LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 8

INDIGENOUS LAW

Issues 2016

Contracting Out of the *Indian Act:* Traditional Protections v. 21st-Century Commercial Forces

Murray Teitel
Murray Teitel Barrister

November 14, 2016

cpd Continuing Professional Development

Contracting Out of the *Indian Act*:
Traditional Protections v. 21st-Century Commercial Forces

Murray Teitel, Barrister

An overall reading of the *Indian Act*, R.S.C. 1985, c. I-5 leads one to the conclusion that it is a paternalistic document. It contains 40 instances of "the Minister may ...". "The Minister" is the Minister of Indian Affairs and Northern Development as she, Carolyn Bennett, is still known even though the Ministry calls itself "Indigenous and Northern Affairs Canada". Some of the Minister's powers are very far-reaching. For example, she retains authority and discretion over what are defined in s. 2 as "Indian moneys".[1]

In addition to the Minister, the Governor General of Canada (acting, of course, by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada) is given even more far-reaching powers over members of First Nations and their reserve lands.[2] He can decide what is a "band" for the purpose of the Act, suspend the application of most sections of the Act to "bands", "Indian" and any reserve. This means an order in council that has the force of law without needing parliamentary approval.

As if that is not enough, the Superintendent has been given other powers. One of the more anachronistic ones, only repealed in 2014[3], was to approve transactions for the sale or barter of produce from reserves in Manitoba, Saskatchewan or Alberta, to persons not members of the First Nation living on the reserve. Without his or her written approval, such transactions were void.[4]

The Act has not been significantly modernized since the amendments of 1951, enacted in a climate of post-Holocaust increased recognition of human rights and the contribution of First Nations to Canadian armed forces in WWII. While eliminating some of the more regressive controls over First Nations and their members (such as the Indian Agents), the amendments did not interfere with the overall paternalism that pervades the statute and reflects the attitude toward members of First Nations prevailing at that time, who (with some exceptions) were not even competent to vote in a federal election. At the time, they were competent to vote in the

elections of three provinces only, and all members of First Nations were not able to exercise federal voting rights until the 1962 election.[5]

Part of the way this paternalism expresses itself is in what La Forest J.,[6] writing on behalf of himself and two others, the other four judges not commenting on the point but disposing of the appeal as these three judges did, though not for entirely the same reasons, called "protective measure[s] for the Indian population lest it be persuaded into improvident transactions".

Not all of the benefits conferred by treaties are related to land. For example, treaties generally required the Crown to provide for education, medicine and supplies, which (as we know from Justice Sinclair's report) the Crown partly reneged on or, if not reneging, ascribed a very perverse definition to the word "education".

The majority of the protections in the *Indian Act* do relate to preserving the integrity of reserve lands. As La Forest J. wrote[7]: "The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, have the potential to erode the Indian ownership of these reserve lands."

Having displaced Canada's original population and, having relegated to miniscule remnants of the territory they once occupied those who would sign treaties with it, the Crown wanted to ensure that the First Nations at least retained their reserves and did not lose them to more wily peoples with whom they might deal commercially.

What kind of provisions does the *Indian Act* contain for the protection of First Nations and members of First Nations?

To start with, the First Nations are not owners of their reserves. Rather, reserves are tracts of lands vested in Her Majesty which have been set apart for Her for the use and benefit of the First Nations.[8] They are thus exempt from seizure under legal process.[9]

Subject to the *Indian Act* and any specific treaty, the government may determine whether any purpose for which lands in a reserve are used or to be used, is for the use and benefit of the

First Nation.[10] This means that someone who supplies materials or in other way improves land upon a reserve cannot place a lien on the land. This is not to say that someone who might otherwise be entitled to a construction lien may not have rights as against monies received by the First Nation or contractors or subcontractors executing a project on a reserve, provided they are trust funds, i.e., monies to be used in the financing of an improvement. Such an "improver" might in the proper case also have rights to information.[11]

Leases of reserved land obviously, therefore, cannot be done directly with a First Nation. There is a procedure for leases of reserve land occupied by a First Nation, which requires a great deal of involvement on the part of the government. This is done by the First Nation designating its right and interest in land on a reserve for the purpose of giving a lease or right of interest. There then has to follow the process of getting approval for the lease. Anyone doing this would have to consult chapters 5 and 7 of http://www.aadnc-aandc.gc.ca/dam/dam-inter-hq/staging/texte-text/enr_lds_pubs_lmm_1315105451402_eng.pdf.

The second protection given to First Nations and members of First Nations, is that of exemption from taxation contained in s. 87 of the *Indian Act*. The purpose of this exemption – according to La Forest J. – is "to 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".[12]

This is not relevant to a discussion of the topic of contracting out, except as concerns how to "contract out" from paying sales tax. When the "point of sale" is on-reserve, First Nations and their members do not pay sales tax whether they plan to use the goods on or off a reserve. However, the "point of sale" is not limited to goods sold on the reserve itself but includes also goods delivered to the reserve by the seller. Therefore, for the First Nation or its members to avoid HST in Ontario, the seller has to actually take charge of the delivery of the goods to the reserve. Some sellers might be reluctant to do so because of the complex logistics involved in getting goods to remote communities accessible only by air, ice road or, in the case of reserves like Attawapiskat or Kashechewan, also by barge for half the year. So if such a retailer sells F.O.B. Moosonee it will have to charge tax. If it arranges for the transport to the reserve it

won't.[13] In Ontario we are only talking about the federal portion of the Harmonized Sales Tax (i.e. the GST), since that province more-or-less does not charge provincial sales tax (PST or RST) to First Nations and their members. The position of Canada Revenue Agency is outlined in its GST/HST Technical Information Bulletin B-039 dated August 2006.[14] The position of the Ontario Ministry of Finance is set out in HST Bulletin 80.

The most important sections for our purposes, are sections 89 – 90, which read as follows:

> **"Restriction on mortgage, seizure, etc., of property on reserve**
>
> **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.
>
> **Exception**
>
> **(1.1)** Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.
>
> **Conditional sales**
>
> **(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.
>
> R.S., 1985, c. I-5, s. 89; R.S., 1985, c. 17 (4th Supp.), s. 12.
>
> **Property deemed situated on 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.
>
> **Restriction on transfer**
>
> **(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.
>
> **Destruction of property**

> **(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.
>
> R.S., c. I-6, s. 90."

In summary form, s. 89 – with two exceptions – forbids the granting of a security interest in property of a First Nation or one of its members **situated on a reserve** and further exempts it from any kind of seizure through legal process. Section 90 deems to be situated on a reserve (and, therefore, subject to the prohibition as in s. 89), personal property that is off reserve but that was purchased for First Nations or their members by the government, or given to them under a treaty or agreement between a First Nation and the government (which the courts have interpreted to mean the federal government)[15]. Note that these provisions do not apply within the First Nation community, but only as concerns non-First Nations and their members, and the property need not be on the reserve of the First Nation in question, but can be on any reserve.[16]

In his book *Native Law*, Mr. Woodward suggests the following:

> "Secondly, a moneylender can arrange that a loan to an Indian is made in joint names of the lender and another Indian, thus coming within the exception allowing for seizure by an Indian. Most large financial institutions should have a standing arrangement with an Indian (possibly a member of the firm's staff) that would permit such joint loans. Insurance on the life of the lending Indian would be necessary."[17]

I include it for those who might want to try it. I would not recommend it to a lender client. What if the figurehead member of the First Nation decided he or she was entitled to half the loan? Presumably, there will be some hidden side agreement setting out that he or she is not entitled. But if the debtor ever wanted to resist enforcement, the side agreement would be producible by the judgment creditor, exposing the whole affair as a sham to get around the provisions of the *Indian Act*. A judge might just decide that the structuring of the loan was an illegal attempt to get around the provisions of the *Indian Act* and rule the enforcement, insofar as it violates the *Indian Act*, unavailable to the creditor.

So you can see how these statutory enactments – enacted with a view to protecting or giving advantage to First Nations and their members – could conceivably also pose a problem for those of them that want to enter what I will loosely call the commercial mainstream and give security interests for the purpose of raising capital for business ventures.

So how have the courts dealt with these two warring policy considerations?

Before getting into the cases, the one piece of advice that I can give to all of you who are giving advice to parties involved in lending to First Nations, is do not look at the plain and ordinary meaning of statutory language, do not look to the correct application of principles of statutory interpretation, and do not look to precedents on related topics. Rather, look to what is trending in the not-so-much-legal-as-socioeconomic philosophy of the majority of the members of the Supreme Court at any given time.

This holds true even for cases at lower levels, since the lower court judges will take their cues from the highest court. The majority of the McLachlin-led Supreme Court believes it is in the best interests of the First Nations and their members to relinquish their statutory advantages so as not to discourage commercial lenders from dealing with the First Nations because those lenders would be unable to avail themselves of the usual legal process for collections of judgment debts.

Before we get to actual contracting out, let's just review the various statutory legal means of achieving the same result.

Section 89(2) carves out an exception for conditional sales contracts, but conditional sales contracts will only be of limited use with respect to chattels ranging from household goods through personal vehicles to heavy equipment.

Similarly, the interest of the First Nation in a lease approved under s. 38 of the *Indian Act*, i.e. the right to receive rents, can be assigned under s. 89(1.1) of the *Indian Act*. This is a common practice. A First Nation will get approval for a lease to a retail outlet on a reserve and give security in the lease to a commercial lender.

However, as everyone should understand, no mortgage or encumbrance may affect the reversionary interest of the Band in the designated land.[18]

There are also provisions for obtaining ministerial permits under s. 28 (2) of the *Indian Act* and the *First Nations Land Management Act*, S.C. 1999, c. 24. Pursuant to s. 6 of this act, a First Nation can adopt and have approved a land code that is consistent with the *Framework Agreement on First Nation Land Management* concluded February 12, 1996, and then enter into an agreement with the Minister.

To date, less than one-tenth of Ontario's First Nations have availed themselves of this Act and one can only speculate that the reason is that even though its provisions will permit a First Nation to free itself of many of the strictures of the *Indian Act*, it amounts to an acknowledgement of Crown sovereignty perhaps inconsistent with long-range goals. Or it may be that they, particularly remotely situated ones, simply have no projects – developmental or other – that are presently contemplated.

Another statutory scheme for avoiding the protections is contained in s. 90(2) of the Act and relates to monies or property received from the federal government.

There is also judicial authority for this practice of using s. 90(2) for waiver of the protection granted to property notionally situated on a reserve. Basically, one applies to the Minister for exemptions from the protection.[19] However, Indigenous and Northern Affairs has no form for someone to fill out, nor a policy for an official to follow in granting one of these exemptions. The INAC manager of lands operation in Ontario has never dealt with such an application and cannot remember one ever having been presented.

Another strategy would be to vest the asset in and take security from a corporation set up by a First Nation. Even if it is totally staffed by and all of its officers and directors are its members, such an entity is not a First Nation, nor is it a member of a First Nation, nor is it a tribal council.[20] Therefore, it cannot avail itself of the *Indian* Act protection. It is not something I would recommend to a client. In the first place, if the corporation were to transfer the property to the First Nation in violation of an agreement not to do so, how would the security

interest be enforced even if it was registered under the provincial security act registration system?

Secondly, enforcement might be defeated without such a transfer if the corporation could argue that it was holding the property in trust for the First Nation. Trust arguments are fact-driven, of course, and sometimes work.[21] Sometimes they don't.[22]

It has been argued that there is a "commercial mainstream exemption" for property that is otherwise inoculated from seizure by virtue of s. 89 of the *Indian Act*. Roberts J. (as she then was) in *Borden & Elliot v. Temagami First Nation et al*., disagreed.[23]

The Nova Scotia Court of Appeal in *Shubenacadie Band v. Martin (1984) Inc.* 1995 CanLII 4259 (NS CA) took the opposite view. While Roberts J. in *Borden & Elliot* appears not to have had the *Shubenacadie* case drawn to her attention, her opinion is certainly the better one and the *Shubenacadie* case is an over-interpretation of what La Forest J. said in *Mitchell*. In light of the recent decisions of the Supreme Court in *Bastien*[24] and *Dubé*[25] the *Borden & Elliot* doctrine should prevail in the Supreme Court if a case on point goes there, though what will actually happen can, of course, not be predicted. In those two cases the Supreme Court reversed years of accepted practice whereby First Nations and members of First Nations were routinely taxed on the income from investment certificates even if the certificates were issued by financial institutions on reserves. These interest payments had been taxed since the interest was generated in the commercial mainstream, i.e., off-reserve. *Shubenacadie* was decided in 1995 and only referred to three times since for different propositions, and in one of the cases it doesn't even enunciate the proposition it is being cited for.[26]

That said, given the present majority on the Supreme Court of Canada that very much favours the *Shubenacadie* conclusion, and given its propensity to read into the *Indian Act* implied provisions I believe were never intended by Parliament, it might distinguish *Bastien* and *Dubé* on the basis that those involved consumer commercial transactions, and treat transactions where First Nations are trying to raise capital for a business venture, differently.

So this brings us to the big question, or the important question, of can a First Nation or one of

its members otherwise contract out of the provisions of ss. 89 and 90?

The Manitoba Court of Appeal in *Tribal Wi-Chi-Way-Win Capital Corporation v. Stevenson et al.* 2009 MBCA 72 answered the question in the affirmative. In that case a member of a First Nation, the Peguis First Nation Indian Band of *Mitchell v. Peguis Indian Band*,[27] no less, waived his s. 89 rights and not only gave security in property but agreed that he "will not exercise his rights under any Treaty with the Government of Canada or the *Indian Act* as same applies to [the respondent's] enforcement of its loans and exercise of its security rights as against the Personal Property and including entry onto the Reserve lands."[28]

This case should be read with extreme caution. It is, with respect, wrongly decided – which is not the same thing as saying that had it gone to the Supreme Court of Canada it would not have been upheld. I believe it wrongly decided for the following five reasons:

It relies on three cases yet none of them are authority for the proposition it asserts. The first case is *Kingsclear,*[29] which dealt with one issue and one issue only, namely, whether a school bus whose "paramount location" was on a reserve and which was owned by a First Nation could be seized while off-reserve. The court did not need to nor did it even express an opinion on whether the protections of s. 89 could be waived. While it is true that the First Nation had signed a waiver of its s. 89 protection as part of a chattel mortgage given to a different creditor, that fact was only mentioned in passing as part of the recitation of the creditor's argument and it did not receive further consideration.

The second case is *Shubenacadie Band v. Martin*[30]. The reasons for decision in this case are a lengthy treatise on the rights of competing creditors under Nova Scotia law and have absolutely nothing to do with the legality of or illegality of contracting out of s. 89 protections.

The third case is itself, with respect, wrongly decided *McDiarmid Lumber Ltd. v. God's Lake First Nation* [2006] 2 S.C.R. 846. I will have more to say about this case at the end.

In *Tribal Wi-Chi-Way-Win,* The Manitoba Court of Appeal was "guided" by four paragraphs of the majority reasons of McLachlin C.J.C. in *McDiarmid*, which said that provincial credit regimes

are designed to apply universally and unless expressly excluded by the act, apply to Indian property.[31]

In making this point, McLachlin C.J.C. is doing little more than reiterating what s. 88 of the *Act* stipulates about usual provincial credit regimes applying where the *Act* and one other act don't occupy the field. Nowhere was she opining that the protections of ss. 89 and 90 could be waived.

Not that she did, but had she intended to say that anybody can contract out of any right provided to him or her under a statute, provided the statute doesn't clearly prohibit it, she would have been standing almost a century of Canadian jurisprudence on its head. Furthermore, she would have been ignoring the difference between a right and a protection, only the former of which, theoretically, can be waived.

However, she certainly was not going to that extreme, and the issue of waiving the s. 89 protection was not an issue in *McDiarmid*. That a s. 90(2) waiver could apply to s. 89 protections and not just s. 90 protections was the view of the minority in *McDiarmid*, while the majority did not opine on this point.[32]

In paragraph 6 of *Tribal* the court says that "…the appellant has been unable to provide us with any principled reason why a person defined as an "Indian" under the *Act* cannot choose to waive those rights, particularly when, as is the case here, they relate to business assets."[33] In fact, there are two very good reasons. The first of these two reasons, and the fourth reason the correctness of the case is questionable is that it fails to take into account the difference between a right and a protection, only the former of which theoretically can legally be waived. If it were otherwise, one could waive one's protection against rape or having one's signature forged (which is not the same thing as saying that truly consensual sex cannot be rape or that the authorized use of a signature cannot be forgery) or being murdered. Section 89 provides protection but not rights. These protections cannot be waived.

There are two reasons reason we know they are protections and not mere rights. The first is that s. 89 does not say something like a creditor (other than a First Nation or a member of a

First Nation) and a First Nation or a member of a First Nation shall not enter into charge, pledge, etc. It says that the property itself is not subject to charge, pledge, etc. The "right", if it did exist, would belong to the property. Furthermore, s. 90(3) says that every transaction purporting to pass property deemed by s. 90 to be situated on a reserve is void and provides for summary conviction, fine and term of imprisonment for offenders.[34] If it were possible to waive the rights under s. 89 why would it not be possible to waive the rights under s. 90?[35] The second is that La Forest J. specifically said they were protections.[36]

The fifth (and most important) reason is that just because a statute does not say that its provisions cannot be waived does not mean that its provisions can be waived. To be sure, there are statutes that do contain such explicit prohibitions.[37] That said, there is a "…longstanding principle that parties cannot contract out of statutory provisions enacted in the public interest."[38]

The provisions of the *Indian Act* are enacted in the public interest. An overall reading of the *Indian Act* leaves one with the impression that it is a paternalistic document. Sections 89 and 90, as La Forest J. said in *Mitchell*, were designed to prevent First Nations and members of First Nations from harming themselves through improvident transactions. If Parliament considers a class of persons so vulnerable that certain kinds of transactions should not be permitted to them, how can it be permitted to them to contract out of these protections? As noted, La Forest J. does not say that the feature of inalienability is a right of the First Nations but "…a *protective measure* for the Indian population lest it be persuaded into improvident transactions."[39] It is the same kind of public policy that prevents people who haven't reached their majority from entering into binding contractual provisions except for the necessities of life and, just like these are not rights given to minors but protections enacted for the safeguarding of minors, so ss. 89 and 90 are clearly protections which on public policy grounds cannot be waived.

This is particularly important, given what was stated at the beginning of the paper about the broad control and discretion over property of First Nations and their members which the *Indian Act* gives to Her Majesty, the Minister, the Governor in Council, and the Superintendent.

The reasonable, informed member of the public looking at this decision might well conclude that it was made in furtherance of the philosophy of interpreting sections of the *Indian Act* in accordance with the now-prevailing socio-economic philosophy of the majority of the Supreme Court in cases like *Mitchell* and *McDiarmid.* The authors of the decisions in those cases almost certainly believed that the protections afforded by the *Indian Act* ultimately worked to the disadvantage of First Nations and their members. As La Forest J. wrote:

> "To elaborate, if Indians are to be unable to pledge or mortgage such personal property as they acquire in agreements with provincial Crowns, businessmen will have a strong incentive to avoid dealings with Indians. This is simply because the fact that Indians will be liable to be distrained in respect of some classes of property, and not in respect of others, will introduce a level of complexity in business dealings with Indians that is not present in other transactions. I think it safe to say that businessmen place a great premium on certainty in their commercial dealings, and that, accordingly, the greatest possible incentive to do business with Indians would be the knowledge that business may be conducted with them on exactly the same basis as with any other person. Any special considerations, extraordinary protections or exemptions that Indians bring with them to the marketplace introduce complications and would seem guaranteed to frighten off potential business partners."[40]

I have left a discussion of these cases to the end because they have nothing to do with contracting out, except in providing the socio-economic philosophy that informed *Tribal* and enables us to predict the future direction such cases will take. These two cases, with respect, are wrongly decided. I have left them to the end so that readers interested only in contracting out can stop reading at this point.

At issue in these cases is whether the words "a treaty or agreement between a band and Her Majesty" mean what anyone proficient in English would understand they mean which is "a treaty or agreement between a band and Her Majesty" or whether they mean what the majority decided that they really mean which is "a treaty or an agreement *ancillary to a treaty* between a band and Her Majesty." Furthermore, the language used in s. 90(1)(b) is closed language. It is not the kind of open language that permits the court to engage its broad interpretive powers which is, in effect, deciding policy matters the legislature has decided to leave to the court for determination.[41]

The majority held that the words of s. 90(1)(b) were ambiguous because treaties are a form of agreement and, therefore, if the court really meant treaties and agreements other than treaties, there would have been no need to include the word "treaty". While technically true (that a treaty is a form of agreement) the obvious and commonsensical explanation as to why the word "treaty" was mentioned is that a treaty, while a subset of the set of agreements, is so specialized an agreement,[42] so distinct from other kinds of agreements and so front and centre in the *Indian Act* that had Parliament merely said "agreement", lawyers would be arguing that Parliament intended only agreements that are not treaties.

By way of contrast, the Judicial Committee of the Privy Council would have had none of this. In the case of *Knight Sugar Co. Ltd. v. The Alberta Railway and Irrigation Co.* [1937] UKPC 109, they refused to manufacture ambiguities where none existed. In this case they were required to interpret the words "coal and other minerals". They did not think that the use of the word "coal" was superfluous just because coal was a mineral. Lord Russell of Killowen said, "'all coal and other minerals'…mean grammatically 'all coal and all other minerals.'"[43] Although he was dealing not with words in a statute but words in a certificate of title to land, he would have utterly rejected the kinds of semantic arguments that we will see our Supreme Court indulged in when interpreting the words "a treaty or agreement."

In *Mitchell*, a judgment creditor of a First Nation obtained a garnishment order against the Government of Manitoba which had agreed to pay almost $1,000,000 to 54 First Nations. This was a refund of an illegal tax imposed by Manitoba Hydro on electricity provided to their reserves (prohibited under s. 87).

While there were a number of side issues, for example, does "Her Majesty" refer only to the federal Crown or does it also refer to the provincial Crown, all seven judges would have disposed of the appeal in favour of the First Nations on the basis that the section of the Manitoba *Garnishment Act*[44] which the judgment creditor relied on did not permit the garnishment of the Manitoba Government other than for debts for wages or services provided.

That conclusion was a complete answer to why the garnishment failed.

However, in paragraphs 73 and 74 of the decision La Forest J. also states as follows:

"Similarly, 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 (T.D.).

Finally, the use of the term "given" in s. 90(1)(b) can be taken as a distinct and pointed reference to the process of cession of Indian lands. It is important to bear in mind that the Crown often committed itself to giving personal property and payments of annuities to Indians in return for the surrender of their traditional homelands. I shall have occasion to touch on these payments later, but for the moment limit myself to pointing out that the choice of the term "given" is decidedly an unhappy one if the section is meant to apply to any personal property that Indian bands could acquire pursuant to the whole range of agreements that might be concluded with a provincial Crown. If that is the meaning Parliament wished the section to bear, it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms."[45]

It is ironic that in a sentence dealing with expressing concepts in clear and direct terms he uses the word "sibylline", which the other 35,999,999 Canadians have to look up in a dictionary unless they are both old enough to have studied Latin yet young enough not to have forgotten it. (It means "having a secret meaning".)

He was writing for himself and two others and Wilson J., writing for herself and two others, said "I agree with La Forest J.'s interpretation of s. 90(1)(b)…".[46] She didn't make it clear whether she was agreeing that "Her Majesty" refers only to the federal Crown or whether "agreement" means agreement ancillary to a treaty or both. One can only conclude that she and her two colleagues concurred with everything La Forest J. said about s. 90(1)(b).

But, if *Mitchell* could have been disposed of without making a statement that "agreement" does not mean "agreement" but "agreement ancillary to a treaty", the correct interpretation of

s. 90(1)(b) was front and centre in *McDiarmid Lumber Ltd. v. God's Lake First Nation* [2006] 2 S.C.R. 846. In that case monies paid to a First Nation were deposited into an off-reserve account pursuant to an individualized Comprehensive Funding Arrangement (hereinafter "CFA") between the federal government and this First Nation. Therefore, these funds were not paid pursuant to a treaty obligation. However, some of the funds were designated for purposes that were also treaty obligations of the federal government such as education. Some of the funds had nothing to do with treaty obligations and as concerns the remainder of the funds it would be difficult to determine whether they were paid for monies that were covered by treaty obligations or not. In any event, the judgment creditor, McDiarmid, was successful in persuading the court that they were not protected by s. 90(1)(b).

In concluding on behalf of herself and five other members of a nine-person panel that the word "agreement" means an agreement ancillary to a treaty, McLachlin C.J.C. picks up on La Forest J.'s brief comments in *Mitchell* and expands on them.

Beginning at paragraph 29 she says La Forest J., without referring to it as such, was referring to the principle of associated meaning (*noscitur a sociis*) which is not really a rule but an aid to statutory construction. She relies on R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed., 2002).

A note on this book is at this point appropriate. Now in its sixth edition, this book is the one every serious litigator keeps a copy of not only in his or her library but also on his or her night table to read in bed once his or her spouse, or whomever he or she is sleeping with, is no longer awake. The reason for this is that if one has to argue that black is white or that by dog Parliament really meant cat or that "agreement" really means "but not an agreement other than one ancillary to a treaty" one will find at least three aids to statutory construction to support such a proposition somewhere within its 881 pages. *Noscitur a sociis* (called in English "the associated words rule" in the sixth edition,[47] which edition will hereinafter be referred to as "*Sullivan*") appears in Chapter 8.

Chapter 2 (of *Sullivan*), which today is the starting point of all Canadian statutory interpretation,

recites the modern principle, which is that: "…the words of a legislative text must be read in their ordinary sense harmoniously with the scheme of the objects of the act and the intention of the legislature."[48] The words "a treaty or agreement" have the ordinary sense of "a treaty or agreement" and it is easy to read them harmoniously within the scheme of the objects of the *Act* and the intention of Parliament, since, in part, the scheme and objects of the *Act* are to afford protection to First Nations and their members in relation to their reserves even to the point of notionally deeming certain property not located on reserves to be located on reserves to prevent seizure by creditors. As explained in the section on contracting out, it is a paternalistic document where reading the words "a treaty or agreement" in their ordinary sense cannot possibly create even the slightest lack of harmony with the objects of the Act.

The bottom line is that nowhere do either La Forest J. or McLachlin C.J.C. give the slightest explanation as to why, if Parliament by use of the word "agreement" meant "agreement ancillary to a treaty", it would not have said that.

To be fair to La Forest J. and McLachlin C.J.C. there is no principle that says that if the words of a legislative text can be read in their ordinary sense harmoniously with the scheme and objects of an act and the intention of the legislature, one is foreclosed from resorting to the other principles of statutory interpretation. However, generally speaking, one does not need to resort to other principles of statutory interpretation unless there is something wrong with interpreting words according to their plain and ordinary meaning.[49] Beyond that, however, both these judges in resorting to the associated words rule, with respect, misstated it.

That is, even if we assume for the sake of argument that there is some ambiguity in s. 90(1)(b), McLachlin C.J.C. is, as appears perfectly plainly from what she *herself* writes about the principle, applying the rule where it ought not to be applied. She writes in paragraph 30, quoting a different judgment of the Supreme Court, "[t]he meaning of a term is revealed by its association with other terms: *it is known by its associates*."[50] Note the use of the word "terms" (plural) and "associates" (again plural). To take only two words and say the one is going to colour the other one, especially when these words are separated by "or", i.e., a disjunctive indicating that the one word is not limited by the other, is not a proper application of the

principle of associated words. To be fair, *Sullivan* says it is theoretically possible to apply the principle of associated words to two terms, but she is unable to provide a case as an example of where this has happened.[51] We can only assume that if she did not find one it is because there is none. (Interestingly, the sixth edition, published nine years after the release of *McDiarmid*, does not cite it as authority for the proposition that *noscitur a sociis* can be applied to only two words. In fact, it is nowhere mentioned in her book, though it could have been cited for other principles of statutory construction. She also doesn't cite *Mitchell* as authority for this proposition even though she relies on *Mitchell* for other principles.) Generally speaking, you would need to have at least two words that give colour to a third because with only two words you don't know which word Parliament intended to colour the other. How would you know the one you want to be the colouror was not meant to be the colouree? It would be a bit like giving a horse a pill with a blowpipe. Who blows first determines who gets the pill. In fact, in the first case McLachlin C.J.C. cites as authority for her opinion, the ambiguous term was "conceals" and it got colour from *two* other words it was associated with, in the phrase "removes, conceals or disposes."[52] The other case the Chief Justice relies on clarifies an ambiguous phrase which appeared alongside *seven* other phrases and could thus reasonably draw colour from their totality.[53] She provides no case in which the interpretation of one of only two words could give rise to the justified application of *noscitur a sociis*.

But even if there had been two other words to give colour to "agreement" in s. 90(1)(b), it still would have been an error to apply this principle. This is because "agreement" is general and "treaty" is particular and what La Forest J. and McLachlin C.J.C. are *really* arguing is that the general term be limited to the specific term. The appropriate principle to apply when one is interpreting in that way is that of the limited class rule or the *ejusdem generis* rule. That rule was defined by La Forest J. himself as: "Whatever the particular document one is construing, when one finds a clause that sets out a *list* of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it."[54] That principle was expressed in the negative form (and more simply) by Lord Russell of Killowen in the aforementioned *Knight Sugar Co. Ltd. v. The Alberta Railway and Irrigation Co.*, where he considered the words "all coal and other minerals." He held that the

ejusdem generis rule does not apply to that phrase so as to limit the words "other minerals" to minerals of the same class as coal because, "it would still be impossible out of the single ingredient "coal," to construct a *genus* of minerals to which the succeeding general words could be confined."[55]

In other words, when the object of invoking a rule is to limit the application of a general term to a specific term, the associated meaning rule (*noscitur a sociis*) is completely inappropriate and yet there can be no doubt whatsoever that what La Forest J. and McLachlin C.J.C. are attempting to do is to limit the general term "agreement" to the specific term "treaty". The only rule that can do that is *ejusdem generis*. However, they could not apply that principle because it requires a ***"list"*** of specific terms (as La Forest J. himself stated). In other words, what these two judges are doing is not trying to have one word draw colour from another but having a specific term colour a general term.

McLachlin C.J.C. even further fell into error, it is respectfully suggested. To further justify her interpretation, McLachlin C.J.C., starting at paragraph 46, talks about the legislative history of s. 90(1)(b), which was first enacted in 1951. No one familiar with the topic would deny that there was a historical context to the 1951 amendments. However, they were more aligned with then current ideas about human rights than economic development. First Nation soldiers had recently fought in World War II and Canada had signed the United Nations Declaration of Human Rights. Oppressive sections of the *Indian Act* like the prohibition against potlatches and entering pool halls and gambling without permission of an Indian agent were removed from the *Indian Act*.[56] But if its worst excesses were removed, the paternalism of the *Act* remained in abundance and, as she herself acknowledges, so did the fear that First Nations would harm themselves if they competed freely in the marketplace. The fact of the matter is that nothing she quotes would lead an objective, fair-minded reader to conclude that Parliament intended to legislate a finely tuned distinction between protecting from seizure monies received under a treaty but not monies received under a CFA. Moreover, as *Sullivan* makes clear, one does not go searching the history of legislation every time one has to interpret a statute. *Sullivan* provides a number of weaknesses in turning to legislative history. For instance, the minister

whose 1938 speech she found in Hansard (even if his words could have been taken to support her interpretation) is not Parliament. Parliament is the legislative body–not one individual speaking with partisan purpose. Furthermore, if legislative history materials are used when the intended meaning or application of a provision is unclear, they must not be given inappropriate weight.[57]

It is to be noted that McLachlin C.J.C. in her extensive analysis of the legislative history of s. 90(1)(b) did not mention the introduction of s. 90(2), then s. 89(2), as part of the 1951 amendments.[58] Section 90(2) allows a waiver of s. 90 protections on consent of the Minister. Let us assume, just for the sake of argument, Parliamentary intention to encourage First Nations (with the guidance of the Minister) to enter the commercial mainstream. Why could it not be argued that the way Parliament intended to accomplish that did not go beyond introduction for the first time of an exemption from the incapacity of First Nations and their members to mortgage reserve property and have it seized by creditors *with s. 90(2) Ministerial approval a*nd that Parliament intended to go no further and never intended its language to be subjected to esoteric, inapplicable and wrongly employed in any event, rules of interpretation?

The reasons of Binnie J., written on behalf of the three dissenting judges, (while they don't make the above criticisms) are worth reading in their entirety. He points out that the fear of La Forest J. and McLachlin C.J.C. that if the First Nations can't have their CFA funds deposited off reserves attached, commercial lenders will not want to do business with them and they will not be able to engage in the mainstream economy, were the least of the concerns of God's Lake First Nation. With fewer than 1,300 people, it accounted for 10% of the tuberculosis cases in Manitoba in 1999. At the time, only 10% of the homes on the reserve had basic sewers and, lying 1,037 km northeast of Winnipeg, it was accessible only by air or ice road.[59] This First Nation is not alone. A table provided by the Statistics and Measurement Directorate of Aboriginal Affairs and Northern Development Canada ("AANDC") gives some indication as to the level of First Nation poverty.[60] Binnie J. would appear to have a point. It has now been ten years since his colleagues removed what they considered to be this major impediment to First Nations joining the commercial mainstream, and still no Korean car maker has sought to locate

an auto manufacturing facility 1,037 km northeast of Winnipeg. A second Silicon Valley has yet to sprout in the mushkeg bordering James Bay. He also makes the excellent point that not all First Nations in Canada have signed treaties with the federal government and it is unlikely that Parliament intended to discriminate between some First Nations who had signed treaties and would, therefore, have some of their funding protected under s. 90(1)(b) and others who, not having signed treaties, would have no protection for any funding under s. 90(1)(b). In fact, at present AANDC recognizes 618 First Nations of whom only 365 have signed treaties. Finally, Binnie J., in paragraph 148, puts forward the practical suggestion that suppliers to First Nations could protect themselves by requiring the First Nation to obtain ministerial approval under s. 90(2) to waive the protections of ss. 89 and 90.[61]

In the end the legal arguments of McLachlin C.J.C. and La Forest J., designed to get around the plain and ordinary meaning of words appearing in a statute, are bound to strike the informed, fair-minded member of the public as more appropriate to the interpretation of an esoteric text which is assumed to contain hidden meaning or a secret, concealed profundity.

Statutory interpretation proceeds from the *opposite* assumption. The laws of a legislative body are presumed to be written clearly without a hidden meaning. Members of the public are supposed to, at least theoretically, be able to read them and understand their rights and obligations as citizens of our parliamentary democracy.

It is to be noted that McLachlin C.J.C.'s decision set aside that of the judge of first instance (upholding the decision of the Senior Master). That judge was no less an authority on First Nations matters than Murray Sinclair J., himself a member of a First Nation, who prior to being appointed to the bench had a real legal practice that acted for First Nations and their members. He was then appointed Chairman of the Truth and Reconciliation Commission of Canada that authored the report on the residential schools system. I leave it to the reader to decide for himself or herself which of the two judges is best placed to know what is best for First Nations.

[1] *Indian Act,* R.S.C. 1985, c. I-5, ss. 2(1) and 64 to 68

[2] *ibid*., ss. 2(1) "band", 35, 52.1, 73 – 74; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 35(1)

[3] *Indian Act Amendment and Replacement Act*, S.C. 2014, c. 38, s. 5 repealing s. 32 of the *Indian Act*

[4] *Ibid.*

[5] *An Act to amend the Canada Elections Act*, S.C. 1960, c. 7, s. 1; Statutes of Canada 1960, *Prefix to Statutes: Acts Proclaimed in Force, List of Proclamations from July 25, 1959 to August 20, 1960*

[6] *Mitchell v. Peguis Indian Band et al.* [1990] 2 S.C.R. 85, at para. 85

[7] *Ibid.*

[8] *Indian Act*, s. 2(1)

[9] *Ibid*., s. 29

[10] *Ibid*., s. 18(1)

[11] In Ontario these rights are pursuant to ss. 7 to 13 and 39 of the *Construction Lien Act*, R.S.O. 1990 c. C.30, as amended. Other provinces no doubt have similar provisions in their equivalent statutes.

[12] *Mitchell v. Peguis Indian Band et al.*, at para. 86

[13] *New Brunswick (Minister of Finance) v. Union of New Brunswick Indians*, [1998] 1 S.C.R. 1161

[14] GST/HST Technical Information Bulletin B-039, August 2006: "GST/HST Administrative Policy – Application of the GST/HST to Indians"

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

[16] *Dubé v. Canada*, [2011] 2 S.C.R. 764

[17] Woodward, Jack. *Native Law* (2015, Carswell), p. 298.1

[18] *Ibid.*, p. 274.4

[19] *McDiarmid Lumber Ltd. v. God's Lake First Nation*, *supra.*

[20] *Four B Manufacturing Ltd. v. United Garmet Workers*, [1980] 1 S.C.R. 1031; *Tribal Wi-Chi-Way-Win Capital Corporation v. Stevenson et al.*, 2009 MBCA 72; *Kostyshyn (Johnson) v. West Region Tribal Council*, [1994] 1 C.N.L.R. 94

[21] *Dubuc Osland v. James Smith Cree First Nation*, 2003 SKQB 110 (CanLII)

[22] *Choken v. Lake St. Martin Indian Band*, [2004] 1 FCR 604, 2003 FC 1273 (CanLII)

[23] *Borden & Elliot v. Temagami First Nation et al.*, 2009 CanLII 18672 (ON SC), para. 20

[24] *Bastien v. R.*, [2011] 2 S.C.R. 710

[25] *Dubé v. Canada*, [2011] 2 S.C.R. 764

[26] *Tribal Wi-Chi-Way-Win Capital Corporation v. Stevenson et al.*, 2009 MBCA 72

[27] *Mitchell v. Peguis Indian Band, supra*.

[28] *Tribal Wi-Chi-Way-Win Capital Corporation v. Stevenson et al., supra*., at para. 3

[29] *Kingsclear Indian Band. v. J. E. Brooks & Associates Ltd., supra*.

[30] *Shubenacadie Band v. Martin (1984) Inc*., 1995 CanLII 4259 (NS CA)

[31] *McDiarmid Lumber Ltd. v. God's Lake First Nation,* [2006] 2 S.C.R. 846, at para. 38

[32] *McDiarmid, supra*., para. 148

[33] *Tribal Wi-Chi-Way-Win Capital Corporation v. Stevenson et al., supra*., at para.6

[34] *Indian Act,* R.S.C. 1985, c. I-5, s. 90(3)

[35] A counter argument to that could be based on the *expressio unius est alterius exclusio* principle. However, this presumptive principle of statutory interpretation is one which must be used with the utmost caution and always requires a contextual analysis: *Metcalfe & Mansfield Alternative Investments II Corp. (Re),* 92 O.R. (3d) 513, para. 98.

[36] *Mitchell v. Peguis Indian Band et al., supra.*

[37] See, for example, the *Residential Tenancies Act,* S.O. 2006, c. 17, s. 4.

[38] *The Royal Trust Company v. Potash* [1986] 2 S.C.R. 351, paras. 37 and 40; *Ontario Human Rights Commission et al. v. Etobicoke,* [1982] 1 S.C.R. 202, at pp. 213-214

[39] *Mitchell v. Peguis Indian Band et al.. supra*., at para. 85

[40] *Mitchell v. Peguis Indian Band et al.. supra*., at para. 126

[41] Examples of such language are found in abundance in the *Constitution Act, 1982* R.S.C. 1985, App. II, No. 44. See, for example, s. 15(1) "Equality before and under law".

[42] Treaties are only between sovereign nations. One thinks, for instance, of the 1648 Treaty of Westphalia which ended the Thirty Years' War, had the participation of 192 states, took forty-seven months to negotiate, the first six of which were devoted to who would sit where and who would enter a room before whom, but established a system under which rulers were sovereign within their national boundaries. Or there is the 1919 Treaty of Versailles that brought an end to World War I and by its retributive terms provided the conditions precedent to the rise of fascism in Europe, Hitler, the outbreak of World War II, the Holocaust, the Vatican's silence despite full knowledge of the deportation and annihilation of the Jews, the inevitable defeat of Germany (yet again), the

expansion of Soviet influence, the Cold War, Nixon's trip to China and China's ascendancy, Obama's speech in Cairo and the self styled Islamic State's ascendancy etc.

[43] *Knight Sugar Co. Ltd. v. The Alberta Railway and Irrigation Co.*, *supra*., at page 111

[44] Manitoba *Garnishment Act*, R.S.M. 1970, c. G20, C.C.S.M., c. G20, s. 3

[45] *Mitchell v. Peguis Indian Band et al., supra.* paras 73 and 74

[46] *ibid*., at para. 50

[47] Sullivan, R. *Sullivan on the Construction of Statutes, 6th Edition*. (2014). LexisNexis Canada., at 8.58.

[48] *Sullivan*, *supra*., at 2.6

[49] *R. v. McCraw,* [1991] 3 S.C.R. 72, at para. 18

[50] *2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919, at para. 195 (emphasis in original)

[51] *Sullivan*, *supra*., 8.61

[52] *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.)

[53] *Ontario v. Canadian Pacific Ltd.,* [1995] 2 S.C.R. 1031., para. 64

[54] *National Bank of Greece (Canada) v. Katsikonouris,* [1990] 2 S.C.R. 1029, at 203; *Sullivan*, *supra*., 8.64

[55] *Knight Sugar Co. Ltd. v. The Alberta Railway and Irrigation Co., supra*., at page 111

[56] http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act.html#amendments

[57] *Sullivan*, *supra.* 23.55 to 23.58

[58] *Indian Act,* S.C. 1951, c. 29, s. 89(2); Venne, Sharon H. (1981). *Indian acts and amendments, 1868-1975*. Saskatoon: University of Saskatchewan, Native Law Centre

[59] A recent call to the First Nation's Chief in the summer of 2015 revealed that there are, thankfully, no more cases of tuberculosis on the reserve. He also disputed information currently shown on the AANDC website that there were no more than 20 people on the reserve who had more than a high school education.

See AANDC 2011 census statistics on Educational Characteristics for God's Lake First Nation: http://pse5-esd5.ainc-inac.gc.ca/fnp/main/search/FNEducation.aspx?BAND_NUMBER=296&lang=eng

[60] See Appendix "1" – Median and Average Total Incomes for 2010 for Aboriginal Identity Populations and Registered Indians on and off-reserve from AANDC. This is the most updated information publicly available.

[61] *McDiarmid Lumber Ltd. v. God's Lake First Nation*, *supra*., para. 148

Appendix "1"

The 2010 Average and Median Total Incomes of the Aboriginal Idenity Populations by Gender and Residence, National Household Survey 2011

	Aboriginal			Registered Indian								
				Total			On Reserve			Off Reserve		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Average Individual Income $	$29,780	$33,570	$26,341	$25,304	$27,109	$23,702	$18,613	$17,906	$19,316	$30,329	$34,788	$26,700
Median Individual Income $	$20,701	$22,924	$19,289	$17,120	$17,023	$17,172	$13,205	$11,518	$14,549	$21,198	$24,271	$19,415

Source: Statistics Canada, National Household Survey 2011.

Non-Status Indian			Inuit			Metis			Non-Aboriginal		
Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
$31,184	$35,936	$26,970	$31,774	$32,887	$30,729	$36,421	$41,743	$29,454	$41,050	$49,131	$33,264
$22,905	$25,054	$20,309	$20,945	$21,700	$20,457	$26,529	$32,529	$22,790	$30,135	$36,650	$24,042