

**LEVERAGING
&
FIRST NATION FINANCING**

**Presenters: Erickson & Partners
John W. Erickson, Q.C. & Etienne Esquega**

**Royal Bank of Canada & Erickson & Partners
Networking Reception
May 31, 2007
Whitewater Golf Course**

WHAT ARE WE TALKING ABOUT?

- The issue of First Nation funds held in your bank accounts;
- Whether they can be seized?; and
- How this can be good for doing business with FN clients?

Indian Act (IA) - Section 89

- Section 89:
 - *the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.*

Indian Act – S.90(1)(b)

- *For the purposes of sections 87 and 89, personal property that was...*
 - *given to Indians or to a band under a treaty or agreement between a band and Her Majesty*
- *shall be deemed always to be situated on a reserve.*

McDiarmid Lumber Ltd. v. God's Lake First Nation (2006)

- Supreme Court of Canada (SCC) considered whether funding allocated from INAC pursuant to Comprehensive Funding Agreements (CFA) could be garnished?
- The FN relied on the *IA* and alleged that the funds were immune from seizure pursuant to s. 89 & s.90(1)(b)

McDiarmid Lumber Cont'd

- In determining the location of the funds the Court:
 - Considered the “plain and ordinary” meaning of “situated on a reserve”; and
 - Considered the common law and statutory *situs* rules
- Held that the funds were not situated on reserve for the purposes of the s.89 immunity since they were deposited in a bank account in a branch situated off reserve.

- With respect to the analysis concerning s.90(1)(b) and whether a CFA was an “agreement” the Court embarked upon another statutory interpretation exercise and:
 - Rejected a broad interpretation of the term “agreement”; and
- Held that s.90(1) (b) was limited to “agreements” pursuant to treaty obligations of the Crown & relied upon an earlier precedent.

In support of a narrow interpretation of s.90(1)(b) the Court considered

- The principle of “associated meaning”;
- The strict construction of exceptions and the protection of rights;
- FNs limited access to credit** (considered the Royal Commission);
- Section 90(2) & (3) of the *IA* – rejecting the idea that every transaction should require Ministerial consent***; and
- The history of section 90(1)(b) – the gov’t narrowed the scope of the protections in 1951 from a much broader provision.

Conclusions of the Court

- Funds deposited in bank accounts in branches situated off reserve is not property situated on reserve for s.89 of the *IA*.
- CFAs are not “agreements” as this term is contemplated by s.90(1)(b) of the *IA* and;
 - Are therefore not deemed to be on reserve; and
 - Are subject to seizure.

For the Good News...

- Funds allocated pursuant to CFA are now subject to seizure if they are in bank accounts off reserve, which means that a FN can:
 - *charge, pledge, mortgage, attach, levy, ...in favour or at the instance of any person other than an Indian or a band*
- Your FN clients have more collateral than everyone thinks.

However...

- Be careful because :
 - CFAs are agreements which are generally negotiated and executed on annual basis (problem for long term collateral);
 - The parties to the CFA may put language in the agreement which may deem certain funds to be allocated pursuant to treaty obligations (I.e. education and health) thereby reducing the amount of collateral; and
 - A FN can still deposit funds in a reserve bank account which the Court seems to suggest would then attract the s.89 immunity.