

**PERSONAL PROPERTY SECURITY INTERESTS ON  
LANDS RESERVED FOR FIRST NATIONS**

A Thesis Submitted to the  
College of Graduate and Postdoctoral Studies  
In Partial Fulfillment of the Requirements  
For the Degree of Master of Laws  
In the College of Law  
University of Saskatchewan  
Saskatoon

By

SCOTT PAUL HITCHINGS

## **Permission to Use**

In presenting this thesis/dissertation in partial fulfillment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis/dissertation in any manner, in whole or in part, for scholarly purposes may be granted by the professor or professors who supervised my thesis/dissertation work or, in their absence, by the Head of the Department or the Dean of the College in which my thesis work was done. It is understood that any copying or publication or use of this thesis/dissertation or parts thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis/dissertation.

## **Disclaimer**

Reference in this thesis/dissertation to any specific commercial products, process, or service by trade name, trademark, manufacturer, or otherwise, does not constitute or imply its endorsement, recommendation, or favoring by the University of Saskatchewan. The views and opinions of the author expressed herein do not state or reflect those of the University of Saskatchewan, and shall not be used for advertising or product endorsement purposes.

Requests for permission to copy or to make other uses of materials in this thesis/dissertation in whole or part should be addressed to:

Dean  
College of Law  
University of Saskatchewan  
15 Campus Drive  
Saskatoon, SK, S7N 5A6 Canada

OR

Dean  
College of Graduate and Postdoctoral Studies  
Room 116 Thorvaldson Building  
110 Science Place  
Saskatoon, SK S7N 5C9 Canada

## **Abstract**

In this thesis I examine the issues encountered by First Nations persons and bands when attempting to use assets that are personal property, as defined by the *Personal Property Security Act, 1993* and similar *Acts* in Canadian jurisdictions, as security in secured financing arrangements. Subsection 89(1) of the *Indian Act* prohibits personal property of a First Nation person or band that is located on reserved lands from acting as collateral, unless it is in favour of another First Nation person or band. The result of this subsection has been that First Nation persons and bands have limited access to credit for personal or business purposes.

I argue that a solution needs to be found to this problem. The solution could take the form of legislative reform from comprehensive changes to the systems regulating secured transactions on First Nations reserved lands, to more simple changes that allow a First Nation person or band to waive the application of the section to their transaction or property. Another solution I explore is that a line of jurisprudence in which a commercial exception has been considered is accepted to be valid law, which would allow First Nation persons and bands to operate under the presumption that commercial assets are exempt from the *Indian Act* prohibition.

## **Acknowledgements**

I acknowledge that this thesis was researched and written at an institution that is situated in Treaty 6 territory and the traditional homeland of the Métis. I pay my respects to the Indigenous and Métis ancestors of this place and reaffirm our relationship with one another.

Thank you to the guidance of my supervisor, Distinguished Professor Ronald C.C. Cuming, Q.C. The comprehensive knowledge of all aspects of commercial law has greatly contributed to the quality of this thesis. Thank you as well to my committee members, Associate Dean Heather Heavin and Associate Professor Clayton Bangsund. Your insights, additions, corrections, and commentary has elevated the analysis contained herein. Though not a member of my committee, I also owe a great deal to the guidance of Canada Research Chair in Indigenous Rights in Constitutional and International Law Professor Dwight Newman, Q.C. The understanding, support, and advice that you provided has helped me accomplish the task that is this thesis.

My most sincere and principal thank you is reserved for my wife Ania Okapiec. Your unending support, encouragement, and love are the reasons that I was able to complete this work. As well, this most sincere thank you is for my daughters Sophie Maria and Ella Charlotte. You inspire me in ways I did not know was possible. This thesis is for you.

I formally dedicate this thesis to Indigenous peoples of Canada. My research is aimed at providing realistic, achievable, and practical solutions to the commercial problems facing First Nation persons and the consequential effect those solutions have on broader Indigenous economic development.

## Table of Contents

Permission to Use & Disclaimer.....	i
Abstract.....	ii
Acknowledgements.....	iii
Chapter 1 – Introduction .....	1
1.1 Thesis Topic.....	1
1.2 Objective.....	2
1.3 Background.....	3
1.4 Structure of the Analysis .....	6
1.5 The Current Landscape of First Nation Access to Capital .....	7
1.5.1 Programs operated by the Canadian Federal Government .....	7
1.5.2 Private Lenders with a Focus on First Nation communities .....	9
1.5.3 Access to Credit Limited by the <i>Indian Act</i> .....	11
1.6 Outline of Chapters .....	11
Chapter 2 – Transaction Costs, Access To Credit, And Economic Development .....	12
2.1 Philosophical Basis – Law & Economics.....	13
2.2 Transaction Costs .....	15
2.2.1 Risk Aversion – The Role of Collateral.....	17
2.3 Transaction Costs & Property Rights.....	19
2.4 Access to Credit & Economic Development for First Nations.....	21
2.5 Conclusion .....	21
Chapter 3: The <i>Indian Act</i> Prohibition Against Collateralization .....	23
3.1 History of Section 89.....	23
3.2. Personal Property of a First Nation person or band .....	26
3.2.1 Application of s.89(1) to assets of a business operated by a First Nation band.....	27
3.2.2 Application of subsection 89(1) to assets of a sole proprietorship operated by a First Nation person.....	27
3.2.3 Application of subsection 89(1) to Partnership Property .....	28
3.2.4 Application of subsection 89(1) to assets of a corporation owned by a First Nation person or band.....	29
3.3 Personal Property ‘Situated On’ Reserved Lands.....	30
3.3.1 Property Situated on Reserved Lands.....	32

3.3.2 Determining the <i>situs</i> of tangible property .....	32
3.3.3. Determining the <i>situs</i> of intangible assets .....	35
3.4. Personal Property Deemed To Be Located On Reserved Lands .....	38
3.5 Conclusion .....	39
Chapter 4 – Exceptions To Subsection 89(1) .....	40
4.1 Security interests “in favour or at the instance of” a First Nation person or band.....	40
4.1.1 Advance of credit from First Nation creditor to First Nation debtor .....	41
4.1.2 Assignment of Debt .....	42
4.2 A possible ‘commercial exception’ .....	51
4.2.1 Waiver.....	54
4.2.2. Narrow Interpretation of Subsection 89(1) to Exclude Business Assets .....	57
4.3 Subsection 89(2) – Conditional Sales Contracts.....	60
4.3.1 Case Law .....	62
4.3.2 Conditional Sales Contract as Purchase Money Security Interests .....	62
4.4 Conclusion .....	63
Chapter 5 - Enforcement on First Nations’ Reserved Lands.....	64
5.1 Trespass provisions .....	64
5.2 Lawful justification for entering reserved lands .....	65
5.3 Bylaws .....	66
5.4. Band Council Resolutions .....	68
5.5. Effect of Seizing Property without Lawful Jurisdiction.....	69
5.6 Conclusion .....	69
Chapter 6 – Possible Approaches .....	70
6.1 Recommendations for Initiatives to Improve Access to Credit for First Nation Debtors... 70	
6.1.1 Rely on the Common Law .....	70
6.1.2 Subsection 89(1) declared inapplicable .....	72
6.1.3 Repeal subsection 89(1) of the <i>Indian Act</i> .....	73
6.1.4 Amend the <i>Indian Act</i> to allow personal property on reserved lands that is for commercial purposes to be used as collateral in a secured financing transaction .....	75
6.1.5 Create an opt-in legislative framework.....	76
6.2 Conclusion .....	78
Bibliography .....	80

## Chapter 1 – Introduction

### 1.1 Thesis Topic

The Federal government should take action to allow First Nation<sup>1</sup> persons and bands to use personal property that is situated on lands reserved for First Nations as collateral in a loan transaction. Under subsection 89(1) of the *Indian Act*,<sup>2</sup> property of a First Nation person or band that is situated on lands reserved for First Nations is prohibited from being used as collateral. The result is that First Nation persons and bands – and, as a result, First Nation communities – suffer economically from the inability to access credit.

I argue in this thesis that this legal structure causes First Nation persons and bands to engage in complex legal strategies in order to gain access to credit. One strategy used by First Nation persons and bands is to establish intricate corporate structures under which the First Nation person or band is the owner of the corporation and the corporation is the owner of the property. Another strategy is to hold assets on non-reserved lands. Each of these strategies is necessary in order for the property to function as collateral. Moreover, each of those options put First Nations persons and bands who want to engage in commercial activities at a disadvantage when compared to their non-First Nation peers, who are not required to engage in legal strategies to circumvent the law in order to leverage the value in their assets to usable credit.

I argue that courts have recognized the detrimental effect that the subsection 89(1) limitation has on First Nation economies and have attempted to limit the effect that the prohibition has on commercial activity by creating certain exemptions in relation to commercial property, and by recognizing that a legal right to waive legislative rights can be used to address the issue. I also argue that there are existing legal exemptions that can be expanded to increase access to credit for

---

<sup>1</sup> A note on the language used in this thesis. The author limits the use of the more ubiquitous term “reserves” to quotations or citations where the use is necessary when referring to the lands reserved for First Nations people, over which the federal government has sole authority under the *Constitution Act, 1867*, Vict I & II, c 3 s 91(24). Instead, the author employs the terminology of “reserved lands” or “lands reserved for First Nations.” This terminology more accurately reflects the Indigenous-settler relationship that is the foundation of the Treaties. The Indigenous population intended to share the lands with the settlers, with certain tracts to be reserved for the use of the Indigenous population, rather than agreeing to be placed on “reserves.” Credit for this change in terminology is owed to Sharon Venne, “Treaties Made in Good Faith” in Paul DePasquale, ed, *Natives & Settlers, Now & Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, 2007).

<sup>2</sup> *Indian Act*, RSC 1985, c I-5 [*Indian Act*], s 89(1).

First Nation persons and bands. I argue that the requirement for First Nation debtors to engage in legal strategies that non-First Nation debtors are not required to engage in can be eliminated by making amendments to the *Indian Act*.<sup>3</sup> Moreover, I argue that the exceptions found in jurisprudence have begun to chart the path that legislative reform can follow.

First, I outline the current landscape of financing options for First Nation persons and bands who are seeking to engage in business activities. While recognizing that there are some well-funded programs available to such First Nation debtors looking to operate on reserved lands, the landscape does not compare to what is available to non-First Nation debtors looking to operate in the same areas.

Then I outline the philosophical basis that permeates this thesis. Specifically, the philosophy is that access to credit has been demonstrated to have important economic effects. This is especially true where the community that has seen an increase in access to credit has had poor economic prospects and performance. Increasing access to credit in those communities helps to lift the fortunes of the entire community. However, access to credit is reduced when transaction costs are high. Here, the risk involved in a transaction is taken into account. On lands reserved for First Nations, the risk facing financiers that are willing to advance credit is that they cannot securitize their loans and therefore face the possibility of losing their investment.

## **1.2 Objective**

First Nation communities have suffered economic hardship caused by paternalistic legislation imposed on them, most notably the *Indian Act*.<sup>4</sup> This thesis considers one particular provision of the *Indian Act* that has a demonstrably detrimental effect on the ability of First Nations to engage in economic activity that can relieve the hardship facing First Nation communities: subsection 89(1).<sup>5</sup> My purpose in writing this thesis is to provide a base of research on the issue of the effects that s. 89(1) has on access to credit. Further, I hope to provide some suggestions on potential law reform initiatives or legal actions that the Federal government can take to address the issues caused by s. 89(1).

The questions that I am answering in this thesis are the following:

---

<sup>3</sup> *Supra* note 2.

<sup>4</sup> *Indian Act, ibid.*

<sup>5</sup> *Indian Act, ibid*, s. 89(1).



- Does subsection 89(1) limit access to credit for First Nation debtors, by prohibiting First Nation debtors from using commercial assets as collateral for commercial loans?
- Does the prohibition place a burden on First Nation commercial ventures that is not experienced by non-First Nation commercial ventures? If so, does this burden result in a lack of access to credit for First Nation businesses, thereby limiting their establishment and growth, or does this burden increase their transaction costs by requiring them to assume a more complex and expensive business structure?
- What solutions are available to combat the negative impacts of subsection 89(1)? Has jurisprudence provided solutions, or is legislative reform the best method?

### 1.3 Background

First Nations communities located on reserved lands experience poverty rates exceeding those found elsewhere in Canada.<sup>6</sup> Although poverty is a multi-faceted problem, economic development on First Nations reserved lands is an important part of the solution.<sup>7</sup> However, the opportunities for economic development in First Nations communities remain few.<sup>8</sup> A barrier to economic development on reserved lands is the difficulty that businesses operating on the reserved lands of First Nations have in accessing credit.<sup>9</sup> This difficulty is caused by provisions of the *Indian*

---

<sup>6</sup> *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol 2, (Ottawa: Supply and Services Canada, 1996) at Chapter 5 [RCAP] at 870 - 893; Mindy McHardy & Erin O’Sullivan, “First Nations Community Well-Being in Canada: The Community Well-Being Index (CWB, 2001)” (Ottawa: Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada, 2004); Fernando M Aragon, “Do better property rights improve local income? Evidence from First Nations’ Treaties” (2015) 116 *Journal of Development Economics* 43 at 45 - 46; Pamela Palmater, “Stretched Beyond Human Limits: Death by Poverty in First Nations” (2011) 65-66 *Can Rev Social Policy* 112 at 113 - 115; Dwight Dorey, “Development Unreserved: Aboriginal Economic Development for the 21st Century” in Dwight Dorey & Joseph Magnet, eds, *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc, 2005) at 9 [Dorey, Development Unreserved].

<sup>7</sup> RCAP, *supra* note 6, Vol 2, at 916-931; John Borrows & Sarah Morales, “Challenge, Change, and Development in Aboriginal Economies” in Dwight Dorey & Joseph Magnet, eds, *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc, 2005) 137 [Borrows & Morales]; Aragon, *supra* note 6 at 45 - 46; Dorey, Development Unreserved, *supra* note 6 at 9.

<sup>8</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Volume 2, Part 5: Economic Development* (1996) [RCAP] at 870 - 893; Aragon, *supra* note 6 at 45 - 46; Borrows & Morales, *supra* note 7; Dorey, Development Unreserved, *supra* note 6.

<sup>9</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Volume 2, Part 5: Economic Development* (1996) [RCAP] at 870 - 893; National Indigenous Economic Development Board, “Indigenous Economic Reconciliation: Recommendations for Reconciliation and Inclusive Economic Growth for Indigenous Peoples and Canada” at 14-19, online at: <http://www.naedb-cndea.com/reports/NIEDB%20-%20Economic%20Reconciliation%20-%20Final%20Report.pdf> [NIEDB]; Roderick A MacDonald & Shauna Troniak, “Do Indigenous People Need a “Tailor Made” Secured Transactions Law?” in Roderick A MacDonald & Véronique Fortin, eds, *Autonomie Économique Autochtone* (Montréal: Les Editions Thémis, 2015) [MacDonald & Troniak] at 121 - 124; James I Reynolds, “Security for Financing Projects on Indian Reserve Land” (1993) 8 *BFLR* 331 [Reynolds (1993)]; James I Reynolds, “Taking and Enforcing Security under the Indian Act and Self-

*Act*,<sup>10</sup> which limit the property rights available on the reserved lands of First Nations and make enforcement against security interests difficult to achieve.<sup>11</sup> This combination reduces the inclination of lenders to enter secured financing transactions with businesses located on the reserved lands of First Nations.<sup>12</sup> Lack of access to credit is detrimental to the economic vitality of First Nations communities.<sup>13</sup> Without access to secured financing mechanisms, businesses lack capital necessary to establish and maintain operations.<sup>14</sup> Moreover, a lack of access to credit for consumers leads to a reduction in spending, thereby causing further damage to the chance of business enterprises located on reserved lands to be successful.<sup>15</sup>

The legal regime that inhibits access to credit for businesses located on First Nations reserved lands is unnecessarily prohibitive and paternalistic. First Nations personal property located on reserve lands is subject to provincially enacted laws of general applicability,<sup>16</sup> except to the extent that there is a conflict with valid federal legislation. Such a conflict occurs when a person<sup>17</sup> located on First Nations' reserved land attempts to use personal property as collateral in a secured financing transaction. In this situation, the provisions of the *Personal Property Security Act, 1993*<sup>18</sup> that regulate the *inter partes* rights of debtors and creditors using personal property as

---

Government Legislation” (2002) 18 BFLR 37 [Reynolds (2002)]; Anita G Wandzura, “The Enforcement of Security Interests Against the Personal Property of First Nation persons on Reserve” (2007) 39:1 Ottawa L Rev 1 at 3 - 4; *Royal Commission on Aboriginal Peoples*, *supra* note 6, Vol 2, at 916-931.

<sup>10</sup> *Indian Act*, *supra*, note 2.

<sup>11</sup> Reynolds (1993), *supra* note 9; Reynolds (2002), *supra* note 9; MacDonald & Troniak, *supra* note 9 at 121 - 124; Wandzura, *supra* note 9; at 3 - 4.

<sup>12</sup> Borrows & Morales, *supra* note 7 at 161 - 164; Reynolds (1993), *supra* note 9; Reynolds (2002) *supra* note 9; MacDonald & Troniak, *supra* note 9 at 121 - 124; Wandzura, *supra* note 9 at 3 - 4.

<sup>13</sup> *Royal Commission on Aboriginal Peoples*, *supra* note 6, Vol 2, at 916-931; *McDiarmid Lumber Inc v God's Lake First Nation*, 2006 SCC 58 at paras 42, 50-56, [2006] 2 SCR 846 [*McDiarmid Lumber*].

<sup>14</sup> Borrows & Morales, *supra* note 7 at 161 - 164; *McDiarmid Lumber*, *supra* note 13 at paras 42, 50-56; *Royal Commission on Aboriginal Peoples*, *supra* note 6 at 870-893; Reynolds (1993), *supra* note 9; Reynolds (2002), *supra* note 9; Wandzura, *supra* note 9 at 3-4. See also, United Nations Development Programme, *The Role of Economic Policies in Poverty Reduction* (September 2003) at 8, online: [www.undp.org/content/undp/en/home/librarypage/poverty-reduction/the-role-of-economic-policies-in-poverty-reduction.html](http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/the-role-of-economic-policies-in-poverty-reduction.html) [UNDP] at 3-7.

<sup>15</sup> UNDP, *supra* note 14 at 3-7..

<sup>16</sup> *Indian Act*, *supra* note 2, s 88; see *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 1990 CanLII 117 (SCC) [*Mitchell*].

<sup>17</sup> A person in this instance includes both natural and legal persons. For instance, a “person” can include a corporation under the *Business Corporations Act*, RSC 1978, c B-10, s 15(1). Although, as discussed below, the issues encountered by corporate persons on the reserved lands of First Nations differ from those facing First Nation persons and bands.

<sup>18</sup> *Personal Property Security Act, 1993*, SS 1993, c P-6.2 [PPSA]. Note that I use the Saskatchewan personal property security act as the template for all analysis within this thesis. The Saskatchewan PPSA is substantially the same as every other personal property security act in Canada.

security encounter provisions of the *Indian Act*<sup>19</sup> that limit property rights on reserved lands. The result is that, with one important exception, the *Indian Act* provisions oust the application of provincial law.<sup>20</sup>

The truth and reconciliation commission of Canada stated that laws must change. Moreover, the relationship between economic development and reconciliation has been noted by the Royal Commission on Aboriginal peoples, the Supreme Court of Canada, and in literature.<sup>21</sup> Reconciliation between Indigenous people and Canada means restoring friendly relations and fusing beliefs that may not be entirely compatible with one another. Reconciliation requires a coming together of different parties, with an acknowledgment of the validity of their perspectives. A number of legal tools have been developed with the idea of recognizing Indigenous perspectives as one of the main focuses. Examples are consultation and accommodation prior to commencing a project. Each of these has the potential to bring Indigenous communities into the fold, to engage in economic development alongside non-First Nation entities seeking to do business with First Nations. By engaging in economic development, First Nation communities are able to accumulate wealth that can be invested in the First Nation community: providing solutions to the problems that plague those communities.

The focus of this paper is business financing that involves the use of personal property as security in a loan transaction, as opposed to consumer acquisition of credit for personal purposes. Although similar legal issues arise for persons located on reserved lands that are seeking credit regardless whether the purpose is commercial or consumer, the author focuses on the legal implications of limiting commercial opportunities by restricting a common mechanism for business financing. Included within the scope of this paper is a situation where the business itself is not located on First Nations' reserved lands, but the assets of the business are located on reserved lands.

The extent to which the *Indian Act* applies to property of a business entity located on reserved lands depends on the business' legal form. The effect of the Act on a sole proprietorship is different than on a corporation. A sole proprietorship exists where an individual carries on

---

<sup>19</sup> *Indian Act*, *supra* note 2.

<sup>20</sup> See *Derrickson v Derrickson*, [1986] 1 SCR 285, 1986 CanLII 56 (SCC), where the provincially enacted regime regulating matrimonial property rights were set aside due to a conflict with the property rights contained within the *Indian Act*, *supra* note 2. For a discussion of operational conflict between federal and provincial legislation, see *Multiple Access v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1.

<sup>21</sup> NIEEDB, *supra* note 9.

business for their own account.<sup>22</sup> All assets and liabilities are that of the individual carrying on the business. Sole proprietorships attract the application of the *Indian Act* when (1) the sole proprietor is a First Nation person or band;<sup>23</sup> and (2) the assets of the business are located on First Nations' reserved lands. When those conditions are met, the sole proprietor's ability to grant rights in the property to creditors is limited, and his or her creditors may encounter difficulty enforcing against property, even where the creditor is legally capable of obtaining an interest in that property.

A corporation is a legal entity, separate from that of its shareholders and directors.<sup>24</sup> Even where the majority or entirety of a corporation's shareholders or directors are First Nation persons or bands, the corporation will not be considered a First Nation person or band under the *Indian Act*.<sup>25</sup> A corporation will not encounter the same issues of limited property rights as a sole proprietor. However, problems remain where the debtor is a corporation. A creditor who agrees to advance credit to a corporate entity located on reserved lands may encounter difficulties in the enforcement process when property of the debtor would normally be seized.

Partnerships are a different business structure that is frequently utilized in business ventures that involve First Nation communities. Typically, partnerships are used for tax-planning reasons that are beyond the scope of this thesis. A general outline of a partnership in this context is a non-Indigenous business – a corporation or otherwise – will enter a partnership agreement with an Indigenous community. The partnership agreement will often identify the non-Indigenous business as the owner of assets in order for those assets to be used as collateral; whereas the Indigenous partner will receive the income in order to take advantage of the tax exemptions found in the *Indian Act*.

#### **1.4 Structure of the Analysis**

This paper examines secured transactions where personal property of a business located on First Nations reserved lands is used as collateral for a loan. Transactions of this nature are regulated

---

<sup>22</sup> R L Campbell, *The Legal Framework of Business Enterprises*, 4th ed, (Concord: Captus Press Inc, 2007); J Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed (Toronto: Irwin Law Ltd, 2009).

<sup>23</sup> Note that only one of the partners or co-owners is required to be a First Nation person or band to attract the application of the *Indian Act*, *supra* note 2. For the purposes of this paper, the author refrains from using the legal term "Indian" as defined by *Indian Act*, *ibid*, s 2. Instead, the author refers to an "indian" under the *Act* as a First Nation person.

<sup>24</sup> Campbell, *supra* note 21, at 27-28, 196 – 218; Vanduzer, *supra* note 21 at 125-129; *Business Corporations Act*, *supra* note 17, ss 2(1)(w), 15.

<sup>25</sup> *R v Bernard*, [1992] 3 CNLR 33, 118 NBR (2d) 361; *Kostyshyn (Johnson) v West Region Tribal Council Inc*, [1994] 1 CNLR 94, 35 ACWS (3d) 502; *Tsilhqot'in Economic Development Corporation v Johnny*, 1995 CarswellBC 2748, [1995] BCWLD 2861 (PC).

by the *PPSA*,<sup>26</sup> which implements a system regulating security interests in personal property.<sup>27</sup> The proprietary interest granted to the creditor under a security agreement as set out in the *PPSA* can be asserted against the assets of the debtor in the event of default by the debtor in discharging the obligation secured by the interest. A short list of the types of personal property that is generally important to secured creditors of small businesses includes: accounts, inventory, equipment such as fixtures, and high value items such as motor vehicles. This paper focuses on the proprietary interest granted in personal property of business debtors. It includes an examination of security interests in all the various types of personal property that can be used as collateral in the transaction between debtors and creditors.

## **1.5 The Current Landscape of First Nation Access to Capital**

The report of the Royal Commission on Aboriginal Peoples identified economic development as one of the most urgent and important issues to be resolved.<sup>28</sup> Part of the recommendations stated that, in order to improve the economic opportunities for First Nations, governments must support financial institutions and lending programs that are directed at First Nation communities.<sup>29</sup> Although some of these programs were already in operating in the 1980s, this recommendation and the government support for it has given rise to Indigenous financial institutions, the purpose of which is to provide funding to businesses owned by First Nation people.<sup>30</sup> The funding for Aboriginal financial institutions comes primarily from the Federal government.<sup>31</sup>

### **1.5.1 Programs operated by the Canadian Federal Government**

In Saskatchewan, businesses operated by First Nation persons or bands are able to apply for commercial or agricultural loans from the Saskatchewan Indian Equity Foundation (SIEF).<sup>32</sup>

---

<sup>26</sup> *PPSA*, *supra* note 18.

<sup>27</sup> Ronald CC Cuming, Catherine Walsh, & Roderick Wood, *Personal Property Security Law* (2 ed), (Markham: Irwin Law Inc); Michael G Bridge, Roderick A Macdonald, Ralph L Simmonds, & Catherine Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions" 44 McGill LJ 567 (1998-1999).

<sup>28</sup> RCAP, *supra* note 6 at 875.

<sup>29</sup> RCAP, *supra* note 6, at 878.

<sup>30</sup> The aim of the Aboriginal Capital Corporations is also to provide funding to Métis and Inuit business opportunities, but that is beyond the scope of this thesis. This thesis considers the *Indian Act*, *supra* note 2 restrictions on access to finance for First Nation communities. The *Indian Act*, *supra* note 2 does not apply to Métis and Inuit communities.

<sup>31</sup> Canada, Department of Indigenous and Northern Affairs, *Final Report: Summative Evaluation of INAC's Economic Development Programs*, 2009.

<sup>32</sup> Saskatchewan Indian Equity Foundation, online <[www.sief.sk.ca](http://www.sief.sk.ca)> [SIEF].

SIEF was founded in 1986 and amalgamated with the Saskatchewan Indian Loan Company in 2002. The purpose of SIEF is to develop a strong economic base for First Nation communities in Saskatchewan. It provides loans to First Nation-run businesses to assist in job creation and foster economic growth within First Nation communities. SIEF was established in part by the First Nation business community in Saskatchewan, which recognized that access to capital was a key component to generate economic development and jobs. Traditional business financing was not available for the First Nation-run businesses, and the purpose of SIEF was to fill this gap in financing to help provide access to capital for First Nation entrepreneurs. SIEF provides capital loans, operating loans, bridge financing, and participation loans for First Nation owned businesses. It can be accessed by First Nation entrepreneurs seeking to establish, acquire, or expand a business. However, SIEF is limited in size, with its most recent annual statements indicating that its net assets were approximately \$18 million. Therefore, while SIEF can provide some assistance to First Nation entrepreneurs, its lending capacity is limited.

Aside from providing assistance to Aboriginal financial institutions, the Department of Indigenous and Northern Affairs (INAC) operates two main programs that can provide financial assistance to First Nation persons or bands seeking to engage in economic development. One is the operational (core) funding program, a sub-part of the lands and economic development services program. Through this program, operational funding is available for economic development activities, such as capacity development, community economic development planning, and the development of proposals to raise financial resources. However, the drawbacks for this program are that it can only be accessed by First Nation communities as a whole rather than individual entrepreneurs, and its purpose is to provide support for establishing the conditions for economic development to occur rather than funding projects that directly influence economic development.

The second program operated under the lands and economic development services program of *INAC* is for project-based funding. This program seeks to provide funding for specific projects that will help to spur economic development within First Nation communities. An important difference for this project-specific funding is that it is more broadly available than the operational (core) funding program. The project-specific funding can still be accessed by First Nation communities as a whole, but it is also available to businesses that are primarily First Nation owned. For instance, project-specific funding was granted to the Jean Marie River First Nation to create a successful sawmill business in the community. The problem with this program is that funding is

limited, and successful applicants must already have other sources of funding in place in order to be considered for the funding. Moreover, it is specific to individual projects rather than providing capital and operating loans for businesses to establish and thrive.

The Strategic Partnerships Initiative (SPI) is a related federal program operated through INAC.<sup>33</sup> The SPI was launched in 2010, following recommendations made by the 2009 Federal Framework for Aboriginal Economic Development.<sup>34</sup> The focus of the program is to increase Aboriginal participation in complex economic development opportunities, particularly in the area of natural resources. However, funding is not directly available to First Nation groups as part of the SPI program.<sup>35</sup> Instead, First Nation communities must collaborate with other federal departments to create a proposal for SPI funding. Upon approval, the funding granted under the SPI seeks to enhance the economic readiness of the community to ensure that the community is better prepared to engage with commercial partners and take full advantage of any economic development opportunities. For instance, rather than providing capital to a First Nation entrepreneur to establish or operate a business on reserved lands, SPI funding is direct towards the early stages of economic development opportunities, where environmental studies, research activities, skills assessments, and negotiations are taking place. Importantly, SPI funding is made available to First Nation businesses, partnerships, and corporations if they require the services that meet the SPI criteria. The funding from SPI is not aimed at providing start-up or operating capital; instead it focuses on enhancing cooperation and collaboration between First Nation businesses, departments of the federal government, and private firms in order to enhance economic development within First Nation communities.

### **1.5.2 Private Lenders with a Focus on First Nation communities**

Although problems exist with private lenders advancing credit to First Nation businesses located on reserved lands, a number of private lenders exist whose purpose is to provide financial services to First Nation communities.

---

<sup>33</sup> Department of Indigenous and Northern Affairs Canada, *Strategic Partnerships Initiative: Overview*, 2010, online: <<https://www.aadnc-aandc.gc.ca/eng/1330016561558/1330016687171>>.

<sup>34</sup> Department of Indigenous and Northern Affairs Canada, *Federal Framework for Aboriginal Economic Development*, 2009, online <[www.aandc-daac.gc.ca](http://www.aandc-daac.gc.ca)>.

<sup>35</sup> *Supra* note 32.

One of these institutions is the First Nations Bank of Canada (FNBC), which received its *Bank Act* charter<sup>36</sup> in 1996, and began operating a branch in Saskatoon in 1997.<sup>37</sup> The bank was conceived and developed “by Aboriginal people, for Aboriginal people” for the purpose of advancing economic self-sufficiency among Aboriginal communities.<sup>38</sup> It provides banking services across Canada, with some branches located on reserved lands. Its primary focus is to provide financial services to the Canadian Aboriginal commercial sector. Services provided by FNBC include business loans, mortgages, transaction accounts, and cash management. For small businesses, it offers operating lines of credit, term loans, overdraft protection, and letters of credit for a combined maximum of \$100,000.<sup>39</sup> It offers the same services to larger Aboriginal-run businesses and First Nation governments with no stated maximum amount. The loans can either be secured or unsecured, with the unsecured loans accumulating a higher rate of interest than secured loans.

Peace Hills Trust is another institution designed to provide financial services to First Nation communities. Describing itself as the “paramount First Nation financial institute” in Canada, it began offering financial services in 1980, and now has regional offices across Canada.<sup>40</sup> It is owned by the Samson Cree Nation, and offers a wide range of financial and retail banking to First Nation clients.<sup>41</sup> The focus of Peace Hills Trust has been meeting the banking needs of First Nation businesses and entrepreneurs who would otherwise be unable to access financial services.<sup>42</sup> PHT offers various financial services to First Nation businesses, such as project financing, commercial lines of credit, and commercial loans and mortgages. It also offers trust services, with the intention of ensuring that funds placed in the trust support the financial development of First Nation communities.<sup>43</sup>

---

<sup>36</sup> Under the *Bank Act*, SC 1991, c 46, the *Bank Act*, *ibid* is the charter of every bank in Canada. Once it is incorporated, a bank is listed in a schedule and is chartered to do business in Canada for a period of five years.

<sup>37</sup> First Nations Bank of Canada, *First Nations Bank of Canada: Who We Are*, online: <<https://www.fnbc.ca/AboutUs/WhoWeAre>>.

<sup>38</sup> *Ibid*.

<sup>39</sup> First Nations Bank of Canada, *Small Business Credit Products*, online: <<https://www.fnbc.ca/Business/Borrowing/SmallBusiness/SBCreditProducts/>>.

<sup>40</sup> Peace Hills Trust, *About Us*, online: <<https://www.peacehills.com/Personal/AboutUs/>>.

<sup>41</sup> However, Peace Hills Trust was incorporated under the *Trust and Loans Company Act*, SC 1991, c 45 and is therefore a separate legal entity from the Samson Cree Nation. As such, it is not a First Nation band with status under the *Indian Act*, RSC 1985, c I-5, s 2(1).

<sup>42</sup> Peace Hills Trust, *Who We Are*, online: <<https://www.peacehills.com/Personal/AboutUs/WhoWeAre/>>.

<sup>43</sup> *Ibid*.



### **1.5.3 Access to Credit Limited by the *Indian Act***

While the specific government programs that have been developed to address the limited access to credit, and the financial institutions with an aim to provide financial services for First Nation businesses provide some measure of success in financing First Nation entrepreneurs, each is limited by the application of the *Indian Act*.<sup>44</sup> Despite the fact that the FNBC and PHT seek out First Nation businesses to provide banking services to them, an unincorporated First Nation business is unable to provide collateral to the financial institutions if the property is situated on reserved lands. Moreover, the programs operated by the federal government are limited in their application due to the conditions that must be met for funding to be approved, and the fact that funding is limited due to the nature of government. In order for First Nation communities to enjoy untrammelled economic development, they must be free of the constraints imposed on them by the *Indian Act*.<sup>45</sup>

### **1.6 Outline of Chapters**

In Chapter 2 I focus on the type of thesis and outline that increasing the efficiency of transactions to reduce transaction costs is the analytical lens through which I am considering the current impact of s. 89(1). In Chapter 3, I engage in a doctrinal analysis by reviewing the history of the implementation of s.89(1) including the policy purpose behind its enactment, as well as an interpretation of s. 89(1). Chapter 4 is also doctrinal, considering exceptions to s. 89(1) that have been outlined, discussed, or upheld in jurisprudence, this Chapter includes a doctrinal analysis of enforcement exceptions. Chapter 5 is also about enforcement but is focused on enforcement of the security interest and its relationship to trespass and laws of the First Nation itself. Chapter 6 then sets out options for approaches to be taken to address the problems presented by subsection 89(1). Essentially, the options are to continue with the current common law interpretations and accepting them as ‘good law’, or engaging in legislative reform to either confirm the decisions of the courts in relation subsection 89(1), or create new legislative regimes that address the issues caused by subsection 89(1).

---

<sup>44</sup> *Indian Act*, *supra* note 2.

<sup>45</sup> *Indian Act*, *supra* note 2.

## Chapter 2 – Transaction Costs, Access To Credit, And Economic Development

This thesis is primarily a doctrinal study of secured financing law as it applies to property located on lands reserved for First Nations, rather than a theoretical study of the same. A doctrinal analysis differs slightly but significantly from a theoretical analysis of the law.<sup>1</sup> Legal doctrine is an “analytical study of the law,” and is referred to by European counterparts as “legal science.”<sup>2</sup> It involves using a specific legal method that seeks to systematically analyze and evaluate the substance of the law and its effects. Central to a doctrinal approach is the interpretation, description, and systemization of the law as it currently exists.<sup>3</sup> It may take into consideration the history of the law and may make suggestions about how the law ought to be reformed, but primarily it consists of a systematic analysis of the current state of the law.

The contrast of a doctrinal analysis is a theoretical study of the law. The latter involves approaching a question from a theoretical – rather than a real – perspective.<sup>4</sup> Rather than taking the existing laws and analyzing them in a systematic method, a theoretical analysis involves considering the current state of the law through the lens of a theoretical paradigm. Theoretical analysis sets out various theories about how the law ought to be, based on strong philosophical, moral, and perhaps historical foundations, then moves on to comparing the current law against the theoretical framework.<sup>5</sup> Rather than beginning with the current law and analyzing its effects, as a doctrinal analysis does, a theoretical approach begins with a theory and analyzes the law from the perspective of the theory.

Although the bulk of this thesis is a doctrinal analysis, the conclusions that it reaches are supported by theoretical principles. This section will situate the thesis within the theoretical realms that support its conclusions. It begins with an overview of law and economics, then focuses on a particular field within law and economics that analyzes the role of transaction costs. Following that is an analysis of how risk and property rights fit into the transaction costs regime, before

---

<sup>1</sup> Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 4, Chapter 1, (Dordrecht, The Netherlands: Springer, 2005).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

moving on to assess the important role of access to capital through credit in the successful economic development of a region.

## 2.1 Philosophical Basis – Law & Economics

Economics is a social science that provides a model to explain the choices made by actors.<sup>6</sup> Its aim is to provide a behavioural theorem that predicts how people will respond to various inputs; it assumes that people have goals and will choose the most efficient way to achieve those goals. A general description of economics is that it seeks to study scarcity or surplus of resources and people's behaviour towards those resources.<sup>7</sup> Economic theory assumes that people are rational creatures, who will respond in a rational manner to any scenario. Moreover, it assumes that people will engage in rational maximization of their self-interest in all areas of life. Generally, these pillars of economic thought are upheld by the scientific and mathematical methods employed within economics.<sup>8</sup> Economics can either be prescriptive or descriptive.<sup>9</sup> It is prescriptive in that it seeks to use economic modelling to guide behaviour; to ensure that the actions taken in the future are guided by rational economic choices. It is descriptive by using tools of economic analysis to describe why a certain action or event has taken place.

Law and economics involves the application of economic principles and methods of analysis to the legal field. In the past, the application of economic principles in legal analysis was limited to antitrust issues, calculations of damages, and matters of taxation.<sup>10</sup> Economics was utilized to determine whether the market share of an actor had grown too large; the monetary effect of a breach of duty; or the effect of a tax rate on earning potential. Prior to this, the tools of economic analysis were considered of limited value beyond their application to the subject of the study: the economy. Any relationship that was not a purely economic one was not studied using the tools of economic analysis. However, since the 1960s, the economic analysis of law has expanded to all areas of law, such as property law, contracts, criminal law and criminal procedure, access to justice, and matters of constitutional law.<sup>11</sup> The emergence of law and economics as a distinct field of study has been attributed to Ronald Coase and the Chicago school of economics,

---

<sup>6</sup>Richard Posner, *The Economic Analysis of Law*, 8th ed, (Aspen Publishers: New York, NY, 2011).

<sup>7</sup> Posner, *ibid.*

<sup>8</sup> Posner, *ibid.*

<sup>9</sup> Posner, *ibid.*

<sup>10</sup> Michael Trebilcock, "Law and Economics" (1993) 16 Dalhousie LJ 360; Posner, *supra* note 6.

<sup>11</sup> Trebilcock, *supra* note 10; Posner, *supra* note 6.

beginning in the 1950s.<sup>12</sup> The publication of Ronald Coase's "The Problem of Social Cost," provided a framework for analysing legal rights using economic tools, bringing attention to the possibility that economic analysis can extend beyond the parameters of the economy.<sup>13</sup>

Generally, law and economics as a means of analyzing the world is concerned with using economics to explain the economic effects of law, to assess which laws are the most economically efficient, and to use principles of economics to guide the creation and alteration of law. Tools of economic analysis can therefore be used in either a positive or a normative sense. A positive analysis involves using economic tools to explain, rather than alter the current state of law. For instance, economics has proven useful to provide an explanation of why certain parties should be at fault for damages, or why a company has grown too large for antitrust purposes. It also provides a useful method of analysing the allocation of risk, and any associated costs, involved in a transaction.<sup>14</sup> Economic analysis is used to determine the efficiencies of the legal rules and how costs are allocated within them. Conversely, a normative approach involves setting a specific economic goal – making legal rules more efficient – followed by law reform initiatives designed to reach the economic goal.

There are limits to law and economics. While the application of economic tools of analysis may provide a helpful framework for guiding the efficiency of laws, whether by pointing out flaws in order for the proper authority to address, or by attempting to create laws around an economic principle, the application of economics to legal regimes ought not be unbounded. A moral argument can be made that not all laws ought to be as efficient as possible, nor should certain laws be created with economic efficiency in mind. An example is anti-pollution laws that restrict the behaviour of people and enterprises from polluting waterways.<sup>15</sup> From the perspective of the entity wishing to dispose of waste, the legal regime does not allow for the most economically efficient method. Rather than simply allowing the entity to dispose of waste in a river or waterway – an efficient method of waste disposal for the entity – it requires the entity to absorb a cost to ensure that the waste is disposed of through more environmentally friendly methods. Laws such as these are not necessarily the types of laws that ought to be guided purely by law and economics

---

<sup>12</sup> Posner, *supra* note 6.

<sup>13</sup> Ronald Coase, "The Problem of Social Cost" 3 *Journal of Law & Economics* 1 (1960); Posner, *supra* note 1.

<sup>14</sup> Posner, *supra* note 6; Trebilcock, *supra* note 10; Coase, *supra* note 13.

<sup>15</sup> For instance, see *The Environmental Management and Protection Act*, 2010, SS 2010, c E-10.22; *The Water Security Agency Act*, SS 2005, c W-8.1.

methodologies. Instead, the law should be shaped with larger public policy interests taken into consideration: clean waterways are more important than the costs imposed on an entity wishing to dispose of waste in a waterway. Secured financing transactions ought to be approached from the perspective of whether and how the transaction can be more efficient. Efficiency in the context of secured financing means the provision of adequate financial services to borrowers at the least cost to them, while minimizing the risk of loss for lenders.

This section of the thesis contains an examination of the law and economic philosophical foundation of secured lending for First Nations communities located on reserved lands. It explores in an expositive way the economic reasons secured financing exists, such as risk aversion and transaction costs, as well as the importance of secured financing for the economic development of communities.

## **2.2 Transaction Costs**

The role played by transaction costs in the successful operation and development of the economy has evolved into its own field within law and economics, known as new institutional economics.<sup>16</sup> At its most basic, new institutional economics states that any transaction between parties involves costs for both parties.<sup>17</sup> Moreover, the theory provides that an inverse relationship exists between transaction costs and the success of the transaction. The transaction is less likely to be successful for both parties where transaction costs are high. Therefore, keeping transaction costs low is a necessary aim for a well-functioning economy to exist where transactions occur with frequency. The costs incurred in any transaction depend on the institutions and legal frameworks that regulate the *inter partes* relationship of the transacting parties,<sup>18</sup> as well as the rights of a secured party against other competing interests in the collateral. This includes the legal regime that regulates the property rights as well as the legal framework that supports the creation and enforcement of security interests. Where the legal foundations help to ensure that the costs of a transaction are low, more transactions are likely to be completed and vice versa.

For a transaction to be successful, the cost for each party must be reasonable. The costs involved in a transaction differ depending on the transaction itself. A cost can be the monetary burdens incurred in the transaction, for instance, the legal fees paid in the purchase of a home.

---

<sup>16</sup> Oliver Williamson, *The Economic Institutions of Capitalism: Firms, Markets, and Relational Contracting*, (New York: Free Press, 1987).

<sup>17</sup> Coase, *supra* note 13.

<sup>18</sup> Posner, *supra* note 6; Williamson, *supra* note 16.

However, a cost can also take the form of the risk involved in the transaction.<sup>19</sup> The inverse relationship between risk and the success of a transaction is therefore the same as in the cost-success relationship. Where there is more risk in a transaction, the transaction is less likely to occur. For instance, if a business is hiring a builder to construct an office building, the business would seek assurances that the builder is able to complete the construction. If the builder does not provide these assurances, the business would risk paying the builder and not receiving an office building. The business is unlikely to engage in a transaction with that builder and will instead seek one that would reduce the risk that the business will not get what it wants from the transaction.

Williamson asserts that the risk involved in a transaction can be mitigated through a contract between the transacting parties.<sup>20</sup> The creation of a contract allocates the risk involved in the transaction in a way that is acceptable to both parties.<sup>21</sup> For instance, the contract would provide that if the builder does not complete the construction within a reasonable time and for reasonable monetary costs, the business would be compensated or pay a reduced amount. However, the creation of contracts brings with it what Williamson terms ‘market transaction costs’ which are the costs of creating and enforcing the contracts. Moreover, Williamson asserts that these transaction costs can be separated into *ex ante* and *ex post* costs.

*Ex ante* costs are the costs incurred in the drafting, negotiating, and protection of an agreement. For a secured lending contract, this would involve ensuring that the borrower has sufficient property rights in the collateral assets, and that the assets are valuable enough to satisfy the cost of the loan if default were to occur. It would also include setting the parameters of what constitutes default, and the remedies available to the creditor upon default. *Ex post* costs refer to the costs associated with ensuring that the contract is upheld or maintained. This would include, for instance, renegotiating with the borrower on terms of repayment if the borrower when interest rates raise, updating the terms of the security agreement to accommodate when new assets are acquired, or older assets are disposed of, ensuring that the registration of security interests is properly maintained, or the cost of enforcing the contract (and fighting priority battles) if the

---

<sup>19</sup> Posner, *supra* note 6; Williamson, *supra* note 16.

<sup>20</sup> Williamson, *supra* note 16.

<sup>21</sup> Posner, *supra* note 6; Coase, *supra* note 13; Williamson, *supra* note 16. It is worth noting here that contracting with the builder is only one option considered by new institutional economics as a means of controlling the transaction costs. Another could be vertical integration of a builder into the business, which involves bringing a builder within the firm as an employee of the business. Then, the builder would follow the instructions of its employer, and could be fired or reprimanded in other ways if the work that it was hired to complete is not completed sufficiently for the purpose of the business.

borrower defaults on the obligation to repay. The cost of enforcing the contract is borne by whichever party is not in breach of the contract and therefore seeks enforcement of the contract or a remedy provided for within the contract when a breach occurs. In the context of secured lending, this cost falls to the creditor, who will seek to ensure that the terms of the loan agreement are enforced upon the borrower and that the obligation to repay the funds loaned is fulfilled.

In the context of secured lending, the costs incurred by a creditor in granting a loan to a debtor must be sufficiently reasonable for the loan to take place. Much of the cost associated with creating a secured credit contract are incurred by the creditor, who is seeking to determine the creditworthiness of the borrower. The primary concern of a creditor is to ensure that the borrower repays the funds that were loaned. If there is a high risk of default on the part of the borrower, the cost associated with that transaction from the perspective of the creditor is high. Creditors will therefore seek to shift the cost associated with a high-risk lending transaction to the borrower. Often, the contract will be created in a way that allocates most of the risk to the debtor. This is typically accomplished through a few different methods: (1) increasing the rate of interest on the money lent; (2) requiring that the borrower purchase credit insurance that protects against default; or (3) requiring that the borrower provide collateral for the loan.<sup>22</sup>

### **2.2.1 Risk Aversion – The Role of Collateral**

It is beyond the scope of this thesis to fully describe the relationship between risk, collateral, and the costs of a transaction. However, the importance of risk in a secured transaction cannot be understated. When a financial institution makes a loan to a business, it is taking the risk that the business debtor will not repay the loan. Financiers undertake a risk-return calculation prior to engaging in a loan, which simply measures the potential risk relative to the potential return.<sup>23</sup> As such, lending to an entity with that is a high credit risk would require a potentially substantial return for the transaction to occur; likewise, an entity that is low credit risk is likely to engage in a successful transaction even where the return to the financier is not as substantial.<sup>24</sup> When engaging in a risk-return calculation, financiers are weary of any uncertainty that can lead to losses.<sup>25</sup>

---

<sup>22</sup> World Bank, *Access to Finance and Development: Theory and Measurement*, (Working Paper) 2016.

<sup>23</sup> Alastair Hudson, *The Law of Finance*, 2 ed, (London: Sweet & Maxwell, 2013).

<sup>24</sup> *Ibid.* Note that a “high credit risk” means an entity where the risk related to providing credit to the entity is high (i.e. an entity that is potentially unable to fulfill its obligations, and which may not have sufficient collateral in place of payment). Contrastingly, a “low credit risk” means an entity to which the risk of advancing credit is low (i.e. the entity is more certainly able to repay the loan, or provide collateral in place of payment).

<sup>25</sup> *Ibid.*

Risk-averse financiers seek to ensure that the risk involved in a transaction is allocated in such a way that the financier bears as little risk as possible. To reduce the burden of risk, financiers will often seek a form of credit support by taking security.<sup>26</sup> Taking security is the process of utilizing legal structures to protect the financier against the risk that the debtor will fail to perform its contractual obligation to repay the debt. Importantly, taking security ensures that the risk involved in granting a loan is transferred to either the borrower or to another third party.<sup>27</sup> For instance, one form of taking security is to require that a third-party guarantee repayment of the loan. In that case, the third-party guarantor will be liable for the debt if the debtor defaults on the loan obligation.<sup>28</sup> The amount of risk involved in a transaction determines the method by which a financier will take security. The financier will seek to ensure that the form and size of security is on par with the risk of loss that would result from the debtor's failure to repay the debt obligation. In some instances, financiers will layer security by relying on multiple sources of security to ensure that the debt will be repaid.<sup>29</sup>

The most important form of taking security is through collateralization of the debt obligation. Collateralization involves the debtor granting to the creditor a proprietary right in the debtor's property.<sup>30</sup> It protects the creditor against the risk that the debtor becomes insolvent or fails to perform its contractual obligation to repay the debt. In the event of insolvency or the debtor's failure to perform, or the occurrence of any other act of default, the creditor can rely on the proprietary right that it was granted in the debtor's property to satisfy the obligation to repay.<sup>31</sup> For collateralization to adequately reduce the risk involved in a transaction, the collateral asset must be sufficiently valuable that it would allow the financier to recover the value of the capital that it lent. Taking security through collateralization of the debt is a key aspect of commercial transactions, as it controls the risk of the debtor's failure to perform.

Collateralization of the debt is viewed as being a superior method of taking security in part because the creditor is granted proprietary rights in tangible and/or intangible assets, the value of which it can realize upon default. This provides more security than the promise of a third-party

---

<sup>26</sup> World Bank, *supra* note 22; Hudson, *supra* note 23.

<sup>27</sup> World Bank, *supra* note 22; Hudson, *supra* note 23.

<sup>28</sup> World Bank, *supra* note 22.

<sup>29</sup> Hudson, *supra* note 23.

<sup>30</sup> Note, however, that ownership of the property is not necessary for collateralization of property to occur. Rights in property that are less than ownership are sufficient for the property to which the debtor has rights to become collateralized, thereby becoming part of the security taken by the lender.

<sup>31</sup> World Bank, *supra* note 22; Hudson, *supra* note 23.



guarantor promising to pay upon default of the primary debtor, because the same issue could arise with the guarantor. If the guarantor becomes insolvent or fails to fulfill the obligation to pay, the creditor is left with little recourse. When the creditor is granted proprietary rights through collateralization of the debt, it is able to take comfort in the fact that its proprietary right to property of the debtor can be relied upon, regardless of the insolvent nature of the debtor or any potential third-party guarantor.

Applying Williams' argument that legal frameworks ought to keep the costs of a transaction low to the interaction between a creditor and debtor, it is important that the legal regime protects the interest of the risk-averse creditors by allowing them to sufficiently allocate risk to the borrower or other third party. A legal regime that facilitates parties' ability to arrive at an agreement that provides an adequate allocation of risk encourages risk-averse parties to engage in behaviour that would otherwise be deemed to be too risky. The opposite effect is felt when the legal regime limits the ability of the parties to agree on a proper allocation of risk. In the context of business financing and economic development, legal regimes that allow for an appropriate level of risk allocation will help to facilitate the successful financing transactions required to get the business off the ground.

Property rights supported by a legal regime effectually allow a party to engage in economic transactions. This also speaks to the allocation of risk and uncertainty. A creditor that is risk averse by nature will not be comforted with a granting of a security interest in property to which the borrower does not have guaranteed property rights. If the borrower has rights in the property, then the creditor will feel comforted in taking that property as collateral, the risk will be successfully allocated away from the creditor, and the funds that the borrower requires will be loaned with the creditor knowing that they can look to the property of the debtor as satisfaction of the loan obligation upon default.

### **2.3 Transaction Costs & Property Rights**

In *The Mystery of Capital*,<sup>32</sup> economist Hernando de Soto outlines the relationship between secure property rights and the likelihood of a community achieving economic success. De Soto argues that there are three institutional frameworks that support individual property rights necessary for any community to have successful economic development: legal, governmental, and

---

<sup>32</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Succeeds in the West and Fails Everywhere Else* (New York, NY: Cambridge, 2000).

fiscal. The governmental and fiscal institutional frameworks are important to ensure that corruption, fraud, and dishonesty among financiers and financial-stakeholders are limited. The legal aspect is important to ensure that individual property rights are respected and treated as valuable tools that enable communities to develop. Where the legal regime fails to support individual property rights the costs involved in a transaction are raised. Financiers are unsure whether they are able to take as collateral the property of the debtor because the property rights that the debtor claims to have in the property may not be supported by the legal institutions. This requires the potential debtor or creditor to provide evidence that the property rights exist, which results in the transaction taking on a higher cost than if the property rights could be assured through a legal framework. The resulting increase in risk further adds to the costs of the transaction, as the creditor will require the debtor to pay more through higher interest rates to ensure that the money it has lent is returned. In short, the failure to protect individual property rights within communities is linked to market failure, impeded economic growth, and reduced competitiveness for businesses located within those communities.<sup>33</sup>

Most First Nations communities in Canada are precluded from the legal, governmental, and fiscal frameworks applicable to other Canadians that support individual property rights. The resulting increase in transaction costs has contributed to a stagnation in economic development in First Nations communities, regardless of their location. The certainty regarding the individual and underlying property rights that is required for markets to work effectively is absent within First Nations communities that are required to abide by the provisions of the *Indian Act*.<sup>34</sup> For Canadians not living on reserved lands, provincial governments provide sophisticated legislative regimes that clarify the rights held in personal property of persons that is used as collateral for a loan.<sup>35</sup> This legal framework helps to protect and to enforce personal property rights, helping to facilitate business transactions and spur economic development. The *Indian Act* restricts access to these important legal regimes for businesses located on reserved lands.<sup>36</sup>

---

<sup>33</sup> Luis F. Lopez-Calva & Carlos Rodriguez-Castelan, “Pro-Growth Equity A Policy Framework for the Twin Goals” World Bank Policy Research Working Paper 7897, available online: <http://documents1.worldbank.org/curated/en/911711479931074058/pdf/WPS7897.pdf> at 5-10 [Lopez-Calva & Rodriguez-Castelan].

<sup>34</sup> *Indian Act*, RSC 1985, c I-5.

<sup>35</sup> For example, see the Saskatchewan Regime contained in the *Personal Property Security Act, 1993*, SS 1993, c P-6.2.

<sup>36</sup> *Indian Act*, *supra* note 33, s 89(1).

## 2.4 Access to Credit & Economic Development for First Nations

Modern economies expand and develop as businesses grow and transactions increase in volume. Generally, businesses can engage in three types of services: the manufacturing of goods, the sale of goods, and the sale of services. Financing is required to make each type of business successful. Manufacturers of goods require equipment necessary in the manufacturing process; vendors require inventory to sell to their customers; and contractors require either equipment to perform a service and sometimes require goods that can be sold as part of that service.<sup>37</sup>

Business financing can be acquired through various means, the most common of which are re-investing profits, acquiring investment from outside sources,<sup>38</sup> and accessing secured credit. Small businesses that are unlikely to produce much profit cannot re-allocate profits that were never created. Moreover, being unprofitable reduces the likelihood that investment in that business will occur. This means that many businesses require access to credit as their primary method of acquiring the financing that is essential to successful operation and expansion. An increase in income from the increased business operations should provide sufficient resources for the business debtor to repay the credit that it receives, allowing the cycle of borrowing and expansion to continue.

## 2.5 Conclusion

In sum, access to finance is an essential feature of the process of economic development.<sup>39</sup> When access to credit is limited for a community, the community's prospects of achieving sustained economic development and of enjoying its corresponding benefits escape the grasp of that community.<sup>40</sup> Improving access to credit and ensuring that the financial systems include all members of a community are imperative objectives for economic development. Without access to capital in the form of credit, the economic potential of a community remains untapped, leading to economic stagnation.<sup>41</sup> Research shows that constraints on credit have a negative impact on

---

<sup>37</sup> For instance, a contractor who sells the service of repairing windows may repair a window and sell replacement panes of glass.

<sup>38</sup> Often this is achieved through the sale of securities or bonds to investors but can also take the form of venture capital given for a stake of ownership in the business unaccompanied by securities. The latter is more common where the business is unincorporated with no securities to sell. See Kwaw, *The Law of Corporate Finance*, 1997 (Toronto, Ont: Butterworths).

<sup>39</sup> World Bank, *Access to Finance and Development: Theory and Measurement*, (Working Paper) 2016.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

economic growth. Importantly, economic research also indicates that where access to credit is improved, overall economic performance improves.<sup>42</sup>

Economic development is an important objective for First Nations communities.<sup>43</sup> The current state of economic opportunities in many First Nations communities is poor. The rate of unemployment on reserved lands is the highest in Canada, along with the rates of poverty. The prospect of economic growth for many of these communities has been stagnant for decades.<sup>44</sup> The Royal Commission on Aboriginal Peoples dedicated a chapter of its report to the importance of economic development within First Nation communities. The commission wrote that finding a solution that achieves a self-reliant economic base for First Nations communities is one of the most important issues to be resolved.<sup>45</sup> Increasing access to capital within First Nation communities was identified as one of the key recommendations outlined by the commission. Moreover, the issue has been identified by First Nations leaders as one of the main barriers to reconciliation in Canada.<sup>46</sup> Increasing access to credit for First Nations communities can lead to sustained economic growth for those communities.<sup>47</sup>

As noted above, high transaction costs reduce the likelihood that a transaction will be successful, and the cost can be reduced through collateralization. Subsection 89(1) of the *Indian Act* and its related provisions<sup>48</sup> limit the ability of First Nations persons and bands from using property on reserved lands as collateral. These provisions are the opposite of what law and economics and property rights theories show is crucial for successful economic development to occur. These sections of the *Indian Act* increase transaction costs with First Nation businesses located on reserved lands.

---

<sup>42</sup> Lopez-Calva & Rodriguez-Castelan, *supra* note 33 at 5-10; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Volume 2, Part 5: Economic Development* (1996) [RCAP] at 870-893.

<sup>43</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Volume 2, Part 5: Economic Development* (1996) [RCAP] at 870-893; See also, Statistics Canada, *2016 Census Aboriginal Community Portrait*, available online: [https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/infogrph/infgrph.cfm?LANG=E&DGUID=2016A000011124\\_OnR&PR=01](https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/infogrph/infgrph.cfm?LANG=E&DGUID=2016A000011124_OnR&PR=01) which shows that the unemployment rate on-reserve in Canada is was 25% at the most recent census; National Indigenous Economic Development Board, “Indigenous Economic Reconciliation: Recommendations for Reconciliation and Inclusive Economic Growth for Indigenous Peoples and Canada” at 14-19, online at: <http://www.naedb-cndea.com/reports/NIEDB%20-%20Economic%20Reconciliation%20-%20Final%20Report.pdf> [NIEDB].

<sup>44</sup> RCAP, *ibid*; NIEDB, *ibid*.

<sup>45</sup> RCAP, *supra* note 43 at 870-893.

<sup>46</sup> NIEDB, *supra* note 43 at 14-19.

<sup>47</sup> RCAP, *supra* note 43 at 870-893.

<sup>48</sup> *Indian Act*, *supra* note 33, ss 89(1), (1.1), (2), 90.

### Chapter 3: The *Indian Act* Prohibition Against Collateralization

Subsection 89(1) of the *Indian Act*<sup>1</sup> is the legal barrier that prohibits First Nation debtors<sup>2</sup> from leveraging their personal property as collateral. It states that personal property of a First Nation person or band located on a reserve is not subject to “charge, pledge, attachment, seizure, distress or execution in favour of any person other than a [First Nation person] or a band.”<sup>3</sup> Effectually, subsection 89(1) ensures that the personal property security regimes<sup>4</sup> in place across Canada cannot apply to property of a First Nation debtor.

#### 3.1 History of Section 89

A prohibition of this nature dates back to at least 1850, where *The Act for the Protection of the Indians in Upper Canada*<sup>5</sup> granted First Nation people immunity from civil judgment on any debt unless the First Nation person owned land with a value equal or greater to £25.<sup>6</sup> This protection was continued in 1859 in *An Act Respecting Civilization and Enfranchisement of certain Indians*.<sup>7</sup> The purpose of these provisions was “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 and occupation.”<sup>8</sup>

The original version of the current *Indian Act* was enacted in 1876,<sup>9</sup> with an aim to consolidate the laws respecting First Nations persons and bands.<sup>10</sup> It has been subject to numerous amendments since.<sup>11</sup> The prohibition against taking security in property of a First Nation person outlined above was continued in the enactment of *Indian Act, 1876*, where section 66 stated:

---

<sup>1</sup> *Indian Act*, RSC 1985, c I-5, s 89(1).

<sup>2</sup> For the purpose of this article, the term “First Nation debtors” includes any debtor that is a First Nation non-corporate person or First Nation band as defined in the *Indian Act*, *supra* note 1.

<sup>3</sup> *Indian Act*, *supra* note 1, s 89(1).

<sup>4</sup> *Personal Property Security Act, 1993*, SS 1993, c 65.

<sup>5</sup> The full title to which is: *An Act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them from trespass and injury*, SC 1850, 13-14 Vict c 74 [*Act for the Protection of the Indians*].

<sup>6</sup> *Ibid*, s 3.

<sup>7</sup> *An Act Respecting Civilization and Enfranchisement of certain Indians*, CSC 1859, c 9, s 2.

<sup>8</sup> *Act for the Protection of the Indians*, *supra* note 70.

<sup>9</sup> *Indian Act, 1876*, SC 1876, 39 Vict c 18.

<sup>10</sup> *Ibid*.

<sup>11</sup> Sharon H Venne, *Indian Acts and Amendments 1868-1975*, (Saskatoon: Native Law Centre, University of Saskatchewan, 1981); Native Law Centre, *The Indian Act and Amendments 1970-1993*, (Saskatoon: Native Law Centre, 1993).

“No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian within Canada, except on property [outside of the reserved lands]; Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid.”<sup>12</sup>

The wording of the section remained substantially unchanged throughout many amendments made to the *Act* until 1951.<sup>13</sup>

In 1951, Parliament updated the language of the *Act* while leaving the intent of the section intact. At that time, the section was amended to read:

88. (1) Subject to this act, the real and personal property of an Indian or a band situated on 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.

(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 reserve.<sup>14</sup>

This wording remains in the most current version of the *Indian Act*.<sup>15</sup> An important aspect of the amendment made in 1951 is that the prohibition was extended to include property belonging to First Nation bands, whereas it previously applied only to property owned by First Nation persons. Moreover, the amendment changes the language from prohibiting “security” taken in the form of a “lien, charge, mortgage, judgment or otherwise” to making property “not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution.” Although the subsection continues the prohibition on collateralization of personal property of a First Nation

---

<sup>12</sup> *Indian Act, 1876, supra* note 9, s 66.

<sup>13</sup> See *Indian Act, 1880*, SC 1880, c 28, s 77; *Indian Act, 1886*, SC 1886, c 43, s 78; *Indian Act, 1906*, RSC 1906, c 81, s 102; *Indian Act, 1927*, RSC 1927, s 105.

<sup>14</sup> *Indian Act, 1951*, SC 1951, c 29, s 88. Note that the language used in the original act was left unaltered to meet the standards of this thesis and modern society. This was done intentionally to leave readers with a sense of the prevailing views of the time when the amendments were enacted.

<sup>15</sup> *Indian Act*, RSC 1985, c I-5, s 89. However, in 1988, subsection 89(1.1) was added which allows leases of designated reserved land to become subject to securitization. No such addition was made regarding personal property.

person or band, it also expands the protection of property to methods that unsecured creditors, such as judgment creditors, would otherwise have at their disposal.

The *Indian Act* contains two exceptions to the general prohibition against securitization of property situated on First Nation reserved lands. One exception is for vendors of property who have retained title to the sale property. This exception was in the original 1867 version of the *Indian Act* and has remained throughout the various amendments.<sup>16</sup> The second exception was not in effect until it was added in the rewording of the section in the 1951 amendment. This one allows property of a First Nation person or band to become securitized if that securitization is “in favour or at the instance of” another First Nation person or band.

The rationale for the prohibition against collateralization of property owned by a First Nation person or band is demonstrated in the recorded parliamentary debate on the implementation of the *Indian Act, 1876*.<sup>17</sup> A member of the opposition, Mr. Paterson, urged that the section was “too sweeping,”<sup>18</sup> and that the consequence of prohibiting the securitization of personal property belonging to First Nation persons, who were “lacking a superabundance of cash,”<sup>19</sup> would be that they cannot purchase goods that they require to function.<sup>20</sup> The member stated that the restrictions should be removed and that First Nation persons be permitted to give chattel mortgages, warning that the section would have “a most injurious effect” if it remained in place.<sup>21</sup>

The response to this criticism conveys the paternalistic approach that is present throughout the *Act* and the subsection 89(1) exemption. According to *Hansard*:

“Hon. Mr. Langevin said it must be considered that Indians were not in the same position as white men. As a rule they had no education, and they were like children to a very great extent. They, therefore, required a great deal more protection than white men.”<sup>22</sup>

The rationale behind the subsection 89 prohibition is rooted in the idea that First Nation persons and bands could not engage in commercial transactions without being taken advantage of

---

<sup>16</sup> *Indian Act*, *supra* note 1, s 89(2).

<sup>17</sup> *Indian Act, 1876*, *supra* note 9; See James I Reynolds, “Taking and Enforcing Security under the Indian Act and Self-Government Legislation” (2002) 18 BFLR 37 [Reynolds, (2002)].

<sup>18</sup> House of Commons Debates, 3rd Session, 3rd Parliament (March 21, 1876) at 751; Reynolds, *supra* note 17.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> House of Common Debates, *supra* note 18 at 752. Note that the language in this quote was not updated to the standards of this thesis; this was done intentionally to reflect the view held towards First Nation persons at the time that the prohibition was debated.

because of an inability to understand the nature of the transaction. This is so despite the rich history of First Nation communities engaging in commercial activity prior to European contact.<sup>23</sup> Evidence indicates that expansive pre-European trade networks connected First Nation communities across North America. For instance, conch-shell masks and ornamental shells that originated in the Gulf of Mexico have been located on the northern plains.<sup>24</sup> As well, historical evidence indicates that First Nation communities met at regular intervals to engage in trade, where representatives of the communities met, set prices for items, and resolved trade disputes.

The basis for the original section, which remains in the current iteration of subsection 89(1), is founded on incorrect assumptions about the abilities of First Nation peoples. Historical evidence supports the conclusion that the lawmakers were ignorant of First Nation trade history. Moreover, the fact that some First Nation communities continue to engage in trade clearly indicates the capability of First Nation persons to engage in commercial activity in the modern world.<sup>25</sup> The passage of time has proven Mr. Paterson to have been correct in his prediction: the prohibition outlined in the *Act* has been an important factor in limiting economic development for First Nation people and communities.<sup>26</sup>

### **3.2. Personal Property of a First Nation person or band**

Subsection 89(1) restricts the exemption to personal property of a First Nation person or band situated on reserved land.<sup>27</sup> Subsection 2(1) of the *Indian Act* defines a First Nation person as a person who is registered pursuant to the *Act*, or who is entitled to be so registered.<sup>28</sup> The subsection further defines a “band” as a body of First Nation persons for whom lands have been reserved,<sup>29</sup> moneys are held by the Crown, or that has been declared by the Governor in Council to be a band for the purpose of the *Act*.<sup>30</sup> Inuit and Métis peoples are not included within the scope

---

<sup>23</sup> See e.g. Paul Robert Magocsi, *Aboriginal Peoples of Canada: A Short Introduction* (Toronto: University of Toronto Press, 2002); Andre Le Dressay, Normand Lavallee, and Jason Reeves, “First Nations Trade, Specialization, and Market Institutions: A Historical Survey of First Nation Market Culture” in *Volume 7: A History of Treaties and Policies* (Toronto: Thomson Educational Publishing, 2013) at 109 – 132.

<sup>24</sup> Magocsi, *supra* note 23 at 86 – 90.

<sup>25</sup> *Ibid.*

<sup>26</sup> Royal Commission on Aboriginal Peoples, *Report of The Royal Commission on Aboriginal Peoples*, Vol 2 Chapter 5.

<sup>27</sup> *Indian Act*, *supra* note 1, s 89(1). The subsection uses the terminology “Indian or a band.” However, for the purpose of this discussion, the word “Indian” is replaced with the term “First Nation person”, the term “band” remains, or is prefaced with the words “First Nation” to become “First Nation band.”

<sup>28</sup> *Indian Act*, *supra* note 1, s 2(1). The definition provided in the *Act* defines an “Indian” and an “Indian band”.

<sup>29</sup> The title to which is vested in the Crown, *ibid.*

<sup>30</sup> *Indian Act*, *supra* note 1, s 2(1).



of the *Act*.<sup>31</sup> Therefore, all property owned by a First Nation person registered or who is entitled to be so registered under the Act and property owned by a First Nation band is subject to the exemption. The effect of subsection 89(1) is that First Nation persons and bands have diminished legal standing to deal with their personal property. In turn, this diminished standing acts as an impediment to economic development in First Nation communities.

### **3.2.1 Application of s.89(1) to assets of a business operated by a First Nation band**

A brief examination of the legal status of a First Nation band is helpful to determine what property would be considered property of a First Nation band. The starting point for considering the legal status of a First Nation band is subsection 2(1) of the *Indian Act*,<sup>32</sup> which establishes the First Nation band. However, the *Act* fails to provide explicit direction on the legal capacity of a band. As a result, the legal capacity of a band has been implied through application of other provisions of the *Act* and refined through a series of court decisions. First Nation bands have been treated as having legal capacity similar to that of an entity, such as a corporation.<sup>33</sup> For instance, First Nation bands have been recognized to have the legal capacity to execute contracts and to sue and be sued in contract.<sup>34</sup> They also have the capacity to be an employer under the *Canada Labour Code*.<sup>35</sup> Importantly, First Nation bands have been found to have the legal capacity to be treated as an entity which can own property.<sup>36</sup> Taking these capabilities together, a First Nation band is legally able to own and operate a business.<sup>37</sup> Any assets of that business would be property of the First Nation band, and would therefore be exempt from acting as security due to subsection 89(1).

### **3.2.2 Application of subsection 89(1) to assets of a sole proprietorship operated by a First Nation person**

The application of the subsection 89(1) exemption is also detrimental to First Nation persons who choose to operate their business as a sole proprietorship.<sup>38</sup> The effect is that many of the efficiencies that benefit entrepreneurs who operate businesses as sole proprietorships are lost

---

<sup>31</sup> *Indian Act*, *supra* note 1, s 4(1); See Indigenous and Northern Affairs Canada, “Indian Status” online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032374/1100100032378>>.

<sup>32</sup> *Indian Act*, *supra* note 1, s 2(1).

<sup>33</sup> Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at p 95 – 99.

<sup>34</sup> *Montana Band v R* (1997), [1998] 2 FC 3, 1997 CanLII 6380; Hanna, *ibid*.

<sup>35</sup> *PSAC v Francis*, [1982] 2 SCR 72; Hanna, *supra* note 33 at pp 95-99.

<sup>36</sup> *R v Peter Ballantyne Band*, 1985 CanLII 2757 (SKQB), 45 Sask R 33.

<sup>37</sup> The band can hold assets that are the subject of the business, employ people to work for the business, and enter contracts for business purposes.

<sup>38</sup> Hanna, *supra* note 33, at pp 135 – 167.

when that entrepreneur is a First Nation person attempting to operate the business on reserve land. For instance, one benefit to operating as a sole proprietor is that the business is not incorporated, thereby reducing the overhead costs – legal and administrative fees, for example – that are associated with incorporation.

Moreover, a First Nation person who seeks to operate as a sole proprietor on reserve land faces greater difficulty than one operating off-reserve. In an off-reserve context, there is no legal distinction between the business operation and the individual operating the business in a sole proprietorship.<sup>39</sup> All assets and liabilities of the business are assets and liabilities of the individual.<sup>40</sup> The effect is that the assets of the business operated by a First Nation person as a sole proprietorship on a reserve are subject to the subsection 89(1) exemption, notwithstanding that the First Nation person owns the property in order to operate the business.<sup>41</sup> As such, the assets of the business cannot be used as collateral in a secured financing transaction, which severely limits the ability of the First Nation person entrepreneur to access capital.<sup>42</sup>

### **3.2.3 Application of subsection 89(1) to Partnership Property**

Property of a partnership can also attract the application of the subsection 89(1) exemption. Subsection 22(1) of *The Partnership Act*, states that “all property and rights and interest in property brought into the partnership” for the purpose of the partnership are property of the partnership.<sup>43</sup> When property is owned by a partnership, each of the partners is an owner of the whole of the property.<sup>44</sup> Therefore, any property of a partnership where one of the partners is a First Nation person or band will be property of a First Nation person or band for the purposes of subsection 89(1).<sup>45</sup> Any partnership property located on reserved lands is subject to the exemption and generally cannot be used as collateral.

A common structure used with First Nation enterprises is a limited partnership wherein the First Nation is either the silent limited partner or is the active limited partner. Each of the two structures offers different benefits and drawbacks to First Nation owned enterprises. For instance,

---

<sup>39</sup> Anthony VanDuzer, *The Law of Partnerships and Corporations*, (Ottawa: Irwin Law, 2009) at Chapter 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80 (CanLII), [2014] 2 CNLR 1; See also *Re Davey*, 1999 CanLII 14798, 44 OR (3d) 327, where the assets of the First Nation debtor that were used for a sole proprietorship were exempt from seizure in a bankruptcy.

<sup>42</sup> Hanna, *supra* note 33 at pp 135 - 167.

<sup>43</sup> *The Partnership Act*, RSS 1978, c 8, s 22(1).

<sup>44</sup> VanDuzer, *supra* note 39.

<sup>45</sup> *Indian Act*, *supra* note 1, s 89(1).

a typical structure is a limited partnership, where the general partner is a corporation owned indirectly by the First Nation, and the limited partner is the First Nation. The First Nation as limited partner would hold the majority (often nearly all) of the ownership interest in the limited partnership. The income generated from the limited partnership goes to the partners per the partnership agreement. Under the structure described above, the corporate general partner receives little of the income and the First Nation as limited partner receives the majority of the income. The income received by the First Nation as limited partner would be exempt from taxation as a result of section 87 of the *Indian Act*. The corporate general partner would typically hold the assets for the partnership in order to ensure that the assets could act as collateral. Complex structures such as these can provide benefit to First Nations that can structure their business in this way, but still must take steps to ensure that assets of the partnership can act as collateral.

### **3.2.4 Application of subsection 89(1) to assets of a corporation owned by a First Nation person or band**

Assets of a corporation are not subject to the subsection 89(1) exemption. As such, First Nation persons or bands can create business corporations that own property in order to circumvent subsection 89(1), thereby allowing the property to be used as security to access capital.

A corporation has a distinct legal identity that is separate from the legal identity of the corporation's directors and shareholders.<sup>46</sup> The distinct legal identity is an important consideration for liability protection of the operators of the business. Whereas under a sole proprietorship, the sole proprietor is responsible for the debts of the business; under a corporate structure, the corporation itself is responsible for any debt that it incurs. If the corporation fails to repay a debt, the legal consequences of non-payment fall on the corporation as a legal entity: the directors, shareholders, and operators are not held personally liable.<sup>47</sup> Assets held by a business that operates under a corporate structure belong to the corporate entity; they are not assets of the directors or shareholders.<sup>48</sup> Corporate assets are beyond the scope of the subsection 89(1) exemption against

---

<sup>46</sup> *Business Corporations Act*, RSC 1978, c B-10, ss 2(1)(ww), 15(1).

<sup>47</sup> This is true for most cases; however, it is possible for a corporate director to be held responsible for the financial situation of the corporation. Such instances are rare and are beyond the scope of this thesis. For more, see Kwaw, *The Law of Corporate Finance in Canada* (Toronto: LexisNexis, 2005).

<sup>48</sup> VanDuzer, *supra* note 39.

securitization and seizure. As a result, First Nation persons or bands that operate their business as a corporation ensure that the subsection 89(1) exemption does not apply to the corporate assets.<sup>49</sup>

The question of whether subsection 89(1) applies to assets of a corporation that is controlled by First Nation persons or bands has been tested in court. The determination in each case has been that assets owned by a corporation operated by First Nation persons or bands are not exempted from acting as security or being subject to seizure pursuant to subsection 89(1) of the *Act*.<sup>50</sup> This is true of corporations located on lands reserved for First Nations,<sup>51</sup> incorporated First Nations bands,<sup>52</sup> and corporations that have been established to operate on reserved lands for the sole purpose of spurring economic development.<sup>53</sup> It is inconsequential what proportion of a corporation's shareholders or directors are First Nation persons or bands, a corporation cannot meet the definition of a First Nation person or band under subsection 2(1) of the *Indian Act*.<sup>54</sup>

While it is possible for a First Nation person or band to circumvent subsection 89(1) by operating their business as a corporation, the fact remains that subsection 89(1) is a substantial obstacle for businesses operated by First Nation persons or bands. One reason for this is that the operation of s.89(1) requires businesses operated by First Nation persons or bands to incur additional initial and ongoing costs to be able to have the legal right to use their property as collateral to access capital.

### 3.3 Personal Property 'Situated On' Reserved Lands

Subsection 89(1) states that the exemption applies to property that is "situated on a reserve".<sup>55</sup> This section requires application of the criteria used to determine the *situs* of personal property. Importantly, subsection 90(1) extends the subsection 89(1) exemption to certain types of

---

<sup>49</sup> Importantly, a corporation can be owned by a single shareholder. This makes it possible for an individual to create a corporation to take advantage of the separate legal entity created through incorporation. Thus, a sole proprietor can incorporate their business and continue to run it on their own, but with all liabilities of the business transferred to the corporation.

<sup>50</sup> *R v Bernard*, *supra* note 21; *Kostyshyn (Johnson) v West Region Tribal Council Inc*, [1994] 1 CNLR 94, 35 ACWS (3d) 502 [*Kostyshyn*]; *Tsilhqot'in Economic Development Corporation v Johnny*, 1995 CarswellBC 2748, [1995] BCWLD 2861(PC) [*Tsilhqot'in Economic Development Corporation*]; Jack Woodward, *Native Law*, (Toronto: Carswell Publishers Ltd, 1989) at 290, 295; McDonald & Troniak, *supra* note 5 at 135; James I Reynolds, "Taking and Enforcing Security under the Indian Act and Self-Government Legislation" (2002) 18 BFLR 37 [Reynolds (2002)] at 44.

<sup>51</sup> *Bernard*, *supra* note 50.

<sup>52</sup> *Kostyshyn*, *supra* note 50.

<sup>53</sup> *Tsilhqot'in Economic Development Corporation*, *supra* note 50.

<sup>54</sup> Hanna, *supra* note 33 at pp 135-167.

<sup>55</sup> *Indian Act*, *supra* note 1, s 89(1).

property that are not situated on reserved lands but, by satisfying the requirements of the subsection, are deemed to be located on reserved lands.<sup>56</sup> Therefore, the question of when property will be situated on reserve for the purpose of subsection 89(1) contains two key elements. The first is whether the reserve land where the property is situated is the reserve land of the First Nation person or band who owns the property. Second, whether tangible and intangible property is located on the reserve land, either by operation of the common law, or by the deeming provision of subsection 90(1).

A series of court decisions have helped to provide clarity on the interpretation of “situated on a reserve.” A potential issue is that the phrase could be interpreted to mean that the prohibition only applies in situations where the First Nation debtor holds property that is located on the lands reserved for their First Nation. For example, a First Nation person who is a member of Whitecap First Nation but holds property that is physically situated on Little Pine First Nation.

The Supreme Court of Canada has provided clarification on how the phrase “situated on a reserve” is to be interpreted by deciding that it is not necessary that property of a First Nation debtor be located on the lands reserved for the First Nation of which the First Nation debtor is a member in order.<sup>57</sup> It is only necessary that the property be situated on lands reserved for a First Nation.<sup>58</sup> This was confirmed in the decision *Dubé v Canada*.<sup>59</sup> In that case, Dubé was a member of the Obedjiwan band and operated a business from that reserved land. The Obedjiwan reserved land did not have a financial institution so Dubé used the services of a Caisse Populaire that was situated on lands reserved for the Mashteuiatsh band. Dubé held certificates of deposit that were issued by the Caisse, and deposited interest received from the certificates in a savings account at the Caisse. The issue was whether the interest was considered property situated on a reserve for the purposes of the *Indian Act*, thereby making it subject to *Indian Act* exemptions, even though the Caisse was located on lands reserved for a First Nation of which Dubé was not a member.<sup>60</sup> Justice Cromwell stated that the meaning of “on a reserve” does not require that the property be located on any

---

<sup>56</sup> *Indian Act*, *supra* note 1, s 90(1).

<sup>57</sup> *Dubé v Canada*, 2011 SCC 39 (CanLII), [2011] 2 SCR 764 at paras 14 – 21 [*Dubé* cited to SCC].

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> The exemptions in this case were related to the taxation exemptions provisions found in subsection 87(1)(b) of the *Indian Act*, *supra* note 1. However, for the most part courts have treated the test to determine whether property is situated on reserved lands to be the same, regardless whether it is for the purposes of sections 87, 88, or 89. An exception to this treatment is found in relation to property deemed to be located on reserved lands and is explored in more detail below. See *infra* 3.4 Personal Property Deemed to be Situated on Reserved Lands.

particular reserved land.<sup>61</sup> Moreover, the property is neither required to be located on reserved land where the First Nation debtor resides, nor be located on lands reserved for the First Nation group to which the debtor belongs.<sup>62</sup>

### 3.3.1 Property Situated on Reserved Lands

As noted above, it is necessary to address the question as to when property will be considered situated on reserve land. Assets of a First Nation person or band that are not located on reserved lands are not protected by subsection 89(1) and can therefore become subject to security interests, unless the property falls within a category that deems it to be located on reserved lands in accordance with section 90.<sup>63</sup>

The method by which courts determine if personal property is situated on reserved lands for the purposes of section 89 has been the subject of a significant amount of litigation.<sup>64</sup> Courts have formulated different tests to be applied based on whether the property at issue is tangible or intangible.<sup>65</sup>

### 3.3.2 Determining the *situs* of tangible property

Tangible property is property that is capable of being physically possessed; it is corporeal and capable of being accessed and identified.<sup>66</sup> For the purposes of the *PPSA*, tangible assets include goods, chattel paper, documents of title, instruments, and money.<sup>67</sup> The type of tangible property most important for businesses operating on lands reserved for First Nations is ‘goods,’ including equipment and inventory.<sup>68</sup> Inherent in the nature of tangible property is that it is capable of being moved between locations. At times, tangible assets of a business can be located on reserved lands and at other times the assets could be located on non-reserved lands. Generally, under the principles of private international law, the *situs* of the tangible personal property is the

---

<sup>61</sup> *Dubé*, *supra* note 57 at paras 14 - 21.

<sup>62</sup> *Ibid.*

<sup>63</sup> Hanna, *supra* note 33 at pp 135 - 167; Reynolds, *supra* note 50; *Indian Act*, *supra* note 1, s. 90. For an analysis on section 90, see below section 4.4 Property Deemed to be Located on Reserved Lands.

<sup>64</sup> Reynolds (2002), *supra* note 50.

<sup>65</sup> *Indian Act*, *supra* note 1, s 90 deems property, tangible or intangible, to be located on reserved lands if it is given to the First Nation person or band pursuant to a treaty or agreement, notwithstanding its actual location.

<sup>66</sup> John A Yogis QC, *Canadian Law Dictionary*, 5th ed, (New York: Barron’s Educational Series Inc) at 274; Ronald CC Cuming, Catherine Walsh, & Roderick Wood, *Personal Property Security Law*, (Toronto: Irwin Law Inc, 2009) [Cuming et al.] at 20-21.

<sup>67</sup> *PPSA*, *supra* note 4, s 2(1)(w).

<sup>68</sup> These terms are defined in the *PPSA*, *supra* note 4, ss 2(1)(i), (p), (x).

physical location of the property.<sup>69</sup> However, courts have been hesitant to use physical location of the property as the main factor to determine whether that property is located on reserved lands within the meaning intended by subsection 89(1).<sup>70</sup>

Rather than apply principles of private international law to determine the *situs* of tangible personal property for the purposes of subsection 89(1), courts rely on a test that determines “the paramount location” of the assets.<sup>71</sup> If the paramount location of the property is determined to be on reserved lands, then the property is situated on reserved lands for the purposes of subsection 89(1), regardless of its actual location.<sup>72</sup> In order to determine whether the paramount location is on reserved lands there must be a discernable nexus between the tangible asset and the reserved lands.<sup>73</sup>

In *Leighton v British Columbia*,<sup>74</sup> the issue before the court was whether the British Columbia government could apply provincial sales tax to tangible property that was used on non-reserved lands or whether the property was exempt under the *Indian Act*. The court concluded that the paramount location of the property must be established in order to determine whether property is situated on reserved lands for the purposes of the *Indian Act* exemptions.<sup>75</sup> When determining the paramount location, the pattern of use and safekeeping of the property must be taken into account.<sup>76</sup> However, the court was not clear whether the pattern of use and safekeeping alone made the paramount location on reserved lands or not on reserved lands. Nonetheless, it is clear from this decision that even where personal property is purchased on non-reserved lands and is used on non-reserved lands, it is possible for the property to fall within the prohibition in subsection 89(1) of the *Indian Act*.<sup>77</sup>

---

<sup>69</sup> See Richard Garnett, *Substance and Procedure in Private International Law*, (Oxford: Oxford University Press, 2012) at pp 132-140. However, the law applicable to the personal property is not necessarily the law of the *situs*. Moreover, in some circumstances the property will be treated as being situated at a place where they are temporarily not located.

<sup>70</sup> Reynolds (2002), *supra* note 50; Hanna, *supra* note 33 at 158-160; 169-172.

<sup>71</sup> *Leighton v British Columbia*, 1989 CanLII 251, 35 BCLR (2d) 216 (CA) [*Leighton* cited to CanLII]; *Wahpeton Dakota First Nation v LaJeunesse*, 2001 SKQB 146, 205 Sask R 91 [*Wahpeton* cited to SKQB]; *Kingsclear Indian Band v JE Brooks & Associated Ltd*, 1991 CanLII 4002, 118 NBR 290 (CA) [*Kingsclear* cited to CanLII]; Reynolds (2002), *supra* note 50; Hanna, *supra* note 33 at pp 135 - 167.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Leighton*, *supra* note 71; *Wahpeton*, *supra* note 71; *Kingsclear*, *supra* note 71.

<sup>74</sup> *Leighton*, *supra* note 71.

<sup>75</sup> *Ibid* at para 14.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at paras 12 – 16.

The reasoning of the court in *Leighton* was endorsed by the Supreme Court of Canada in the *Mitchell v Peguis Indian Band* decision,<sup>78</sup> which added another layer in the analysis that determines the paramount location. While endorsing that the *situs* of property will be determined by its paramount location, the decision noted that the protections provided by subsection 89(1) will have no application in the absence of a “discernable nexus” between the personal property concerned and the reserved lands. As a result of the decision, the paramount location of tangible personal property will be situated on reserved lands if there is a discernable nexus between the property and the reserved lands. The determination whether a discernable nexus exists involves an analysis of the pattern of use and safekeeping of the personal property.

The application of this approach is evident in a pair of cases decided a decade apart from one another, both concerning the seizure of First Nation debtor-owned school buses by non-First Nation creditors. In *Kingsclear Indian Band v JE Brooks & Associates LTD*,<sup>79</sup> a decision of the New Brunswick Court of Appeal, the Kingsclear First Nation purchased a school bus to transport children from their home on the reserved land to a school in Fredericton. JE Brooks & Associates obtained judgment against the Kingsclear First Nation and later obtained an order for seizure and sale to collect the judgment debt.<sup>80</sup> As a result, a Sheriff seized the Kingsclear school bus while it was in Fredericton. The Court determined that a sufficient discernable nexus existed between the bus and the reserved land because it was used to transport children to school and then return them home. This was enough to establish that the paramount location of the bus was not Fredericton, but the lands reserved for Kingsclear making it “situated on [reserved lands] within the meaning of subsection 89(1)”.<sup>81</sup> As such, the school bus was exempt from seizure.

The Saskatchewan decision of *Wahpeton Dakota First Nation v Lajeunesse* had a similar fact scenario to *Kingsclear*.<sup>82</sup> However, in *Wahpeton* the school buses were owned by a First Nation person, Mr. Waditika, rather than being owned by the First Nation band. Just as in *Kingsclear*, the interest was not a consensual security interest; rather, the court was considering a seizure of property owned by a First Nation person pursuant to a repairer’s lien. The facts of the case in *Wahpeton* are that the buses were used to take children from the reserved land to a school

---

<sup>78</sup> *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 1990 CanLII 117 (SCC) [*Mitchell*].

<sup>79</sup> *Kingsclear*, *supra* note 71.

<sup>80</sup> Note that cases that deal with the enforcement of judgments apply to enforcement of security interests. Both enforcement of judgments and enforcement of security interests are addressed in subsection 89(1).

<sup>81</sup> *Kingsclear*, *supra* note 71 at p 11.

<sup>82</sup> *Wahpeton*, *supra* note 71; *Kingsclear*, *supra* note 71.



located on non-reserved lands. This service was provided pursuant to a contract with the Wahpeton First Nation. When the buses were not used, they were located at the home of Mr. Waditika, which was on the lands reserved for the Wahpeton First Nation. In this case, Mr. Waditika took one of the buses to be repaired at a location on non-reserved lands, where the repairperson refused to release the bus until the repairperson was paid an outstanding account for past services. The Court determined that this was seizure in violation of subsection 89(1) of the *Indian Act*, and applied the reasoning from *Kingsclear* to determine that the paramount location of the buses was reserved lands, due to the discernable nexus between the buses and the reserved land.<sup>83</sup> In so doing, it considered that the pattern of use was going from the reserved land and back, and that the pattern of safekeeping was on reserved land, where the buses remained for the night.

As noted above, an option considered by Darwin Hanna in *Legal Issues on Indigenous Economic Development* to allow First Nation businesses to use property as collateral would be to hold their assets on non-reserved lands.<sup>84</sup> However, holding assets on non-reserved lands does not guarantee that a court would not consider the assets to be located on reserved land for the purpose of subsection 89(1). The paramount location of assets of a business that is located on reserved lands of a First Nation could be considered situated on reserved land, if a sufficient discernable nexus exists. It is within the realm of possibility that a sufficient discernable nexus would exist if the assets are owned by a business located on reserved lands, and simply held on non-reserved lands. The connection between the personal property and its actual location is tenuous as a result.

### **3.3.3. Determining the *situs* of intangible assets**

Intangible assets are those that do not have a corporeal existence and thus do not have a physical location.<sup>85</sup> Their existence is certain, but their location is less certain. The nature of intangible property creates an added complexity in the analysis to determine the location of the property. The Supreme Court of Canada has addressed the issue of determining the location of intangible assets of First Nation debtors. A substantial portion of the litigation has been in the context of determining whether property has been situated on reserved lands for the purposes of section 87, which provides exemptions from taxation.<sup>86</sup> However, the Court applied a different

---

<sup>83</sup> *Wahpeton*, *supra* note 71.

<sup>84</sup> Hanna, *supra* note 33, at 165.

<sup>85</sup> *Yogis*, *supra* note 66; *Cuming et al.*, *supra* note 66.

<sup>86</sup> Subsection 87 of the *Indian Act*, *supra* note 1 makes certain property exempt from taxation. Paragraph 87(1)(b), *ibid*, makes personal property of a First Nation person or band exempt from taxation when the personal property is

approach in the context of subsections 89(1) and 90(1)(b). In the *Williams v Canada*<sup>87</sup> decision, the Supreme Court of Canada introduced the “connecting factors” test to determine the *situs* of intangible assets of First Nation persons or bands. The determination of an intangible asset’s *situs* in *Williams* was related to property for the purposes of taxation under section 87 of the *Indian Act*. The Court in *Williams* concluded that the proper approach requires courts to “identify the various connecting factors which are potentially relevant.”<sup>88</sup> Following the identification of these factors, courts are to determine the weight each ought to carry in determining the *situs* of the property. Courts must take into consideration the purpose of the *Indian Act* exemption, the type of property at issue, and the taxable nature of that property.<sup>89</sup> The Court did not specify an authoritative list of factors for lower courts to use in their analysis to determine the location of an intangible asset.<sup>90</sup> For this reason, lower courts that have applied the *Williams* test have relied on a wide range of connecting factors to determine the location of the intangible assets and have therefore arrived at varying conclusions.<sup>91</sup>

In *McDiarmid Lumber Inc v God’s Lake First Nation*, the Supreme Court of Canada rejected an application of the *Williams* approach to determine the location of intangible property in the context of subsections 89(1) and 90(1)(b).<sup>92</sup> The Court noted that the *Williams* approach may still be useful in the context of s.87, but decided that a different approach is to be used when analysing the effect of s.89(1) and 90(1)(b). The Court applied a “concrete common law interpretation,”<sup>93</sup> which is that the *situs* of property is where the property is located. For a bank account, the *Bank Act* dictates that an account is located where the debtor can access the funds. The *Williams* test is unnecessary where the location of an asset is objectively easy to determine, such as a bank account.<sup>94</sup> The Court’s reasoning in *McDiarmid* rested in part on the fact that the

---

situated on reserved lands. The analysis to determine whether property is situated on reserved lands is similar for both paragraph 87(1)(b) and subsection 89(1), because the issue for each is whether personal property of a First Nation person or band is situated on reserved lands.

<sup>87</sup> *Williams v Canada*, 1992 CanLII 98 (SCC), [1992] 1 SCR 877.

<sup>88</sup> *Ibid* at 892 – 893.

<sup>89</sup> *Ibid*.

<sup>90</sup> Reynolds (2002), *supra* note 50.

<sup>91</sup> Reynolds (2002), *supra* note 50 at 44-47.

<sup>92</sup> *McDiarmid Lumber*, 2006 SCC 58, [2006] 2 SCR 846 (*McDiarmid*). The *Williams* connecting factors are still used to determining where personal property is situated for the purposes of taxation. See, e.g. *Bastien Estate v Canada*, 2011 SCC 38, [2011] 2 SCR 710; *Dubé v Canada*, 2011 SCC 39, [2011] 2 SCR 764 where the Supreme Court of Canada applied the *Williams* factors in relation to section 87 of the *Indian Act*, *supra* note 1.

<sup>93</sup> *McDiarmid Lumber*, *supra* note 92 at paras 16 – 18.

<sup>94</sup> *Ibid*.

*Indian Act* contains provisions that deem property to be located on reserved lands, regardless of its true location under a common law test.<sup>95</sup> The result of the decision is that the *Williams* test should no longer be applied to determine the *situs* of intangible assets of a First Nation person or band when deciding if the property is subject to the exemption in subsection 89(1). Instead, the common law test should be applied.

The location of an intangible asset in the form of a debt or monetary obligation to be paid is the location of the account debtor – the person who owes the obligation.<sup>96</sup> When funds are deposited into an account, the financial institution becomes the account debtor and the person depositing the funds is the creditor of the bank.<sup>97</sup> This is relevant for a situation where a First Nation debtor deposits funds in an account, and then seeks to grant a security interest in that account. The *McDiarmid* test provides a certain answer to the location of the collateral asset,<sup>98</sup> and therefore, whether the account is subject to the subsection 89(1) exemption. It provides that the location of the account is the location of the account debtor (i.e. the financial institution), not the First Nation depositor. ~~debtor~~. Moreover, the location of the account is not the location of the First Nation debtor, as could be the case if the *Williams* “connecting factors” test were to be applied.

To be clear, the effect of this is that if the financial institution where the First Nation debtor has funds in a deposit account is located on lands reserved for a First Nation, then the account is located on reserved lands according to *McDiarmid*. Any such account would be subject to the exemption under subsection 89(1). Conversely, as the fact scenario in *McDiarmid* demonstrates, where the funds are held in an account in a financial institution that is not located on reserved land, then the account is not located on reserved lands for the purpose of the subsection 89(1) exemption and can therefore be subject to a security interest and any related enforcement measures.

---

<sup>95</sup> *Ibid* at para 20.

<sup>96</sup> *McDiarmid Lumber*, *supra* note 92; See also MH Oglivie, *Bank and Customer Law in Canada* (Toronto: Irwin Law, 2013) at pp 238 – 242, 267 – 311, where the nature of an account is discussed. Another example of this is where a First Nation person or band that is located on reserve sells goods or provides services on a credit basis to a non-First Nation person or band, or to a First Nation person or band not located on reserved lands. In that situation, subsection 89(1) would not apply to the account payable to the First Nation person or band that has sold the goods or provided the service, meaning that the First Nation person or band can give an effective security interest in the accounts payable.

<sup>97</sup> HG Oglivie, *supra* note 96.

<sup>98</sup> The collateral asset in this example is the account in which the First Nation debtor has deposited funds. The relationship between the First Nation debtor is such that the First Nation debtor is the creditor of the financial institution where the funds were deposited, and the financial institution is the debtor of the First Nation debtor.

### 3.4. Personal Property Deemed To Be Located On Reserved Lands

Section 90(1) deems certain property to be located on reserved lands for the purpose of subsection 89(1), regardless of its true location.<sup>99</sup> Paragraph 90(1)(a) applies to personal property that was purchased by the Crown with First Nations moneys or moneys for the use and benefit of First Nation persons or bands that has been so appropriated by Parliament.<sup>100</sup> Paragraph 90(1)(a) has not been the subject of extensive litigation and is not particularly relevant for the topic of this thesis. As such, it will not be discussed further. On the other hand, paragraph 90(1)(b) extends the deeming provision to include property that was given to a First Nation person or band under a treaty or agreement between a band the Crown.<sup>101</sup>

Paragraph 90(1)(b) has been the subject of extensive litigation.<sup>102</sup> *McDiarmid* is the most prominent Supreme Court of Canada decision regarding the interpretation and application of the paragraph. Prior to the *McDiarmid* decision, the main issue involving paragraph 90(1)(b) was the extent to which agreements between the Crown and First Nations should adhere to the paragraph due to the word “agreement.” One possible interpretation is that the paragraph applies to property purchased with money obtained or payable by Parliament for the benefit of “Indians or bands” pursuant to treaties between First Nations and the Crown, and to agreements between First Nations and the Crown. First Nations have engaged in a multitude of agreements with the Crown that are not directly related to treaties. An example of these agreements are comprehensive funding arrangements, under which the Crown agrees to give funding to First Nation bands for different purposes, such as economic development, construction of residences, and other such purposes.<sup>103</sup>

Money transferred under a comprehensive funding arrangement was the subject of the dispute before the Supreme Court of Canada in *McDiarmid*.<sup>104</sup> The issue was whether the funds transferred according to the arrangement were “subject to a treaty or agreement” and consequently deemed to be located on reserved lands under paragraph 90(1)(b).<sup>105</sup> The Court determined that the word “agreement” in paragraph 90(1)(b) must be read as narrowly as possible.<sup>106</sup> The meaning

---

<sup>99</sup> *Indian Act*, *supra* note 1, s 90(1).

<sup>100</sup> *Indian Act*, *supra* note 1, s 90(1)(a).

<sup>101</sup> *Indian Act*, *supra* note 1, s 90(1)(b).

<sup>102</sup> *McDiarmid*, *supra* note 92.

<sup>103</sup> It should be noted that it is possible for some funding in a Comprehensive Funding Arrangements may be related to treaty obligations; however, not all funding in CFAs are always related to treaty obligations.

<sup>104</sup> *McDiarmid*, *supra* note 92.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

attributed to an “agreement” is limited to agreements that expressly or by necessary implication give effect to Crown obligations pursuant to a treaty.<sup>107</sup> It does not extend more broadly to include any agreement between the government and First Nation persons or bands. Part of the reasoning provided by Chief Justice McLachlin (as she then was) in reaching the decision was that sections 89 and 90 of the *Indian Act* interfere with First Nations’ ability to engage in economic independence.<sup>108</sup> A narrow interpretation of the provisions ensures that First Nations are not limited by the sections by allowing funding from comprehensive funding arrangements or similar agreements to be used as collateral in loan transactions.

The effect of the decision is that property that is given to a First Nation person or band pursuant to a treaty or a treaty obligation will be deemed to be located on reserved lands and will be subject to the subsection 89(1) exemption.<sup>109</sup> Property that is given to a First Nation person or band by the federal government pursuant to an agreement that is unrelated to a treaty obligation will not be protected by subsection 89(1), and can therefore be used as collateral, allowing it to become subject to enforcement proceedings as long as it is not situated on reserved lands.<sup>110</sup> Funds of a First Nation person or band originating from funding agreements like the one at issue in *McDiarmid* will therefore be capable of becoming subject to a charge if the funds are located in an account that is not on reserved lands.

### **3.5 Conclusion**

This chapter has outlined how subsection 89(1) and section 90, of the *Indian Act* limit access to credit for First Nation communities. It has outlined how subsection 89(1) limits individual First Nation persons, and First Nation bands, from using property that is located on reserved land as collateral in a secured lending transaction. This limit reduces the ability of First Nation businesses operated by First Nation persons or bands from engaging in successful business opportunities, due to their limited access to capital, putting them at a disadvantage when compared to non-First Nation owned businesses operating on reserve lands.

---

<sup>107</sup> *McDiarmid Lumber*, *supra* note 92 at paras 69 – 70.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

## Chapter 4 – Exceptions To Subsection 89(1)

Subsection 89(1) does not provide absolute protection to assets held by a First Nation debtor on reserved lands. Subsection 89(1) provides that personal property of a First Nation debtor can be subject to attachment, charge, and seizure “in favour or at the instance of” a First Nation creditor.<sup>1</sup> Subsection 89(2) provides that a vendor under a conditional sales contracts can enforce their rights under the contract against a First Nation debtor, notwithstanding that the property that is the subject of the contract is situated on reserved lands.<sup>2</sup> A possible third exception arises from jurisprudence and provides that property that is used for commercial activities by a First Nation debtor are not subject to subsection 89(1), despite it being situated on reserved lands.<sup>3</sup> However, even where a security interest can be granted in property of a First Nation person or band, the secured party can encounter issues in enforcing the security interest.

### 4.1 Security interests “in favour or at the instance of” a First Nation person or band

Subsection 89(1) allows the personal property of a First Nation person or band that is located on reserved land to become subject to attachment, charge, and seizure if it is “in favour or at the instance of” a First Nation person or band.<sup>4</sup> While there is a dearth of jurisprudence in which this aspect of subsection 89(1) was the central issue, the few cases that have investigated the topic indicate that there are two methods by which this exception can be utilized. The first is when a First Nation creditor advances credit, either on a secured or unsecured basis, to a First Nation debtor. Any enforcement measures that result from this transaction would fall within the exception.<sup>5</sup> The second involves an assignment of a debt that is “in favour or at the instance of” a non-First Nation creditor to a First Nation person or band, thereby potentially making the debt be “in favour or at the instance of” a First Nation person or band. In either of these situations, no

---

<sup>1</sup> *Indian Act*, RSC 1985, c I-5, s 89(1).

<sup>2</sup> *Indian Act*, *supra* note 1, s 89(2).

<sup>3</sup> James I Reynolds, “Taking and Enforcing Security under the Indian Act and Self-Government Legislation” (2002) 18 BFLR 37 [Reynolds (2002)]; see also in the context of judgment enforcement Anna Lund, “Judgment Enforcement Law in Indigenous Communities - Reflections on the Indian Act and Crown Immunity from Execution” (2018), 83 SCLR (2d) at 279 - 315 [Lund].

<sup>4</sup> *Indian Act*, *supra* note 1, s 89(1). Hereafter the terminology “First Nation creditor” will be used to describe a First Nation person or band that has advanced credit.

<sup>5</sup> Note that an unsecured debt can be enforced through the enforcement of money judgments regime, which provides methods of execution that would otherwise be unavailable to a creditor due to subsection 89(1). There appears to be no issue with a secured debt being enforced by the secured creditor if this exception is met, see *infra*, 5.1.1. Advance of Credit from First Nation creditor to First Nation debtor.

conflict would occur between the provincial credit regimes and the *Indian Act* due to the exception within subsection 89(1).

#### **4.1.1 Advance of credit from First Nation creditor to First Nation debtor**

A First Nation creditor that advances credit on a secured basis to a First Nation debtor can register a valid security interest in the personal property of the First Nation debtor and can engage in enforcement measures under Part V of the *PPSA* upon default. Likewise, a First Nation creditor who advances credit on an unsecured basis can take advantage of the enforcement measures provided by judgment enforcement laws. In each of these scenarios, the subsection 89(1) prohibition against personal property of a First Nation debtor becoming subject to a charge and enforcement is not applicable, because any charge or enforcement is in favour of First Nation creditors. As described above,<sup>6</sup> the First Nation creditor could only be a First Nation person or band and could not be a financial institution owned or operated by First Nations persons or bands with a separate legal identity.

Jurisprudential support for this is demonstrated in the following two decisions. The first decision is *Bellegard v Qu'Appelle Indian Residential School Council Inc*,<sup>7</sup> a decision of the Saskatchewan Court of Appeal. There, a First Nation person obtained judgment against another First Nation person. The First Nation judgment creditor attempted to garnish the wages of the First Nation judgment debtor. The court stated that the First Nation judgment creditor must “enjoy the status of a [First Nation person or band] as defined by s. 2(1) of the *Indian Act* in order to successfully attach their claim” to the wages of the First Nation judgment debtor.<sup>8</sup> The second decision is *Potts v Potts*,<sup>9</sup> by the Alberta Court of Appeal. *Potts* considered a scenario in which a First Nation person sought to garnish wages of another First Nation person under the *Maintenance Enforcement Act*.<sup>10</sup> The Court determined that although the garnishment would normally be prohibited by subsection 89(1), it was not prohibited in this case because the garnishment was at the instance of a First Nation person, and thus “fell within the confines” of subsection 89(1).<sup>11</sup>

---

<sup>6</sup> See *above*, 3.2 Property of a First Nation person or band.

<sup>7</sup> *Bellegard v Qu'Appelle Indian Residential School Council Inc*, 1991 CanLII 7926, 92 Sask R 285 (CA).

<sup>8</sup> *Ibid* at para 3.

<sup>9</sup> *Potts v Potts* (1991), 78 Alta LR (2d) 240, [1992] 1 CNLR 182 [*Potts*].

<sup>10</sup> *Maintenance Enforcement Act*, SA 1985, c M-O.5.

<sup>11</sup> *Potts*, *supra* note 9 at para 7.

This exception allows a First Nation person or band to hold an enforceable security interest in the property of another First Nation person or band, regardless of the location of the property. As such, it provides an opportunity for First Nation lenders to fill the lending-void created by subsection 89(1), as First Nation lenders ought to be more willing to advance credit to First Nation debtors, knowing that they would be able to enforce against the First Nation debtors' property upon default. However, practical difficulties would be encountered for this type of lending to make a substantial impact on the lack of access to credit for First Nation debtors. In order to fit within the exception, it must be a First Nation person or band that advances the credit: it cannot be a separate legal entity, such as a First Nation corporation, a chartered bank under the *Bank Act*, or a credit union, since those are separate legal entities. Moreover, this hypothetical First Nation lender would necessarily be required to have a substantial amount of liquid capital on hand to fund the loans. As such, while this exception may be useful for some circumstances such as if a First Nation band wanted to make small loans accessible to its members, this exception is generally not helpful to address the issue of the lack of access to capital facing First Nation businesses operating on reserve.

#### **4.1.2 Assignment of Debt**

As described in the preceding section, subsection 89(1) does not apply to debt that is in favour of a First Nation person or band. The question investigated in this section is whether debt that is assigned to a First Nation person or band becomes in favour of the First Nation person or band. The effect of an assignment making debt in favour a First Nation person or band would be that the debt that is the subject of the assignment can be enforced against, as it would then fall under the exception as outlined in the preceding section. This section will investigate whether a security interest, charge, or right to enforce can be considered to be "in favour of" a First Nation person or band when the debt owing to a non-First Nations creditor is assigned to a First Nation person or band. This section will first describe the nature of debt, then will provide a background on the nature of an assignment, with specific focus on assignment of debt. This section will then proceed to outline and analyse how assignments made as described above have been treated by two separate Court decisions. The Alberta Court of Appeal, outlined in the decision below, noted that an assignment of debt from a non-First Nation person or band to a First Nation person would trigger the exception to the subsection 89(1) exemption if it had been an absolute assignment. In



another decision, an absolute assignment was disregarded due to the Court's interpretation of the principle of *nemo dat*.

A debt is a *chose in action*.<sup>12</sup> Sykes and Walker describe a *chose in action* as a right that can only be enforced and rendered enjoyable by taking action.<sup>13</sup> Debt is a *chose in action* because the right to enjoy the debt is enforced by the creditor taking action to ensure the debtor pays their debts. The equitable structure of assignments remains largely intact, having been unaltered by the introduction of the *PPSA* regime.<sup>14</sup> However, some aspects, such as a requirement that the assignment be in writing<sup>15</sup> and the priority position of an assignee<sup>16</sup> have since been modified by statute. An important equitable feature regarding assignments of debt is that the assignee takes the debt subject to equities that would have been available to the debtor against the assignor.<sup>17</sup>

#### **4.1.2.1 PPSA Rights between the Account Debtor and the Transferee**

This section will outline the issues encountered in a hypothetical assignment of accounts receivable where the rights of secured creditors in the *PPSA* conflict with the protections afforded to First Nation debtors in the *Indian Act*.

One issue to be explored is the treatment of a conflict between an account debtor and a transferee where the account debtor has defaulted on its payments, thereby requiring the transferee to enforce against the account debtor. Presuming that the debt is situated on reserved lands, then in a situation where the account debtor is a First Nation person or band situated on reserved lands, enforcement measures taken by a non-First Nation transferee against the account debtor would attract the application of subsection 89(1).<sup>18</sup> Specifically, the enforcement actions of the non-First Nation transferee would be execution against property of a First Nation person situated on reserved lands. However, in a situation where the account debtor is a First Nation person or band with the debt situated on reserved lands, and the transferee is a First Nation person or band, then the enforcement actions would not be barred by subsection 89(1).

---

<sup>12</sup> Edward I Sykes & Sally Walker, *The Law of Securities*, 5th ed, (Brisbane: The Law Book Company Ltd, 1992) at 759-800; *The Choses in Action Act*, RSS 1978, c C-11.

<sup>13</sup> Sykes & Walker, *supra* note 12 at 759.

<sup>14</sup> *Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

<sup>15</sup> *The Choses in Action Act*, *supra* note 12.

<sup>16</sup> *PPSA*, *supra* note 14, s 41.

<sup>17</sup> Sykes & Walker, *supra* note 12 at 763-771; Anthony Duggan and Jacob Ziegel, *Secured Transactions in Personal Property*, 6 ed, (Toronto: LexisNexis, 2013) at 9-10.

<sup>18</sup> *Indian Act*, *supra* note 1, s 89(1).

An important point to consider is that the rules of equity state that the transferee takes the assignable interest subject to any equities connected with the original contract between the account debtor and the transferor.<sup>19</sup> This principle was codified in the *PPSA*, which states that the rights of a transferee are subject to any defence arising from the contract between the account debtor and the transferor and any other defence that the account debtor could have claimed against the transferor.

#### **4.1.2.1.1 Enforcement by a non-First Nation transferee against an account owed by First Nation account debtor**

In this scenario, a First Nation person or band is an account debtor to a creditor who is not a First Nation person or band.<sup>20</sup> That non-First Nation creditor assigns the account to a non-First Nation transferee. The non-First Nation transferee is prohibited from enforcing the debt owed by a First Nation account debtor.<sup>21</sup> Effectually, this reduces the inclination of a non-First Nation creditor to purchase accounts owed by First Nation account debtors, since the non-First Nation creditor would have no recourse if the First Nation account debtor ceases payment.<sup>22</sup>

#### **4.1.2.1.2 Enforcement by a First Nation transferee of an account owed by a First Nation account debtor**

However, as stated by the justices in the decisions outlined below, the possibility exists that a debt owed by a First Nation account debtor located on a reserve to a non-First Nations creditor can be valid if the debt is assigned to a First Nation transferee. The defence available to a First Nation account debtor is that subsection 89(1) protects property situated on reserved land from being subject to a charge and enforcement, unless it is in favour or at the instance of a First Nation person or band.<sup>23</sup> If the assignment is absolute, then the debt owed by the account debtor is owed to the First Nation transferee. As such, any enforcement by the First Nation transferee

---

<sup>19</sup> This is reiterated in section 2 of *The Choses in Action Act*, *supra* note 79 which states:

“Every debt and every chose in action arising out of contract shall be assignable by law by any form of writing containing apt words in that behalf, but subject to such conditions and restrictions with respect to the right of transfer as may appertain to the original debt or as may be connected with or be contained in the original contract.”

<sup>20</sup> Again, in this scenario, the account/debt would be situated on reserved lands.

<sup>21</sup> *Ibid.*

<sup>22</sup> It would be possible for the non-First Nation creditor to obtain judgment against the First Nation account debtor, but the non-First Nation creditor would be unable to utilize the enforcement of money judgements regime because that regime relies on granting a charge in the property of the judgment creditor.

<sup>23</sup> *Indian Act*, *supra* note 1, s 89(1).

against the account debtor would fit within the exception in subsection 89(1), as it would be “in favour or at the instance of” a First Nation person or band.

The First Nation transferee could engage in enforcement measures by suing the First Nation account debtor in court and then seeking to enforce the judgment through enforcement of money judgment legislation.<sup>24</sup>

#### 4.1.2.1.2.1 Jurisprudence

The issue has been tested in court. In *Alberta (Workers’ Compensation Board) v Enoch Band*, the Alberta Court of Appeal suggested that an assignment of a debt is possible when the assignment is absolute.<sup>25</sup> Pursuant to its guiding legislation, the Alberta Worker’s Compensation Board can issue assessments for dues and register the assessment in the Court of Queen’s Bench.<sup>26</sup> Upon registration, the Board is able to enforce the assessment as though it were a judgment of the Court.<sup>27</sup> In *Enoch*, the Board followed this procedure and attempted to enforce against a debt owed by a First Nation band by garnishing an account held by the band. However, due to subsection 89(1), the Board was not able to enforce against property of the First Nation debtor. To circumvent the subsection, the Board entered an agreement with a First Nation person whereby the Board assigned the debt to that person.

Importantly, the assignment contained a number of conditions; the most relevant was that the First Nation transferee was required to pay the non-First Nation transferor 85% of the debt that the transferee collected “as and when collected.”<sup>28</sup> Due to these conditions, the Court determined that the assignment was a conditional assignment rather than an absolute assignment. As a result, the First Nation transferee was viewed as an agent of the board rather than an independent

---

<sup>24</sup> See *Enforcement of Money Judgments Act*, SS 2010 c E-9.22 [EMJA]. The debt could be secured in that the creditor receives an *in rem* right to property of the debtor through the EMJA, *ibid*. In this scenario, the First Nation transferee could sue the First Nation account debtor for the debt, then engage in the process of the EMJA, *ibid* to get an enforcement charge that could be registered against the property of the First Nation debtor. The First Nation transferee would then have rights to property of the First Nation account debtor in relation to the debt, thereby “securing” the unsecured debt.

<sup>25</sup> *Alberta (Workers’ Compensation Board) v Enoch Band*, 1993 CanLII 3421, 11 Alta LR (3d) 305 (CA) at para 10 [Enoch].

<sup>26</sup> *Ibid* at para 3.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Enoch*, *supra* note 25 at para 12.

transferee. The Court decided that the assignment did “not trigger the exception to the exemption” because it was not an absolute assignment.<sup>29</sup>

In *Gifford v Lax Kw’Allams Indian Band*,<sup>30</sup> a law firm obtained a garnishing order after receiving judgment against the Lax Kw’Allams First Nation for unpaid legal fees. The judgment debt was “assigned absolutely” to Mr. Helin, a First Nation person and lawyer who lived on the lands reserved for the Lax Kw’Allams First Nation.<sup>31</sup> Mr. Helin issued the garnishing order to a bank that was located on the reserved lands, where the Lax Kw’Allams band held funds in a deposit account. The bank complied and paid the amount due into Court. The Lax Kw’Allams band challenged the garnishment order, arguing that it was prohibited by subsection 89(1).<sup>32</sup>

The Court considered the argument that Mr. Helin was able to garnish the account of the First Nation, notwithstanding that it was situated on reserved lands, because the attachment is “in favour or at the instance of” a First Nation person, because Mr. Helin was a First Nation person.<sup>33</sup> As such, Mr. Helin was not barred by subsection 89(1) from collecting the debt owed by the First Nation.<sup>34</sup> In support of his argument, Mr. Helin referred to the *Enoch* decision, which stated that where collection of an account transferred under a conditional assignment is barred by subsection 89(1), an “ordinary out-and-out assignment” would not be barred.<sup>35</sup> The Court considered the fact that any assignment is subject to the equities contained in the original agreement, and that subsection 89(1) was an equity that was contained in the original garnishment order.<sup>36</sup> The Court decided that Mr. Helin could not overcome the limitation contained in subsection 89(1) simply due to his status as a First Nation person, because the assignee “cannot acquire a better right than the assignor had.” The application by the Court of the fundamental assignment law principle of *nemo dat* in its conclusion was done partially for policy reasons, as the decision notes that it is interested in seeking to protect property of First Nation persons or bands from execution in favour of non-

---

<sup>29</sup> *Enoch*, *supra* note 25 at paras 21-22. The ‘exception to the exemption’ being that property of a First Nation person or band can become subject to attachment, charge, and seizure at the instance of a First Nation person or band.

<sup>30</sup> *Gifford v Lux Kw’Alaams Indian Band*, 2000 BCSC 273 (CanLII), [2000] 2 CNLR 30 [*Gifford*].

<sup>31</sup> *Ibid* at para 4.

<sup>32</sup> *Gifford*, *supra* note 30 at para 8.

<sup>33</sup> *Gifford*, *supra* note 30 at para 10.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Gifford*, *supra* note 30 at paras 11-14.

<sup>36</sup> *Gifford*, *supra* note 30 at paras 16, 19-25.

First Nation persons.<sup>37</sup> There are two points of issue that result from the *Gifford* decision: policy, and the application of *nemo dat*.

#### 4.1.2.1.2.2 Policy

A criticism is that the policy reasoning that the court in *Gifford* relied on is outdated. The Supreme Court enunciated a policy under which subsection 89(1) of the *Indian Act* should be liberally interpreted to facilitate economic activity;<sup>38</sup> importantly, the policy outlined by the Supreme Court aligns with the arguments that interpretations of law are required to address issues of access to credit from the law and economics perspective. At issue in *McDiarmid Lumber* was whether funds paid to a First Nation pursuant to an agreement with the federal government constitutes property deemed to be on reserved lands within the meaning of section 90(1)(b) of the *Indian Act*. The analysis for that section, included a consideration of the implications for subsection 89(1) as well.<sup>39</sup> Writing for a majority of the Court, Chief Justice McLachlin (as she then was) stated that provisions of the *Indian Act* that inhibit First Nations from engaging in consensual commercial ventures ought to be interpreted as narrowly as possible.<sup>40</sup> Of particular concern was the negative impact that the provisions have on First Nations communities by limiting access to credit on reserved lands.<sup>41</sup>

The policy presented by Chief Justice McLachlin (as she then was) regarding how Courts ought to interpret the *Indian Act* is that commercial activity should be encouraged, and the *Indian Act* should be interpreted as narrowly as possible to allow such commercial activity to occur. This policy directly contradicts the policy purpose relied upon by the British Columbia Supreme Court in *Gifford*.

In describing the application of the *Indian Act* provisions to provincial credit regimes, Chief Justice McLachlin (as she then was) wrote:

“specific criteria were set out to describe the features of property that Parliament wanted to exclude from the credit regimes established by the

---

<sup>37</sup> *Gifford*, *supra* note 30 at paras 28 – 30; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 1990 CanLII 117 (SCC) [*Mitchell*].

<sup>38</sup> *McDiarmid Lumber v God's Lake First Nation*, 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*] at paras 38 – 68.

<sup>39</sup> *Ibid* at para 38. The discussion thereafter pertains to the “provisions” that interfere with the scope of provincial credit regimes. Moreover, the application of subsection 89(1) to the funds in question was a live issue in the decision.

<sup>40</sup> *McDiarmid*, *supra* note 38 at paras 39-41.

<sup>41</sup> *McDiarmid*, *supra* note 38 at para 42.

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.”

An assignment of a debt from a non-First Nation creditor to a First Nation creditor is not one of the “limited exceptions” to the application of the provincial credit regimes that was created by Parliament. The exception to the provincial regime exists when a non-First Nation creditor attempts to enforce against the property of a First Nation person or band; it does not carve out an exception when a First Nation creditor enforces against the property of a First Nation person or band.<sup>42</sup> Rather, the intention of Parliament in creating subsection 89(1) was to explicitly allow the property of a First Nation debtor to be subject to attachment, charge, and seizure at the instance of a First Nation person or band. The subsection does, however, nullify any security given to a non-First Nations assignor. A non-First Nation assignor has only an unsecured debt that can be assigned to a First Nation assignee. The First Nation assignee would then have to take steps to secure the unsecured debt that it has been assigned, or in the event of default in payment by the First Nations debtor, to obtain a judgment and enforce it under *The Enforcement of Money Judgments Act*.

Parliament also did not attempt to regulate how an obligation that could be secured by attachment or charge came into existence. Subsection 89(1) does not stipulate that personal property of a First Nation person or band cannot become subject to attachment, charge or seizure at the instance of a First Nation person or band, unless that interest was acquired by way of assignment from a non-First Nation creditor. The policy in interpreting the *Indian Act* is to avoid reading in such limitations. On this point, another excerpt from Chief Justice McLachlin (as she then was) is pertinent:

“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

---

<sup>42</sup> This is unaffected by the principle of assignment law that an assignee is in no better position vis-à-vis the account debtor than the assigner (*nemo dat quod non habet*) because the position of the assigner was that they were prohibited by the specific wording of subsection 89(1) from enforcing against the account debtor. The specific wording of subsection 89(1) allows a First Nation person or band to enforce against another First Nation Person or band. Therefore, the First Nation person or band assignee is not in a better position than the assigner – they are still limited by subsection 89(1) to the extent that subsection 89(1) provides a limitation to them. However, the limitation in subsection 89(1) is not a limitation to a creditor/assignee who is a First Nation person or band.

enforceable rights for the debtors and creditors who are governed by them...It is against this backdrop that the exceptions created by the *Indian Act* provisions must be interpreted.

**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.**<sup>43</sup> [emphasis added]

The *Indian Act* does not impose an explicit restriction on the right of transfer on a debt owed by a First Nation debtor, so there is no statutory restriction with respect to the right of transfer of the non-First Nation creditor in relation to the debt.

Moreover, the *Indian Act* explicitly states that property of a First Nation person or band is not subject to charge, attachment, mortgage, enforcement, unless it is in favour of a First Nation person or band. This means that the *Indian Act* allows First Nation persons and bands to hold valid charges, and to engage in valid enforcement against, property of other First Nation persons or bands. Therefore, a First Nation transferee ought to be able to enforce against the property of a First Nation account debtor, since the debt owed by the First Nation account debtor is in favour of a First Nation person or band.

#### **4.1.2.1.2.3 The principle of *nemo dat***

An additional issue to be considered is the proper application of the principle of *nemo dat*. One view – taken by the Court in *Gifford* but seemingly not an issue in *Enoch* – is that the principle of *nemo dat* could be interpreted in a way that prohibits the seizure of the account, even if it is in the hands of the First Nation transferee. The principle of *nemo dat* is that a person cannot transfer better title to property than they had in the property. The issue here would be whether the First Nation transferee can acquire a ‘better title’ from a transferor due to the fact that they can exercise greater rights in the property than the transferor could prior to the transfer. That is, the transferor was not able to enforce against the property of the First Nation account debtor; a simple application of *nemo dat* would result in the conclusion that a transferee of a title from the transferor should

---

<sup>43</sup> *McDiarmid*, *supra* note 38 at paras 40 – 41. Note that the approach taken by Chief Justice (as she then was) McLachlin in *McDiarmid* has been criticized in Frankie Young, “A Trojan Horse: Can Indian Self Government Be Promoted Through the Indian Act?” (2019) 97:3 Cnd Bar Rev 697. Although in the context of comments that were made in *McDiarmid* about self-governance, rather than the use of property as collateral, Professor Young notes that the interpretation in *McDiarmid* about parliament’s intentions when creating section 90 is open to criticism.

then also be prohibited from enforcing against the property. The prohibition against enforcement was part of the title that the transferor had and should therefore constitute part of the title that is in the hands of the transferee.

The response to this, as noted above and implicit in the *Enoch* decision, would be to consider the underlying reason why the transferor was prohibited from enforcing against the account debtor. In this scenario, it was not a matter of pure prohibition; the prohibition against enforcement was dependent on the conditions outlined in subsection 89(1) of the *Indian Act*.<sup>44</sup> As the *Enoch* decision notes, there is an exception to the exemption. The application of the principle of *nemo dat* would require that the prohibition – along with its conditions – is passed to the transferee when title is passed. Therefore, the transferee would not have better rights in the title than the transferor. Instead, the transferee would be in a position to enforce the rights that are contained within the title, whereas the transferor was not in a position to do so. The right itself has not changed – it remains subject to subsection 89(1) of the *Indian Act*.<sup>45</sup> However, due to the nature of the right, it can be enforced by some and not others.

The wording of subsection 89(1) specifically states that property located on reserve is prohibited from, *inter alia*, enforcement if it is “in favour or at the instance of anyone person other than an Indian or Band”.<sup>46</sup> Therefore, in this instance the right that is held by the transferor and that is transferred to the transferee can be enforced by a transferee who is a First Nation person or band, even though it could not be enforced by a transferor who is non-First Nation. The principle of giving better title is not violated – the title remains subject to the entire legislative limitation found in subsection 89(1) of the *Indian Act*.<sup>47</sup> That limitation includes an exception that makes the title more valuable when it is in owned by First Nation persons or bands, due to the fact that they are exempted from the limitation on enforcement that is found in the title.

---

<sup>44</sup> *Indian Act*, *supra* note 1, s 89(1).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, emphasis added. Note that this is the “exception to the exemption” that the Court of Appeal in *Enoch* was describing.

<sup>47</sup> *Ibid.*



## 4.2 A possible ‘commercial exception’

Another potential exception to the subsection 89(1) exemption relates to personal property used primarily for commercial purposes.<sup>48</sup> The content of this exception is that commercial property should not be afforded protection from attachment, charge, or enforcement proceedings by subsection 89(1), notwithstanding that it is property of a First Nation person or band situated on reserved lands. This idea was discussed in the majority reasoning of the Supreme Court of Canada’s *Mitchell*<sup>49</sup> decision and has been noted in literature.<sup>50</sup>

The Court in *Mitchell* considered the application of the paragraph 90(1)(b) deemed property provision in relation to taxable property of a First Nation. The facts of the case were that the First Nation band contracted a non-First Nation person to negotiate tax rebate for the First Nation. The terms of the agreement were that the non-First Nation person would be paid a portion of the funds received from the tax rebate. The tax rebate was agreed to, but the First Nation did not actually receive the funds, which were instead held in a trust account. The issue was whether those funds could be garnished to pay the non-First Nation person for the services provided under the agreement.

Relevant to the Court’s analysis was the fact that the funds were to be given to the First Nation resulting from a commercial agreement, rather than as an obligation of the Crown pursuant to a treaty. Therefore, the funds of the First Nation could be characterized as a commercial asset of the First Nation. The issue was whether this commercial asset of the First Nation could be subject to enforcement proceedings. In relation to the “legislative ‘package’” of sections 87-90 of the *Indian Act*, Justice La Forest (as he then was) wrote that Parliament did not intend to include a purely commercial agreement as part of those provisions.<sup>51</sup> Further, he stated:

... the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different

---

<sup>48</sup> For a view on the commercial exception in the context of judgment enforcement, see Anna Lund, “Judgment Enforcement Law in Indigenous Communities - Reflections on the Indian Act and Crown Immunity from Execution” (2018), 83 SCLR (2d) at 279 - 315 [Lund].

<sup>49</sup> *Mitchell*, *supra* note 37 at paras 86 - 126.

<sup>50</sup> *Reynolds* (2002), *supra* note 3. Moreover, the historical evidence regarding the purpose of the *Indian Act* exemptions indicates that Parliament intended to include all property of First Nation persons or bands, regardless whether that property is used for commercial purposes. For instance, see *McDiarmid*, *supra* note 38 where Chief Justice (as she then was) McLachlin outlines a brief history of the provisions at paras 18 - 42.

<sup>51</sup> *Mitchell*, *supra* note 37 at para 101.

terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use deal with it on the same basis as all other Canadians.<sup>52</sup>

The intention to exclude commercial agreements from the protective provisions of the *Indian Act* also aligns with the policy reasoning of Chief Justice McLachlin (as she then was) in *McDiarmid*, and with the overarching theme in the field of law and economics that the law should do what it can to ensure widespread access to credit. In that decision, the economic harm caused by the provisions was emphasized as a main reason why the provisions ought to be interpreted as narrowly as possible. A possible interpretation of subsection 89(1) is that Parliament did not intend for the provision to exempt business assets from seizure – it was meant to protect First Nations from being unfairly dispossessed of their property.<sup>53</sup> Property that becomes subject to a security interest as a result of a sophisticated commercial arrangement is not an unfair dispossession of the sort that was contemplated by Parliament at the time the provision was enacted.

The consequence of a commercial exemption having legal validity cannot be understated. The issue described by Chief Justice McLachlin (as she then was) in *McDiarmid* of First Nations being excluded from the provincial credit regimes would cease to be relevant. This would allow First Nations businesses to use any property as collateral in a loan transaction, opening up opportunities for economic development to thrive in First Nations communities. It would overturn years of difficult litigation and strategic planning on the part of both creditors and debtors to circumvent the subsection 89(1) restriction. Moreover, it would call into question the need to reform that section of the *Indian Act*, because access to credit would no longer be an issue for First Nations. This section will describe two methods by which a possible commercial exemption has been carved out.

A fundamental problem when supporting a commercial exception, however, is that it involves Courts engaging in a method of legislative interpretation that is open to criticism. In *CBC v SODRAC*,<sup>54</sup> [2015] 3 SCR 615, Justice Rothstein stated regarding the interpretation of the

---

<sup>52</sup> *Mitchell*, *supra* note 37 para 87.

<sup>53</sup> For instance, it has been suggested that the purpose of the protection was to ensure that newly-arrived European settlers would not somehow take advantage of the Indigenous population. See Jack Woodward, *Native Law*, (Toronto: Carswell Publishers Ltd, 1989). See also *infra* 3.1 History of Subsection 89(1).

<sup>54</sup> *Canadian Broadcasting Corporation v SODRAC*, 2015 SCC 57 (CanLII), [2015] 3 SCR 615 [CBC].

legislation that was in issue in that decision, that “the scope [of the legislation at issue] is specific and deliberate. Parliament could have adopted broader provisions. It chose not to. It is not for the Court to do by ‘interpretation’ what Parliament chose not to do by enactment.”<sup>55</sup> Moreover, as Pierre-Andre Cote points out:<sup>56</sup>

Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say:

The presumption against adding words must be treated with caution because legal communication, like all communication, has both implicit and explicit elements. The presumption only concerns the explicit element of the legislature's message: it assumes that the judge usurps the role of Parliament if terms are added to a provision. However, if the judge makes additions in order to render the implicit explicit, he is not overreaching his authority. The relevant question is not whether the judge can add words or not, but rather if the words that he adds do anything more than express what is already implied by the statute.

Sections 2 and 4.1 of the *Indian Act* explicitly state that the *Indian Act* applies to Indians, including any person who is on a band list, and Bands. As such, any legislative interpretation that results in a commercial exception is required to take this into account when reaching its conclusion.

An important difference between Rothstein’s comments, above, and the interpretation put forward in the cases described below, is that the *Indian Act* is a piece of legislation the roots of which are firmly grounded in racist and paternalistic notions that First Nation persons and bands

---

<sup>55</sup> *Ibid* at para 53.

<sup>56</sup> Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp 231-32.

– by their inherent nature – are unable to obtain the level of sophistication required to enter transactions that will not be to their detriment.<sup>57</sup> As noted in Section 3 of this thesis, Parliament enacted the protections that are now in subsection 89(1) because the prevailing notion at the time was that First Nation persons and bands needed legislative protection. That policy purpose is no longer relevant, as noted by Chief Justice McLachlin in *McDiarmid*: the protections enacted in the 1800s that remain in place today do not always protect First Nation persons and bands.<sup>58</sup> In many instances, those protections harm their opportunity to engage in economic development.<sup>59</sup> Moreover, the sections of the legislation that Justice Rothstein was interpreting in the *CBC* decision were a legislative response to a decision of the Supreme Court<sup>60</sup> and were therefore clearly aimed at addressing a new and pressing issue. The difference between those subsections in *CBC* and the protections in the *Indian Act* are important enough to allow Courts to follow a method of interpretation where more grounds for leeway are provided in the application of the written word in the legislation. The sections at issue in *CBC* were a few years old, drafted specifically to tailor the results of a decision of the Supreme Court; the subsections at issue in the *Indian Act* are over 100 years old, drafted specifically with the intention to protect uneducated “Indians” who were unable to conduct business in their own right.<sup>61</sup>

#### 4.2.1 Waiver

One possible form that a commercial exception can take is in the form of a waiver for the purposes of purchasing business assets. This form of exception was upheld by the Manitoba Court of Appeal in *Tribal Wi-chi-way-Win Corp v Stevenson*.<sup>62</sup> There, the Chief of the Peguis First

---

<sup>57</sup> See *infra* 3.1 History of Subsection 89(1).

<sup>58</sup> *McDiarmid*, *supra* note 38.

<sup>59</sup> See, e.g. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) Volume 5 [RCAP] at 870-893; Darwin Hanna, *Legal Issues on Indigenous Economic Development*, (Toronto: LexisNexis, 2017) [Hannah]; John Borrows and Sarah Morales, “Challenge, Change and Development in Aboriginal Economies” in *Legal Aspects of Aboriginal Business Development*, Dwight Dorey and Joseph Magnet (eds), (Markham: LexisNexis, 2005) [Borrows & Morales].

<sup>60</sup> *CBC*, *supra* note 54 at para 172.

<sup>61</sup> See House of Commons Debates, 3rd Session, 3rd Parliament (March 21, 1876) at 751 – 752.

<sup>62</sup> *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 32, 240 Man R (2d) 122 affirming 2009 MBQB 32, 237 Man R (2d) 94. It is noteworthy that the Department of Indian and Northern Development relied on the reasoning of the court in *Tribal*, *ibid* in support for its argument that property of a band be subject to enforcement procedures. See *Tobique Indian Band v R*, 2010 CF 67, 184 ACWS (3d) 580 at para 30. *Tobique* states:

As for the possible seizure of funds by creditors, the Respondent acknowledges that this was a specifically articulated concern in the decision letter. It also acknowledges that generally speaking [section 89](#) of the *Indian Act* will exempt such funds from seizure. However, the Respondent argues that case law has held that Bands can waive this condition (see *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, [2009 MBCA](#)

Nation received a loan in his personal capacity from a non-First Nation creditor to purchase commercial property situated on reserved lands.<sup>63</sup> The Chief signed agreements waiving his rights under the *Indian Act* for the purpose of granting a valid security interest in the commercial property. The Chief defaulted on the loan, which resulted in the non-First Nation creditor appointing a receiver to sell the business assets. The Court of Appeal concluded that the waiver was valid, citing the reasoning of Chief Justice McLachlin (as she then was), in *McDiarmid* that provincial credit schemes should apply universally unless expressly excluded.

A waiver involves “the voluntary relinquishment or abandonment of a legal right or advantage.”<sup>64</sup> It will be found where the waiving party had full knowledge of the rights being waived and an unequivocal and conscious intention to abandon them.<sup>65</sup> The waiver of a statutory right is possible unless the waiver is contrary to public policy.<sup>66</sup> In general, a waiver will be contrary to public policy where allowing the waiver would harm the public interest.<sup>67</sup> A waiver of the subsection 89(1) right does not *prima facie* cause harm to the public interest. Instead, as pointed out by the Court in *Tribal Wi-Chi-Way-Win*, such a waiver aligns with the policy reasoning of the Chief Justice in *McDiarmid*.<sup>68</sup> Therefore, the possibility exists that a First Nation debtor can waive the protection of subsection 89(1) in relation to business assets, thereby allowing a valid security interest to attach to property on reserved lands. This would ensure compliance with Part V of the *PPSA* is possible, bringing certainty to the non-First Nation creditor that the loan carries less risk than if enforcement was not possible.

#### **4.2.1.1 Legislative examples of debtor-protection legislation that distinguishes between personal and commercial debtors for the purpose of waiving the debtor protection measures**

There are examples in Saskatchewan of debtor-protection legislation that makes a distinction between personal debtors and commercial debtors in terms of allowing the latter to

---

[72](#), 240 Man.R. (2d) 122) and that DIAND was informed that funds may be seized pursuant to terms and condition of a security agreement.

<sup>63</sup> It is noteworthy that the Chief acted with the support of three members of the First Nations Band Council. See *ibid* 2009 MBQB 32 at 24.

<sup>64</sup> Black’s Law Dictionary, *supra* note 109 at 1611; *Potash v Royal Trust Co*, 1984 CanLII 3023 (MBCA) at paras 30-50.

<sup>65</sup> *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, 1994 CanLII 100 (SCC) at para 20, [1994] 2 SCR 490.

<sup>66</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)*, [1982] 1 SCR 202, 1982 CanLII 15 (SCC) at 213-214.

<sup>67</sup> *Re Estate of Charles Millar, Deceased* (1937), [1938] SCR 1, 1937 CanLII 10 (SCC).

<sup>68</sup> *McDiarmid Lumber*, *supra* note 38.

waive the application of the legislation. *The Limitation of Civil Rights Act*<sup>69</sup> and the *Land Contracts (Actions) Act*<sup>70</sup> are two debtor-protection statutes in force in Saskatchewan. Both statutes contain provisions that affect the rights of creditors in relation to their debt-collection measures against debtors in the Province of Saskatchewan. Under the *LCRA*, where land is sold under an agreement for sale in writing or is mortgaged for the purpose of securing the purchase price or part of the purchase price of the land, the creditor's right to recover any unpaid balance is restricted to the land sold or mortgaged and no action shall lie on the covenant for payment in the agreement for sale or mortgage.<sup>71</sup> Moreover, section 6 of the *LCRA* states that a final order for foreclosure operates in full satisfaction of the debt secured by the mortgage. Similarly, the *LCAA* provides that an action to foreclose against, obtain a sale of, or recover any money under a mortgage or agreement for sale of land is a nullity unless the mortgagee or vendor has obtained consent of the court pursuant to the *LCAA*.<sup>72</sup> The *LCAA* gives the court broad powers to delay any enforcement action. Both statutes are designed to act as debtor-protection measures, ensuring that debtors are not taken advantage of by creditors.<sup>73</sup>

Both the *LCRA* and the *LCAA* contain provisions that allow the protections they provide to be waived.<sup>74</sup> However, the ability to waive the protections is limited to corporate bodies.<sup>75</sup> The policy purpose behind the waiver is that the debtor protection measures were created to help unfortunate consumers rather than commercial enterprises. In *National Trust Co v Mead*,<sup>76</sup> the Supreme Court of Canada endorsed the view that the purpose of the waiver is to facilitate corporate financing that would be unavailable if the debtor could not offer property as collateral for lenders to realize on upon default. The provisions of the *LCRA* and *LCAA* were not meant to apply to commercial enterprises, which are to be treated as sophisticated parties, capable of entering commercial transactions without requiring the protections afforded to consumers.

The same principle can be applied to a waiver of the debtor-protection provision found in subsection 89(1) of the *Indian Act*, though they would be applied more broadly. The *LCRA* and *LCAA* only allow waivers for corporate bodies; the ability to waive does not extend to

---

<sup>69</sup> *The Limitation of Civil Rights Act*, RSS 1978, c L-16, [*LCRA*].

<sup>70</sup> *The Land Contracts Actions Act*, RSS 1978, c L-3 [*LCAA*].

<sup>71</sup> *LCRA*, *supra* note 69, s 2(1).

<sup>72</sup> *LCAA*, *supra* note 70, s 3.

<sup>73</sup> Ron CC Cuming, *An Overview of Saskatchewan Real Property Security Law* (Regina: Queen's Printer, 2016).

<sup>74</sup> *LCRA*, *supra* note 69, s 40(2); *LCAA*, *supra* note 70, s 5(2).

<sup>75</sup> *Ibid.*

<sup>76</sup> *National Trust Co v Mead*, 1990 CanLII 73 (SCC), [1990] 2 SCR 410.

unincorporated businesses. The ability to waive subsection 89(1) considered above would apply to any First Nation person or band. The protections may be compelling for individual consumers but are less compelling when applied to commercial ventures. The provision inhibits access to credit for First Nation-run enterprises due to the inability of lenders to realize on security. As demonstrated by the examples of the *LCRA* and the *LCAA*, it is possible for a system to provide debtor-protection measures for individual consumers while allowing commercial ventures to waive the application of the debtor-protection measures.

#### **4.2.2. Narrow Interpretation of Subsection 89(1) to Exclude Business Assets**

Another form of commercial exception found in jurisprudence involves Courts providing a narrow interpretation of subsection 89(1). In the following decisions, the Courts interpret the application of subsection 89(1) such that it excludes personal property of a First Nation person or band when that personal property is generated from or closely related to commercial arrangements. These conclusions are reached notwithstanding that the property at issue is First Nation person or band property and is located on reserved lands, and thus should attract the application of subsection 89(1).

In a decision of the Federal Court penned by Justice Rothstein,<sup>77</sup> gasoline tax refunds were determined to not be exempt from seizure under subsection 89(1). This was due to the fact that the business operation, a gasoline bar, from which the tax refunds were generated, was operated “in the commercial mainstream” because it sold gasoline to non-First Nations people.<sup>78</sup> Although the gasoline bar was physically located on reserved lands, the Court determined that the tax refunds were related to income that was not generated on reserved lands.<sup>79</sup> The main factor that swayed the Court’s decision was that the gasoline bar operated in the commercial mainstream.<sup>80</sup> Thus, the tax refunds were not subject to subsection 89(1), because the subsection only applies to First Nation person or band property on reserved lands. The *Brandt* decision determined that subsection 89(1) did not apply because the funds were generated in the commercial mainstream. However, it

---

<sup>77</sup> *Brandt v R* (1998), 152 FTR 28, 98 GTC 6296 [*Brandt*].

<sup>78</sup> *Ibid* at para 28.

<sup>79</sup> An important distinction to be made is that the monies owed were tax refunds rather than funds owed by an account debtor. Due to the nature of the monies owed to the First Nation the treatment of it differs. As noted above, if the funds were owed by a purchaser of goods or services – in this instance, someone who patronized the gas bar – then the accounts of the account debtor would not be subject to subsection 89(1).

<sup>80</sup> *Brandt*, *supra* note 77.

is relevant because the court determined that a business located on reserved lands could not rely on subsection 89(1) due to the fact that it operated in the commercial mainstream.

The British Columbia Supreme Court reached a similar conclusion in a decision relating to a garnishment order against funds of a First Nation Band in *Ramsay Painting Ltd v St Mary's Indian Band*.<sup>81</sup> There, the St. Mary's band asked the court to set aside a garnishment order of a judgment creditor. The judgment creditor sought to garnish funds in an account of the First Nation that was not located on reserved lands. The Band argued the funds should be exempt under subsection 89(1) due to the fact that a portion of the funds came from a comprehensive funding arrangement and were therefore deemed to be located on reserved lands in accordance with paragraph 90(1)(b).<sup>82</sup> The request of the Band was refused. In its reasoning, the Court noted that s.90(1)(b) only applies when the funding agreement is ancillary to a treaty and noted that the St. Mary's Indian Band were not signatories to a treaty. The Court could have ended its reasoning there. However, the Court continued in its reasons and stated that the judgment in question that resulted in a garnishing order "arose out of a commercial venture in which the Band was party" and that it "flows from what was in all respects a straightforward commercial agreement."<sup>83</sup> The relevance of this decision is that the court determined that property of a First Nation person or band – funds of the band – were not protected by subsection 89(1), and therefore could be subject to enforcement proceedings, at least in part because the judgment from which the garnishment order originated was related to a purely commercial arrangement of the First Nation.

In *L Martin (1984) Inc v Shubenacadie Band*, the Nova Scotia Court of Appeal interpreted "personal property" in subsection 89(1) to mean property that is used in a personal capacity rather than a business capacity.<sup>84</sup> The Court of Appeal concluded that the subsection applied only to assets held by a First Nation person or band within their personal capacity.<sup>85</sup> The property at issue in the decision was accounts that were used for the purpose of engaging in a business venture. As such, it was not 'personal' property of the nature protected by the *Indian Act*. Instead, it was

---

<sup>81</sup> *Ramsay Painting Ltd v St Marys Indian Band*, 2006 BCSC 976, 55 BCLR (4th) 361 [*Ramsay*].

<sup>82</sup> This decision was released before the *McDiarmid*, *supra* note 38 decision. It is clear from *McDiarmid*, *supra* note 38 that the request should have been refused from the onset, but that was not clear at the time the Court was hearing the case.

<sup>83</sup> *Ramsay*, *supra* note 81 at para 38.

<sup>84</sup> *L Martin (1984) Inc v Shubenacadie Band*, 1995 CanLII 4251, 114 NSR (2d) 241 (CA) [*Shubenacadie* cited to CanLII].

<sup>85</sup> *Ibid* at 4.



“business” property, which the court determined is not protected by the subsection 89(1) exemption. Justice Hallett stated:

“The section applies to prevent [a First Nation person or band] from pledging his personal assets on [reserved lands] such as his home, furniture, appliances and household goods. When a [First Nation person or band] is in business he or she holds and deals with his or her property in the commercial mainstream on terms no different from those applicable to all other Canadians.”<sup>86</sup>

Although the application of interpretive principles is likely incorrect in this decision, due to the fact that the section clearly refers to real and personal property, where personal property is the category of property that is not real property, the reasoning behind the decision is important. The decision indicates a willingness on the part of the Court to interpret s.89(1) of the *Indian Act* narrowly in order to limit the detrimental effect it has on the economic prospects of First Nation debtors. This reasoning aligns with the policy of providing a narrow interpretation outlined by Chief Justice McLachlin (as she then was) in *McDiarmid*,<sup>87</sup> as noted above.

As is demonstrated in the decisions outlined above, the existence of a commercial exemption to subsection 89(1) has some jurisprudential support. The commercial exception in the jurisprudence holds that business assets are not subject to subsection 89(1) despite being owned by a First Nation person or band. As evidenced by the aforementioned decisions, a commercial exemption is possible in two circumstances: (1) where a First Nation debtor has agreed to waive their rights under the subsection; or (2) where the assets in question were used primarily for business purposes and were utilized or originated in the “commercial mainstream.” The application of a commercial exception in these circumstances, where a First Nation debtor is aware that the assets can be used as collateral and accepts that risk, aligns with the policy reasoning of Chief Justice McLachlin (as she then was) in *McDiarmid* where she outlined the importance of ensuring First Nation debtors have access to credit for purposes of economic development that subsection 89(1) currently impedes.<sup>88</sup>

---

<sup>86</sup> *Shubenacadie*, *supra* note 84.

<sup>87</sup> *McDiarmid Lumber*, *supra* note 38.

<sup>88</sup> *Ibid.*

However, the fact remains that the legislation in place states that personal property of a First Nation person or band cannot become subject to attachment, charge, or enforcement at the instance or in favour of anyone other another First Nation person or band. Regardless of the strength of a public policy argument that supports a narrow interpretation – or a re-interpretation of the meaning of ‘personal property’ – the legislation has not been amended. Therefore, the law as it stands on whether personal property of a First Nation person or band – whether used for commercial purposes or personal purposes – cannot become subject to attachment, charge, or enforcement in favour or at the instance of a non-First Nation creditor.

#### **4.3 Subsection 89(2) – Conditional Sales Contracts**

Subsection 89(2) of the *Indian Act* provides an additional exception to the subsection 89(1) prohibition.<sup>89</sup> It permits a person who sells personal property to a First Nation person or band under an agreement whereby the right of property or right of possession remains wholly or in part with the seller, the seller is able to exercise their rights under the contract, notwithstanding that the chattel is situated on reserved lands.<sup>90</sup> Prior to the PPSA regime implementation, conditional sales contracts served as valid financing mechanism, which was legally distinct from financing mechanisms involving a grant of security.<sup>91</sup> The law recognized the seller/financier as the true owner of the property until the purchaser fulfilled the conditions of the contract, which includes providing full payment for the property.<sup>92</sup> When a sales agreement between a seller, non-First Nations or otherwise, and a First Nation person or band included a title-retention clause and allowed the seller to reclaim property, subsection 89(2) ensured that the ‘true owner’ of the property would have their property restored by allowing them to take it back.

However, the issue with subsection 89(2) is that conditional sales contracts have been integrated into the *PPSA* framework in many Canadian jurisdictions.<sup>93</sup> The integration results in a

---

<sup>89</sup> *Indian Act*, *supra* note 1, s 89(2).

<sup>90</sup> *Ibid.* Note that the terminology employed by the subsection indicates that the subsection has not been kept up to date with changes in personal property security law. The term “chattel” is has fallen into disuse and is now included in the more inclusive terminology of “personal property” that can be tangible or intangible.

<sup>91</sup> Michael G Bridge, Roderick A Macdonald, Ralph L Simmonds, & Catherine Walsh, “Formalism, Functionalism, and Understanding the Law of Secured Transactions” 44 McGill LJ 567 (1998-1999) [Bridge et al.] at 587 – 598.

<sup>92</sup> *Ibid.*

<sup>93</sup> *PPSA*, *supra* note 14. See *above* 3.3 Conditional Sales Agreements; Paragraph 3(1)(a) of the *PPSA*, *ibid* states that the *Act* applies to every transaction that creates a security interest in substance, without regard to its form and without regard to the person who has title. A security interest is defined in subparagraph 2(1)(qq)(a) as an interest in personal property that secures payment or performance of an obligation. Conditional sales contracts are typically structured such that the vendor all rights in the property to the purchaser but retains title of the property until the price of the property is fully paid. The purpose of the title retention is to ensure that the vendor has recourse against

conclusion that a conditional sale simply provides the seller with a security interest in case the purchase price is not paid. Therefore, a vendor under a conditional sales contract is treated as a secured party for the purposes of the *PPSA*.<sup>94</sup> Importantly, the validity of a conditional sales contract as a distinct legal tool has not been repealed by the *PPSA*. Instead, a conditional sales contract attracts the application of the *Act*. In effect, a title-retention clause in a contract remains legally valid, but the vendor may lose in a priority dispute with another secured party if they have not complied with the registration, perfection, and priority parts of the *Act*. Moreover, the vendor must enforce their rights against the property in compliance with Part V of the *PPSA*.<sup>95</sup>

A scenario in which the application of subsection 89(2) is important is one in which a non-First Nation vendor agrees to sell goods to a First Nation purchaser, where the First Nation purchaser cannot pay the full purchase price at the time of the sale, so the non-First Nation vendor allows the First Nation purchaser to pay the purchase price over a term. The non-First Nation vendor would ensure that the contract includes a title retention clause, providing that title to the property is retained by the non-First Nation vendor until the full purchase price under the contract has been paid. If the First Nation purchaser does not pay, then the non-First Nation vendor can take advantage of the title retention clause and reclaim the property. Although the non-First Nation vendor would be engaging in enforcement against personal property situated on reserved lands, the vendor is not prohibited by subsection 89(1) from enforcing against property of the First Nation debtor. Instead, subsection 89(2) explicitly allows for the property that was the subject of the purchase contract to be seized. Therefore, when a contract is structured as a conditional sales agreement the *Indian Act* recognizes the vendor/secured party's ability to seize property of the First Nation purchaser/debtor, notwithstanding the fact that the property is located on reserved lands.

---

the property that is the subject of the contract if the purchaser fails to pay the full purchase price. Thus, although the contract is structured as a sale, the true purpose of the title retention is that it allows the vendor to retain an interest in the property to secure performance of the purchaser's obligation to pay the price of the contract, therefore being exactly what the *PPSA* defines as a security interest. Moreover, paragraph 3(1)(b) of the *PPSA*, *ibid* states that the *Act* will apply to conditional sales.

<sup>94</sup> Bridge et al., *supra* note 91 at p 587-598.

<sup>95</sup> Ronald CC Cuming, Catherine Walsh, & Roderick Wood, *Personal Property Security Law*, (Toronto: Irwin Law Inc, 2009) [Cuming et al.] at p 78.

#### 4.3.1 Case Law

Evidence of how a court will respond to this scenario is scarce. Similar facts were encountered by the New Brunswick Court of Queen's Bench in *R v Bernard*.<sup>96</sup> There, a non-First Nation seller retained title under a conditional sales contract until the full purchase price had been paid by the First Nation purchaser. When the First Nation purchaser ceased to make payments on the contract, the unpaid vendor attempted to seize the property.<sup>97</sup> The Court upheld the validity of the conditional sales contract, and granted permission deciding that a sheriff could seize property that was the subject of the conditional sales contract notwithstanding the property being situated on reserved lands.<sup>98</sup> However, the New Brunswick legislature had not enacted its *Personal Property Security Act* at the time of the decision,<sup>99</sup> and therefore the court was not required to address the interface between conditional sales agreements and the *PPSA*.

#### 4.3.2 Conditional Sales Contract as Purchase Money Security Interests

The *PPSA* defines a purchase money security interest (PMSI) as including a security interest "taken in collateral...to the extent that it secures all or part of its purchase price."<sup>100</sup> The purpose of the title-retention clause under a conditional sale contract is to provide security to the vendor, to secure the payment of the purchase price of the goods subject to the contract. As such, a vendor under a conditional sales contract has a purchase money security interest in the property of the First Nation debtor. As a result, subsection 89(2) of the *Indian Act* indirectly allows purchase money security interests in the form of conditional sales contracts to be validly held in personal property of a First Nation person or band and would be able to enforce under Part V of the *PPSA*.

An important aspect of purchase money security interests is that there is little functional difference between a vendor-held PMSI and a lender-held PMSI. In both instances, the holder of the PMSI is advancing credit to the debtor for the debtor to acquire rights to property. The purchase money aspect of security interest only exists to the extent that it secures the money loaned to purchase the goods in which the security interest is taken. Because of this it might be possible that a lender-held PMSI could fit within the exception contained in subsection 89(2). Courts that apply the *PPSA* look to the substance of the transaction rather than the form. Due to the fact that there is

---

<sup>96</sup> *R v Bernard*, [1992] 3 CNLR 33, 118 NBR (2d) 361 (CA).

<sup>97</sup> An altercation ensued, where the purchaser attempted to stop the agents of the vendor from seizing the property, which necessitated the involvement of the court.

<sup>98</sup> *Bernard*, *supra* note 96.

<sup>99</sup> It was not given assent until 1993. See, *Personal Property Security Act*, SNB 1993, c P-7.1.

<sup>100</sup> *PPSA*, *supra* note 14, s 2(1)(jj).

little difference in the substance of a conditional sales contract and a vendor-held PMSI, and there is little difference in the substance between a vendor-held PMSI and a lender-held PMSI, it is possible that a court would allow a lender with a purchase money security interest to enforce against property of a First Nation debtor under subsection 89(2). The functional difference between ‘retaining title to secure payment of the purchase price’ which gives rise to a security interest under the *PPSA*, and a security interest ‘taken in collateral to secure payment of the purchase price’ is minimal. Therefore, it is possible that a court would look at the substance rather than the form of the transaction and allow it to occur.

The law that applies to conditional sales contracts is the *PPSA*. Therefore, when a purchaser under a conditional sales contract defaults on payment, the options available to the vendor are limited to Part V of the *PPSA*, which – among other remedies – allows the secured party to seize the collateral assets of the debtor. The result of this is that the Conditional Sales Contract involving a First Nation debtor is able to be enforced by a non-First Nation creditor under Part V of the *PPSA*,<sup>101</sup> because subsection 89(2) expressly validates conditional sales contracts as a form of transaction that is allowable on reserved lands.

#### **4.4 Conclusion**

This chapter has outlined that exceptions exist to the prohibition against collateralization in subsection 89(1) and section 90 of the *Indian Act*. Some of these exceptions exist within the legislative provisions themselves, whereas others have been applied through interpretations of the legislative provisions when challenged in court. These exceptions are important for demonstrating potential paths forward for First Nation debtors to find ways to be able to use property located on lands reserved for First Nations as collateral, thereby increasing access to capital and helping to ensure that they are more competitive when compared with non-First Nation peers.

---

<sup>101</sup> *PPSA*, *supra* note 14.

## Chapter 5 - Enforcement on First Nations' Reserved Lands

A secured creditor that holds a valid security interest in personal property of a First Nation person or band that is situated on reserved lands may encounter difficulties enforcing against the collateral. Moreover, the same issues can be encountered for secured parties that have advanced credit to a non-First Nation person or band when the collateral is situated on reserved lands. For instance, a corporate entity or partnership where the partners are non-First Nation, but whose property is located on reserved lands. This section will outline the problems that may be encountered in the enforcement of security interests. These problems stem from other powers granted to First Nation bands under the *Indian Act*.

### 5.1 Trespass provisions

A prohibition that forbids trespassing on the lands of First Nations peoples can be traced to the Royal Proclamation of 1763.<sup>1</sup> Section 30 of the *Indian Act* provides that “a person who trespasses on [reserved lands] is guilty of an offence.”<sup>2</sup> Section 31 permits the First Nation person or band against whom trespass was committed to seek relief or remedy in the form of a civil action.<sup>3</sup> The definitions section of the *Indian Act* fails to include a definition of what constitutes trespass against reserved lands.<sup>4</sup> Nor does section 30 or subsection 31(1) specify an internal limit on what comprises an act of trespass. Courts have turned to the common law interpretation of actions that constitute trespass to flesh out the meaning of the provisions.<sup>5</sup>

Although courts have defined ‘trespass’ in different ways, a consistent feature is that it involves entering on land of another “without lawful justification.”<sup>6</sup> Black’s Law Dictionary defines trespass to mean “an unlawful act committed against the person or property of another, especially wrongful entry on another’s real property.”<sup>7</sup> Applying these interpretations of trespass

---

<sup>1</sup> Jack Woodward, *Native Law*, (Toronto: Carswell Publishers Ltd, 1989) at 250 – 253.

<sup>2</sup> *Indian Act*, RSC 1985, c I-5, s 30.

<sup>3</sup> *Indian Act*, *supra* note 2, s 31. Also worth noting is that the ‘trespasser’ could be convicted of a criminal offence for committing the trespass. See *Custer and Morin v Hudson’s Bay Company Developments Limited and The Governor and Company of Adventurers of England Trading Into Hudson’s Bay*, 1982 CanLII 2709, 20 Sask R 89, (CA) [*Custer*].

<sup>4</sup> *Indian Act*, *supra* note 2, s 2(1).

<sup>5</sup> *R v Pinay*, 1990 CanLII 7435, 84 Sask R 287 (QB) [*Pinay*]; *Joe v Findlay*, 1981 CanLII 401, 26 BCLR 376 (CA) [*Findlay*]; *Custer*, *supra* note 3.

<sup>6</sup> *Joe v Findlay*, *supra* note 5; *Pinay*, *supra* note 5; *Custer*, *supra* note 3; *Montana Band of Indians v Canada (Minister of Indian and Northern Affairs)*, 1988 CanLII 5630, [1988] 4 CNLR 69 (FC) [*Montana*].

<sup>7</sup> Bryan A Garner, (ed), *Black’s Law Dictionary*, 8th ed (St Paul: Thomson-West, 1999) at 909.

to a situation where a secured creditor<sup>8</sup> attempts to enforce against property located on reserved lands, the secured creditor will be guilty of trespass if they have wrongfully entered the reserved lands, or have entered the reserved lands without lawful justification.

## 5.2 Lawful justification for entering reserved lands

If a secured creditor enforcing against the collateral assets of a debtor in which it has a proprietary interest is a lawful justification, then the secured creditor cannot be guilty of trespass. The issue of lawful justification was considered by the Saskatchewan Court of Appeal in the decision of *R v Pinay*.<sup>9</sup> In that case, a deputy sheriff had entered reserved lands without permission of the First Nation to serve a First Nations person with a statement of claim. The court concluded that provincial officials that are otherwise entitled to enter private property are not guilty of trespass, if they have entered in execution of their official duties.<sup>10</sup> This result is supported by a decision of the Alberta Provincial Court, which concluded that a peace officer in execution of their duties is not without lawful justification and therefore cannot be guilty of trespass.<sup>11</sup> The same result has been reached in regards to a wildlife officer acting under the authority of the *Wildlife Act*,<sup>12</sup> and a fisheries officer acting under the authority of the *Fisheries Act (Saskatchewan)*.<sup>13</sup>

The result has not been extended to bailiffs operating on a fee-for-service basis whose profession is to seize assets on behalf of creditors. *Burns v Financial Bailiff Services Ltd*, a decision of the Saskatchewan Queen's Bench, is instructive on the matter.<sup>14</sup> There, a creditor had advanced a loan to First Nations persons who pledged a vehicle as security, despite the van being located on reserved lands.<sup>15</sup> The First Nations debtors defaulted on the loan, at which point the creditor hired bailiffs to seize the vehicle from its location on reserved lands; an unsuccessful attempt was made in this regard. The Court determined that the bailiffs had entered the reserved lands without a

---

<sup>8</sup> Or a party on their behalf.

<sup>9</sup> *Pinay*, *supra* note 5.

<sup>10</sup> *Ibid* at paras 4 – 6.

<sup>11</sup> *R v Potts*, 2010 ABPC 59 (CanLII) at para 210, 492 AR 138.

<sup>12</sup> *R v Charles*, 1997 CanLII 11288, 159 Sask R 126 (QB); *The Wildlife Act*, SS 1979, c W-13.1.

<sup>13</sup> *R v Couillonneur*, 2002 SKPC 10 (CanLII), 224 Sask R 50 at para 76; *Fisheries Act, 1994*, SS 1994, c F-16.1.

<sup>14</sup> *Burns v Financial Bailiff Services Ltd*, 2000 SKQB 546, 200 Sask R 146 [*Burns*].

<sup>15</sup> The agreement between the First Nations debtors and the creditor was described as a “chattel mortgage.” That terminology having been eliminated from Saskatchewan personal property law lexicon for nearly two decades prior to the case being brought to court. As well, the court made no mention in its decision of whether the “chattel mortgage” was valid, whether the creditor held a valid security interest, or if the vehicle could validly be pledged as security.

lawful purpose, and that they had attempted an unlawful seizure. The Court awarded punitive damages to the First Nations debtors as a result of the attempted seizure.

No jurisprudence indicates whether a court would consider a secured creditor that is enforcing against property of a non-First Nations person situated on reserved lands pursuant to the authority granted by paragraph 58(2)(b) of the *PPSA*<sup>16</sup> to be acting unlawfully. If so, the secured creditor would be considered to be trespassing in contravention of sections 30 and 31 of the *Indian Act*.<sup>17</sup> However, the situation described above is distinguishable from that facing the court in *Burns*.<sup>18</sup> The bailiffs in *Burns* were not acting pursuant to valid legislative provisions that authorized them to seize the assets of the First Nations debtors; in fact, they were operating in contravention of subsection 89(1).<sup>19</sup> The creditor on whose behalf the bailiffs were acting did not have a legal authority to enforce the security interest in the property of the First Nations debtor. The bailiffs acted in the absence of a legal basis authorizing their actions.

A secured creditor seizing assets of a non-First Nations debtor is authorized to do so by paragraph 58(2)(b). A security interest can exist in property of a non-First Nations entity that is situated on reserved lands. As such, there appears to be no reason why a secured creditor in this situation would be considered to be on property without lawful jurisdiction. A secured creditor acting pursuant to paragraph 58(2)(b) is more similar to an officer acting pursuant to the *Wildlife Act* or the *Fisheries Act* than to the bailiffs in *Burns*. The secured creditor has legislative authority to seize the assets of a non-First Nations debtor; the bailiffs in *Burns* had no legal justification for their attempted seizure. Therefore, the jurisprudence points towards the conclusion that a secured creditor that would enforce against property of a non-First Nations entity situated on reserved lands is not trespassing, and therefore can engage in a legal seizure of assets.

### 5.3 Bylaws

The *Indian Act* provides that a First Nation is to have limited powers of self-governance, the authority of which lies in the First Nations Chief and Council.<sup>20</sup> Paragraph 81(1)(p) gives the dually elected First Nations Council the authority to create bylaws for “the removal and punishment of persons trespassing on [reserved lands] or frequenting [reserved lands] for

---

<sup>16</sup> *Personal Property Security Act, 1993*, SS 1993, c P-6.2, s 58(2)(b).

<sup>17</sup> *Indian Act, supra* note 2, ss 30-31.

<sup>18</sup> *Burns, supra* note 14.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Indian Act, supra* note 2, ss 74-80; Jack Woodward, *supra* note 1, at 163-187.



prohibited purposes.”<sup>21</sup> Paragraph 81(1)(q) further states that the Council may create bylaws “with respect to any matter arising out of or ancillary to the exercise of powers under this section.”<sup>22</sup> These provisions create the possibility that a First Nations Council can create bylaws that define and interpret the meaning of trespass to effect the enforcement rights of creditors.<sup>23</sup>

The result of any such bylaw could support the rights of secured creditors by ensuring that they are not trespassing when they are enforcing against property of a non-First Nations debtor situated on reserved lands. However, the result of the bylaw could have the opposite effect and be designed to interfere with the rights of secured creditors by ensuring that entering reserved lands for the purposes of enforcement is considered trespass.<sup>24</sup> No cases have been reported that determine whether a First Nation council can create bylaws for this purpose.<sup>25</sup> The only guidance from the Supreme Court of Canada is found tangentially in the decision of *Corbiere v Canada (Minister of Indian and Northern Affairs)*<sup>26</sup> where the Court stated that paragraph 81(1)(p) grants the First Nation council the authority to “affect the ability of non-residents to use the facilities and land” within the reserved lands.

Support for this ability is found in the fact that Courts have shown a deference to the ability of First Nations Councils to determine whether an individual is permitted to be on reserved lands. This is true, even where the individual is on the reserved lands to seize collateral assets of a non-First Nations debtor situated on reserved lands. The *Agricredit Acceptance Canada Ltd v Muskowekan Band* decision is instructive on this matter.<sup>27</sup> There, the Muskowekan First Nation raised the issue of whether Agricredit could seize collateral situated on the First Nation. Agricredit held a valid *PPSA* security interest in property of non-First Nations debtor that was abandoned on reserved lands. Justice Zarzeczny stated that the Court was prepared “to respect the wishes of the [First Nation band] with respect to whom it invites *or permits* to enter upon its reserved lands in

---

<sup>21</sup> *Indian Act*, *supra* note 2, s 81(1)(p).

<sup>22</sup> *Indian Act*, *supra* note 2, s 81(1)(q).

<sup>23</sup> Anita G Wandzura, “The Enforcement of Security Interests Against the Personal Property of First Nation persons on Reserve” (2007) 39:1 Ottawa L Rev 1 at 14 - 16.

<sup>24</sup> See *Revolution Infrastructure v Lytton First Nation*, 2016 BCSC 1562, where a First Nation enacted a bylaw deeming that vehicles that enter the reserved lands without first obtaining permission are trespassing. The matter before the court was whether to grant an injunction, so the issue was not decided. The injunction was extended in 2016 BCSC 258 and again in 2017 BCSC 468 without deciding the issue.

<sup>25</sup> Wandzura, *supra* note 23.

<sup>26</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 at para 75.

<sup>27</sup> *Agricredit Acceptance Canada Ltd v Muskowekan Band*, 2001 SKQB 428, 212 Sask R 102 [*Agricredit*].

the context of these circumstances.”<sup>28</sup> This indicates that Courts recognize the authority of First Nations bands to determine whether non-First Nations creditors are permitted to enter reserved lands for the purposes of seizing collateral assets of a non-First Nations debtor. As such, the possibility remains that a First Nations council may create a bylaw that limits the ability of a secured creditor to enforce against property of a non-First Nations debtor situated on reserved lands.

An important feature of the *Agricredit* decision is that Court ordered the Muskokewan First Nation Band to deliver the collateral asset that was situated on reserved lands to Agricredit.<sup>29</sup> If the collateral was not delivered, the Court granted leave for Agricredit to issue an order authorizing its appointed representatives or agents to enter the reserved lands for the purpose of obtaining possession of the collateral asset.<sup>30</sup> The Court’s reasoning rested on the fact that the collateral assets were not subject to a property interest of a First Nations person or band.<sup>31</sup> Because the representatives or agents acting on behalf of Agricredit would be acting pursuant to a court order they would have lawful justification for their actions. Therefore, a method exists for the collateral assets of a First Nation corporation situated on reserved lands that are subject to a valid security interest in favour of a non-First Nations creditor to be enforced in compliance with Part V of the *PPSA* without the secured creditor potentially being liable for trespass. However, this does not provide a solution to the problem that a secured creditor has the right under paragraph 58(2)(b) to seize collateral assets without resorting to judicial action; this remedy requires court involvement.

#### **5.4. Band Council Resolutions**

A less formal method of granting or refusing permission to enter reserved lands is a Council resolution. Authority for these resolutions is not located in the *Indian Act*; they are simply a result of a council voting on a resolution proposed at a meeting of the First Nations Council.<sup>32</sup> No

---

<sup>28</sup> *Ibid* at para 38.

<sup>29</sup> *Agricredit*, *supra* note 27 at para 39.

<sup>30</sup> *Agricredit*, *supra* note 27 at para 40.

<sup>31</sup> The Court notes that the Muskokewan First Nation had not claimed a lien pursuant to *The Garage Keepers Act*, RSS 1978, c G-2 [now *The Commercial Liens Act*, SS 2001, c C-15.1] or *The Warehouseman’s Lien Act*, RSS 1978, c W-3 and relied instead on a common law possessory lien. A brief analysis reveals that the Muskokewan may have had a valid claim to a Garage Keepers lien pursuant to section 3 of that *Act*. However, a First Nation encountering a similar situation may not have a valid claim under the *Commercial Liens Act*, *ibid*, because the owner of the collateral abandoned the property on reserved lands, that *Act* requires the owner to have requested the services of the lien claimant.

<sup>32</sup> Wandzura, *supra* note 23 at 14 - 16; Thomas Isaac, *Aboriginal Law: Cases and Commentary*, (Saskatoon: Purich Publishing, 2012).

jurisprudence has determined the legal enforceability of a band council resolution designed to ensure or restrict the rights of creditors to enforce against collateral situated on reserved lands.<sup>33</sup> However, it has been noted that “the *de facto* practice of lending institutions” is to seek the permission of a First Nation council to seize assets of a non-First Nations debtor situated on reserved lands through obtaining a Council resolution to that effect.<sup>34</sup>

### **5.5. Effect of Seizing Property without Lawful Jurisdiction**

A question arises regarding the effect of a seizure that has been completed unlawfully. If a secured creditor seizes assets of a non-First Nations debtor on reserved lands but is considered trespassing, then that seizure is unlawful. In *Newell v McIvor*,<sup>35</sup> a secured creditor unlawfully seized property of a debtor and was determined to be liable for conversion.<sup>36</sup> The damages owed where conversion is found is a return of the asset, or replacement of the value of the asset if it cannot be returned, and any other damages that may have arisen from the conversion.<sup>37</sup> This is unchanged by the *Indian Act* provisions.<sup>38</sup> This result eliminates the purpose of the creditor’s right to seize property of the debtor, since an allegation of trespass could nullify the value recovered from the seizure. This creates uncertainty for any business operating on First Nations reserved lands that are attempting to use property as collateral, reducing the chance of accessing low-cost credit, because of the uncertainty in using property as collateral.

### **5.6 Conclusion**

This chapter has outlined the practical implications that can be faced when a creditor attempts to enforce a security interest in assets that are owned by a First Nation debtor and are located on lands reserved for First Nations. The potential issues outlined in this chapter demonstrate that any solution that allows First Nation debtors to provide their assets as collateral must also provide for the rights of creditors to gain access to the assets.

---

<sup>33</sup> *Ibid.*

<sup>34</sup> Wandzura, *supra* note 23 at 15 citing Catherine Walsh, “Section 89 of the *Indian Act*: Personal Property Financing and Creditors’ Rights” at Chapter 5, at 14. [note: the author has been unable to locate the Catherine Walsh resource].

<sup>35</sup> *Newell v McIvor*, 1998 CanLII 19177, 170 Sask R 68 (QB), aff’d 180 Sask R 318, 92 ACWS (3d) 448 (CA).

<sup>36</sup> *Ibid* at para 55.

<sup>37</sup> *Petreny v Porteous*, 1933 CanLII 224, [1933] 3 WWR 602 (SKCA).

<sup>38</sup> *Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80 (CanLII), [2014] 2 CNLR 1.

## **Chapter 6 – Possible Approaches**

### **6.1 Recommendations for Initiatives to Improve Access to Credit for First Nation Debtors**

This paper has outlined legal obstacles that are limiting the opportunity of First Nation people and bands in Canada from using personal property as collateral in a secured financing transaction. The main obstacle is subsection 89(1) of the *Indian Act*,<sup>1</sup> which prohibits personal property of a First Nation person or band that is situated on reserved lands from being used as security except where a title retention sales contract is used as the financing agreement. The prohibition in subsection 89(1) affects the ability of First Nation people and bands to access secured financing in a personal and in a business capacity. However, any initiative to improve access to credit for First Nation debtors must also address means of decreasing transaction costs and the practical issues of enforcing debt secured by assets located on reserved lands.

The effect of the prohibition against collateralization of personal property of a First Nation person or band is that it inhibits economic development opportunities within First Nation communities. The link between access to credit and successful economic development has been established and is accepted by financial institutions and economic thinkers across the globe. Subsection 89(1) of the *Indian Act* ensures that First Nation persons and bands do not have access to credit on par with Canadians whose property is located on non-reserved lands. Considering that reserved lands are among the most impoverished communities in Canada, it is imperative that legislative solutions to the legal issues encountered by First Nation people and bands are created that will alleviate the economic difficulties facing First Nation communities.

This section will outline a few possible approaches that can be taken, including options for law reform, to address the use of personal property as security on Indigenous lands. It will first describe potential law reform initiatives that apply to First Nations under the *Indian Act* before moving on to consider potential initiatives that would be broadly applicable to Indigenous communities in Canada.

#### **6.1.1 Rely on the Common Law**

As I have outlined in this thesis, a number of Court decisions have limited the application of subsection 89(1) by ensuring that it is read to be as minimally invasive as possible to economic

---

<sup>1</sup> *Indian Act*, RSC 1985, c I-5, s 89(1) [*Indian Act*].

interests of First Nation persons and Bands, and by reading in a potential commercial exception to the application of subsection 89(1). One approach to take is to rely on these decisions as being good law. If that is the case, then the *McDiarmid* principle would ensure that it is strictly property that was given to a First Nation person or band clearly due to Treaty obligations that is deemed to be located on reserved lands, with the effect being that any property pursuant to mechanisms such as comprehensive funding arrangements would be able to be used as collateral. The *McDiarmid* principle would also ensure that when Courts interpret the application of subsection 89(1), they do so in the strictest sense possible, while ensuring that the effect of their interpretation limits the economic opportunities of the First Nation person or band as little as possible.

The principles from the cases that considered a commercial exception would allow for First Nation persons or bands to waive their subsection 89(1) rights to any property, thereby allowing all personal property to be subject to a security interest, notwithstanding that it is located on reserve lands. The principles would further allow for First Nations to make specific exceptions to property that is used solely for commercial purposes and would also open up a market for First Nation persons and bands to purchase the accounts receivable of other First Nation persons and bands, due to the fact that they could enforce on the accounts if payment fails to continue.

Treating the decisions outlined above as being good law provides solutions to both the issue of access to credit for First Nation debtors and thereby provides a means by which the transaction costs will be kept at a minimum. Improved access to credit would naturally flow from First Nation debtors having the option to waive the application of subsection 89(1) to their assets, as providing the waiver would provide the level of certainty sought by creditors by allowing the creditor to take a security interest in those assets. Improved access to credit would also flow from subsection 89(1) being interpreted in a strict sense to limit the negative impact on economic development as possible, because where different interpretations exist, the law would fall on the side of the interpretation that allows First Nation debtors to engage in economic development by limiting subsection 89(1). Each of these would serve to reduce the transaction costs because First Nation debtors would not be required to create complex organizational structures to hold assets on their behalf in order for the assets to be available as collateral.

The issue of trespass and other *Indian Act* bylaw infractions is not addressed by relying on the existing body of common law as good law. As I outlined in this thesis, First Nation band

councils are authorized to limit access to lands reserved for First Nations by the *Indian Act*.<sup>2</sup> The common law – correctly – protects this right. However, this right can be used by First Nation band councils to limit access to reserved lands, thereby ensuring that secured creditors cannot access the collateral in which they have rights.

Yet, due to the potential for these cases to not be uniformly applied and interpreted in the same way in every court decision in every jurisdiction, legislative change would be recommended to crystallize the principles outlined in the cases above. Legislative reform would also help to achieve a level of certainty and predictability in lending transactions with First Nation debtors, which in turn would help to alleviate the risk that is currently inherent in these transactions.

### **6.1.2 Subsection 89(1) declared inapplicable**

A potential solution is for First Nation persons and bands that do not want to be bound by the subsection 89(1) prohibition to utilize the powers subsection 4(2)<sup>3</sup> of the *Indian Act* and have the Governor in Council declare that subsection 89(1) does not apply themselves, or to their lands.

Subsection 4(2) of the *Indian Act* states that the Governor in Council may by proclamation declare that the *Indian Act* or any portion thereof shall not apply to any First Nation persons or any First Nation group or band or that it shall not apply to any surrendered lands or reserved lands or any part thereof.<sup>4</sup> This subsection could be used by the Canadian government to declare that subsection 89(1) of the *Indian Act* would not apply to any First Nation person or band who declares that the subsection does not apply to them. Alternatively, it could be done on an application basis – if a First Nation person or band does not want subsection 89(1) to apply to them, they submit a form to the Governor in Council to make a s.4(2) declaration that subsection 89(1) does not apply specifically to that First Nation person or band. This option would allow First Nation person to declare that the subsection does not apply to their specific property; and a First Nation band could use a declaration made under the subsection to declare that the subsection 89(1) prohibition does not apply to the entirety of the band, or to any property that is located on the lands reserved for the band. This option is flexible enough that it would allow a First Nation band to declare that the subsection 89(1) prohibition does not apply to only a portion of the reserved lands. This way, the

---

<sup>2</sup> Note that it could be argued that there is an inherent right for Indigenous groups to protect their land and to be the arbiters of who can and cannot enter their land. However, for this purpose, I am referring to the power given to First Nation band councils by the *Indian Act*, *supra* note 1.

<sup>3</sup> *Indian Act*, *supra* note 1, s 4(2).

<sup>4</sup> *Indian Act*, *supra* note 1, s 4(2).

band could ensure that areas of the reserved land that have been developed for business purposes could have property used as collateral, while still allowing consumers to utilize the subsection 89(1) prohibition for their non-business purposes. To be fully effective, such a declaration would be required to include that trespass and bylaw issues would be inapplicable to the extent that is required for a secured creditor to realize on the collateral.

This is a potentially far-reaching power. First, it would increase access to credit for First Nation debtors as it would allow First Nation persons or bands that are seeking to pursue commercial ventures and who are limited by subsection 89(1) to ensure that all assets that are situated on lands reserved for their First Nation could be used as collateral. Second, it would help to reduce transaction costs because First Nation debtors would not resort to incorporation or otherwise creating a legal entity to hold their assets. Third, it would ensure that no issue of trespass or other bylaws is encountered, allowing the secured creditor to be certain that the assets are available to be seized upon, and that they are not left with a bare right to the assets.

Currently there is no explicit process provided by the government that would allow a First Nation to ask the Governor in Council to make such a declaration. The process appears to be *ad hoc* requests that are made to the Crown.<sup>5</sup> As such, the Crown could take steps to create a streamlined process whereby First Nation persons or bands that are seeking to engage in commercial ventures, and in whose interest it is to not be limited by subsection 89(1), to apply to the Governor in Council for a declaration that subsection 89(1) does not apply to them, or to the lands on which their commercial venture operates. As noted above, the Government should couple any declaration that suspends the application of subsection 89(1) with a declaration that the trespass provisions and any bylaw that would serve to limit secured creditors access to lands reserved for First Nations are similarly suspended. This coupling would allow for effective enforcement of the rights of secured creditors.

### **6.1.3 Repeal subsection 89(1) of the *Indian Act***

A different solution is to repeal section 89(1) of the *Indian Act*.<sup>6</sup> Repealing subsection 89(1) of the *Indian Act* would ensure that any First Nation person or band can use their assets as collateral in a loan transaction. This would provide the solution for First Nation people and bands that are currently unable to access credit. Without subsection 89(1) prohibiting them from using property

---

<sup>5</sup> See, e.g. *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 (CanLII), [2009] 1 SCR 222.

<sup>6</sup> *Indian Act*, *supra* note 1, s 89(1).

situated on reserved lands, First Nation persons and bands would stand a better chance of accessing credit due to the ability to offer assets as collateral. Moreover, it would reduce transaction costs by allowing First Nation debtors to use property as collateral without resorting to the creation of distinct legal entities.

However, while repealing subsection 89(1) would have a significant effect on the ability of First Nation debtors to use their assets located on reserved lands as collateral, it would not provide a solution to the problems encountered in enforcement. It is not advisable to broadly repeal the provisions of the *Indian Act* that allow First Nation band councils from having the authority to set bylaws and determine what constitutes trespass. As such, simply repealing subsection 89(1) without finding a solution to the practical enforcement issues would not provide a comprehensive solution to the issues addressed in this thesis, as it leaves secured creditors with a right that is potentially unenforceable. Part of the solution for this would be that the decision to amend trespass provisions and other bylaws to allow secured creditors to access collateral on reserved land would be left to the individual First Nation band councils. In that sense, it passes the option to the First Nation band councils to determine whether the right to use property on reserve as collateral is something they want to engage with, or whether they would leave it on the table as a bare, unenforceable right.

Another disadvantage to repealing subsection 89(1) is that the section also prohibits collateralization of real property.<sup>7</sup> Eliminating the subsection could allow interests in real property that are located on reserved lands to become open to enforcement measures.<sup>8</sup> While there is an argument to be made that First Nations should be free to use real property as collateral as well, inherent within any discussion of lands reserved for First Nations are complex constitutional issues relating to Treaty obligations of the Crown. Due to these issues, simply repealing section 89 and leaving real property on reserved land open to be enforced against is too broad of a solution to a problem that could be solved by taking into account the finer details.

However, repealing the subsection is the simplest method of ensuring that the provincial legislative regime regulating the use of personal property as collateral would apply to personal

---

<sup>7</sup> *Ibid.*

<sup>8</sup> An underlying piece to this is that title to lands reserved for First Nations is held by the Crown; so the issue of mortgaging and seizing land is complicated by the fact that it is land held in the name of the Crown. However, interests in real property (e.g. leasehold interests) are capable of being mortgaged and enforced against.



property of First Nation persons and bands located on reserved lands, notwithstanding the practical issue of enforceability of the rights provided by the provincial legislative regime.

#### **6.1.4 Amend the *Indian Act* to allow personal property on reserved lands that is for commercial purposes to be used as collateral in a secured financing transaction**

Another option is for Parliament to amend the *Indian Act*, with particular focus on section 89, to allow First Nation people and bands to use personal property situated on reserved land as collateral. The form of the amendment could vary widely, depending on how wide of a scope Parliament wishes to place on it. The author will suggest three possible ways that the *Indian Act* could be amended to allow personal property to be used as collateral.

The first option would follow the path set out in a small number of court decisions: to create a commercial exception to subsection 89(1). As outlined above, there are a few decisions where courts have determined that where personal property of a First Nation person or band that would otherwise be exempt from seizure due to the application of subsection 89(1) is used in the ‘commercial mainstream’, that personal property is immune to the exemption. The logic behind these decisions is that the exemption in section 89 is not meant to protect business arrangements.<sup>9</sup> That the section applies equally to both business-related and non-business-related personal property leads to the depressed economic position of businesses located on reserved lands that are operated by First Nation people and bands. As such, amending subsection 89(1) to insert a commercial exception to the prohibition against securitization and enforcement would help businesses located on reserved land to access credit. This would increase access to credit and reduce transaction costs by allowing First Nation debtors to use commercial property as collateral, and by allowing First Nation debtors to operate businesses without creating a separate legal entity, respectively.

A second option would be to codify another principle laid down in the jurisprudence: to allow First Nation people and bands to waive the application of subsection 89(1) to their property. As outlined above, it is not explicit that the legislation cannot be waived, and the law on waivers could be interpreted to allow First Nation people and bands to validly waive the section. However, uncertainty remains on whether such a waiver would be valid. A legislative solution that provides explicit permission for First Nation people and bands to waive the application of the section to their property would validate the idea that has been outlined in jurisprudence. The effect of

---

<sup>9</sup> See *infra* 3.1 History of Subsection 89(1).

allowing a waiver would bring the benefits of a commercial exception, because First Nation people and bands would have the ability to waive the application of subsection 89(1) in relation to business property. In addition, it would allow First Nation people and bands that are not in business to access credit to enhance their participation in the economy, at a local, provincial, and national level. Moreover, First Nation people and bands who do not want the protection to be waived would not be forced to waive it.<sup>10</sup>

Amendments to the provisions of the *Indian Act* that allow First Nation band councils to set laws regarding trespass and other bylaws relating to land would also require amendment for the above-mentioned amendments to be effective. Any amendment that limits the authority of First Nation band councils should be as minimal as possible. These amendments would be aimed specifically at reducing the ability of First Nation band councils to limit access to reserved lands for secured creditors who are attempting to enforce against collateral that is located on reserved lands.

The purpose of amending the prohibition in *Indian Act* as opposed to simply repealing it would be to attempt to preserve some of the history of the legal arrangements that are in place due to the fact that they were arranged under the current system. Simply repealing sections of the *Indian Act* would provide too broad of a solution to a problem that could be handled with more care to have a more precise effect: to allow businesses run by First Nation people and bands access to credit, to reduce transaction costs for First Nation commercial interests, and to provide secured creditors with assurance that they would be able to enforce against the collateral.

### **6.1.5 Create an opt-in legislative framework**

The solution favoured by the Author is to create an opt-in legislative framework that provides First Nations the ability to implement personal property security regimes if desired. The federal government has utilized opt-in legislative regimes as a tool for providing alternative legal schemes for First Nations.<sup>11</sup> The details of an opt-in legislative regime would be substantially similar to a legislative framework that is outlined in Section 6.1.4 above. The key difference in this suggestion is that this legislative framework is created to allow First Nations to opt-in to the

---

<sup>10</sup> It is possible that the practical reality would be that every security agreement and unsecured loan agreement with a First Nation person or band would include a waiver clause as a “boiler plate” clause. If that is the case, then the practical reality would be that subsection 89(1) would cease to have relevance.

<sup>11</sup> See, e.g. *First Nations Land Management Act*, SC 1999, c 24; *First Nations Fiscal Management Act*, SC 2005, c 9.

regime. The ability to opt-in could be limited at the level of the First Nation, or it could extend to the individual level and allow individual First Nation persons to opt-in. In the latter case, the legislation would have to provide a means by which secured creditors would be protected from the effects of potentially violating trespass and other bylaws of the First Nation band council, if those laws exist in relation to reserved lands from which they seize collateral.

Creating a comprehensive opt-in regime creates the possibility that all of the issues addressed in this thesis are taken into consideration. A comprehensive opt-in regime could ensure that First Nation debtors have increased access to credit by allowing assets located on reserved land to be used as collateral, as decided by the First Nation debtor. In addition, it could ensure that transaction costs are kept to a minimum through allowing First Nation businesses to choose options other than incorporation. Moreover, a comprehensive regime would be able to create the mechanisms that address the practical issues of creditors enforcing against collateral.

A similar scheme has been proposed in the past that would allow First Nations the option of holding lands in fee-simple in the form of the *First Nations Property Ownership Act*.<sup>12</sup> However, the proposal encountered negative feedback, particularly because it failed to address First Nations' aspirations of sovereignty over lands and was perceived to be forcing the idea of fee-simple title on First Nations. Part of the concern was that the proposed *FNPOA* was simply an attempt to allow

---

<sup>12</sup> For information on the proposed *First Nations Property Ownership Act (FNPOA)*, see: House of Commons, Standing Committee on Finance, *Evidence*, 40th Parl, 2nd Sess, No 39 (15 September 2009) at 3-4 (Manny Jules), online: < <http://www.parl.gc.ca/content/hoc/Committee/402/FINA/Evidence/EV4099400/FINAEV39-E.PDF>>, archived: < <https://perma.cc/P765-SVW2>>. It was also committed to in 2012. See House of Commons, Minister of Finance, *Jobs, Growth, and Long-Term Prosperity: Economic Action Plan, 2012* (29 March 2012) at 171, online: < <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>>, archived: < <https://perma.cc/FU25-D94E>>; A draft of the proposed Act was not presented to a parliamentary committee or to Parliament, so the exact details of the legislation remain speculative. The essence of the Act, however, would have been to allow First Nations to have fee simple title over reserved lands (Standing Committee on Finance, *ibid*). See also Tom Flanagan, Christopher Alcantara, and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights*, (Montreal and Kingston: McGill-Queen's University Press, 2010), John W Gailus, "Legislative Developments Related to Reserve Land" (Paper delivered at the Aboriginal Law: Current Issues Conference of the Pacific Business & Law Institute, Vancouver, 7 May 2013) at 16-18, online: < [http://www.dgwlaw.ca/wp-content/uploads/2014/12/Reserve\\_Land\\_JWG2013.pdf](http://www.dgwlaw.ca/wp-content/uploads/2014/12/Reserve_Land_JWG2013.pdf)>, archived: < <https://perma.cc/8YTF-273G>>; See Kanatase Horn, *Reconfiguring Assimilation: Understanding the First Nations Property Ownership Act in Historical Context*(MA Thesis: Carleton University, 2013) [unpublished] (comparing the FNPOA to the 1969 White Paper); Lindsay Monk, *Decolonizing Home: A Re-conceptualization of First Nations' Housing in Canada* (MA Thesis: University of Victoria, 2013) [unpublished] (for the arguments against the FNPOA); First Nations Tax Commission, "Background on the First Nations Property Ownership Initiative" (1 July 2012), online: < <http://fntc.ca/backgroundon-the-first-nations-property-ownership-initiative/>>, archived: < <https://perma.cc/9LDM-TENZ>>; Indigenous Land Title Initiative, "Indigenous Land Title Initiative (ILTI) Proposal: In Summary" (2012) (for the arguments in favour of the proposal), online: < <http://ilti.ca/en/proposal/>>, archived: < <https://perma.cc/Y5FG-DA5B>>.

non-First Nation individuals to purchase reserved lands away from First Nations people and bands.<sup>13</sup>

In relation to personal property, however, Parliament could model a new opt-in legislative regime based on the *Nisga'a Final Agreement*, which recognizes the authority of Indigenous communities to exercise governmental authority over the lands. Thus, the First Nation could retain a degree of sovereignty over property situated on reserved land. Additionally, the opt-in regime could provide a framework within which First Nations would have the ability to implement their own personal property security regime, one that dovetails with the provincial regime, but that allows key parts of the administration – for instances, the categories of property that is exempt from execution, such as property given under Treaty or that has cultural value to the First Nation – to be decided by the First Nation community. Making the legislation available on an opt-in basis would ensure that only First Nations that are interested in allowing the personal property security regime to apply on lands reserved for them would have the legislation apply to them.<sup>14</sup> If a First Nation group is philosophically opposed to allowing personal property to be used as collateral and become part of the personal property security regime, then the legislation would not be foisted on that group.

## 6.2 Conclusion

As outlined in this thesis, ensuring that First Nation people and bands have access to credit by engaging in legal reforms that address the inadequacies of the *Indian Act*<sup>15</sup> would provide beneficial outcomes for the economy. First Nation people and bands would have greater power to spend within their local economy and the economy at large. Moreover, First Nation people and bands would have a greater ability to pursue economic development opportunities by opening businesses and entering partnerships with existing enterprises both within their local community and in the larger economy.

---

<sup>13</sup> See, e.g. Horn, *supra* note 12; Monk, *supra* note 12.

<sup>14</sup> It is worth noting that the notion of Indigenous-created Commercial Codes that are created by individual communities, as opposed to a federally-created regime to which First Nation communities can opt-in, has been considered and discussed in Douglas Sanderson, “Commercial Law and Indigenous Sovereignty: It’s a Nice Idea, but how to you build it in Canada?” (2012) 53 Cnd Bus L J 92. An important aspect of the Federal regime that First Nations could opt-in to is that it would allow a ready-made solution for small First Nations that may not have the capacity to develop a commercial code.

<sup>15</sup> *Indian Act*, *supra* note 1, s 89(1).

Law reform initiatives that further the goals of reconciliation while allowing Indigenous groups to collateralize personal property located on lands to which they have rights ought to be a main priority for Parliament. Taking steps to remove the legal barriers that keep Indigenous groups from accessing secured credit would help spur economic development for Indigenous groups and would further the goals of reconciliation. In addition, any legal reform package must necessarily include reforms that are directed at reducing transaction costs and ensuring that creditors are able to practically engage in enforcement of the collateral.

## **Bibliography**

### **Legislation**

---

*An Act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them from trespass and injury*, SC 1850, 13-14 Vict c 74

*An Act Respecting Civilization and Enfranchisement of certain Indians*, CSC 1859, c 9

*Bank Act*, SC 1991, c 46

*Business Corporations Act*, RSS 1978, c B-10

*Business Corporations Act*, RSS 1978, c B-10

*Constitution Act, 1867*, Vict I & II, c 3

*Enforcement of Money Judgments Act*, SS 2010 c E-9.22

*First Nations Fiscal Management Act*, SC 2005, c 9

*First Nations Land Management Act*, SC 1999, c 24

*First Nations Property Ownership Act (FNPOA)* (proposed act)

*Fisheries Act, 1994*, SS 1994, c F-16.1

*Indian Act, 1876*, SC 1876, 39 Vict c 18

*Indian Act, 1880*, SC 1880, c 28, s 77

*Indian Act, 1886*, SC 1886, c 43, s 78

*Indian Act, 1906*, RSC 1906, c 81

*Indian Act, 1927*, RSC 1927, s 105

*Indian Act, 1951*, SC 1951, c 29

*Indian Act*, RSC 1985, c I-5

*Maintenance Enforcement Act*, SA 1985, c M-O.5

*Personal Property Security Act, 1993*, SS 1993, c P-6.2

*Personal Property Security Act*, SNB 1993, c P-7.1

*The Choses in Action Act*, RSS 1978, c C-11

*The Commercial Liens Act*, SS 2001, c C-15.1

*The Environmental Management and Protection Act*, 2010, SS 2010, c E-10.22

*The Garage Keepers Act*, RSS 1978, c G-2

*The Land Contracts Actions Act*, RSS 1978, c L-3

*The Limitation of Civil Rights Act*, RSS 1978, c L-16

*The Partnership Act*, RSS 1978, c 8

*The Warehouseman's Lien Act*, RSS 1978, c W-3

*The Water Security Agency Act*, SS 2005, c W-8.1

*The Wildlife Act*, SS 1979, c W-13.1

*Trust and Loans Company Act*, SC 1991, c 45

## **Jurisprudence**

---

*Adventurers of England Trading Into Hudson's Bay*, 1982 CanLII 2709, 20 Sask R 89 (CA)

*Agricredit Acceptance Canada Ltd v Muskowekan Band*, 2001 SKQB 428, 212 Sask R 102

*Alberta (Workers' Compensation Board) v Enoch Band*, 1993 CanLII 3421, 11 Alta LR (3d) 305 (CA)

*Bastien Estate v Canada*, 2011 SCC 38, [2011] 2 SCR 710

*Bellegard v Qu'Appelle Indian Residential School Council Inc*, 1991 CanLII 7926, 92 Sask R 285 (CA)

*Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80 (CanLII), [2014] 2 CNLR 1

*Brandt v R* (1998), 152 FTR 28, 98 GTC 6296

*Burns v Financial Bailiff Services Ltd*, 2000 SKQB 546, 200 Sask R 146

*Canadian Broadcasting Corporation v SODRAC*, 2015 SCC 57 (CanLII), [2015] 3 SCR 615

*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687

*Custer and Morin v Hudson's Bay Company Developments Limited and The Governor and Company of Adventurers of England Trading Into Hudson's Bay*, 1982 CanLII 2709, 20 Sask R 89 (CA)

*Derrickson v Derrickson*, [1986] 1 SCR 285, 1986 CanLII 56 (SCC)

*Dubé v Canada*, 2011 SCC 39, [2011] 2 SCR 764

*Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 (CanLII), [2009] 1 SCR 222

*Gifford v Lux Kw'Alaams Indian Band*, 2000 BCSC 273 (CanLII), [2000] 2 CNLR 30

*Joe v Findlay*, 1981 CanLII 401, 26 BCLR 376 (CA)

*Kingsclear Indian Band v JE Brooks & Associated Ltd*, 1991 CanLII 4002, 118 NBR 290 (CA)

*Kostyshyn (Johnson) v West Region Tribal Council Inc*, [1994] 1 CNLR 94, 35 ACWS (3d) 502

*L Martin (1984) Inc v Shubenacadie Band*, 1995 CanLII 4251, 114 NSR (2d) 241 (CA)

*Leighton v British Columbia*, 1989 CanLII 251, 35 BCLR (2d) 216 (CA)

*McDiarmid Lumber Inc v God's Lake First Nation*, 2006 SCC 58 [2006] 2 SCR 846

*Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 1990 CanLII 117 (SCC)

*Montana Band of Indians v Canada (Minister of Indian and Northern Affairs)*, 1988 CanLII 5630, [1988] 4 CNLR 69 (FC)

*Montana Band v R* (1997), [1998] 2 FC 3, 1997 CanLII 6380

*Multiple Access v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1

*National Trust Co v Mead*, 1990 CanLII 73 (SCC), [1990] 2 SCR 410.

*Newell v McIvor*, 1998 CanLII 19177, 170 Sask R 68 (QB), aff'd 180 Sask R 318, 92 ACWS (3d) 448 (CA)

*Ontario (Human Rights Commission) v Etobicoke (Borough)*, [1982] 1 SCR 202, 1982 CanLII 15 (SCC)

*Petreny v Porteous*, 1933 CanLII 224, [1933] 3 WWR 602 (SKCA)



*Potash v Royal Trust Co*, 1984 CanLII 3023 (MBCA)

*Potts v Potts* (1991), 78 Alta LR (2d) 240, [1992] 1 CNLR 182

*PSAC v Francis*, [1982] 2 SCR 72

*R v Bernard*, [1992] 3 CNLR 33, 118 NBR (2d) 361 (CA)

*R v Charles*, 1997 CanLII 11288, 159 Sask R 126 (QB)

*R v Coullonneur*, 2002 SKPC 10 (CanLII), 224 Sask R 50

*R v Peter Ballantyne Band*, 1985 CanLII 2757 (SKQB), 45 Sask R 33

*R v Pinay*, 1990 CanLII 7435, 84 Sask R 287 (QB)

*R v Potts*, 2010 ABPC 59 (CanLII) at para 210, 492 AR 138

*Ramsay Painting Ltd v St Marys Indian Band*, 2006 BCSC 976, 55 BCLR (4th) 361

*Re Davey*, 1999 CanLII 14798, 44 OR (3d) 327

*Re Estate of Charles Millar, Deceased* (1937), [1938] SCR 1, 1937 CanLII 10 (SCC)

*Revolution Infrastructure v Lytton First Nation*, 2016 BCSC 1562

*Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490

*Tobique Indian Band v R*, 2010 CF 67, 184 ACWS (3d) 580

*Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 32, 240 Man R (2d) 122 affirming 2009 MBQB 32, 237 Man R (2d) 94

*Tsilhqot'in Economic Development Corporation v Johnny*, 1995 CarswellBC 2748, [1995] BCWLD 2861 (PC)

*Wahpeton Dakota First Nation v LaJeunesse*, 2001 SKQB 146, 205 Sask R 91

*Williams v Canada*, 1992 CanLII 98 (SCC), [1992] 1 SCR 877

## **Commentary**

---

Alastair Hudson, *The Law of Finance*, 2 ed, (London: Sweet & Maxwell, 2013)

Andre Le Dressay, Normand Lavallee, and Jason Reeves, “First Nations Trade, Specialization, and Market Institutions: A Historical Survey of First Nation Market Culture” in *Volume 7: A History of Treaties and Policies* (Toronto: Thomson Educational Publishing, 2013)

Anita G Wandzura, “The Enforcement of Security Interests Against the Personal Property of First Nation persons on Reserve” (2007) 39:1 Ottawa L Rev 1

Anna Lund, “Judgment Enforcement Law in Indigenous Communities - Reflections on the Indian Act and Crown Immunity from Execution” (2018), 83 SCLR (2d)

Anthony Duggan and Jacob Ziegel, *Secured Transactions in Personal Property*, 6 ed, (Toronto: LexisNexis, 2013)

Anthony VanDuzer, *The Law of Partnerships and Corporations*, (Ottawa: Irwin Law, 2009)

Bryan A Garner, (ed), *Black’s Law Dictionary*, 8th ed (St Paul: Thomson-West, 1999)

Canada, Department of Indigenous and Northern Affairs, *Final Report: Summative Evaluation of INAC’s Economic Development Programs*, 2009

Catherine Walsh, “Section 89 of the *Indian Act*: Personal Property Financing and Creditors’ Rights” at Chapter 5, page 14. [note: the author has been unable to locate the Catherine Walsh resource]. Cited in Wandzura,

Darwin Hanna, *Legal Issues on Indigenous Economic Development*, (Toronto: LexisNexis, 2017)

Department of Indigenous and Northern Affairs Canada, *Federal Framework for Aboriginal Economic Development*, 2009, online <[www.aandc-daac.gc.ca](http://www.aandc-daac.gc.ca)>

Department of Indigenous and Northern Affairs Canada, *Strategic Partnerships Initiative: Overview*, 2010, online: <<https://www.aadnc-aandc.gc.ca/eng/1330016561558/1330016687171>>

Dwight Dorey, “Development Unreserved: Aboriginal Economic Development for the 21st Century” in Dwight Dorey & Joseph Magnet, eds, *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc, 2005)

Edward I Sykes & Sally Walker, *The Law of Securities*, 5th ed, (Brisbane: The Law Book Company Ltd, 1992)

Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 4, Chapter 1, (Dordrecht, The Netherlands: Springer, 2005)

Fernando M Aragon, “Do better property rights improve local income? Evidence from First Nations’ Treaties” (2015) 116 *Journal of Development Economics* 43

First Nations Bank of Canada, *First Nations Bank of Canada: Who We Are*, online: <<https://www.fnbc.ca/AboutUs/WhoWeAre>>

First Nations Tax Commission, “Background on the First Nations Property Ownership Initiative” (1 July 2012), online: < <http://fntc.ca/backgroundon-the-first-nations-property-ownership-initiative/>>, archived: < <https://perma.cc/9LDM-TENZ>>

Hernando de Soto, *The Mystery of Capital: Why Capitalism Succeeds in the West and Fails Everywhere Else* (New York, NY: Cambridge, 2000)

House of Commons Debates, 3rd Session, 3rd Parliament (March 21, 1876)

House of Commons, Minister of Finance, *Jobs, Growth, and Long-Term Prosperity: Economic Action Plan, 2012* (29 March 2012) online: < <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>>, archived: < <https://perma.cc/FU25-D94E>>

House of Commons, Standing Committee on Finance, *Evidence*, 40th Parl, 2nd Sess, No 39 (15 September 2009) online: < <http://www.parl.gc.ca/content/hoc/Committee/402/FINA/Evidence/EV4099400/FINAEV39-E.PDF>>, archived: < <https://perma.cc/P765-SVW2>>

Indigenous and Northern Affairs Canada, “Indian Status” online: < <https://www.aadnc-aandc.gc.ca/eng/1100100032374/1100100032378>>

Indigenous Land Title Initiative, “Indigenous Land Title Initiative (ILTI) Proposal: In Summary” (2012) (for the arguments in favour of the proposal), online: < <http://ilti.ca/en/proposal/>>, archived: < <https://perma.cc/Y5FG-DA5B>>

J Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed (Toronto: Irwin Law Ltd, 2009)

James I Reynolds, “Security for Financing Projects on Indian Reserve Land” (1993) 8 BFLR 331

James I Reynolds, “Taking and Enforcing Security under the Indian Act and Self-Government Legislation” (2002) 18 BFLR 37

John A Yogis QC, *Canadian Law Dictionary*, 5th ed, (New York: Barron’s Educational Series Inc)

John Borrows & Sarah Morales, “Challenge, Change, and Development in Aboriginal Economies” in Dwight Dorey & Joseph Magnet, eds, *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc, 2005)

John W Gailus, “Legislative Developments Related to Reserve Land” (Paper delivered at the Aboriginal Law: Current Issues Conference of the Pacific Business & Law Institute, Vancouver, 7 May 2013) at 16-18, online: < <http://www.dgwlaw.ca/wp->

content/uploads/2014/12/Reserve\_Land\_JWG2013.pdf>, archived: < <https://perma.cc/8YTF-273G>>

Kanatase Horn, *Reconfiguring Assimilation: Understanding the First Nations Property Ownership Act in Historical Context* (MA Thesis: Carleton University, 2013) [unpublished]

Kwaw, *The Law of Corporate Finance in Canada* (Toronto: LexisNexis, 2005)

Lindsay Monk, *Decolonizing Home: A Re-conceptualization of First Nations' Housing in Canada* (MA Thesis: University of Victoria, 2013)

Marena Brinkhurst & Anke Kessler, "Land Management on First Nations reserves: lawful possession and its determinants." (2013) 8(2) *Journal of Aboriginal Economic Development* 78

MH Oglivie, *Bank and Customer Law in Canada* (Toronto: Irwin Law, 2013)

Michael G Bridge, Roderick A Macdonald, Ralph L Simmonds, & Catherine Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions" 44 *McGill LJ* 567 (1998-1999)

Michael Trebilcock, "Law and Economics" (1993) 16 *Dalhousie LJ* 360

Mindy McHardy & Erin O'Sullivan, "First Nations Community Well-Being in Canada: The Community Well-Being Index (CWB, 2001)" (Ottawa: Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada, 2004)

National Indigenous Economic Development Board, "Indigenous Economic Reconciliation: Recommendations for Reconciliation and Inclusive Economic Growth for Indigenous Peoples and Canada" online at: <http://www.naedb-cndea.com/reports/NIEDB%20-%20Economic%20Reconciliation%20-%20Final%20Report.pdf>

Native Law Centre, *The Indian Act and Amendments 1970-1993*, (Saskatoon: Native Law Centre, 1993)

Oliver Williamson, *The Economic Institutions of Capitalism: Firms, Markets, and Relational Contracting*, (New York: Free Press, 1987)

Pamela Palmater, "Stretched Beyond Human Limits: Death by Poverty in First Nations" (2011) 65-66 *Can Rev Social Policy* 112

Paul Robert Magocsi, *Aboriginal Peoples of Canada: A Short Introduction* (Toronto: University of Toronto Press, 2002)

Peace Hills Trust, *About Us*, online: <<https://www.peacehills.com/Personal/AboutUs/>>

Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)

R L Campbell, *The Legal Framework of Business Enterprises*, 4th ed, (Concord: Captus Press Inc, 2007)

*Report of the Royal Commission on Aboriginal Peoples: Renewal – A Twenty Year Commitment*, *ibid*, Vol 5

*Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol 2, (Ottawa: Supply and Services Canada, 1996)

Richard Garnett, *Substance and Procedure in Private International Law*, (Oxford: Oxford University Press, 2012)

Richard Posner, *The Economic Analysis of Law*, 8th ed, (Aspen Publishers: New York, NY, 2011)

Roderick A MacDonald & Shauna Troniak, “Do Indigenous People Need a “Tailor Made” Secured Transactions Law?” in Roderick A MacDonald & Véronique Fortin, eds, *Autonomie Économique Autochtone* (Montréal: Les Editions Thémis, 2015)

Ron CC Cuming, *An Overview of Saskatchewan Real Property Security Law* (Regina: Queen’s Printer, 2016)

Ronald CC Cuming, Catherine Walsh, & Roderick Wood, *Personal Property Security Law* (2 ed), (Toronto: Irwin Law Inc)

Ronald Coase, “The Problem of Social Cost” 3 *Journal of Law & Economics* 1 (1960)

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) Volume 5

Saskatchewan Indian Equity Foundation, online <[www.sief.sk.ca](http://www.sief.sk.ca)>

See House of Commons Debates, 3rd Session, 3rd Parliament (March 21, 1876)

Sharon H Venne, *Indian Acts and Amendments 1868-1975*, (Saskatoon: Native Law Centre, University of Saskatchewan, 1981)

Sharon Venne, “Treaties Made in Good Faith” in Paul DePasquale, ed, *Natives & Settlers, Now & Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, 2007)

Thomas Isaac, “*First Nations Land Management Act* and Third Party Interests” (2005) 42:4 *Alta L Rev* 1047

Thomas Isaac, *Aboriginal Law: Cases and Commentary*, (Saskatoon: Purich Publishing, 2012)

Tom Flanagan, Christopher Alcantara, and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights*, (Montreal and Kingston: McGill-Queen's University Press, 2010)

*UNDP Microfinance Policy*, online:

<[http://uncdf.org/sites/default/files/download/undp\\_microfinance\\_policy\\_o.pdf](http://uncdf.org/sites/default/files/download/undp_microfinance_policy_o.pdf)>

United Nations Development Programme, *The Role of Economic Policies in Poverty Reduction* (September 2003) online: [www.undp.org/content/undp/en/home/librarypage/poverty-reduction/the-role-of-economic-policies-in-poverty-reduction.html](http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/the-role-of-economic-policies-in-poverty-reduction.html)

Jack Woodward, *Native Law*, (Toronto: Carswell Publishers Ltd, 1989)

World Bank Group, "Closing the Gap for Formal and Informal Micro, Small, and Medium Enterprises" (2013) (Washington: World Bank Group)

World Bank, "Research Shows Financial Development is not only Pro-Growth, but also Pro-Poor" (Working Paper) 2016

World Bank, *Access to Finance and Development: Theory and Measurement*, (Working Paper) 2016.