program

Social development

Basic needs

Special needs

Service delivery

In-home care

National child benefit reinvestment

Infrastructure

Capital planning and project infrastructure

Fire protection

Roads and bridges

Sanitation systems

Water systems

Electrical systems

Community buildings

Maintenance management

Solicitor General policing

On-Reserve Housing & Renovation

Indian government services

Band support funding

Band employee benefit plans — statutory contribution

Band employee benefit plans — non-statutory (flexible transfer payments)

Miscellaneous

Indian Registry administration

Economic development

Community and economic development organization planning and operations

101 As mentioned, CFA funds are transferred in monthly payments which are not segregated by program. For example, the God's Lake Band administers its own education programs on the reserve. At present it has 400 students enrolled in the on-reserve school (which gives some idea of the demographics of the reserve). The band employs 39 teachers and staff. According to the testimony of Mike Angers, co-manager of the God's Lake CFA, the garnishing order has frozen part of the money needed to operate and maintain the schools and school services. In addition to on-reserve students, the band also supports band children who attend post-secondary education off the reserve. Approximately $54,000 per month is spent on tuition, housing and support for these students. Mr. Angers testified that this funding was also frozen by the garnishment order. By way of further example the band maintains its own Social Services program which provides money for the unemployed and the physically or mentally disabled, as well as in-home care for the elderly and infirm. As Sinclair J. put it:

> The [CFA] between the Band and the federal government is one intended by the parties to allow the Band to carry out what could be called administrative governmental functions. It is also a vehicle by which the government can meet its treaty obligations, such as the provision of educational services to Band members, through delegation to the Band. The members of the Band clearly rely on the funding for their existence on their reserve. Housing construction, as well as construction of other community buildings, appears to be contemplated by the agreement. In addition, salaries to Band employees are provided for, a matter essential to the functioning of Band government. The operation and maintenance of the Band's schools is covered by the agreement, as well as the provision of social assistance. It is safe to say that, without the agreement, the

> ability of the Band and its members to reside on the reserve would be clearly jeopardized. [Emphasis added; para. 73.]

C. *The Situation of CFA-Funded Indian Bands More Generally*

102 The RCAP found that aboriginal people suffer ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries. "The persistence of such social conditions in this country — which is judged by many to be the best place in the world to live — constitutes an embarrassment to Canadians, an assault on the self-esteem of Aboriginal people and a challenge to policy makers." See *RCAP Report*, vol. 3, *Gathering Strength*, p. 1. RCAP further observed that:

> Their traditional economies disrupted, reduced to a small fraction of their land and resource base, and subjected to inappropriate economic policies and practices, it is hardly surprising that Aboriginal nations are far from self-reliant. There are, of course, important exceptions, usually the result of advantageous location, particularly imaginative leadership, unusual resource endowments, or comprehensive claims agreements . . . . On average, however, Aboriginal economies will require substantial rebuilding if they are to support Aboriginal self-government and if they are to meet current and anticipated income and employment needs.
>
> (*RCAP Report*, vol. 2, at p. 800)

103 According to the federal government, the purpose of its funding agreements with Indian bands is to "ensure that programs and services provided by Aboriginal governments and institutions are reasonably comparable to those provided in non-Aboriginal communities": see Indian Affairs and Northern Development, *Gathering Strength — Canada's Aboriginal Action Plan* (1997), Part III: Developing

a New Fiscal Relationship, at p. 20. At present, the primary funding vehicle to achieve this important government objective is the CFA.

V. Relevant Statutory Provisions

104 See Appendix.

VI. Analysis

105 The importance of the reserves and their survival lies at the heart of the *Indian Act* and related federal policies as a place "where the bonds of community are strong and where Aboriginal culture and identity can be learned and reinforced". (See *RCAP Report*, vol. 2, at p. 812.) Depopulation of the reserves and migration of band members to the larger urban centres like Winnipeg risks loss of that culture and the likelihood of assimilation.

106 The history of Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures. Of course, arrival of new settlers also brought considerable benefits. The world has changed and with it the culture and expectations of aboriginal peoples have changed, as they have for the rest of us. Yet it has been recognized since before the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) that at some point the process of dispossession has to stop. Accordingly, even in periods when federal government policies favoured assimilation, which is to say for most of the first century of Canada's existence, Parliament's legislative policy was to protect reserves and their contents as

a sanctuary for those Indians who wished to stay in their own communities and adhere to their own cultures. The promise in Treaty No. 5 of agricultural supplies is a 19th and 20th century recognition of the need to ameliorate the effects of dispossession. In my view, whatever legislative measures flow out of Parliament's recognition of the impact of that dispossession, and the desire for reconciliation of aboriginal and non-aboriginal peoples arising from that situation, should apply as much to bands dispossessed without a treaty as to those with whom treaties were made.

107 My colleague argues that the exemption from taxation and distraint in ss. 87-90 of the *Indian Act* is at best outdated and at worst paternalistic and harmful to the First Nations themselves, as isolating them from what La Forest J. called "the commercial mainstream" (*Mitchell*, at pp. 131 and 138). However, as the trial judgment makes clear, bands like God's Lake have no access to the commercial mainstream, and no realistic prospect of ever obtaining it. Although RCAP looked for ways to improve the access to capital for bands positioned realistically to participate in the commercial world, and noted in this respect provisions in the *Indian Act* "that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral", it made no recommendation to amend the *Indian Act* to remove such provisions: *RCAP Report*, vol. 2, at pp. 906-11. RCAP also noted the possibility of "using forms of collateral other than lands or property" but identified this as merely one of several "strategies . . . worth considering" (p. 931). Under the existing *Indian Act* s. 90(2), bands with a commercial aptitude and prospects can obtain a ministerial waiver of ss. 88 to 90. In that respect there is no need to amend the Act.

108 I agree with the Chief Justice that the starting point of our analysis in this case is *Mitchell*. A number of courts, in addition to Sinclair J. in this case, have exempted funds for essential public services from seizure or execution: *Sturgeon Lake Indian Band v. Tomporowski Architectural Group Ltd.* (1991), 95 Sask. R. 302 (Q.B.); *Royal Bank of Canada v. White Bear Indian Band*, [1992] 1 C.N.L.R. 174 (Sask. Q.B.); *Young v. Wolf Lake Indian Band* (1999), 164 F.T.R. 123. I accept, as did Sinclair J., that not everything in the CFA can be construed as "fleshing out" the provisions of Treaty No. 5. It is also true, as it was put by counsel for the appellant, that it would be "incongruous to protect property such as some hoes, twine and cattle which were the basic needs of the Band one hundred years ago and not protect property such as the funding that maintains education, health, social services and housing which are the basic needs today for the Band members". Be that as it may, the outcome of the appeal turns on whether s. 90(1)(*b*) truly requires the CFA to be "ancillary" at all.

109 In *Mitchell* itself, the lead judgment of La Forest J., from which only Dickson C.J. dissented (although he agreed in the result), held that the purpose of the *Indian Act* exemptions from "taxation and distraint" was to counter the prospect of dispossession as follows:

> . . . by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing, and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that

> the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like . . . . [pp. 130-31]

It is evident that non-treaty Indians are equally at risk of "alienation of the Indian land base", although in their case the reserves were simply allocated rather than agreed to.

110 The *Mitchell* focus on "treaty obligations" is only one strand of La Forest J.'s analysis. It is convenient to say more about that case, as it forms the cornerstone of the judgment of my colleague, the Chief Justice.

A. *The Facts of the Mitchell Case*

111 The facts of *Mitchell* are important. The Peguis Indian Band had been represented by a lawyer (Mitchell) in negotiations with Manitoba Hydro over a tax invalidly imposed on the sale of electricity on a reserve. The Government of Manitoba subsequently settled the Indians' claim. The band's lawyers were unpaid, and obtained a prejudgment garnishing order against the settlement funds in the hands of the provincial Crown to the extent of their fees. The Peguis Indian Band applied to have the garnishing order set aside because the money, they argued, was paid by "Her Majesty" to the band and, under s. 90(1)(*b*) of the *Indian Act*, they argued, it was not subject to attachment by a non-Indian. The *Indian Act* defence was rejected by a majority of the Court, Dickson C.J. dissenting, but the band succeeded in the result because all members of our Court agreed that the provincial *Garnishment Act* did not

authorize a garnishee against the Crown except in respect of work or services rendered to the Manitoba Crown.

112 The basis of the majority judgment rejecting the *Indian Act* defence was that the reference in s. 90(1) to "Her Majesty" was to the federal Crown only. Monies flowing under agreements of any description between the band and *provincial* Crowns were excluded from *Indian Act* protection. In the course of elaborating on that conclusion, however, La Forest J. (with whom five judges agreed) identified a number of considerations that, depending on emphasis, would lead to different results in the present case.

(1) Commercial Agreements Are Excluded

113 *Mitchell* clearly holds that "any dealings in the commercial mainstream in property acquired in this [ordinary commercial] manner will fall to be regulated by the laws of general application. Indians will enjoy no exemptions from taxation in respect of this property, and will be free to deal with it in the same manner as any other citizen" (p. 138). Noting that provincial governments have no constitutional responsibilities for Indian affairs, La Forest J. stated that if s. 90 were interpreted to include agreements with the provincial Crowns "there is no basis in logic for the further assumption that some, but not all agreements, between Indian bands and [the] Provincial Crown would be contemplated by [s. 90(1)(*b*)]" (p. 136).

(2) Protected Agreements Include All Agreements Between an Indian Band and Her Majesty in Right of Canada

114 As La Forest J. noted "Section 90(1)(*b*) does not qualify the term 'agreement'" (p. 137). Accordingly, speaking in the context of the *provincial* Crowns, he stated:

> Section 90(1)(*b*) does not qualify the term "agreement", and if one interprets "Her Majesty" as including the provincial Crown, it must follow as a matter of due course that s. 90(1)(*b*) takes in all agreements that could be concluded between an Indian band and a provincial Crown.
>
> . . .
>
> Once one accepts the assumption that "Her Majesty" includes the provincial Crowns, it would be more an exercise in divination than reasoned statutory interpretation to purport to be able to select from among the full spectrum of agreements that can be concluded between Indian bands and provincial Crowns and conclude that Parliament wished s. 90(1)(*b*) to apply in one case but not in another. [pp. 137 and 146]

115 By parity of reasoning, it could be said, *because* s. 90(1)(*b*) does not qualify the term "agreement" (and the French term "*accord*" is just as broad) there is no logical basis "to select from among the full spectrum" of agreements that could be concluded between an Indian band and the *federal* Crown, and therefore all such agreements fall within the protection of s. 90(1)(*b*).

(3) Only Agreements Between an Indian Band and Her Majesty in Right of Canada That Fund Governmental Responsibilities Such as Education, Housing, Health and Welfare Are Protected

116 La Forest J. refers at several points to the federal authority over Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act, 1867* and to the responsibilities assumed thereunder, which he links back to policies adopted by the British Crown in the *Royal Proclamation* of 1763:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. [p. 131]

The *Royal Proclamation* of 1763 was not a treaty, of course, but a unilateral declaration of policy by the Imperial Crown. Only a handful of treaties predated the *Royal Proclamation* of 1763 (such as the treaty with the Mi'kmaq Indians discussed in *R. v. Marshall*, [1999] 3 S.C.R. 456). In his reference to the *Royal Proclamation* of 1763, therefore, La Forest J. must be talking about fulfillment of policies of the Crown that *led* to the treaties, and not just to the treaties themselves. He goes on to say:

> From that time [i.e. 1763] on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base. [p. 131]

Funding agreements for education, housing, health and welfare (such as the CFA) are of course intimately linked to enabling Indians to continue on their lands, as mentioned earlier. La Forest J. continued at p. 141:

> It is perfectly consistent with the tenor of the commitments made by the Crown to Indians through the centuries that the Crown would seek to protect payments of property owed to Indians pursuant to the Crown's treaty obligations <u>in exactly the same way in which it protects all other property to which Indians may lay claim by virtue of their status as Indians</u>. [Emphasis added.]

The underlined words are of significance. God's Lake First Nation possesses its reserve by virtue of Treaty No. 5 and its members live there by virtue of their status

as Indians. Importantly, as Sinclair J. pointed out, the community at God's Lake, like many other First Nations' communities, would likely not survive without CFA funding of essential services administered by the band government.

(4) Only Monies Flowing Under "Treaties and Ancillary Obligations" Are Protected

117 In the end, La Forest J. chooses to limit s. 90(1)(*b*) to "treaties and ancillary agreements" which he explains at p. 124:

> . . . Indian treaties are matters of federal concern and, as I see it, the terms "treaty" and "agreement" in s. 90(1)(*b*) take colour from one another. It must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown; see for an example of such an agreement *Greyeyes v. The Queen*, [1978] 2 F.C. 385. . . . [Emphasis added.]

In *Greyeyes v. The Queen*, [1978] 2 F.C. 385 (T.D.), federal scholarship monies payable to an Indian student were held exempt from garnishment. La Forest J. characterized the scholarship agreement as "details of the [Crown's] promise in Treaty No. 6 to provide assistance for education" (p. 135). Some other treaties, particularly the pre-Confederation treaties, make no explicit mention of education. Presumably, under La Forest J.'s interpretation, such funds *could* be garnisheed, because he says at p. 136:

> In summary, I conclude that an interpretation of s. 90(1)(*b*), which sees its purpose as limited to preventing non-natives from hampering Indians from benefiting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed *vis-à-vis* the protection of native property. [Emphasis added.]

B. *Does Mitchell Control the Outcome of This Appeal?*

118 As stated, the *ratio decidendi* of *Mitchell* did not depend on an interpretation of the *Indian Act* but on the Court's conclusion that the provincial *Garnishment Act*, R.S.M. 1970, c. G20, did not authorize garnishment of the funds in question.

119 In terms of doctrine, the Court divided over whether the term "Her Majesty" in s. 90(1)(*b*) of the *Indian Act* included the Crown in right of a province. The majority concluded that it did not. That holding, too, was dispositive of the appeal.

120 The further refinement that the word "agreements" with the *federal* Crown excludes agreements other than those "ancillary" to a treaty was certainly not necessary to resolve the *Mitchell* appeal, and in my view we ought to take a closer look at the issue in the context of this case where that precise point *is* dispositive.

C. *Anomalies Are Created by the Treaty Approach*

121 I have already mentioned what I believe to be some of the problems with the approach outlined by La Forest J. and adopted by the Chief Justice. The essential problem is that s. 90(1)(*b*) would operate inequitably among bands in relation to the same types of CFA funding for the same essential on-reserve services. It is convenient at this point to elaborate somewhat on the lack of equity which I think ought not to be attributed to Parliament in the absence of very clear language.

122 My colleague's approach excludes from s. 87 and s. 89 protection monies paid to bands in many parts of Canada (including most of British Columbia, but also many tracts of land across the country, among them lands not covered by treaty lying on the south watershed of the Ottawa River where the nation's capital sits). Even in areas where treaties were concluded there are ongoing disputes about which bands were or were not signatories (see, e.g., *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, aff'g (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), aff'g (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.)).

123 Secondly, even among the treaties the enumerated benefits vary greatly. *Greyeyes* dealt with Treaty No. 6 where education happened to be mentioned but many if not most of the pre-Confederation treaties do not mention education. On what rational basis would Parliament intend scholarship monies to be garnisheed in the case of some Indian students but not others?

124 Thirdly, La Forest J.'s focus in the context of Treaty No. 5 was on the benefits given by "the Crown, as part of the consideration for the cession of Indian lands" (p. 130). In the maritime provinces, however, nothing is said in at least some of the treaties about cession of lands. The Indians say these treaties were treaties of peace and friendship. Nevertheless, as the waves of non-aboriginal settlement arrived, the Indian bands still wound up being dispossessed of their traditional territories (except reserves) regardless of consent. To the extent the exemptions in s. 90 are seen as part of the purchase price for the cession of land, it makes little difference to the dispossessed whether dispossession occurred by agreement or not. The approach taken by the Chief Justice would result in a checkerboard of exemptions and non-exemptions

across the country determined by the vagaries of the treaty-making process rather than rational legislative policy.

125 Fourthly, the definition of treaty (to which "agreements" must be found to be "ancillary") is elastic, running the gamut from any "engagements made by persons in authority as may be brought within the term 'the word of the white man'" (*R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649, aff'd [1965] S.C.R. vi) to the elaborate modern land claims settlements such as the *Nisga'a Final Agreement* (1999) or the *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (1993). The range of benefits under the modern comprehensive treaties go well beyond the limited CFA categories of government to government-type funding. On what basis can it be said that the extensive modern treaty benefits should be free of tax and execution (unless the exemptions are negotiated away) whereas the CFA benefits even to *treaty* bands do not enjoy such exemptions unless they can be said to be "ancillary" to some 19th century Crown negotiator's sense of fairness incorporated in an 1875 document written in a language most of the Indians of God's Lake likely didn't understand?

126 No doubt the courts would generously interpret what agreements can be said to "flesh out" the treaties, but that does not help the bands which have no treaties at all.

127 Finally, it is curious that in s. 88, a neighbouring provision, the word "treaty" appears without the added "or agreement":

> **88.** [General provincial laws applicable to Indians] Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Either the addition of the words "or agreement" in s. 90(1)(*b*) means something different than "treaty" in s. 88 or it does not. If it does not, the words "or agreement" are surplusage, a result which courts try to avoid. If it does mean something different but only to the extent it covers agreements "fleshing out" treaties, it means that "agreements fleshing out treaties" are not exempted by s. 88 from provincial laws of general application that touch on "Indian-ness". The operation of s. 88 is complicated enough without this added dimension. It is more consistent with the legislative purpose of s. 88, it seems to me, to read the word "agreement" in s. 90(1)(*b*) as going beyond treaties and their modes of implementation.

D. *Section 90(1)(b) Should Be Construed to Protect Monies Provided by the Federal Government to Indian Bands for Education, Housing, Health and Welfare and Other Similar Government-Type Essential Services on Reserves*

128 The CFA essentially relates to services provided to other Canadians by their provincial, territorial and municipal governments. It is simply the vehicle by which the federal government delivers programs and services to First Nations with public funds appropriated by Parliament.

129 The government identifies what are generally referred to as essential programs and services that include health, housing, education, welfare and community infrastructure. Funding under the CFA is accounted for in accordance with ss. 32 and

34 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. (See *Peace Hills Trust Co. v. Moccasin* (2005), 281 F.T.R. 201, 2005 FC 1364, at para. 12.) In my view the word "agreement" in s. 90(1)(*b*) should include government to government transfers such as the CFA by embracing what I would call "the public sector services approach". Such an approach takes the categories of expenditure identified by La Forest J. at pp. 130 and 135 of *Mitchell* (namely education, housing, health and welfare) in the context of the numbered treaties and simply generalizes them more broadly (as I do not read La Forest J. as intending his list to be exhaustive) and applying them to Indian bands more generally (i.e., whether or not there is a treaty in place and irrespective of the benefits conferred by a particular treaty).

130 The public sector services funding approach would not include monies provided by the federal Crown with a more commercial orientation such as the Resource Partnerships Program, Economic Development Opportunity Fund, Resource Acquisition Initiative, Aboriginal Contract Guarantee Instrument, and Aboriginal Business Development Initiative. (See generally, *Gathering Strength — Canada's Aboriginal Action Plan: A Progress Report* (2000), at pp. 18-19.)

131 I accept that CFAs take a broad approach to what constitutes the "public sector". This recognizes the stubborn fact that in most reserves the potential for a significant private sector is extremely limited. Self-reliance is a wonderful objective where the potential exists, but its allure should not blind us to deplorable socio-economic realities on the vast majority of reserves.

132 It seems to me a public sector services funding approach is consistent with the text, context and purpose of the relevant provisions of the *Indian Act* for the following reasons.

(1) The Text

133 Section 90(1)(*b*) does not qualify the term "agreement", and as pointed out by La Forest J. in *Mitchell* "it would be more an exercise in divination than reasoned statutory interpretation to purport to be able to select from among the full spectrum of agreements that can be concluded between Indian bands and provincial Crowns and conclude that Parliament wished s. 90(1)(*b*) to apply in one case but not in another" (p. 146). The reason why *Mitchell* ultimately suggested differentiation among "agreements" was not the text of s. 90(1)(*b*) but because of the difference in provincial and federal responsibilities for Indian affairs under s. 91(24) of the *Constitution Act, 1867* and the *Indian Act* and related Crown policies. I turn therefore to context.

(2) The Context

134 As mentioned, *Mitchell* identifies s. 90(1)(*b*) as "part of a legislative 'package' which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763" (p. 131). Part of that obligation is to address the issue of potential dispossession (*ibid.*). Much of the *Indian Act* is concerned with the inalienability of reserves and "[t]he exemptions from taxation and distraint have historically protected the ability of Indians to benefit from [reserve] property" (*ibid.*, at p. 130). I agree with my colleague that this context properly limits the scope of the word "agreement" in s. 90(1)(*b*), but I do not agree

with where the Chief Justice would draw the line. In my view, the relevant context has little to do with treaties (after all s. 90(1)(*b*) says "treaty or agreement") and much to do with the general problems associated with First Nations' reserves and steps taken to protect and encourage their survival as liveable communities. It also has to do with statutory mechanisms put in place to ensure that public monies "given" to an Indian band for essential public services are used for the intended purposes.

(3) The Purpose

135 Survival of reserves is assured in the treaty context by "assistance in spheres such as education, housing, and health and welfare" (*Mitchell*, at p. 135). The financial lifeline is provided these days by the CFAs. Survival of reserves for *non*-treaty Indian bands is assured by the same lifeline. Whether or not a band signed a treaty in 1909 (or 1809 for that matter) is irrelevant to the preservation and betterment of viable reserves. In my view the purpose of the "legislative package" is undermined rather than advanced by my colleague's interpretation of s. 90(1)(*b*). I believe the public sector services funding approach better serves the legislative purpose.

136 Firstly, the public sector services funding approach would still exclude commercial dealings (such as those under the Aboriginal Business Development Initiative) as well as monies provided by the Provincial Crown (e.g., the Casino Rama revenues addressed by the Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37).

137 Secondly, the public sector services funding approach would avoid tying the exemption to the historical anomalies created by the treaty-making process. It

would treat the non-treaty Salish bands of British Columbia on the same basis (for this purpose) as the Cree bands who signed treaties on the prairies. No dramatic consequence would flow from the fact that Treaty No. 6 refers to providing a "medicine chest" whereas other treaties do not. The emphasis would be on the public sector purpose of the funding rather than the elevation of historical anomalies to the level of legislative policy.

138 Thirdly, the public sector services funding approach puts the focus on the location where the needs of the band are to be met (the reserve) rather than on where the federal funds voted by Parliament for that purpose happen to be on deposit (off-reserve).

139 Fourthly, the public sector services funding approach avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a deposit-taking financial institution. The s. 89 exemption would not be limited to CFA funds on deposit at the Scotiabank branch on the Standoff Reserve of the Blood First Nation in Alberta, or the Royal Bank branch at the Norway House Reserve in Manitoba. By virtue of the deeming provision in s. 90(1)(*b*) the exemption would also cover CFA funds deposit in Winnipeg to the credit of the God's Lake Band (which adhered to Treaty No. 5 at roughly the same time as the Norway House Band).

140 As mentioned, other types of funding (e.g., for economic development) are, with minor exceptions handled outside the CFA framework. Thus, federal government methods of funding make it relatively easy to segregate those funds protected under s. 90(1)(*b*). There will, of course, be issues of interpretation as to

whether to characterize some agreements as falling within or outside government to government transfer payments for public on-reserve services, but these can be resolved on the basis of the "generous and liberal" principles of statutory interpretation favourable to the Indians established in *Nowegijick* and affirmed in *Mitchell*, at p. 142. In the interest of certainty, I would characterize funds flowing under the present CFA model as wholly protected, as discussed below.

141 The Attorney General of Canada expressed a concern that if s. 90(1)(*b*) included CFA funds then s. 90(3) would require ministerial approval for their disbursement. The short answer to that is that the CFA itself is ministerial authority for disbursement. The Chief Justice agrees to some extent (para. 45) but points out that the Minister cannot be taken to have given approval to expenditure of funds under agreements which "d[o] not specify how funds are to be spent" (a consideration that does not arise in the case of the CFA) nor can the Minister be taken to have approved funds "not put to the proper use". I agree with that qualification, of course, but the lack of ministerial agreement with improper diversion of funds is in any event clear from the terms of the CFA itself. Lack of ministerial consent will not prevent the funds from being diverted from the agreed CFA purposes. Only a purposeful as opposed to restrictive reading of s. 90(1)(*b*) will accomplish that objective.

(4) Is This Outcome "Paternalistic"?

142 I believe the concern about the need to avoid "paternalism" is, with respect, misdirected. The issue was related by La Forest J. in *Mitchell* to the *commercial* dealings of Indian bands:

> Indians, I would have thought, would much prefer to have free rein to conduct their affairs as all other fellow citizens when dealing in the commercial mainstream.
>
> . . .
>
> Any special considerations, extraordinary protections or exemptions that Indians bring with them to the market-place introduce complications and would seem guaranteed to frighten off potential business partners. [pp. 146-47]

143 I do not accept, with respect, that this concern should disqualify the CFAs from the protection of s. 90(1)(*b*). There is a great difference between withholding protection from funds passing under a tax settlement with the Manitoba government from the claim of the band lawyer to be paid his fees (the facts of *Mitchell*), and withholding protection from CFA funds provided by the federal government out of funds appropriated by Parliament for health, education, housing, welfare and infrastructure on a remote, impoverished, northern reserve (this case) and other disadvantaged reserves across the country.

(5) The CFA Should Be Exempted as a Whole

144 Exemption of the CFA based on the federal government's present model, advances the federal government policy of promoting "[f]inancially viable Aboriginal governments able to generate their own revenues and able to operate with secure, predictable government transfers". See *Gathering Strength — Canada's Aboriginal Action Plan: A Progress Report,* at p. 3 (emphasis added). As funding models change, the CFA exemption may have to be re-examined, but for the moment I believe any disputes about the minutiae of the CFA should be resolved generously in favour of the Indians under the *Nowegijick* principle of statutory construction referred to earlier.

145 To impose, as the Chief Justice does, an onus on the band to prove which parts of CFA funding on deposit at any particular time "flesh out" treaty commitments of the Crown (para. 26) and which parts of CFA funding do not, is a burden they cannot discharge, given the deposit of blended monthly payments which are not segregated on a project by project basis.

146 The objective of predictability and certainty in economic relations between First Nations and non-aboriginal people is better served by a categorical denial of execution or garnishment of CFA funds whether those funds are parked at a financial institution on or off the reserve. The procedure suggested by my colleague, with respect, simply adds the uncertainties of litigation to an already complicated situation.

147 This is a test case to establish matters of legal principle. Litigation in the general run of cases over what is or what is not sufficiently connected to a treaty to qualify for s. 90(1)(*b*) protection will drain First Nation finances that should be put to better use elsewhere.

(6) Protection of Suppliers

148 The protection of suppliers such as the respondent is not difficult. Get your money up front. Alternatively, require the Chief and band council to obtain ministerial approval under s. 90(2) of a waiver of ss. 89-90 protection.

(7) The Public Purse May Now Pay Twice for the Same Services

149 As mentioned earlier, the appellant band appears to have incurred debts of about $3 million without the means of repayment. The creditors will seek to garnishee payment of those debts from the roughly $7 to $9 million annual CFA funding. If the garnishee is successful there will not be enough money to pay for essential public services. This means either band members will live in the "third world conditions" described by RCAP or the federal government will step in at some stage to fund the delivery of the essential services it had already funded under the CFA but which funds were diverted to other priorities determined by the band council. The first alternative is to perpetuate what RCAP calls a national embarrassment. The other alternative is for the public to pay twice. Neither is palatable public policy. In my view, Parliament cannot have intended an interpretation of s. 90(1)(*b*) that creates such a Hobson's choice.

VII. Conclusion

150 I would allow the appeal and restore the conclusion reached by Sinclair J.

APPENDIX

Indian Act, R.S.C. 1985, c. I-5

> **87.** (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
>
> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

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.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

90. (1) For the purposes of sections 87 and 89, personal property that was

(*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

Appeal dismissed with costs, BINNIE, FISH *and* ABELLA JJ. *dissenting.*

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