Court of Appeal File No. C56118
Superior Court File No. CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT IN THE MATTER OF SINO-FOREST CORPORATION

Applicant

APPLICATION UNDER THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANT, ERNST & YOUNG LLP

November 12, 2012

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TO: **THE SERVICE LIST**

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TAB 1

THE INSTITUTE OF
CHARTERED ACCOUNTANTS
OF ONTARIO

RULES OF PROFESSIONAL CONDUCT

Adopted or continued under the authority of Section 63 and Section 65 of the *Chartered Accountants Act, 2010*, S.O. 2010, Chapter 6, Schedule C and the bylaws of the Institute as amended from time to time.

September 2012

203.1 Professional competence

A member shall sustain professional competence by keeping informed of, and complying with, developments in professional standards in all functions in which the member practises or is relied upon because of the member's calling.

204 Independence

Definitions

For the purposes of Rules 204.1 to 204.8 and the related Council Interpretations:
"**accounting role**" means a position in which a person may or does exercise more than minimal influence over:

(a) the contents of the financial statements; or
(b) anyone who prepares the financial statements.

"**assurance client**" means an entity in respect of which a member or firm has been engaged to perform an assurance engagement.
"**assurance engagement**" means an assurance engagement as contemplated in the *CICA Handbook – Assurance*.
"**audit client**" means an entity in respect of which a member or firm has been engaged to perform an audit of the financial statements. In the application of Rule 204.4(1) to (12) "audit client" includes its related entities, and the reference to an assurance client, a client or an entity that is an audit client shall be read as including all related entities of the assurance client, client or entity as the case may be.
"**audit committee**" means the audit committee of the entity, or if there is no audit committee another governance body which has the duties and responsibilities normally granted to an audit committee.
"**audit engagement**" means an engagement to audit financial statements as contemplated in the *CICA Handbook – Assurance*.
"**audit partner**" means a person who is a partner in a firm or a person who has equivalent responsibility, other than a specialist or technical partner or equivalent who consults with others on the engagement team regarding technical or industry-specific issues, transactions or events, who is a member of the audit engagement team having responsibility for decision-making on significant auditing, accounting, and reporting matters that affect the financial statements, or who maintains regular contact with management and the audit committee, and includes the following:

(a) the lead engagement partner;
(b) the engagement quality control reviewer;
(c) another partner who, during the engagement period, provides more than ten hours of assurance services in connection with the annual financial statements or interim financial information of the client; and
(d) a subsidiary entity engagement partner.

"**clearly insignificant**" means trivial and inconsequential.
"**close family**" means a parent, non-dependent child or sibling.
"**direct financial interest**" means a financial interest:

(a) owned directly by and under the control of an individual or entity (including those managed on a discretionary basis by others);
(b) beneficially owned through a collective investment vehicle, estate, trust or other intermediary over which the individual or entity has control;
(c) owned through an investment club or by a private mutual fund in which

the individual participates in the investment decisions.

"**engagement quality control reviewer**", often referred to as reviewing, concurring or second partner, means the audit partner who, prior to issuance of the audit report, evaluates the significant judgments made by the lead engagement partner and other persons on an engagement team, the conclusions reached in formulating the audit report and other significant matters that have come to the partner's attention.

"**engagement team**" means:

(a) each member of the firm participating in the assurance engagement;

(b) all other members of the firm who can directly influence the outcome of the assurance engagement, including:

(i) those who recommend the compensation of, or who provide direct supervisory, management or other oversight of, the assurance engagement partner in connection with the performance of the assurance engagement. For the purposes of an audit engagement this includes those at all successively senior levels above the lead engagement partner through to the firm's chief executive officer;

(ii) those who provide consultation regarding technical or industry-specific issues, transactions or events for the assurance engagement; and

(iii) those who provide quality control for the assurance engagement;

and

(c) in the case of an audit client, all persons in a network firm who can directly influence the outcome of the audit engagement.

"**financial interest**" includes a direct or indirect ownership interest in an equity or other security, debenture, loan or other debt instrument of an entity, including rights and obligations to acquire such an interest and derivatives directly related to such interest.

"**financial reporting oversight role**" means a position in which a person may or does exercise influence over:

(a) the contents of the financial statements; or

(b) anyone who prepares the financial statements.

"**firm**" means a sole practitioner, partnership, professional corporation or association of members who carries or carry on the practice of public accounting, or carries or carry on related activities as defined by the Council.

"**fund manager**" means, with respect to a mutual fund, an entity that is responsible for investing the mutual fund's assets, managing its portfolio trading and providing it with administrative and other services, pursuant to a management contract.

"**immediate family**" means a spouse (or equivalent) or dependant.

"**indirect financial interest**" means a financial interest beneficially owned through a collective investment vehicle such as a mutual fund, estate, trust or other intermediary over which the beneficial owner has no control.

"**lead engagement partner**" means the audit partner having primary responsibility for an audit or review engagement.

"**market capitalization**" in respect of a particular fiscal year means the average market price of all outstanding listed securities and publicly traded debt of the entity measured at the end of each of the first, second and third quarters of the prior fiscal year and the year-end of the second prior fiscal year.

"**member of a firm**"or "**member of the firm**", as the case may be, means a person, whether or not a member of a provincial Institute or Ordre, who is:

measured using the closing price on the day of the public offering; and

(b) the term "total assets" shall be read as referring to the amount of total assets presented on the most recent financial statements prepared in accordance with generally accepted accounting principles included in the public offering document.

In the case of a reporting issuer that does not have listed securities or publicly traded debt, the definition of reporting issuer shall be read without reference to market capitalization.

"**review client**" means an entity in respect of which a member or firm conducts a review engagement. In the application of Rule 204.4(1) to (12) "review client" includes its related entities, and the reference to an assurance client, a client or an entity that is a review client shall be read as including all related entities of the assurance client, client or entity, as the case may be.

"**review engagement**" means an engagement to review financial statements as contemplated in the *CICA Handbook – Assurance*.

"**specified auditing procedures engagement**" means an engagement to perform specified auditing procedures contemplated in the *CICA Handbook – Assurance*.

"**subsidiary entity engagement partner**" means the lead engagement partner for an audit engagement related to the annual financial statements or interim financial information of an entity that is a subsidiary or joint venture of an audit client and whose assets or revenues constitute 20% or more of the assets or revenues of the audit client's respective consolidated assets or revenues.

"**total assets**"in respect of a particular fiscal year means the amount of total assets presented on the third quarter of the prior fiscal year's financial statements prepared in accordance with generally accepted accounting principles that are filed with a relevant securities regulator or stock exchange. In the case of an entity that is not required to file quarterly financial statements, total assets in respect of a particular fiscal year means the amount of total assets presented on the annual financial statements of the second previous fiscal year prepared in accordance with generally accepted accounting principles that are filed with a relevant securities regulator or stock exchange.

204.1 Assurance and Specified Auditing Procedures Engagements

A member or firm who engages or participates in an engagement:

(a) to issue a written communication under the terms of an assurance engagement; or

(b) to issue a report on the results of applying specified auditing procedures;

shall be and remain independent such that the member, firm and members of the firm shall be and remain free of any influence, interest or relationship which, in respect of the engagement, impairs the professional judgment or objectivity of the member, firm or a member of the firm or which, in the view of a reasonable observer, would impair the professional judgment or objectivity of the member, firm or a member of the firm.

204.2 Identification of Threats and Safeguards

A member or firm who is required to be independent pursuant to Rule 204.1 shall, in respect of the particular engagement, identify threats to

independence, evaluate the significance of those threats and, if the threats are other than clearly insignificant, identify and apply safeguards to reduce the threats to an acceptable level. Where safeguards are not available to reduce the threat or threats to an acceptable level, the member or firm shall eliminate the activity, interest or relationship creating the threat or threats, or refuse to accept or continue the engagement.

204.3 Documentation

A member or firm who, in accordance with Rule 204.2, has identified a threat that is not clearly insignificant, shall document a decision to accept or continue the particular engagement. The documentation shall include the following information: a description of the nature of the engagement;

(a) the threat identified;
(b) the safeguard or safeguards identified and applied to eliminate the threat or reduce it to an acceptable level; and
(c) an explanation of how, in the member's or firm's professional judgment, the safeguards eliminate the threat or reduce it to an acceptable level.

204.4 Specific Prohibitions, Assurance and Specified Auditing Procedures Engagements

In addition to complying with Rules 204.1, 204.2, 204.3, 204.5 and 204.6 a member or firm shall comply with the following specific prohibitions:

Financial interests

(1) (a) A member or student shall not participate on the engagement team for an assurance client if the member or student, or the immediate family of the member or student, holds a direct financial interest or a material indirect financial interest in the client.

(b) A member or student shall not participate on the engagement team for an assurance client if the member or student, or the immediate family of the member or student, holds, as trustee, a direct financial interest or a material indirect financial interest in the client.

(2) A member or firm shall not perform an audit or review engagement for an entity if the member, firm or a network firm, has a direct financial interest or a material indirect financial interest in the entity.

(3) A member or firm shall not perform an audit or review engagement for an entity if a pension or other retirement plan of the firm or network firm has a direct financial interest or a material indirect financial interest in the entity.

(4) A member who is a partner of a firm and who holds, or whose immediate family holds, a direct financial interest or a material indirect financial interest in an audit or review client shall not practice in the same office as the lead engagement partner for the client.

(5) A member who is a partner or managerial employee of a firm and

TAB 2

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

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of trial whereas para. (i) refers to conclusion of the judge or jury on the ultimate issue of guilt or innocence.[46]

The presumption can also be rebutted by suggesting reasons why in the circumstances the legislature may have wished to be redundant or to include superfluous words. Drafters sometimes anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, resort to repetition or the inclusion of unnecessary detail.[47] Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.

In the *Chrysler* case, for example, McLachlin J. in her dissenting judgment conceded that the phrase "and any matters related thereto" appearing in the *Competition Tribunal Act* would be unnecessary if its only function were to confer ancillary powers on the Tribunal. However, in her view,

> one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. *Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers....* Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find [Mr. Justice Gonthier's] argument persuasive.[48]
>
> [Author's emphasis]

When there is reason to believe that the tautologous words were deliberately included in the legislation, the presumption is rebutted.

The Presumption of Consistent Expression

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the

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46 *Ibid.*; see also *Zaidan Group Ltd. v. London (City)*, [1990] O.J. No. 33, 64 D.L.R. (4th) 514 (Ont. C.A.); affd [1991] S.C.J. No. 92, [1991] 3 S.C.R. 593 (S.C.C.); *Clarke v. Clarke*, [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795, at 16 (S.C.C.); *Firestone Canada Inc. v. Ontario (Pension Commission)*, [1990] O.J. No. 1377, 74 O.R. (2d) 325, at 339 (Ont. H.C.J.); revd [1990] O.J. No. 2316, 1 O.R. (3d) 122 (Ont. C.A.).

47 See, for example, *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 55 (S.C.C.): " ...the additional words are not intended to add to the meaning of benefit, but to prevent the meaning ... from being restricted."

48 *Supra* note 41, at 435.

same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended.

The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

Same words, same meaning. In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[49] Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.[50] The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

> There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).
>
> The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report ... and any "recommendations" that the Committee considers appropriate....
>
> It would be obviously inappropriate to interpret "recommendations" in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both sections.[51]

The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning;

---

49 [1989] S.C.J. No. 50, [1989] 1 S.C.R. 1378, at 732 (S.C.C.).

50 [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.).

51 *Ibid.*, at 243-44.

he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.[52]

Different words, different meaning. Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Peach Hill Management Ltd. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[53]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must have meant to express a different idea.[54] In *R. v. Barnier*[55] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity.... Under the primary canon of construction to which I have referred, "appreciating"

---

52 See, for example, *Sero v. Canada*, [2004] F.C.J. No. 71, at paras. 35-36 (F.C.A.); *R. v. Knoblauch*, [2000] S.C.J. No. 59, [2000] 2 S.C.R. 780, at para. 85 (S.C.C.); *Canada v. Schwartz*, [1996] S.C.J. No. 15, [1996] 1 S.C.R. 254 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-24 (S.C.C.); *Henrietta Muir Edwards v. A.G. for Canada*, [1930] A.C. 124, at 124 (P.C.); *Wishing Star Fishing Co. v. "B.C. Baron" (The)*, [1987] F.C.J. No. 1149, 81 N.R. 309, at 313 (F.C.A.); *R. v. Budget Car Rentals (Toronto) Ltd.*, [1981] O.J. No. 2888, 20 C.R. (3d) 66, at 82 (Ont. C.A.).

53 [2000] F.C.J. No. 894, 257 N.R. 193, at para. 12 (F.C.A.).

54 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673, at 677-90 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, *supra* note 35, at 39-41. See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95, at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, *supra* note 52, at 123, *per* La Forest J.: "... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown."

55 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

drafter chose the particular string of words because a single word would not do and that each word is there for a reason. The challenge is to identify what that reason is.

Expressio unius is based on a reader's legitimate expectation that the text in question will refer to a particular thing expressly. When this expectation is not met, when the text is silent with respect to the thing in question, interpreters infer that the silence was deliberate: the thing is not mentioned because the legislature intended to exclude it. This inference is based on the presumptions of perfection, consistent expression and orderly arrangement. Like the inferences underlying the associated words and limited class maxims, *expressio unius* is not conclusive of legislative intent. It must be tested against other possible explanations for what the drafter has done.

Although the maxims discussed in this chapter are generally thought of as legal presumptions, there is nothing particularly legal about them. They are actually instances of the sort of reasoning that readers engage in, usually at a subconscious level, in reading any text -- from a grocery list to a Shakespearean play. This realization should not devalue the maxims; on the contrary, it shows that they help to identify the grammatical and ordinary meaning of a text, which is the starting point for all interpretation.

Arguably, there are drawbacks to assigning names to the inferences of which the maxims are comprised, especially Latin names. It tends to obscure the reasoning process involved in drawing inferences and it gives undue emphasis to the features of the text on which these particular inferences are based. In fact *all* features of a text contribute to meaning and any one of them can be potentially important in given circumstances. To attach names to some obscures the existence and importance of others; it does not facilitate an accurate appreciation of what goes on in interpretation.

ASSOCIATED WORDS

The associated words rule (noscitur a sociis).[95] The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator. As Martin J.A. explained in *R. v. Goulis*:

---

95 The maxims examined in this Part are referred to as "rules" only because they are part of the body of so-called statutory interpretation rules. As explained by Lord Reid in *Maunsell v. Olins*, [1975] A.C. 373 at 382 (H.L.), the rules of statutory interpretation "are not rules in the ordinary sense of having some binding force.... They are aids to construction, presumptions or pointers."

TAB 3

Case Name:

Crystallex International Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36 as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

[2012] O.J. No. 2651

2012 ONCA 404

91 C.B.R. (5th) 207

2012 CarswellOnt 7329

216 A.C.W.S. (3d) 550

Dockets: C55434 and C55435

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., R.A. Blair and A. Hoy JJ.A.

Heard: May 11, 2012.
Judgment: June 13, 2012.

(99 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Costs of administration -- Appeal by major creditors of company under protection from court's approval of two loans and a management incentive plan dismissed -- Appeal from bridge loan was moot where money had been advanced, spent and repaid -- Approval of DIP loan was reasonable where financing was required for company to pursue arbitration claim which represented its only asset of value -- Loan did not constitute an arrangement requiring creditor approval -- Survival of lenders' right after protection ended did not preclude loan -- Board was in best position to assess which employees were essential to restructuring -- Plan to retain executives was in company's best interest -- Companies' Creditors Arrangement Act, ss. 6, 11.2.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Orders -- Interim or interlocutory orders -- Appeal by major creditors of company under protection from court's approval of two loans and a management incentive plan dismissed -- Appeal from bridge loan was moot where money had been advanced, spent and repaid -- Approval of DIP loan was reasonable where financing was required for company to pursue arbitration claim which represented its only asset of value -- Loan did not constitute an arrangement requiring creditor approval -- Survival of lenders' right after protection ended did not preclude loan -- Board was in best position to assess which employees were essential to restructuring -- Plan to retain executives was in company's best interest.

Appeal by Computershare, trustee for holders of senior notes payable by Crystallex, from three orders made by the judge supervising Crystallex's protection proceedings. Crystallex's contract to develop a gold deposit in Venezuela was rescinded by the Venezuelan government, through no fault of Crystallex. As a result, Crystallex was unable to pay $100,000,000 to the noteholders, due December 31, 2011. Crystallex obtained creditor protection on December 23, 2011. In the orders under appeal, Crystallex was authorized to obtain bridge financing of $3,125,000 from Tenor, to obtain $36,000,000 in DIP financing from Tenor, and to implement a Management Incentive Plan designed to ensure the retention of key executives until Crystallex's $3,400,000,000 arbitration claim against the Venezuelan government was completed. The DIP loan entitled Tenor to 35 per cent of the net proceeds of the arbitration claim, provided governance rights that might continue after Crystallex exited protection, and other rights. Substantially all the creditors opposed these orders. Crystallex represented that it hoped to negotiate a plan of arrangement or compromise with the noteholders and other creditors by July 30, 2012, when the current stay was set to expire. By the time of the appeal, Tenor had advanced the bridge loan, and Crystallex had spent and repaid it.

HELD: Appeal dismissed. The appeal from the bridge loan was moot because the loan funds had been advanced, spent and repaid. The judge was not precluded from approving the DIP loan because the rights Tenor obtained pursuant to it might continue after Crystallex emerged from protection. The DIP loan was necessary for Crystallex to pursue its arbitration claim, its only asset of value. The judge did not err in focusing on this fact in deciding whether or not to approve the DIP loan. He did not misapprehend the evidence in finding the noteholders' offer to provide financing was not made on the same terms as Tenor's offer, and would not provide Crystallex with sufficient funds to pursue its arbitration claim. The judge reasonably exercised his discretion in approving the Tenor DIP loan. The loan was not a plan of arrangement or compromise requiring the approval of two-thirds of Crystallex's creditors. The loan did not compromise the terms of the noteholders' indebtedness or take away any of their legal rights. The recommendations of Crystallex's board, based on expert evidence, provided support for the judge's conclusion that the Management Incentive Plan should be approved. The board was in the best position to assess which employees were essential to the success of Crystallex's restructuring efforts.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6(1), s. 11, s. 11.2, s. 11.2(1), s. 11.2(4), s. 11.2(4)(a), s. 11.2(4)(d), s. 23(1)(b)

United States Bankruptcy Code, Chapter 15

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Appeal From:

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

Counsel:

Richard B. Swan, S. Richard Orzy, Derek J. Bell and Emrys Davis, for the appellant Computershare Trust Company of Canada.

Andrew J.F. Kent, Markus Koehnen and Jeffrey Levine, for the respondent Crystallex International Corporation.

Barbara L. Grossman, for Tenor Capital Management Company, L.P. and Affiliates.

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

David Byers, for the Monitor Ernst & Young Inc.

The judgment of the Court was delivered by

A. HOY J.A.:--

I. OVERVIEW

1 The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mis-management by Crystallex.

3 As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

4 At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

5 The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (the "DIP Financing Reasons").

6 Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

7 Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

8 The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

II. THE LEGISLATIVE FRAMEWORK

9 The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> Interim financing
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge - in an amount that the court considers appropriate - in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> ...
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;
(b) how the company's business and financial affairs are to be managed during the proceedings;
(c) whether the company's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(e) the nature and value of the company's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the monitor's report referred to in paragraph 23(1)(b), if any.[1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. THE BACKGROUND

A. Events Prior to the CCAA Filings

10 Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

11 Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

12 The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

13 The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364, 263 O.A.C. 137; and *Computershare v. Crystallex*, 2011 ONSC 5748.

B. Commencement of Proceedings under the CCAA and Chapter 15

14 On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

15 Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

16 It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

17 On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: *Re Crystallex International Corporation*, 2011 ONSC 7701, at para. 26. The Noteholders did not appeal the Initial Order.

18 Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

19 Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

20 Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on

completion of the CCAA and U.S. Chapter 15 reorganization proceedings, would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

21 On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

22 The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

23 The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

24 On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

25 The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

26 The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

27 Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

28 The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
>
> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
> (d) Crystallex will pay Tenor a $1 million commitment fee.
> (e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.
> (f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.
(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.
(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.
(d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

[25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

29 Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012, that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

30 In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

> ... provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor ...

H. The Noteholders' Proposed Plan

31 Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

32 The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

I. The Management Incentive Plan

33 The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

34 At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

35 The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

36 In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

37 On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

38 The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

39 Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

40 At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

IV. THE SUPERVISING JUDGE'S REASONS

A. The Bridge Loan

41 The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation - based on Mr. Skatoff's advice - that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc.* (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

42 The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

43 Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

44 The substance of the supervising judge's reasons for approving the Tenor DIP Loan - as set out in the DIP Financing Reasons - may be summarized as follows.

i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).

ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Re Calpine Canada Energy Limited*, 2007 ABQB 504, 415 A.R. 196, leave to appeal refused, 2007 ABCA 266, 417 A.R. 25.

iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, "the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration" (at para. 47);

(b) The management of the business and affairs of Crystallex "are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders" (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed "extreme displeasure" at Crystallex's management's delay in commencing arbitration proceedings, they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan - in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor - will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93),

the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances, the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

45 The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

46 In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

47 Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.) and *Timminco Ltd. (Re)*, 2012 ONSC 948, the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

48 As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the

participants were known to Mr. Swartz . Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. THE PARTIES' SUBMISSIONS

A. The Noteholders' Submissions

49 The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

50 They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

51 The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

52 The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

53 They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

54 They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

55 The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

56 The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

57 They also renew their objections to the MIP.

B. Crystallex's Submissions

58 Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

59 As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies

on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

60 Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

61 Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

62 The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

63 The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances".[3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders ...
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* - avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

64 It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

65 Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

66 I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

67 Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

68 Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*.[4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of

the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

69 The question becomes whether the unique facts of this case permitted the supervising judge to approve "interim financing" that was of such duration and structure that it could well outlast the CCAA protection period. This court should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

(3) Standard of review

70 Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion "where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion": *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

71 As detailed below, I conclude that there is no basis for interfering with the supervising judge's exercise of discretion in approving the Tenor DIP Loan.

72 Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as "exit financing", it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge's focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

73 In my view, the Noteholders' real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not "achieved common ground" on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

a. The Noteholders' competing DIP loan offer

74 The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

75 The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was not necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

b. Loss of leverage

76 In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive.[5]

77 Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

78 The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

79 Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

80 In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing. The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

81 The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

82 The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

83 The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), as authority for this proposition.[6]

84 The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

85 *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

86 The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products*, at para. 26.

d. *Cliffs Over Maple Bay* is distinguishable

87 In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

88 The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] ... DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

89 I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

90 While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

91 An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

92 The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

93 I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

94 In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

95 As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

96 The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

97 In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

VII. DISPOSITION

98 Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. COSTS

99 If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

A. HOY J.A.
D.R. O'CONNOR A.C.J.O.:-- I agree.
R.A. BLAIR J.A.:-- I agree.

cp/e/qlacx/qlpmg/qlmll/qlgpr

1 Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

2 The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

3 The full text of section 11 is as follows: 11. Despite anything in the *Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act,* if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

4 In *Air Canada,* Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

5 The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

6 An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

TAB 4

Case Name:

Thomson v. Canada (Deputy Minister of Agriculture)

Her Majesty The Queen, as represented by the Department of Agriculture, and the Deputy Minister of Agriculture, appellant;
v.
Robert Thomson, respondent, and
Security Intelligence Review Committee, intervener.

[1992] S.C.J. No. 13

[1992] A.C.S. no 13

[1992] 1 S.C.R. 385

[1992] 1 R.C.S. 385

89 D.L.R. (4th) 218

133 N.R. 345

J.E. 92-277

3 Admin. L.R. (2d) 242

31 A.C.W.S. (3d) 762

File No.: 22020.

Supreme Court of Canada

1991: October 28 / 1992: February 13.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (90 paras.)

Public Service -- Security clearance -- Successful candidate denied requisite security clearance -- Security Intelligence Review Committee recommending security clearance -- Deputy Minister refusing to follow Committee's recommendation -- Whether Deputy Minister required to follow Committee's recommendation -- Canadian Security Intelligence Service Act, S.C. 1984, c. 21, ss. 42, 52(1), (2).

Statutes -- Interpretation -- Public Service -- Security clearance -- Successful candidate denied requisite security clearance -- Security Intelligence Review Committee recommending security clearance -- Deputy Minister refusing to follow Committee's recommendation -- Meaning of word "recommendations" in Canadian Security Intelligence Service Act.

Administrative law -- Natural justice -- Right to be heard -- Public Service -- Security clearance -- Successful candidate denied requisite security clearance -- Security Intelligence Review Committee recommending security clearance -- Deputy Minister refusing to follow Committee's recommendation -- Candidate not given hearing by Deputy Minister -- Whether denial of natural justice.

Respondent was offered a public service position in 1984, subject to his obtaining security clearance. The Canadian Security Intelligence Service conducted an investigation and advised the department against granting the requisite security clearance. The department's Deputy Minister considered the CSIS report, and after consulting with the Privy Counsel Office, denied the security clearance and rescinded the job offer. The respondent then filed a complaint with the Security Intelligence Review Committee pursuant to s. 42 of the Canadian Security Intelligence Service Act. The Committee conducted an investigation, held two meetings where the parties were present and/or represented by counsel, and issued a report pursuant to s. 52 which recommended that respondent be granted the security clearance. The Deputy Minister nevertheless decided to maintain his denial of the security clearance.

The respondent first commenced an action in the Federal Court of Appeal, pursuant to s. 28 of the Federal Court Act, to have the Deputy Minister's decision to deny the security clearance set aside. The court held that, while the Deputy Minister was bound by the Review Committee's recommendation, the court did not have jurisdiction under s. 28 to review and set aside his decision. The respondent then sought certiorari to set aside the Deputy Minister's decision and mandamus to require the Deputy Minister to grant him security clearance. The judge denied the application. He concluded that "recommendations", according to the ordinary meaning of the word, was not binding. The Federal Court of Appeal reversed that decision, set aside the Deputy Minister's decision to deny security clearance and ordered him to grant it.

At issue here is whether a Deputy Minister is bound to follow the "recommendations" of the Security Intelligence Review Committee, and more particularly, the meaning to be given the word "recommendations" in s. 52(2) of the Canadian Security Intelligence Service Act.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed.

Per La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.: In order to interpret "recommendations" in s. 52(2), the Canadian Security and Intelligence Service Act must be read as a whole in order to ascertain its aim and object. When the words used in the statute are clear and unambiguous, no other step is needed to identify the Parliament's intention.

The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning.

The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that. The wording of this section would be strained by giving the statute any wider scope. The Deputy Minister bears the onerous responsibility not only for the granting of security clearance but also for the ongoing security in his or her department. Accordingly, the final decision as to security clearance should be left to the Deputy Minister, notwithstanding the recommendations of the Committee.

The word "recommendations" is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. In s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in s. 52(2) to receive a different interpretation.

Finally, the Deputy Minister had evidence upon which he could reasonably have concluded that the respondent's security clearance should have been denied.

Per L'Heureux-Dubé J. (dissenting): The Deputy Minister was bound to follow the "recommendations" of the Security Intelligence Review Committee.

To determine the meaning of any particular statutory provision, the act must be read as a whole in order to ascertain its aim and object. Heed must be paid to the language used, the context of both the specific provision and the law itself, and the purpose or intent of the legislation. Although Parliament's intent can sometimes be discerned by the "plain meaning" of a statutory provision, "plain meaning" itself depends on the context of the provision and the overall scheme of the act. The meaning of specific terms must also be reconciled with the intent of Parliament.

Reference to context and intent is important since the word "recommendations" does not lend itself automatically to a single, rigid definition. Dictionary definitions are all merely suggested meanings; the true meaning of the word must necessarily flow from its context within the entire statute. Thus, while "recommendations" often connotes advice or information which the recipient may disregard, the term might also refer to directions or orders which are binding.

The words in the Act must also be given a meaning consistent with both its French and English texts. Section 52(2) of the French text of the Canadian Security and Intelligence Service Act refers to "recommandations". The words "commandement" and "ordre" are dictionary synonyms for "recommandation".

Context refers both to the provisions immediately surrounding the provision under examination and to the overall scheme of the statute. Nothing necessarily compels that a permissive meaning be attributed to the term "recommendations". Other provisions in the Act, moreover, are consistent with the less restrictive interpretation.

The section 42 mechanism for review of denials of security clearance suggests something more than an advisory role for the Committee. The Deputy Minister's adversarial role in the Committee's hearing also indicates that the Committee's recommendations are more than suggestive. A funda-

mental tenet of natural justice is contradicted if the deputy minister can, following a hearing to which he or she has been a party and without any other reasons than those he or she expressed at the hearings, reverse the decision that resulted from the hearing.

Finally, a judge's fundamental consideration in statutory interpretation is the purpose of legislation. In setting up the review mechanism under s. 42, Parliament must have intended to provide a system of redress for parties who were unjustly deprived of employment due to erroneous or flawed CSIS reports. Parliament could not have intended to create a situation where a civil servant could be denied employment or promotion without any chance of righting a wrong done to him or her, especially given the context of today's labour relations.

Only where a candidate has proved to the Committee that the CSIS report contains spurious or unfounded allegations and the Committee recommends that the clearance be granted must the Deputy Minister accept the candidate. Although the Deputy Minister must bear ultimate responsibility for security even if acting on another body's directives, this situation is not unique.

Even if the Deputy Minister had the discretion to deny a security clearance notwithstanding the Committee's report, the appeal should be dismissed on the grounds that he did not exercise that discretion properly. The Deputy Minister's decision disregarded the Review Committee's recommendations on the strength of the original CSIS report. Since the Review Committee's findings served to correct and revise the CSIS report, the Deputy Minister should have relied almost exclusively on them rather than on the erroneous CSIS allegations.

The Deputy Minister also failed to respect the requirements of natural justice, since he neither gave the respondent reasons for his decision nor a chance to be heard.

Cases Cited

By Cory J.

Distinguished: Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide (1975), 11 S.A.S.R. 504; referred to: Lee v. Attorney General of Canada, [1981] 2 S.C.R. 90; Attorney General of Canada v. Murby, [1981] 1 F.C. 713; R. v. Multiform Manufacturing Co., [1990] 2 S.C.R. 624; Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643.

By L'Heureux-Dubé J. (dissenting)

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; Cloutier v. The Queen, [1979] 2 S.C.R. 709; Quebec Railway, Light, Heat and Power Co. v. Vandry, [1920] A.C. 662; City of Victoria v. Bishop of Vancouver Island, [1921] 2 A.C. 384; Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 ; R. v. Sommerville, [1974] S.C.R. 387; Julius v. Bishop of Oxford (1880), 5 A.C. 214; Hands v. Law Society of Upper Canada (1890), 17 O.A.R. 41; Bridge v. The Queen, [1953] 1 S.C.R. 8; Labour Relations Board of Saskatchewan v. The Queen, [1956] S.C.R. 82; Cité de Côte-St-Luc v. Canada Iron Foundries Ltd, [1970] C.A. 62; Reference as to the constitutional validity of certain

sections of The Fisheries Act, 1914, [1928] S.C.R. 457; R. v. S.(S.), [1990] 2 S.C.R. 254; Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide (1975), 11 S.A.S.R. 504; The King v. Christ's Hospital Governors, [1917] 1 K.B. 19; The Queen v. Compagnie Immobilière BCN Ltée, [1979] 1 S.C.R. 865; Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997; Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653.

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Canadian Security Intelligence Service Act, S.C. 1984, c. 21 (now R.S.C., 1985, c. C-23), ss. 5(i), 41, 42, 52(1), (2).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.
Financial Administration Act, R.S.C. 1970, c. F-10.
Official Languages Act, R.S.C. 1970, c. O-2, ss. 8(1), (2)(d).
Public Service Employment Act, R.S.C. 1970, c. P-32.

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APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 820, setting aside a judgment of the Federal Court, Trial Division, [1989] 1 F.C. 86, dismissing an application for writs of certiorari and mandamus after the dismissal, for want of jurisdiction, of an application to the Federal Court of Appeal under s. 28 of the Federal Court Act, [1988] 3 F.C. 108, 31 Admin. L.R. 14. Appeal allowed, L'Heureux-Dubé J. dissenting.

I.G. Whitelhall, Q.C., and B.S. Russell, for the appellant.
Sean T. McGee and Steven J. Welchner, for the respondent.
Simon Noël and Sylvie Roussel, for the intervener Security Intelligence Review Committee.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. was delivered by

1 **CORY J.**:-- The prime issue on this appeal is whether a deputy minister is bound to follow the "recommendations" of the Security Intelligence Review Committee.

Factual Background

2 In 1984, Robert Thomson, the respondent, was offered a position with the International Affairs Directorate of Agriculture Canada. The offer was subject to the granting of security clearance to the respondent. The Canadian Security Intelligence Service ("CSIS") conducted an investigation. CSIS then reported to the Department of Agriculture. It advised that the respondent was not an individual in whom the Canadian government could repose full confidence or who should be in a position where he would have access to documents and matters that were classified for reasons of national interest. The conclusion was based upon the following findings by CSIS:

- that you may have revealed the classified contents of a message from the Canadian Ambassador in Santiago to the Department of External Affairs in Ottawa in 1973;
- that you revealed the contents of a classified telex to a Member of Parliament in 1973 and that you at first denied knowing the Member of Parliament;
- that you refused to name the person with whom you said you had discussed the contents of the classified telex ...;
- that by your own admission you transmitted letters in a clandestine fashion to a recipient in Guyana;
- that you have maintained contact, in a clandestine manner, with officials and/or agents of foreign governments and offered to provide classified information on at least one known occasion to them.

3 The Deputy Minister considered the CSIS report. After consulting with the Privy Counsel Office, he denied security clearance to the respondent and rescinded the job offer. The respondent then filed a complaint with the Security Intelligence Review Committee (the "Committee"). This was done pursuant to s. 42 of the Canadian Security Intelligence Service Act, S.C. 1984, c. 21, (the "Act"). The Committee conducted an investigation. The Committee then held hearings on August 13, October 9 and November 7, 1985. Throughout the hearings the respondent was present with counsel. The Deputy Minister and the Committee were each represented by separate counsel. Pursuant to s. 52 of the Act, the Committee then issued a report which recommended the granting of security clearance to the respondent. The essential aspects of the report were as follows:

> We find that, with one exception, the allegations concerning Mr. Thomson's activities since 1973 are not supported by the evidence. The exception is that Mr. Thomson was not forthright in his interview with the CSIS investigator when he was questioned in 1985 about the unauthorized release of telexes in 1973.
>
> ...
>
> It remains that Mr. Thomson admitted to the unauthorized release of classified information .... This release was not, it should be noted, to a foreign power,

but to a Canadian M.P. It was, nevertheless, a serious breach of trust, and the question which must be answered is: would Mr. Thomson do such a thing in the future if circumstances led to his becoming, once again, emotionally engaged?

The answer to that question must be entirely subjective. We believe that since the incidents took place some twelve years ago when Mr. Thomson was both less experienced and less mature, his actions then cannot, in the absence of other evidence, lead to the conclusion that, in similar circumstances, he would act in the same way now or in the future. There was no other evidence which would have led us to that conclusion.

We find, therefore, that Mr. Thomson would be unlikely to release classified information if he were once again employed in a position with access to such material.

Recommendation

We recommend that the Deputy Minister of Agriculture Canada grant Mr. Thomson a Secret security clearance so that he may continue his career in the position offered to him in 1984.

4 Despite the recommendation, the Deputy Minister decided to maintain his decision to deny security clearance. It was his opinion that he should not grant security clearance until his doubts as to the reliability of the respondent had been resolved. Neither the report of CSIS nor that of the Committee had resolved these doubts.

Decisions in the Courts Below

Federal Court of Appeal, [1988] 3 F.C. 108

5 The respondent first commenced an action in the Federal Court of Appeal, pursuant to s. 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, to have the Deputy Minister's decision set aside. Stone J.A. writing for the court recognized that the interpretation of the word "recommendations" as it appears in s. 52(2) of the Act was crucial. He concluded that the word was not used in its literal sense. It was his opinion that the Deputy Minister was not entitled to "re-make" a decision he had already rendered after the matter had become the subject of a "complaint" and of a "recommendation". Stone J.A. concluded that the Deputy Minister was bound by the recommendation. However, it was his view that the court did not have jurisdiction under s. 28 of the Federal Court Act to review and set aside the decision of the Deputy Minister denying security clearance.

Federal Court, Trial Division, [1989] 1 F.C. 86

6 The respondent next applied for relief by way of certiorari to set aside the Deputy Minister's decision to deny the security clearance and by way of mandamus to require the Deputy Minister to grant security clearance to him. Dubé J. concluded that the word "recommendations" in the Act retained its ordinary meaning. That is to say that it was not a binding decision or conclusion but simply a recommendation to the Deputy Minister. He found that there was no obligation cast upon the Deputy Minister to follow the Committee's recommendation. Accordingly, Dubé J. denied the

application. In his opinion, the Deputy Minister had acted fairly and, therefore, the Court would not interfere with the Deputy Minister's discretionary decision.

Federal Court of Appeal, [1990] 2 F.C. 820

7 The Federal Court of Appeal reversed the decision of the trial judge, set aside the Deputy Minister's decision to deny security clearance and ordered him to grant the required security clearance to Mr. Thomson.

The Key Statutory Provisions

8 The Canadian Security Intelligence Service Act, S.C. 1984, c. 21, s. 52 (now R.S.C., 1985, c. C-23) provides:

> 52. ...
>
> (2) On completion of an investigation in relation to a complaint under section 42, the Review Committee shall provide the Minister, the Director, the deputy head concerned and the complainant with a report containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant.

9 A reading of the section makes it clear that this case will turn upon the meaning given to the word "recommendations".

Background

A. The Prerogative Power and Cabinet Directive No. 35

10 So long as forms of government have existed they have engendered confidential conversations, confidential documents and confidential materials. All forms of government must have trust in their employees and officers to preserve that degree of security which a government requires to operate effectively. Democracies tend to be more open than other forms of governments. Although some governments are more open than others, it nonetheless remains true that all governments must maintain some degree of security and confidentiality in order to function. The most open democracy still requires a high degree of security and confidentiality with regard to many matters including, for example, the defence of the realm or trade negotiations. The degree of security required will vary with the position and role of the government employee. The higher the position, the greater will be the access to sensitive information, and the greater the need for security.

11 Originally, it was the monarch that appointed and managed the public service. The power of appointment was historically a royal prerogative. The ever expanding role of public service led to the passage of legislation in the 1960s establishing the Treasury Board, the Public Service Commission and the Public Service Staff Relation Board. The role of these bodies was to manage and control the federal public service. Nonetheless, the power to grant or deny security clearances as a condition of appointment remained part of the royal prerogative or more appropriately, in our times, a function of management controlled by the Crown.

12 This principle was recognized in Lee v. Attorney General of Canada, [1981] 2 S.C.R. 90. That case specifically approved the reasons of Le Dain J.A. (as he then was) in the Federal Court of Appeal decision of Attorney General of Canada v. Murby, [1981] 1 F.C. 713. There it was found

that the authority to require security clearance as a condition of appointment and the authority to determine whether such clearance should be granted were part of the management authority. It was held that these functions had not been excluded or reassigned by the Public Service Employment Act, R.S.C. 1970, c. P-32.

13 Furthermore, the Federal Court of Appeal noted that Cabinet Directive No. 35 ("C.D. 35") was a directive from the government concerning the exercise of this component of the management authority. It was confirmed that the deputy head or Deputy Minister bore the responsibility for making the decision as to security clearance in any particular case. Le Dain J. concluded that the prerogative power to grant security clearance was delegated to the Deputy Minister in accordance with the requirements of C.D. 35. That directive was superseded in 1987 by a similar one entitled "Security Policy of the Government of Canada" issued by the Treasury Board of Canada, under the authority of the Financial Administration Act, R.S.C. 1970, c. F-10.

14 Cabinet Directive No. 35 is not, of course, legislative in nature. Rather, it is an internal directive which instructs civil servants as to the manner in which the royal prerogative is to be exercised. Specifically, the directive requires that a security clearance is mandatory for anyone who will have access to classified material. It outlines the procedures for obtaining information about individuals from appropriate sources. Two paragraphs in C.D. 35 are of particular significance:

> 13. ... If ... there is in the judgment of the deputy minister ... a reasonable doubt as to the degree of confidence which can be reposed in the subject, the granting of a security clearance will be delayed until the doubt has been resolved to the satisfaction of the deputy minister ....
>
> 25. ... The deputy head of department or agency will be responsible for granting or withholding a security clearance and will assume a continuing responsibility for a person's access to Top Secret, Secret and Confidential information.

15 It can thus be seen that before the Act came into existence, there was a system in place which ensured the security of the government.

B. The Canadian Security Intelligence Service Act

16 In 1984, the Canadian Security Intelligence Service Act was passed. It provided a statutory means for dealing with security matters in the public service. Part I of the Act established the Canadian Security Intelligence Service (CSIS). Part II provided for the judicial control of its operation. Part III applied to the control and review of CSIS through the Security Intelligence Review Committee. The Committee was given broad powers to investigate complaints by those individuals who were refused employment based on a denial of a security clearance.

17 The investigation pertaining to the denial of a security clearance may include a full hearing. At such a hearing, all parties are entitled to be represented by counsel, to call and examine witnesses and to make representations. Upon completion of the investigation, the Committee must provide the CSIS Director, the deputy head concerned, the Solicitor General of Canada and the complainant with a report "containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant".

18 This then is the background against which s. 52(2) of the Act should be considered. Consideration must now be given to the fundamental question of whether the "recommendations" of the Committee are binding upon the Deputy Minister.

Statutory Limitations on the Prerogative Power

19 It is beyond doubt that the prerogative power of the Crown can be abolished or limited by statute. Once a statute occupies the ground formerly occupied by the prerogative power, the Crown must comply with the terms of the statute. See, for example, Hogg, Constitutional Law of Canada (2nd ed. 1985), at p. 11. Thus, if the "recommendations" of the Committee, referred to in s. 52(2), are interpreted as a decision binding upon the Deputy Minister, then the Act will limit the prerogative powers formerly exercised by the Deputy Minister.

The Interpretation of s. 52(2)

Positions of the Parties

20 The respondent and the intervening Committee contend that the Act introduces a three level system for dealing with security clearances. This system, as they see it, is based upon an interpretation of "recommendations" as a "binding decision". Their arguments proceed in this way. First, the Deputy Minister is solely responsible for granting or denying security clearance in accordance with C.D. 35, using the information received from CSIS. Second, if an individual lodges a complaint with the Committee, the Committee then conducts an investigation and reports its recommendations. Third, the Deputy Minister must give effect to the recommendations made by the Review Committee. In circumstances where the Deputy Minister considers fresh information which was not examined by the Review Committee, then the Deputy Minister may return to step one of the process and refuse a security clearance. At that point, the same three-step process would again be set in motion.

21 On the other hand, the appellant submits that the Act does not relieve Deputy Ministers of their responsibility to grant or to deny security clearances. The appellant contends that the "recommendations" of the Committee are advisory only. Moreover, it is argued that the purpose of the investigation is to disclose to the complainant the reasons for denial of clearance and to provide the complainant with an opportunity to be heard.

Meaning of "Recommendations"

22 All parties are in agreement that in order to interpret "recommendations" in s. 52(2), the Canadian Security Intelligence Service Act must be read as a whole in order to ascertain its aim and object. As well, it is accepted that when the words used in the statute are clear and unambiguous, no other step is needed to identify the intention of Parliament. See, for example, R. v. Multiform Manufacturing Co., [1990] 2 S.C.R. 624, at p. 630.

23 The respondent argues that the word "recommendations" should not automatically be given its ordinary meaning. Rather, it should be interpreted in the context of the statute. Great reliance is placed on the Australian case Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide (1975), 11 S.A.S.R. 504. In that case, it was found that in the context of a statute empowering the Governor to make regulations "on the recommendation" of a municipal authority or council, that the Governor's regulations must closely conform with the recommended draft. The Myer case is readily distinguishable from the case at hand. The wording of the legislation challenged in that case made it very clear that the "recommendation" had to be followed. The statute in the Myer case specifically

contemplated some action being taken by one party "on the recommendation of" another party. By contrast, s. 52(2) does not concern itself with any action by a deputy head "on the recommendation" of the Committee.

24 The contention of the respondent should not, in my view, be accepted. The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. I agree with the conclusion of Dubé J. of the Trial Division who noted, at p. 92, that:

> The grammatical, natural and ordinary meaning of the word "recommendation" is not synonymous with "decision". The verb "to recommend" is defined in the Oxford English Dictionary as "to communicate or report, to inform". In Webster's Third New International Dictionary it is defined as "to mention or introduce as being worthy of acceptance, use, or trial; to make a recommendatory statement; to present with approval; to advise, counsel".

25 There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning. The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that. The wording of this section would be strained by giving the statute any wider scope. It should never be forgotten that it is the Deputy Minister who is responsible, not simply for the granting of security clearance, but for the ongoing security in his department. It is an onerous responsibility that is cast upon the Deputy Minister. Accordingly, it is reasonable and appropriate that the final decision as to security clearance is left to the Deputy Minister, notwithstanding the recommendations of the Committee. The conclusion that the words in the statute are clear and unambiguous is sufficient to dispose of the appeal. Nevertheless, I should make a brief reference to two of the other issues raised.

Harmonious Interpretation of "Recommendations" within the Sections and the Act.

26 There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).

27 The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report containing the findings with regard to s. 41 investigations and any "recommendations" that the Committee considers appropriate. A section 41 investigation stems from a complaint to the Committee "with respect to any act or thing done by" CSIS.

28 It would be obviously inappropriate to interpret "recommendations" in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly in s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.

Was there Evidence Upon Which the Deputy Minister Could Conclude that the Respondent's Security Clearance Should be Denied

29 It is the respondent's position that the Deputy Minister had no evidence upon which he could reasonably have concluded that the respondent's security clearance should have been denied. I cannot accept this submission. It must be remembered that the Committee emphasized that its own conclusions were "entirely subjective". The Committee found that the respondent had in fact admitted to the unauthorized release of classified information while working for the Canadian International Development Agency. The Committee also determined that the respondent had lied to the CSIS investigators about the telex incidents. Thus, there was evidence upon which the Deputy Minister could conclude that the respondent's security clearance should be denied.

30 It is clear that the Deputy Minister, did, in fact, rely upon this evidence to support a clearance refusal. In a letter dated June 4, 1986, the Deputy Minister wrote to Mr. Thomson's solicitor and advised him that "the decision to deny security clearance is maintained". The letter also mentioned the report of the Review Committee. It can be readily inferred from this letter that the Deputy Minister maintained the clearance refusal only after considering the report. Further the Deputy Minister in his affidavit of September 5, 1986, explained, his reasons for continuing to deny security clearance. In paragraphs 17-19 of that affidavit he deposed that the refusal was based on "the said report from the Canadian Security Intelligence Service, even as commented upon or explained in the said report from the Security Intelligence Review Committee". This clearly indicates that the Deputy Minister made his decision only after considering the evidence of the Review Committee.

The Requirements of Natural Justice

31 This Court has repeatedly recognized the general common law principle that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (see Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 653). It follows that the Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position. When all the surrounding circumstances are taken into account it is clear that the Deputy Minister fully satisfied these requirements.

32 Prior to the Review Committee hearing, Mr. Thomson had been apprised of the objections of the Deputy Minister in a document titled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". This document listed the objections considered by the Deputy Minister in his clearance denial. Mr. Thomson was given a full opportunity to respond to the allegations against him at his hearing before the Review Committee. Despite his own explanations and the submissions made on his behalf, the Review Committee accepted that three of the five reasons for refusal in the above document were in fact well founded. It is thus apparent that Mr. Thomson was given proper notice and a full hearing in regard to the allegations which formed the basis of the Deputy Minister's decision. The requirements of natural justice have been satisfied.

Summary

33 The word "recommendations" in the context of s. 52(2) should receive its plain and ordinary meaning. It should not be taken to mean a final or binding decision. Consequently, s. 52(2) does not detract from the Deputy Minister's authority to make the ultimate decision regarding security clear-

ance. This conclusion flows from the wording of s. 52(2). It is supported by the compelling policy reasons for ensuring government security, a duty which is the responsibility of each deputy head.

34 Further, the Deputy Minister clearly had evidence upon which he could base his conclusion that security clearance should not be granted. In those circumstances, a court should not interfere with that decision.

Disposition

35 In the result, I would allow the appeal and deny the applications for certiorari and mandamus.

The following are the reasons delivered by

36 L'HEUREUX-DUBÉ J. (dissenting):-- I have read the reasons of my colleague Justice Cory and, with respect, I can agree neither with them nor with his conclusion. In my opinion, the Deputy Minister was bound to follow the "recommendations" of the Security Intelligence Review Committee (the "Committee") in the circumstances of the case at bar, largely for the reasons set forth by Stone J.A. for the unanimous Federal Court of Appeal, [1988] 3 F.C. 108.

37 The main issue in this case, as my colleague points out, is the interpretation of s. 52(2) of the Canadian Security Intelligence Service Act, S.C. 1984, c. 21 (the "Act") and, specifically, whether a Deputy Minister may ignore the recommendations of the Committee which has reviewed the security clearance of an applicant.

38 I agree with my colleague Cory J. that, to determine the meaning of any particular statutory provision, the act "must be read as a whole in order to ascertain its aim and object". While judges long ago might have thought that it was possible to confine their examination to the words of a particular provision alone, today it is well established that, in statutory interpretation, heed must be paid to the language used, the context of both the specific provision and the law itself, and the purpose or intent of the legislation. The current approach is aptly explained by Côté in The Interpretation of Legislation in Canada (2nd ed. 1991) at pp. 324:

> Interpretation founded on text alone is unacceptable, if only because words have no meaning in themselves. Meaning flows at least partly from context, of which the statute's purpose is an integral element. Not only does the strictly literal approach ask more of language than it can offer, but it also overestimates the foresight and skill of the drafter. The separation of powers should not necessarily exclude collaboration between them. Drafters are not clairvoyant, they cannot anticipate all circumstances to which their texts will apply. Courts should do more than simply criticize, and the drafter should be able to count on their positive cooperation in fulfilling the goals of legislation. Lord Denning said that the judge, because of the special nature of his role, cannot change the fabric from which the law is woven, but he should have the right to iron out the creases.

39 The well known passage by Driedger in Construction of Statutes (2nd ed. 1983) at p. 87, cited with approval by Chief Justice Dickson in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1134, emphasises these points:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Emphasis added.]

40 Or, as Justice Pratte wrote in Cloutier v. The Queen, [1979] 2 S.C.R. 709, at p. 719:

> A legislative provision should not be interpreted in isolation; its true meaning cannot be determined without giving consideration to the object of the statute in which it is contained and to the related provisions taken as a whole. Otherwise, there is a danger of arriving at an absurd conclusion.

41 Here, the crux of the case is the meaning of the word "recommendations" in s. 52(2) of the Act, which reads as follows:

> 52. ...
>
> (2) On completion of an investigation in relation to a complaint under section 42, the Review Committee shall provide the Minister, the Director, the deputy head concerned and the complainant with a report containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant. [Emphasis added.]

42 For my colleague Cory J., the Committee's report under this section cannot be binding because the term "recommendations" usually connotes advice, and because, in his view, there is nothing in the provision or in the Act which indicates that the word should have anything other than its ordinary meaning. In my opinion, however, the context of the Act and the intention of the legislation which can be deciphered from the whole statute, as well as the plain meaning of the words used, do not lead to my colleague's conclusion but to a contrary one.

Plain Meaning

43 In interpreting the plain meaning of a statute, the search for the one, true literal or dictionary definition is no longer paramount. According to Côté, supra, at p. 243:

> Contemporary authorities have unequivocally rejected the idea that a statute's context can be ignored, and its interpretation founded on no more than the wording of the legislation.

See Quebec Railway, Light, Heat and Power Co. v. Vandry, [1920] A.C. 662, at p. 672; City of Victoria v. Bishop of Vancouver Island, [1921] 2 A.C. 384, at p. 387; Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436, at p. 461; R. v. Sommerville, [1974] S.C.R. 387, at p. 395.

44 The limitations inherent in interpretation with reference to the text of a particular statutory provision alone are by now well known. As Driedger, supra, explains at p. 3:

> Words, when read by themselves in the abstract can hardly be said to have meanings. A dictionary may give many definitions of a word, but it cannot have meaning unless it is connected with other words or things so as to express an idea. [Emphasis in original.]

Côté expands on this idea at p. 221:

> The need to determine the word's meaning within the context of the statute remains. Dictionaries provide meanings for a number of standard and recurring situations. Even the best of them will only tersely indicate the context in which a particular meaning is used. The range of meanings in a dictionary is necessarily limited. It cannot be sufficiently repeated "how much context and purpose relate to meaning".

45 Accordingly, although the intent of Parliament can sometimes be discerned by the "plain meaning" of a statutory provision, "plain meaning" itself depends on the context of the provision and the overall scheme of the act. As Driedger notes at p. 89:

> The general principles, as we have seen, are that if the words are clear and unambiguous they must be followed; but if they are not, then a meaning must be chosen or found. But the Act must be read as a whole first, for only then can it be said that the words are or are not clear and unambiguous.

46 Finally, the meaning of specific terms must also be reconciled with the intent of Parliament, as Driedger reiterates at p. 83:

> It is clear that today, the words of an Act are always to be read in the light of the object of the Act.

47 The classic example of the application of these principles arises in the context of legislation containing permissive or directory language. The expressions "may" or "it shall be lawful", for instance, have often been held by the courts to exclude the possibility of discretion; Côté, supra, p. 199 and generally at pp. 199-202. In Julius v. Bishop of Oxford (1880), 5 A.C. 214, the House of Lords held that the meaning of the term "it shall be lawful" must be inferred from the context of the statutory provision, rather than from the "plain and unambiguous" ordinary meaning of the expression. As the Lord Chancellor wrote at pp. 222-23:

> The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. [Emphasis added.]

48 Similarly, the Ontario Court of Appeal held in Hands v. Law Society of Upper Canada (1890), 17 O.A.R. 41, at p. 50, that the presumption that "shall" was mandatory and "may" was facultative was not dispositive:

> I see nothing in this case, or in any other case, to warrant our holding that whenever the Legislature has created a tribunal to try offences or exercise such powers of deprivation as are given in the case before us, and empowers that tribunal to compel the attendance of witnesses and to examine them on oath, that it can be left to discretion to exercise such powers or not.
>
> It has been suggested that our Interpretation Acts have stamped unalterable meanings on such words as "shall" and "may". I can hardly think that the Legislature intended any change in the law.

49 This approach was adopted by this Court in Bridge v. The Queen, [1953] 1 S.C.R. 8, at pp. 12-13:

> ... it is first submitted that as the permissive word "may" is used in section 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all; but the by-law must, of course, be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in the manner laid down in the by-law.

50 The Court emphasized in Labour Relations Board of Saskatchewan v. The Queen, [1956] S.C.R. 82, that looking beyond permissive language to the intent of the legislator is particularly important in the context of statutory provisions which give effect to legal rights. According to Locke J. at pp. 86-87:

> The language of s. 5, in so far as it affects this aspect of the matter, reads: --
>
> 5. The board shall have power to make orders: --
>
> ...
>
> (i) rescinding or amending any order or decision of the board.
>
> While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application .... Enabling words are always compulsory where they are words to effectuate a legal right .... [Emphasis added.]

51 The Quebec Court of Appeal followed this example in Cité de Côte-St-Luc v. Canada Iron Foundries Ltd., [1970] C.A. 62. At page 65, Tremblay C.J. stressed the dangers of conferring discretion in certain circumstances:

> [TRANSLATION] There would have to be a text of great clarity to lead me to conclude that the legislature was imprudent enough to confer on municipal councils the discretionary power to accept or refuse a review at their whim. What a risk of favouritism and persecution.

For other cases in which this Court has interpreted permissive or mandatory expressions, see also Reference as to the constitutional validity of certain sections of The Fisheries Act, 1914, [1928] S.C.R. 457, at pp. 476-77, and, more recently, R. v. S.(S.), [1990] 2 S.C.R. 254, per Dickson C.J., at pp. 274-75.

52 In this case, reference to context and intent is important since, in my view, the word "recommendations" does not lend itself automatically to a single, rigid definition. As Dubé J. noted below, at p. 92, the meaning of the verb "to recommend" in the Oxford English Dictionary and Webster's Third New International Dictionary runs the gamut from "to communicate or report" to "to advise, counsel". Moreover, as Côté and Driedger point out, these dictionary definitions are all merely suggested meanings; the true meaning of the word must necessarily flow from its context within the entire statute. Thus, while "recommendations" often connote advice or information which the recipient may disregard, the term might also refer to directions or orders which are binding.

53 Accordingly, in Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide (1975), 11 S.A.S.R. 504, a court found that a governor was obliged to make regulations "on the recommendation" of a municipal authority, without departing substantially from the authority's directions. Wells J. wrote at p. 547, paraphrasing counsel's argument with which he ultimately agreed:

> Why should the legislature have gone to such lengths to ensure that the views of the public about proposed regulations should be thoroughly canvassed and that those regulations should conform with the provisions and objects of the authorized development plan, if no more was to be required of the Governor than that he should not act without consulting the Council, that he should not act in direct opposition to its advice, and that he should act simply on its instigation? Why invite and consider objections from the relevant public, and attempt, in advance, to ensure compliance with the authorized development plan, if such painstaking vigilance is to be set at naught by an interpretation of s. 36 that enables the Governor to depart substantially from the recommended draft? Should not the regulations, when made, therefore, conform closely with the recommended draft?

54 While I agree with Cory J. that Myer might be distinguished from the instant case because the meaning of the phrase "on the recommendation" may be different from that of the word "recommendations", Myer is still instructive with respect to the importance of the context of a statutory provision. It suggests that a very elaborate scheme for hearings provided by law shows a legislative intent to give the resulting report binding force, which in turn may imply that certain terms have something other than their "ordinary" meaning.

55 Similarly, in The King v. Christ's Hospital Governors, [1917] 1 K.B. 19, Darling J. wrote at p. 23:

> The word "recommendation" is not there used in its ordinary sense as when one says "I recommend you to do so and so," or as when a doctor says to his patient

> "I recommend you to take a change of air." Although put in the form of a recommendation, the clause really empowers those bodies to say "We nominate such and such a person, and you must appoint him an almoner; we cannot put him there ourselves; you are the governors of the institution and you have the means of including him in the list". I think that what was in the minds of those who framed the scheme was something equivalent to a congé d'élire, which, though in words a permission or invitation to elect, is really a command to do it. So here a nomination is called a "recommendation". The most definite language has not been used, but, as I have said, I think the word "recommendation" is used not in the mild sense, but as really meaning a nomination.

56 The context of Christ's Hospital Governors again differs from that of the case at bar, and yet the interpretation, which emphasizes the intention of the legislature, supports the conclusion that the correct meaning of the word "recommendation" may not be discerned with reference to the strict language of s. 52(2) alone.

57 As well, I am bound to attribute the words in the Act a meaning which is consistent with both its French and English texts according to s. 8 of the Official Languages Act, R.S.C. 1970, c. O-2. It reads in part:

> 8. (1) In construing an enactment, both its versions in the official languages are equally authentic.
>
> (2) In applying subsection (1) to the construction of an enactment,
>
> ...
>
> (d) if the two versions of the enactment differ in a manner not coming within paragraph (c), preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects. [Emphasis added.]

58 In dealing with s. 8 in The Queen v. Compagnie Immobilière BCN Ltée, [1979] 1 S.C.R. 865, at p. 872, this Court said:

> ... the narrower meaning of one of the two versions should not be preferred where such meaning would clearly run contrary to the intent of the legislation and would consequently tend to defeat rather than assist the attainment of its objects.

59 Section 52(2) of the French text of the Act refers to "recommendations". In Le Petit Robert 1, the words "commandement" and "ordre" are listed as synonyms for "recommandation".

Context

60 Context refers both to the provisions immediately surrounding the provision under examination and to the overall scheme of the statute. As Côté explains at pp. 236-37:

> First of all it includes the legal environment of the provision, the other provisions of the statute, the related statutes, etc. This is the narrow view of con-

> text. But "context" goes much further: it includes all ideas related to the wording that Parliament can reasonably consider to be sufficiently common knowledge as to obviate mention in the enactment. This may include the circumstances which led to the enactment, the aim and purpose of Parliament, the legislator's value system and linguistic habits, etc.

61 Turning first to the immediate context of s. 52(2), I find nothing that would necessarily compel me to attribute a permissive meaning to the term "recommendations". My colleague maintains that the same word should have exactly the same meaning throughout a statute. Since s. 41 empowers the Committee to review "any act or thing" done by the Canadian Intelligence Security Service ("CSIS") and give recommendations, he contends that giving the Committee's recommendations binding force would allow it to usurp the management powers of CSIS.

62 However, I must again emphasize the importance of not limiting ourselves to hard and fast rules lending to literal interpretation. As Driedger points out at p. 93:

> There is another draftsman's guide to good drafting and hence also a reader's guide, namely, the same words should have the same meaning, and, conversely, different words should have different meanings. But this too is only an initial guide and not a rule. [Emphasis added.]

63 Other provisions in the Act, moreover, are consistent with the less restrictive interpretation of "recommendations". As Stone J.A. pointed out in the first Federal Court of Appeal decision in this case ([1988] 3 F.C. 108), in which he held, at p. 138, that the Deputy Minister was bound to follow the Committee's recommendations but that the Federal Court did not have the jurisdiction to set the decision aside:

> ... other provisions of the Act rather suggest that Parliament did not use the word "recommendations" in its literal sense. Thus, among the "consequential and related amendments" are provisions for the referral of a security question to investigation by the intervenant in accordance with the procedures I have already reviewed, and for the making of a report upon the completion of an investigation pursuant to the Canadian Human Rights Act, (subsection 36.1(7)), ... or the Citizenship Act (subsection 17.1(5) ...) or the Immigration Act, 1976 (paragraphs 39(8)(a) ... and 82.1(6)(a) ...). It is significant, I think, that in none of these cases did Parliament authorize the intervenant to make any "recommendations" but merely "findings" or "conclusions" which the ultimate decision-maker is authorized to "consider".

64 It appears, then, that the legislation distinguishes between the binding force of the conclusions which the Committee could make with respect to investigations involving CSIS, and other investigations perhaps involving matters outside its expertise. While the effect of recommendations made concerning complaints under s. 41 of the Act is not at issue in this appeal, I am not prepared to assume that it would be outrageous to attribute to them a great weight or even a binding force. Accordingly, I do not think the use of the term "recommendations" in s. 52(1) mandates the literal interpretation of the same word in s. 52(2).

65 Turning then to the overall scheme of the Act, the mechanism for review of denials of security clearance set up by s. 42 of the Act is so elaborate that it suggests something more than an advisory role for the Committee. Stone J. began by detailing, at pp. 136-37, the extensive powers and obligations which the Committee has when undertaking investigations under s. 42:

> In my view, the word "recommendations" in subsection 52(2) of the Act must be construed with an eye to the entire statutory scheme for the investigation of a "complaint" by an individual denied employment in the public service by reason of the denial of a security clearance. Certain features of that scheme impress me as indicating an intention of Parliament to provide the complainant with redress rather than with merely an opportunity of stating his case and of learning the basis for the denial. They include the care that was taken to establish eligibility for appointment to membership of the intervenant, the manner of selecting and tenure of office of those appointed (section 34); the requirement that each member subscribe to an oath of secrecy (section 37); the requirement that an adverse decision exist before the intervenant may commence an investigation (subsection 42(1)); the need for providing all concerned with a statement, or a copy thereof, "summarizing such information available to the Committee as will enable the complainant to be as fully informed as possible of the circumstances giving rise to the denial of the security clearance" (section 46); the requirement that both the Director and the deputy head be informed of the complaint before it is investigated (section 47); the opportunity made available to all concerned "to make representations to the Review Committee, to present evidence and to be heard personally or by counsel" (subsection 48(2)); the broad powers of the intervenant to summon and enforce the appearance of witnesses, and to compel the giving of evidence on oath and the production of "such documents and things as the Committee deems requisite to the full investigation and consideration of the complaint in the same manner and to the same extent as a superior court of record", to administer oaths, and to receive and accept evidence or other information, whether on oath or by affidavit or otherwise (section 50); the extent of access granted the intervenant to information "notwithstanding any other Act of Parliament or any privilege under the law of evidence", and the proscription against withholding of such information "on any grounds" unless it be a confidence of the Queen's Privy Council for Canada to which subsection 36.3(1) of the Canada Evidence Act applies ... (subsections 39(2) and (3)). [Emphasis added.]

66 Based on this scheme, Stone J.A. concluded at pp. 137-38, that the Committee's recommendations must be something more than mere suggestions, since otherwise Parliament need not have established such a complex mechanism for investigation of complaints:

> In my view, the nature of this scheme indicates a desire by Parliament to provide a means of making full redress available to a complainant. It seems to me that a far less elaborate scheme would have sufficed had Parliament merely intended to provide means whereby a complainant might state his case to a third party and be made aware of the basis for denial of the clearance. The adoption of

> a detailed scheme by Parliament, which includes the obligation for a formal report in which "findings" and any "recommendations" are to be stated, suggests that this latter word was used other than in its literal sense. Secondly, the details of that scheme, including, for example, its emphasis on the need for prior notice, opportunity to be heard, summoning of witnesses, production of documents, access to sensitive information, etc., rather suggests an intention that the intervenant [the Committee] have the ability to examine the whole basis on which a denial rests to ensure such redress as its investigation may indicate. I can find no other acceptable explanation for arming it with such extensive powers. Given the lengths to which and the care with which Parliament dealt with this matter under the Act, I seriously doubt that it intended any "recommendations" to be merely advisory or suggestive. To view the scheme differently would be somewhat akin to saying that Parliament, like the mountains, though labouring mightily, brought forth a mouse.

67 The elaboration within the Act of the Deputy Minister's role in investigations provides another reason to conclude that the Committee's recommendations are more than suggestive. The Deputy Minister is a party to an adversarial process before the Committee. He has a full opportunity to state his case and defend his decision not to grant a security clearance, whether it was based on the CSIS report or other considerations. To conclude that, following the Committee hearings to which he has been a party, he may, without any other reasons than those he expressed at the hearings, reverse a decision which goes against his personal judgment, contradicts one of the fundamental tenets of natural justice. I agree with the respondent when he argues that: "It would be an absurd result for such a party to have a right at the end of the process to say that it is in fact the final decision-maker on the very issue being litigated".

Purpose of the Legislation

68 Finally, a judge's fundamental consideration in statutory interpretation is the purpose of legislation. Côté writes at p. 249:

> The function of all interpretation is to discover the meaning conveyed by the enactment, either explicitly or implicitly. If it has been written that courts must not add words to a law unless they are already implicit, it can be asserted, a contrario, that courts must also clarify what can be inferred from the context of the legal expression. A judge would be neglecting his duty were he to say: "I can see clearly what the statute intends, but its formulation is not appropriate".

69 Appellant's counsel argues that the almost exclusive purpose of the Committee is the internal regulation of CSIS. The Committee's recommendations to a Deputy Minister carry some persuasive force in terms of the final decision he or she will make, but he suggests that they function primarily as a commentary on the behaviour of CSIS's agents. In his view, since the Act does not explicitly relieve Deputy Ministers of their duty to ensure reliability and loyalty in their employees, no transfer of this power to the Committee may be inferred.

70 In my opinion, however, in setting up the review mechanism under s. 42, Parliament must have intended to provide a system of redress for parties who were unjustly deprived of employment due to erroneous or flawed CSIS reports. It would be illogical for Parliament to create the Commit-

tee and invest it with such extensive powers if, in the end, its conclusions could be ignored and complainants left in no better a position than they would have enjoyed had their complaints been unfounded. A Committee hearing involves a complete investigation of the complainant's character and history. It is difficult to see why an individual who had been denied a security clearance because of a CSIS report would go ahead with a complaint, if he or she had no assurance that a positive recommendation by the Security Committee would have any result whatsoever.

71 Besides, a decision that a deputy minister could deny a security clearance, despite a report refuting CSIS allegations and a positive recommendation by the Committee, means that a complainant would be the only civil servant who could be denied employment or promotion without any chance of righting a wrong done to him, as admitted by counsel for the appellant during the oral hearing before this Court. When asked whether a complainant would indeed have no remedy or recourse according to his interpretation of the Act, he replied:

> He has no redress in the sense that he can compel or submit argument which would result in a legal right that he be granted a security clearance. He has the redress in the sense my lord Mr Justice La Forest has put, that he now has the opportunity to know why he was denied a security [clearance].

72 In the context of today's labour relations, it is hard to believe that Parliament would have had the intent to limit complainants' rights in the way that this admission suggests.

73 Finally, I must disagree with my colleague Cory J.'s view that the final decision as to the security clearance must be left to the Deputy Minister, since the Deputy Minister is responsible for ongoing security in his or her department.

74 Given the actual hiring process, the Deputy Minister has full discretion to eliminate anyone whom he or she does not like at the initial selection stage, without giving any reasons whatsoever. In fact, the provisions of Cabinet Directive No. 35 require Deputy Ministers, in the hiring process, to satisfy themselves that successful candidates are acceptable security risks. Deputy Ministers also have the ability to deny security clearances to candidates based on the CSIS reports they receive. It is only where a candidate has proved to the Committee that the CSIS report contains spurious or unfounded allegations, as in this case, and the Committee recommends that the clearance be granted, that the Deputy Minister must accept the candidate. As Stone J.A. wrote at pp. 138-39:

> Obviously, the purpose of the Act goes well beyond that of protecting the individual interest in obtaining a security clearance, for it is primarily directed toward protecting the national interest in matters of security generally. On the other hand, the "complaints" procedure under Part III appears to take that objective into account by ensuring, especially by the composition and powers of the intervenant and the requirement for secrecy, that this interest not be sacrificed. The Act evidently reflects a careful balancing of the two interests. It does not address itself directly to the manner in which the initial decision to deny a clearance is to be made, entering the picture only subsequent to that decision and then only after a "complaint" has been lodged. At that point, in my view, the question whether a clearance was rightfully denied is taken away from a deputy head, and is thereafter committed to the determination of the intervenant acting in accordance with the procedures laid down by the Act including the full opportunity of

> the deputy head to defend his decision and of CSIS to defend its advice to the deputy head. I am satisfied that the entire basis for the denial is thus opened to investigation including any subjective assessment of the complainant's reliability that may be required. As I see it, a deputy head is not entitled, so to speak, to "re-make" a decision he has already rendered after the matter has become the subject of a "complaint" and a "recommendation". [Emphasis added.]

75 I agree with Stone J.A. that the Deputy Minister loses the discretion to refuse a security clearance where the initial decision to withhold it was based on an erroneous CSIS report. To conclude otherwise would imply that a candidate's employment chances might be irreparably damaged by the misconduct or mistake of the investigating agency, and that he can have no hope of redress. As for the spectre of the Deputy Minister's ultimate responsibility, this would certainly not be the only situation in which an official would be held accountable for a problem which resulted from acting on another body's directives.

Exercise of Discretion

76 In view of this analysis, once the Review Committee has conducted its investigation, a deputy minister does not retain discretion to deny a security clearance against its recommendations. However, even if the Deputy Minister did have such discretion, I would still be of the opinion that the appeal should be dismissed on the grounds that he did not exercise that discretion properly in this case.

77 In the English case of Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997, the House of Lords ordered the Minister to send a case to the review committee set up by Parliament to investigate complaints. It held that, although the Minister could reject complaints which were frivolous or groundless, he could not use his discretion to defeat the purposes of the legislation. In the words of Lord Reid at p. 1030:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

78 The CSIS Review Committee was established for various reasons. Its most important role is probably that of a watchdog agency over the Service, and its reports serve to alert the public of CSIS's misdoings and errors. But the Committee also functions as the only means of redress available to a candidate whose employment has been blocked by a flawed CSIS report. It is doubtful that Parliament would have set up this elaborate structure for review if a deputy minister could lightly disregard its findings and rely upon the original and mistaken CSIS report to make his or her decision.

79 In this case, however, the Deputy Minister admits that he made his decision to disregard the Committee's recommendations primarily on the strength of the original CSIS report. Cory J. contends that the letter sent by J.-J. Noreau to Mr. Jewitt on June 4, 1986 shows that the Deputy Minis-

ter considered the recommendations of the Review Committee before he made his decision to uphold the denial of the security clearance. In his view, the affidavit sworn by the Deputy Minister dated September 5, 1986 confirms that he based his final decision on both the initial CSIS report and the Review Committee report.

80 In my opinion, however, neither the letter nor the affidavit show that the Deputy Minister exercised his discretion properly under the test in Padfield, supra. The very brief letter reads as follows:

> Dear Mr Jewitt:
>
> I refer to your letter of May 16, 1986, concerning the recommendation made in the Security Intelligence Review Committee's report of April 9, 1985, pursuant to your client's complaint under section 42 of the Canadian Security Intelligence Service Act.
>
> I wish to advise that the decision to deny security clearance is maintained.
>
> Yours sincerely,
>
> Jean-Jacques Noreau

Accordingly, the Deputy Minister in no way indicated in the letter why or on what basis he decided to defy the recommendations. In fact, his allusion to the Review Committee's report in the context is simply confusing, since the respondent would have expected a decision to grant the security clearance in light of its recommendations.

81 As for the affidavit, in paragraph 19 of his statement, Mr. Noreau attested that he decided to refuse the clearance after considering the "report from the Canadian Security Intelligence Service, even as commented upon or explained in the said report from the Security Intelligence Review Committee" and in paragraph 20, he said: "There was nothing in either the report by the Canadian Security Intelligence Service or in the report by the Security Intelligence Review Committee to resolve my doubts" (emphasis added). These statements indicate to me that, at best, the Deputy Minister placed an equal value on the CSIS report and the Review Committee recommendations. In fact, since the Committee's findings served to correct and revise the CSIS report, the Deputy Minister should have relied almost exclusively on them, rather than the erroneous CSIS allegations.

82 The Deputy Minister was also obliged to act in accordance with the principles of natural justice. As Le Dain J. wrote in Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 659:

> The issue then is what did procedural fairness require of the Director in exercising his authority, pursuant to s. 40 of the Penitentiary Service Regulations, to continue the administrative dissociation or segregation of the appellants, despite the recommendation of the Board, if he was satisfied that it was necessary or desirable for the maintenance of good order and discipline in the institution. I agree with McEachern C.J.S.C. and Anderson J.A. that because of the serious effect of the Director's decision on the appellants, procedural fairness required

> that he inform them of the reasons for his intended decision and give them an opportunity, however, informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution. [Emphasis added.]

See also Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311.

83 In Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, the majority of this Court held that a school board had a duty to comply with the rules of procedural fairness in dismissing an employee because of the final and specific nature of the decision, the nature of the employer-employee relationship, and the effect of the decision on the individual's rights. With respect to this last point, we held at p. 677:

> Various courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body.

84 Aside from the serious impact that dismissal usually has upon an individual, the Court found, at p. 674, that there were practical reasons for requiring procedural fairness, even if this meant abandoning old classifications between the office held at pleasure and other types of employment:

> The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination .... One person capable of providing the administrative body with important insights into the situation is the office holder himself .... To grant [the right to be heard] to the holder of an office at pleasure would not import into the termination decision the necessity to show just cause, but would only require the administrative body to give the office holder reasons for the dismissal and an opportunity to be heard.

85 My colleague Cory J. maintains that the requirements of procedural fairness set out in Cardinal, supra, were met in this case because the respondent was apprised of the original reasons for the denial of the security clearance in the document issued by the Review Committee before its hearing entitled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". As well, the respondent got a full opportunity to respond to the CSIS allegations in the hearing before the Committee. Thus, in Cory J.'s opinion, the respondent got both notice and fair hearing.

86 I cannot agree. The facts in the present case closely parallel those in Cardinal, which stands for the principle that the ultimate decision-maker must give the subject of his or her decision a chance to be heard, and the reasons for the final decision. In that case, based on the report that he received from another institution about transferred prisoners' participation in a riot, the Director of Kent Institution made a segregation order. This order was reviewed by the Segregation Review

Board, which recommended that the order be lifted. The Director refused, without giving the prisoners either a further opportunity to make representations or informing them of the basis for his decision to override the recommendations. In striking down the order, Le Dain J. wrote for the unanimous Court at p. 659, following the passage which I quoted, supra:

> With great respect, I do not think it is an answer to the requirement of notice and hearing by the Director ... that the appellants knew as a result of their appearance before the Segregation Review Board why they had been placed in segregation. They were entitled to know why the Director did not intend to act in accordance with the recommendation of the Board and to have an opportunity before him to state their case for release into the general population of the institution. [Emphasis added.]

87 Similarly, in the case at bar, the Deputy Minister initially denied the security clearance based on information from a third party, CSIS. This decision was appealed to the Review Committee, which recommended that it be reversed. The Deputy Minister refused, without giving the respondent a further opportunity to make representations or informing him in a meaningful way of the reasons for his decision. He stated at paragraph 20 of his affidavit of September 5, 1986, that he saw "no point" in meeting with the respondent because he had already made representations to the Review Committee.

88 But the Deputy Minister's belief, however sincerely held, that the respondent would not be able to add anything or persuade him is not sufficient to satisfy the requirements of natural justice. The Deputy Minister still had a duty to give the respondent some opportunity to respond. Furthermore, as I have already noted, the letter he sent to the respondent's lawyer (over a year after the Committee issued its recommendations, and only on the persistent demands of Mr. Jewitt) was inadequate in terms of informing the respondent of the basis of his decision.

89 The Deputy Minister's decision to withhold the security clearance must accordingly be set aside. As the Court concluded in Cardinal at p. 661:

> ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.
>
> For these reasons I am of the opinion that by his failure to afford the appellants a fair hearing on the question whether he should act in accordance with the recommendation of the Segregation Review Board that they be released from administrative segregation into the general population of the institution, the Director rendered the continued segregation of the appellants unlawful [Emphasis added.]

Conclusion

90 For these reasons, I would dismiss the appeal with costs.

Solicitor for the appellant: John C. Tait, Ottawa.
Solicitors for the respondent: Nelligan/Power, Ottawa.
Solicitors for the intervener: Noël, Berthiaume, Aubry, Hull.

TAB 5

Indexed as:

McDiarmid Lumber Ltd. v. God's Lake First Nation

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

[2006] 2 S.C.R. 846

[2006] S.C.J. No. 58

2006 SCC 58

File No.: 30890.

Supreme Court of Canada

Heard: April 20, 2006;
Judgment: December 15, 2006.

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

(150 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Catchwords:

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

Summary:

The appellant Indian band resides on an isolated reserve in northern Manitoba. It has adhered to Treaty No. 5 with the federal government and, in exchange for the extinguishment of claims, the Crown agreed, *inter alia*, to provide annual grants and to maintain schools. The band is entirely funded by the federal government under a Comprehensive Funding Arrangement ("CFA") pursuant to which funds for various programs are [page847] deposited monthly into the band's account in a financial institution in Winnipeg. The respondent company sued the band to obtain payment for construction materials and services it had supplied for projects on the reserve. The parties entered into a consent judgment, but the band was unable to pay. The company served a notice of garnishment on the Winnipeg financial institution. The band moved to set aside the garnishment order on the ground that these were CFA funds that were exempt from seizure under ss. 89 or 90(1)(*b*) of the *Indian Act*. The Master released from garnishment the portion of those monies that he found were CFA funds, but set aside the sum of $125,000. The motions judge concluded that the CFA was an "agreement" under s. 90(1)(*b*) of the Act and that the funds were therefore "deemed always to be situated on a reserve" and were exempt from seizure. The Court of Appeal set aside that decision, holding that s. 89 did not apply, as the funds were not "situated on a reserve", nor were they deemed to be situated on a reserve under s. 90, because they were not paid pursuant to an agreement ancillary to Treaty No. 5.

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

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

Section 90(1)(*b*) of the *Indian Act* does not extend the immunity from seizure to the CFA funds, because the band has not demonstrated that the disputed funding is protected by virtue of its relationship to treaty obligations. The word "agreement" in s. 90(1)(*b*) should not be construed broadly as extending to any agreement between the government and Indians that confers [page848] benefits or "public sector services" benefits, but should be confined to property that enures to Indians pursuant to agreements that are ancillary to, or that flesh out, treaty obligations of the Crown. [para. 1] [para. 25] [para. 27] [para. 73]

The history of s. 90(1)(*b*) supports a narrow interpretation of the word "agreement". For decades, Parliament's approach to Indian property was a paternalistic one under which virtually all property that could be traced to treaties with or gifts from the Crown was exempt from seizure. In 1951, Parliament revised the *Indian Act*, signalling an intention to encourage Indian entrepreneurship and self-government. This new approach is consistent with an intention to confine protection from seizure to benefits flowing from treaties. To exempt property broadly would be inconsistent with self-sufficiency, because it would deprive Indian communities of credit, which is a cornerstone of economic development. But to eliminate all protection would neglect the persistent concerns about

exploitation. These potentially conflicting policy considerations suggest that Parliament wanted to provide limited protection for treaty entitlements while not interfering with the ability of Indians to achieve great economic independence. Given that our Constitution also grants a special place to treaty obligations, Parliament's decision to distinguish between treaty and non-treaty property in the statutory scheme is not one that the Court can or should disturb. [para. 37] [para. 40] [para. 55] [paras. 66-67]

The rules of statutory interpretation also lead to the conclusion that the word "agreement" in s. 90(1)(*b*) must be interpreted narrowly. Pursuant to the "associated meaning" principle, which functions as an aid to ascertaining Parliament's intention, the words "treaty" and "agreement", being linked, take colour from one another, which limits the scope of the broader term "agreement" such that it is as supplementary to the narrower term "treaty". Furthermore, it is presumed that Parliament avoids superfluous or meaningless words. If "agreement" were to be interpreted broadly to cover all types of agreements between Indians and the government, then the word "treaty" would have no role to play. Lastly, the word "agreement" in s. 90(1)(*b*) must be read narrowly, because the *Indian Act*'s exemption provisions not only create limited exceptions to the general rule that the provincial credit regimes will apply to Indian property, but also limit the ability of aboriginal peoples to access credit, which is a significant deterrent to financing business activity on-reserve. [para. 31] [paras. 34-39] [para. 42]

[page849]

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

Per Binnie, Fish and Abella JJ. (dissenting): The CFA between the band and the Crown is a "treaty or agreement" pursuant to s. 90(1)(*b*) of the *Indian Act* so that funds flowing to the band under the CFA should be exempt from garnishment. Because the CFA is an agreement to provide on-reserve essential public services, s. 90(1)(*b*) places those CFA funds given by the federal Crown to a band under ss. 87 and 89 protection. Without this protection, seizure of CFA monies would inevitably impair the band's capacity to deliver these essential services to its members. Section 90(1)(*b*) also protects the interest of taxpayers in ensuring that funds transferred by Parliament to a band for housing, education, infrastructure, health and welfare, are used for the designated purposes, and not, as here, diverted to other purposes chosen by the band. [para. 77] [para. 79] [para. 83] [para. 87]

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

CFA funds free from the threat of attachment and execution. [para. 81] [para. 90] [para. 108] [para. 134] [para. 141]

Section 90(1)(*b*) should apply as much to bands dispossessed of their traditional lands without a treaty as to those with whom treaties were made. CFAs for education, housing, health and welfare are intimately linked to enabling Indians to continue on their lands and are in the nature of government to government [page850] transfer payments. The purpose of these agreements is to provide the same essential services to Aboriginal communities as are provided to other Canadians by their provincial, territorial and municipal governments. If s. 90(1)(*b*) is narrowly construed to cover only funds transferred to Indian bands by the federal Crown pursuant to agreements that "flesh out" treaty terms, bands without treaties would not obtain the same protection from attachment and seizure as treaty bands. This would mean that s. 90(1)(*b*) would operate inequitably among bands in relation to the same types of CFA funding for the same essential on-reserve services. Such a lack of equity ought not to be attributed to Parliamentary intent in the absence of very clear language. In addition, even among the treaties, the enumerated benefits vary greatly and it should not be concluded that Parliament intended that monies could be garnisheed in the case of some Indian reserves but not others. To the extent the exemption in s. 90 is seen as part of the purchase price for the cession of land, it makes little difference to the dispossessed whether dispossession occurred by agreement or not. The narrow interpretation of s. 90(1)(*b*) would result in a checkerboard of exemptions and non-exemptions across the country determined by the vagaries of the treaty-making process rather than rational legislative policy. [para. 95] [para. 103] [para. 106] [para. 116] [para. 121] [paras. 123-124] [para. 128]

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

A public sector services funding approach, which would exclude commercial dealings but include CFA funds provided by the federal government for health, education, housing, welfare and infrastructure, is consistent with the text, context and purpose of the relevant provisions of the *Indian Act* for the following reasons. Firstly, the text of s. 90(1)(*b*) does not qualify [page851] the term "agreement" but is part of a legislative package which bears the impress of the Crown's obligations to native peoples generally. Secondly, the suggested approach would avoid tying the exemption to the historical anomalies created by the treaty-making process. Thirdly, it puts the focus on the reserve where the needs of the band are to be met rather than on where the federal funds voted by Parliament for that purpose happen to be on deposit -- in this case, off-reserve. Fourthly, it avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a deposit-taking financial institution. [paras. 132-133] [paras. 135-139]

To impose an onus on the band to prove which parts of CFA funding on deposit at any particular time "flesh out" treaty commitments of the Crown and which parts of CFA funding do not, is a bur-

den they cannot discharge, given the deposit of blended monthly payments which are not segregated on a project by project basis. The objective of predictability and certainty in economic relations between First Nations and non-aboriginal people is better served by a categorical denial of execution and garnishment of CFA funds whether those funds are parked at a financial institution on or off the reserve. [paras. 145-146]

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By McLachlin C.J.

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

By Binnie J. (dissenting)

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Sturgeon Lake Indian Band v. Tomporowski Architectural Group Ltd.* (1991), 95 Sask. R. 302; *Royal Bank of Canada v. [page852] White Bear Indian Band*, [1992] 1 C.N.L.R. 174; *Young v. Wolf Lake Indian Band* (1999), 164 F.T.R. 123; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Greyeyes v. The Queen*, [1978] 2 F.C. 385; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, aff'g (1989), 58 D.L.R. (4th) 117, aff'g (1984), 15 D.L.R. (4th) 321; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, aff'd [1965] S.C.R. vi; *Peace Hills Trust Co. v. Moccasin* (2005), 281 F.T.R. 201, 2005 FC 1364; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37.

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Philp and Hamilton JJ.A.) (2005), 192 Man. R. (2d) 82, 340 W.A.C. 82, 251 D.L.R. (4th) 93, 8 C.B.R. (5th) 244, 50 C.L.R. (3d) 17, [2005] 2 C.N.L.R. 155, [2006] 1 W.W.R. 486, [2005] M.J. No. 29 (QL), 2005 MBCA 22, allowing an appeal from a decision of Sinclair J. (2004), 186 Man. R. (2d) 31, [2004] 3 C.N.L.R. 192, [2004] M.J. No. 281 (QL), 2004 MBQB 156, dismissing an appeal against an order issued by Senior Master Lee. Appeal dismissed, Binnie, Fish and Abella JJ. dissenting.

[page854]

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

McLACHLIN C.J.:--

1. Introduction

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

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

[page855]

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

2. Issues

4 The appeal raises two issues:

1. How should the location of a banking debt be determined for the purposes of s. 89(1)? Is the debt protected because it is notionally on reserve?
2. Do the words "personal property ... given to Indians or to a band under a treaty or agreement between a band and Her Majesty" in s. 90(1)(*b*) apply to the funds provided under the CFA in the case at bar?

3. The Statute

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

> **89.** (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.
>
> (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the [page856] agreement notwithstanding that the chattel is situated on a reserve.
>
> **90.** (1) For the purposes of sections 87 and 89, personal property that was
>
> (*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
>
> (*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,
>
> shall be deemed always to be situated on a reserve.

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

4. Judicial History

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

7 On appeal, Sinclair J. of the Court of Queen's Bench first asked whether the funds were "property situated on a reserve" and thus protected from seizure by s. 89 of the *Indian Act*. He rejected the common law natural meaning approach to *situs* in favour of a connecting factors test aimed at identifying a discernible nexus between the property in question and the Indian occupation of reserve land. He identified and considered seven factors: the nature of the CFA; the purpose of the funds provided; the location of the recipient band under the CFA; the location of the account into which the [page857] funds were deposited; the location of expenditures from the fund; the intended beneficiaries or recipients of payment from the fund; and the importance of the fund to the band's ability to occupy the reserve. Sinclair J. concluded that the funds constituted Indian property closely related to Indian occupation of reserve land and that they ought to be protected from seizure. He held:

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

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

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

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

> I am of the view that the CFA reflects the federal government's responsibilities for Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act 1867*. Such an agreement, therefore, is covered by s. 90 of the *Indian Act*. As such, the funds deposited in the Band's bank account at Peace Hills were deemed always to be [page858] situated on an Indian Reserve and therefore not attachable. [para. 87]

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

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

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

10 The court then turned to s. 90. It held that the governing authority was *Mitchell*, which restricted [page859] the scope of s. 90(1)(*b*) to personal property that enures to Indians through the discharge by Her Majesty of her treaty or ancillary obligations. It followed that the motions judge's broad reading of "agreement" in s. 90 was untenable. The only question was whether the CFA was ancillary to Treaty No. 5. The court noted that the CFA, for the most part, dealt with areas not covered by Treaty No. 5. There was "no evidence that established an explicit connection between the band's treaty rights and the CFA" (para. 126), and the importance of the funds to the band's viability did not change the agreement's nature.

5. Analysis

5.1 *Determining Location Under Section 89(1)*

11 Section 89(1) of the *Indian Act* provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band". The question is whether the expression "situated on a reserve" is to be given its plain meaning and sub-

jected to the common law and statutory *situs* rules, or whether it has a more abstract meaning unique to the *Indian Act*.

12 The band relies on *Williams v. Canada*, [1992] 1 S.C.R. 877. In that case, the issue was whether unemployment insurance benefits received by an Indian were "situated" on the reserve for the purposes of exemption from taxation under the *Indian Act*. The Court, *per* Gonthier J., found that the *situs* for this purpose was on the reserve, having regard to "a number of potentially relevant connecting factors" relating to the transaction and the parties involved (p. 893). Gonthier J., in *obiter*, suggested that the same approach would apply to seizures.

[page860]

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

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

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

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

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

[page861]

> [W]e are not concerned with where a transaction is located for the purposes of taxation. We are concerned with the garnishment of the band's funds that are deposited in bank accounts at the Winnipeg branch of Peace Hills. The law is well settled that a bank deposit constitutes a debt owing by the bank to its customer.

> Gonthier, J., reasoned in *Williams*, it is "not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax ... would amount to the erosion of the entitlements of an Indian ...". On the other hand, the place where a debt may be enforced has everything to do with the seizure of a debt. [Emphasis added; para. 60.]

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

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

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

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

[page862]

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

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

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

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

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

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

23 The appellant band is a 1909 adherent to Treaty No. 5, concluded at Norway House in 1875. In exchange for the extinguishment of claims, the Crown agreed, *inter alia*, to protect traditional activities on the surrendered land, provide annual grants, and maintain schools. In the case at bar, the funds in question were provided through a CFA under which funds are to be delivered to the band's off-reserve bank account on a monthly basis. The [page863] motions judge found that the band has "almost no independent sources of funding for its financial needs other than those provided by the federal government" (para. 5). The parties disagree about both the proper interpretation of the word "agreement" in s. 90(1) and the proper characterization of the CFA.

24 The question is one of statutory interpretation. What is the meaning of "agreement" in s. 90(1)(*b*)? Does it extend to any agreement between the government and an Indian band? Or is it confined to particular types of agreements, and if so, what types of agreements?

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

5.2.1 Precedent

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

27 The Court confirmed in *Williams* that the purpose of the exemptions in ss. 87, 88 and 89 of the *Indian Act* "was to preserve the entitlements of Indians to their reserve lands and to ensure that

the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize" (p. 885). The purpose is to protect what the Indian band was "given" in return for [page864] the surrender of Indian lands. The exemptions are tied to the reserve lands and the Indians' ability to preserve their lands against outside intrusion and diminishment. As Gonthier J. stated in *Williams*, "the purpose of the sections was not to confer a general economic benefit upon the Indians" (p. 885). For example, they do not exempt from seizure or taxation contractual arrangements in the commercial mainstream that amount to normal business transactions, but only "property that enures to Indians pursuant to treaties and their ancillary agreements": *Mitchell*, at p. 138. Only the latter is protected by s. 90(1)(*b*).

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

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

5.2.2 The Principle of Associated Meaning

30 It is a fundamental principle of statutory interpretation that when two or more words linked by "and" or "or" serve an analogous grammatical and logical function within a provision, they should be interpreted with a view to their common features: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 173. This principle is known as the principle of [page865] associated meaning or *noscitur a sociis*. It is based on the idea that "[t]he meaning of a term is revealed by its association with other terms: *it is known by its associates*": *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195 (emphasis in original). As explained by Bastarache J. in *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at paras. 66-71, applying the principle enables courts to understand the "immediate context" of the statutory words whose meaning is in dispute.

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

> **350.** Every one who,
>
> (*a*) with intent to defraud his creditors,

> (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
> (ii) removes, conceals or disposes of any of his property
>
> ...
>
> is guilty of an indictable offence ... .

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

> In this case, the words which lend colour to the word "conceals" are, first, the word "removes", which clearly refers to a physical removal of property, and second, the words "disposes of", which, standing in contrast to the kind of disposition which is expressly dealt with in subpara. (i) of the same para. (*a*), namely, one which is [page866] made by "gift, conveyance, assignment, sale, transfer or delivery", strongly suggests the kind of disposition which results from a positive act taken by a person to physically part with his property. In my view the association of "conceals" with the words "removes" or "disposes of" in s. 350(*a*)(ii) shows that the word "conceals" is there used by Parliament in a sense which contemplates a positive act of concealment. [p. 61]

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

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

> [A]s I observed in *Nova Scotia Pharmaceutical Society* ... legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found ...". Thus, it is significant that the expression challenged by CP as being vague ... appears in s. 13(1)(*a*) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause *injury or damage* to property or to plant or animal life (s. 13(1)(*b*)), cause *harm or material discomfort* (s. 13(1)(*c*)), *adversely affect* health (s. 13(1)(*d*)), *impair* safety (s. 13(1)(*e*)), render property or plant or animal life *unfit for use* by man (s. 13(1)(*f*)), cause *loss* of enjoyment of normal use of property (s. 13(1)(*g*)), or *interfere* with the normal conduct of business (s. 13(1)(*h*)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which

> is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(*a*) EPA for releasing a contaminant which could have only a [page867] minimal impact on a "use" of the natural environment. [Emphasis in original; para. 64.]

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

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

35 In *Mitchell*, this Court applied the principle of associated meaning to clarify the meaning of "agreement" in s. 90(1)(*b*) of the *Indian Act*. La Forest J. echoed the language of Martin J.A. in the earlier case of *Goulis*, at p. 61, stating that "the terms 'treaty' and 'agreement' ... take colour from one another" (p. 124). In my view, the Court did not err in applying this principle.

5.2.3 The Presumption Against Tautology

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

37 If "agreement" is interpreted broadly to cover all types of agreements between Indians and the [page868] government, the word "treaty" has no role to play. Treaties are special and particularly solemn agreements, but they are agreements nonetheless. This supports the view taken in *Mitchell* that "agreement" in s. 90(1)(*b*) should be read more narrowly as supplementing "treaty".

5.2.4 The Strict Construction of Exceptions and the Protection of Rights

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

39 The wording of the provisions makes clear that Parliament did not seek to exempt Indian property in a broad sense. Instead, specific criteria were set out to describe the features of property that Parliament wanted to exclude from the credit regimes established by the provinces. Given the

importance of access to the credit economy, and given Parliament's choice to create only limited exceptions to its application, it is not for the courts to adopt a reading of the statute that distorts that choice. Courts should be hesitant to find exceptions where they are not explicit, particularly when their effect is to materially affect the rights of citizens under statute or common law. The exceptional effect of the provisions at issue here is limited by the precise wording Parliament used and the underlying purpose that the provision serves. It should not be read more broadly than necessary to give meaning to the words and to give effect to Parliament's purpose.

40 The fact that the effect of the provisions is to suspend the rights of both creditors and debtors provides further support for a narrow interpretation of the exceptions. Provincial credit regimes create important and enforceable rights for the debtors [page869] and creditors who are governed by them. They enable debtors to leverage assets and creditors to take measured risks. They are the modern incarnation of the panoply of rules of credit developed at common law. It is against this backdrop that the exceptions created by the *Indian Act* provisions must be understood.

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

5.2.5 Limiting Access to Credit

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

[page870]

5.2.6 Sections 90(2) and 90(3)

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

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

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

45 My colleague, Binnie J., disagrees. He suggests that, in cases involving a CFA, the agreement itself will constitute ministerial consent for the transaction (para. 141). If the agreement directs funds to be used for a particular purpose, and those funds are indeed used for that purpose, I agree that the agreement itself may constitute ministerial consent for "the transaction". If, however, an agreement does not specify how funds are to be spent, or it does so, but the funds are not put to the proper use, I do not agree that the agreement itself would constitute ministerial consent for "the transaction". If this Court were to adopt a broad interpretation of "treaty or agreement", the result would be litigation about whether the agreement itself constitutes ministerial consent, followed by delays in the delivery of needed programs and services in those cases where the agreement did not constitute ministerial [page871] consent. This is yet another reason that this Court should be cautious about adopting a broad interpretation of "agreement" in s. 90(1)(*b*).

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

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

47 The *Indian Act* seizure exemptions have a long history. The current provision, adopted in 1951 as s. 89 of the *Indian Act*, replaced s. 108 of the *Indian Act*, R.S.C. 1927, c. 98, which in turn was preceded by similar provisions in the 1906, 1886 and 1880 Acts. Section 108 and its predecessors made no reference to property given under a "treaty" or "agreement". Instead they protected from seizure "presents given to Indians or non-treaty Indians", "annuities or interest on funds" and

"moneys appropriated by Parliament, held for any band of Indians", as well as related property purchased with those funds. The 1850 *Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* also protected "annuities and presents" and associated property (S. Prov. C. 1850, 13 & 14 Vict., c. 74, s. VIII).

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

49 Why did Parliament in 1951 abandon the former approach of exempting certain kinds of property, [page872] in favour of an approach that based the exemption on whether the property was given under a treaty or agreement? The record reveals no definitive answer. What it does reveal, however, is a change in philosophy after 1951.

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

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

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

51 The paternalism of the 19th century continued to animate many Indian policies and social and political attitudes well into the 20th century. By the 1930s and 1940s, however, other values had also become important. Increasingly, there was a realization that the paternalistic model that had been in place was no longer entirely appropriate. Self-determination and self-government had emerged as an aspiration, if not a reality, and bands were beginning to embark on projects to improve their economic situation.

52 The role of the federal government in supporting different forms of development was also changing. In 1938, s. 94B of the 1927 *Indian Act*, which enabled the federal government to introduce [page873] a "revolving loan fund" for aboriginal communities, was enacted (S.C. 1938, c. 31, s. 2). The words of the Minister of Mines and Resources in Parliament reflect some change in old attitudes:

> The second point involved is really a new departure in Indian administration. It is the creation of what is popularly called a revolving fund... . As it stands

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

53 These changing attitudes were reflected in the work of the Special Joint Committee on the *Indian Act*, struck in 1946 in response to an increasing sense of a need to modernize Indian policy. The participation of Indians in the Second World War and a growing concern for human rights following that conflict had drawn the attention of the public and of Parliament to the conditions faced by Indians: see R. G. Moore, *The Historical Development of the Indian Act* (2nd ed. 1978), at p. 132. The Committee's unprecedented consultative reach in the Indian community revealed the degree to which the needs of Indians varied from region to region and according to socio-economic conditions which were often unique to particular communities. The final report in 1948 made a series of recommendations "designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance [page874] themselves": Special Joint Committee of the Senate and the House of Commons on the Indian Act, *Minutes of Proceedings and Evidence*, Issue No. 5, at p. 187, Fourth Report, June 22, 1948. The recommendations addressed electoral rights, increased funding to communities and the end of Indian-specific alcohol regulation, and revealed a new focus on accession to full citizenship and some form of greater self-government at the band level.

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

55 The adoption of the revised *Indian Act* in 1951, and of the present s. 90(1)(*b*), was born of this tension. Indians were to be encouraged to manage their own affairs and enter into commercial arrangements for their own betterment and economic advantage. This was incompatible with exemption from seizure of virtually all property that could be traced to government gifts and funds. At the same time, it was felt that basic protection from exploitation by others in society was still required. This was consistent with maintaining protection for funds flowing from treaty obligations, as well as for property situated on reserves. Minister Walter Edward Harris recognized the tension in Indian policy more generally:

> The problem is to maintain the balance of administration of the Indian Act in such a way as to give self-determination and self-government as the circumstances [page875] may warrant to all Indians in Canada, but that in the meantime we should have the legislative authority to afford any necessary protection and assistance.
>
> (*House of Commons Debates*, vol. II, 4th Sess., 21st Parl., March 16, 1951, at p. 1352)

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

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

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

59 An alternative explanation is that "agreement" was added to cover those agreements between the federal government and treaty and non-treaty Indians providing funds for "basic" or "essential" public services. My colleague, Binnie J., prefers a variant of this alternative explanation, which he calls the "public sector services approach". Under [page876] this approach, s. 90(1)(*b*) is construed to protect monies provided by the federal government to Indian bands for education, housing, health and welfare and other similar government-type essential services on reserve (para. 129). Funding provided under CFAs would be wholly protected (para. 146).

60 Binnie J. suggests that this broader interpretation of "treaty or agreement" is justified for several reasons. First, it is justified, he suggests, because it avoids the differential treatment of treaty and non-treaty Indians, by protecting all "public sector services" funding, regardless of whether it is ancillary to a treaty. Given that non-treaty Indians had property protections under the older and much broader seizure provisions, this justification for a broader reading of "treaty or agreement" seems appealing at first blush. However, on further reflection, it seems much more likely that Parliament actually intended to single out property related to treaty entitlements for special treatment under s. 90(1)(*b*). Why? It seems to me that the answer may lie, at least in part, in the finality of the treaty-making process. Parliament may have intended to give special protection to property given under a treaty, because this property was considered to be unique, in the sense that, under most treaties, it represented the complete package of property that would be given to the band(s) in return for

the surrender of Indian lands, and the extinguishment of possible claims. (This is not to say, that the package given to a band in exchange for the surrender of lands was fair or just.) As La Forest J. noted in *Mitchell*, at p. 124, the word "given" in s. 90(1)(*b*) "can be taken as a distinct and pointed reference to the process of cession of Indian lands".

61 Although this was perhaps not in the contemplation of Parliament in 1951, in retrospect, there seems to be a good reason for the differential treatment of treaty Indians and non-treaty Indians. It is open to the Crown to include provisions intended to protect the particular band in any funding agreements that it makes with the band. As was put to us in argument, the CFAs themselves often have [page877] numerous provisions to ensure that the monies are used to provide the benefits and the services that they are intended to cover. If the band is not using the money in that way, there is often a provision for a third-party manager to step in to remedy the problem. Different bands have different needs and desires. It may be best to let the federal government and the particular band determine what protective provisions will govern the funds in question, rather than imposing a "one size fits all" solution to protection from garnishment that may not suit the needs and desires of the band in question.

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

63 Third, Binnie J. suggests that his broader reading of "treaty or agreement" is justified because, unlike the *Mitchell* interpretation of "treaty or agreement", it would not result in the differential treatment of treaty Indians, *inter se*, resulting from [page878] the "vagaries of the treaty-making process" (para. 124) and "serendipitous differences in the wording of the treaties" (para. 92). If, as I conclude, it seems likely that Parliament actually intended to protect only treaty entitlements, it is reasonable to assume that Parliament contemplated and accepted the differential treatment of treaty Indians, as it would logically flow that treaty Indians would receive different levels of protection, depending on the property "given" under the particular treaty. If Parliament now feels that treaty Indians (or, for that matter, treaty Indians and non-treaty Indians) should be treated equally under s. 90(1)(*b*), it is open to it to amend the *Indian Act* to so provide.

64 In my view, the key difficulty with the approach advocated by Binnie J. is that it would require the courts to engage in political decision-making. Absent statutory language or relevant constitutional imperatives, it is not the place of the judicial system to determine which elements of public spending relate to "essential services" and which do not. The purpose of the exemption provi-

sions is neither to confer a "general economic benefit" on aboriginal communities or to nurture a particular model of public expenditure.

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

[page879]

66 To sum up, the record does not disclose precisely why Parliament chose to replace the pre-1951 categories of protected property with protection based on whether the property had been given pursuant to a "treaty" or "agreement" with the Crown. Nor does it disclose precisely why the word "treaty" was supplemented with "agreement". However, Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties. Exempting property broadly would be inconsistent with self-sufficiency because it would deprive Indian communities of a cornerstone of economic development: credit. Eliminating all protection would neglect the persistent concerns about exploitation. These documented and potentially conflicting policy considerations suggest that Parliament wanted to provide limited protection for treaty entitlements while not interfering with the ability of Indians to achieve great economic independence. This supports the restricted meaning of "agreement" in s. 90(1)(*b*) adopted by this Court in *Mitchell*.

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

[page880]

68 The position of Indians in Canada has greatly changed. Many bands have achieved a substantial degree of economic independence. Aboriginal owned and operated commercial enterprises

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

5.2.8 Conclusion on the Meaning of "Agreement"

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

70 I note, for the sake of clarity, that modern land claims agreements (e.g., the *Nisga'a Final Agreement* (1999)) are protected under the *Mitchell* interpretation of "treaty or agreement". This conclusion flows logically from s. 35(3) of the *Constitution Act, 1982*, which provides that "'treaty rights' includes rights that now exist by way of land claims agreements or may be so [page881] acquired". This serves to mitigate, in some small measure, the exclusion of non-treaty Indians from s. 90 protection. Non-treaty Indians that are not currently protected under s. 90 may acquire protection in the future, if their band negotiates a land claims agreement with the federal government.

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

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

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

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

the funds may flow directly from those obligations. At the Court of Queen's Bench, Sinclair J. made reference to the Crown's treaty obligation in respect of education, but he failed to engage in an analysis of the relationship, if any, between the treaty obligation and the pool of funds in question. Given his reasoning that s. 90(1)(*b*) provided broad protection, this determination was unnecessary. Under the proper interpretation of the provision set out [page882] above, however, it would be determinative of the issues before us.

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

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

6. Conclusion

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

[page883]

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

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

78 The *Indian Act* is a law of general application to Indians and lands reserved for Indians across Canada. I believe Parliament intended s. 90(1)(*b*) to operate equitably to all Indian bands,

and should not be given an interpretation that favours treaty bands over non-treaty bands, and those with certain types of provision in their treaties over others. The *Indian Act* should be taken to reflect rational public policy, equitably administered, rather than a vehicle to perpetuate the anomalies of an on-again off-again treaty making process with a dodgy record that stretches back more than 250 years. If Parliament had intended such an inequitable result it could have said so in clear language. It did not do so, and I do not believe the Court should impose such a discriminatory result by a process of restrictive interpretation.

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

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

[page884]

I. Overview

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

82 My colleague's argument that native reserves would benefit by greater access to credit in the market economy is an attractive concept for those bands in a position to take advantage of it, but Parliament must be taken to be aware of the realities of life on most reserves. There is the attractive concept, but then there is the reality. The God's Lake Reserve lies 1,037 kilometers northeast of Winnipeg. No conventional roads or railways link God's Lake to the rest of the province. The reserve is accessible only by air or by winter ice road after freeze-up. Sinclair J. found that local employment is limited to band government or its subsidiaries and small entrepreneurs, e.g., grocery stores ((2004), 186 Man. R. (2d) 31, 2004 MBQB 156, at para. 79). The band is entirely funded by the federal government through the annual CFA (para. 5). For the appellant, the prospect of significant participation in the off-reserve economy is likely as remote as their geographic location.

83 Of much greater immediacy is the need to protect the integrity of funds appropriated by Parliament for CFA disbursement. Parliament should be taken to intend to avoid making Canadian taxpayers pay twice over for delivery of the CFA services. The Attorney General of Canada acknowledges in his factum "the valid concern that garnishment of the funds in [the band's] accounts could lead to hardship or a loss of its capacity to deliver essential services". The small community of God's Lake, consisting of fewer than 1,300 people, accounts for 10 percent of all tuberculosis cases in Manitoba (*House of Commons Debates*, vol. 135, No. 176, [page885] 1st Sess., 36th Parl., February 8, 1999, at p. 11602). Only about 10 percent of the homes on the reserve have basic sewer systems. I agree with the Attorney General of Canada that CFA services are essential. Being essential, Parliament can be taken to be aware that, if garnishment of CFA funds is to be

permitted, at some point the government will feel obliged to step in with more funds to ensure their continuance even if it means paying twice.

84 Quite apart from, and in addition to, the respondent's claim, the appellant's banker, Peace Hills Trust, asserts priority for $1,668,872 in respect of various lines of credit obtained by the band council outside the CFA framework. The record discloses that the total non-CFA debt run up by this band council is about $3 million. When this is compared with total annual CFA funding at the relevant time of $7,354,404, it demonstrates the scale of the public policy dilemma.

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

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

[page886]

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

The problem, as will be discussed, is that such "protections" were included in *this* band's CFA and a "third-party manager" *was* put in place "to remedy the problem" but all of these contractual protections were circumvented by the band council. It incurred non-CFA debts it had no money to pay for, then consented to judgment in favour of the respondent which led to the seizure of the CFA funds. The result of the Court's decision today is that the band council was able simply to walk around the CFA contractual provisions designed to prevent this from happening.

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

II. The Absence of On-Site Banking Facilities

88 Opinions may differ, of course, as to whether exemption from execution and garnishment is ultimately to the benefit of Indian bands, who thereby may have difficulty in providing security and establishing credit worthiness in a market economy. (There is no doubt that exemption from *taxation* is a benefit.) These exemptions have been a feature of successive *Indian Acts* since before Confederation, as my colleague describes in some detail. The [page887] question before us is not the wisdom of the exemptions in ss. 87-90 but the scope of their intended application.

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

90 The God's Lake Band is too poor and its reserve too remote to attract a branch of a deposit-taking financial institution. If it were rich enough to have an on-site branch, the CFA deposit would constitute a debt located on the reserve and thus a form of personal property exempt from seizure or execution under s. 89 of the *Indian Act*. One of the recommendations of the Royal Commission on Aboriginal Peoples ("RCAP") was to improve the access of bands to on-reserve banking facilities: see *Report of the Royal Commission on Aboriginal Peoples* (1996) ("*RCAP Report*"), vol. 2, *Restructuring the Relationship*, at p. 911. Although the Chief Justice suggests that her conclusion will empower Indian bands to pursue economic opportunities, the reality is that as a result of today's decision only the more fortunate and economically developed bands, the handful of bands served on site by a deposit-taking financial institution, will receive their CFA funds free of taxation (s. 87) and "not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band" (s. 89(1)). The less advantaged bands will have their off-reserve funds subject to taxation and seizure. My colleague suggests (at para. 62) that a band council could avoid the impact of the narrow interpretation of s. 90(1)(*b*) by making use of the handful of on-reserve banking branches elsewhere in the province. It is possible, of course, that some of the over 50 bands in Manitoba will move their banking to the three or so reserves which do have on-site banking, thereby circumventing the "access to capital" rationale favoured by the Chief Justice, but this proposal doesn't address the fundamental problem in this case. Band councils which (as here) want to use the CFA income stream as collateral for [page888] other loans and priorities will now have little incentive to make on-reserve banking arrangements that if made would frustrate achievement of their non-CFA objectives.

III. Unnecessary Entrenchment of Anomalies

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

92 Then, too, what is to be made of serendipitous differences in the wording of the treaties? Treaty No. 6 (1876), for example, obliges the Crown to keep a medicine chest on the reserve. Leaving aside the question of what the "medicine chest" clause means in 2006, it is difficult to iden-

tify any legislative purpose that would be served by protecting payments for on-reserve medical services in the case of Treaty No. 6 bands but not Treaty No. 5 bands (because Treaty No. 5 does not mention a medicine chest) or medical services provided on reserves to bands that have no treaty at all.

93 What about the east coast "peace and friendship" treaties that had fewer benefits than the [page889] post-Confederation numbered treaties, and vastly fewer benefits than the modern comprehensive land claims settlements (which are included in the definition of "treaty" under s. 35(3) of the *Constitution Act, 1982*)? I do not agree with my colleague that entrenchment of such disparities for the purposes of taxation, seizure and garnishment was in the contemplation of Parliament when it enacted s. 90(1)(*b*).

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

95 I am in respectful agreement with Sinclair J. who concluded that the CFA reflects the responsibilities assumed by the Crown under laws in relation to Indians and lands reserved for Indians enacted under s. 91(24) of the *Constitution Act, 1867* (para. 87). The responsibilities accepted by the Crown are not limited to *treaty* Indians. Indian bands have been recognized as possessing greater or lesser powers in the nature of self-governing institutions since the 1869 amendments (S.C. 1869, c. 6) to *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ord[i]nance Lands*, S.C. 1868, c. 42. This legislation predated even the initial phase of Treaty No. 5 negotiations. The adhesion of the God's Lake Band on August 6, 1909 also post-dated passage of the *Indian Act, 1876*, S.C. 1876, c. 18. These early enactments not only recognized exemptions from taxation seizure and execution, as noted by the Chief Justice, but also acknowledged that to a large extent Indian bands could, should and would continue to govern themselves. The trouble was (and is) that dispossession from much of their traditional economic base and subsequent changes in the economy have left most [page890] band governments too few resources to be self-sufficient. CFA funding is in the nature of government to government transfer payments, covering essential services such as education, housing, health and welfare. These are matters that were characterised in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 134-35, as the type of program targeted by s. 90(1)(*b*). If, as *Mitchell* holds, a primary purpose of the *Indian Act* is to protect reserves and its members from economically induced dispossession, why should s. 90(1)(*b*) not be interpreted as applicable to *all* reserves to achieve that objective?

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

IV. Facts

A. *Treaty No. 5*

97 In 1909, the God's Lake First Nation adhered to Treaty No. 5 which covers much of what is present day Manitoba and parts of northwestern Ontario. The Indian signatories to the treaty surrendered more than a hundred thousand square kilometers of land in two stages. In the first phase (1875), the Crown accepted the surrender of the southern prairie lands of Manitoba by the Saulteaux (or Chippewa) and Swampy Cree First Nations. The surrender was considered "essential" to the westward expansion of non-aboriginal Canadians, as Alexander Morris, then Lieutenant-Governor of [page891] the North-West Territories, Manitoba and Kee-wa-tin, wrote at the time:

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

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

98 In exchange for the surrender of the aboriginal interest in these vast lands "Her Majesty the Queen" agreed to set aside certain reserves and undertook as well, among other things, to provide for the maintenance of schools on reserves, the right to pursue hunting and fishing throughout the unoccupied lands surrendered in the treaty, to provide farming and carpentry tools to families and bands, to provide seeds for planting, to provide cattle to each band, an amount of $500 per annum [page892] for ammunition and twine for nets to be divided among all Indians covered by the treaty and an annual grant of five dollars for each Indian person covered by the treaty (Treaty No. 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians, 1875 and 1909).

B. *The God's Lake Reserve*

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

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

Education

Instructional services formula
Low cost special education
Student transportation services
Guidance and counselling
Post-secondary education
Administration of post-secondary education
Schools operation and management
Teaching/Residences/Group homes operation and management
Special education
First Nations & Inuit career promotion and awareness program
First Nations & Inuit science and technology program
First Nations & Inuit student summer employment opportunities program

[page893]

First Nations & Inuit youth work experience program

Social development

Basic needs
Special needs
Service delivery
In-home care
National child benefit reinvestment

Infrastructure

Capital planning and project infrastructure
Fire protection
Roads and bridges

Sanitation systems
Water systems
Electrical systems
Community buildings
Maintenance management
Solicitor General policing
On-Reserve Housing & Renovation

Indian government services

Band support funding
Band employee benefit plans -- statutory contribution
Band employee benefit plans -- non-statutory (flexible transfer payments)

Miscellaneous

Indian Registry administration

Economic development

Community and economic development organization planning and operations

101 As mentioned, CFA funds are transferred in monthly payments which are not segregated by program . For example, the God's Lake Band administers its own education programs on the reserve. At present it has 400 students enrolled in the on-reserve school (which gives some idea of the demographics [page894] of the reserve). The band employs 39 teachers and staff. According to the testimony of Mike Angers, co-manager of the God's Lake CFA, the garnishing order has frozen part of the money needed to operate and maintain the schools and school services. In addition to on-reserve students, the band also supports band children who attend post-secondary education off the reserve. Approximately $54,000 per month is spent on tuition, housing and support for these students. Mr. Angers testified that this funding was also frozen by the garnishment order. By way of further example the band maintains its own Social Services program which provides money for the unemployed and the physically or mentally disabled, as well as in-home care for the elderly and infirm. As Sinclair J. put it:

> The [CFA] between the Band and the federal government is one intended by the parties to allow the Band to carry out what could be called administrative governmental functions. It is also a vehicle by which the government can meet its treaty obligations, such as the provision of educational services to Band members, through delegation to the Band. The members of the Band clearly rely on the funding for their existence on their reserve. Housing construction, as well as construction of other community buildings, appears to be contemplated by the agreement. In addition, salaries to Band employees are provided for, a matter essential to the functioning of Band government. The operation and maintenance of the Band's schools is covered by the agreement, as well as the provision of social

> assistance. It is safe to say that, without the agreement, the ability of the Band and its members to reside on the reserve would be clearly jeopardized. [Emphasis added; para. 73.]

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

102 The RCAP found that aboriginal people suffer ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries. "The persistence of such social conditions in this country -- which is judged by many to be the best place in the world to live -- constitutes an embarrassment [page895] to Canadians, an assault on the self-esteem of Aboriginal people and a challenge to policy makers." See *RCAP Report*, vol. 3, *Gathering Strength*, p. 1. RCAP further observed that:

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

103 According to the federal government, the purpose of its funding agreements with Indian bands is to "ensure that programs and services provided by Aboriginal governments and institutions are reasonably comparable to those provided in non-Aboriginal communities": see Indian Affairs and Northern Development, *Gathering Strength -- Canada's Aboriginal Action Plan* (1997), Part III: Developing a New Fiscal Relationship, at p. 20. At present, the primary funding vehicle to achieve this important government objective is the CFA.

V. Relevant Statutory Provisions

104 See Appendix.

VI. Analysis

105 The importance of the reserves and their survival lies at the heart of the *Indian Act* and related federal policies as a place "where the bonds of community are strong and where Aboriginal culture and identity can be learned and reinforced". (See *RCAP Report*, vol. 2, at p. 812.) Depopulation of the reserves and migration of band members to [page896] the larger urban centres like Winnipeg risks loss of that culture and the likelihood of assimilation.

106 The history of Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures. Of course, arrival of new settlers also brought considerable benefits. The world has changed and with it the culture and expectations of aboriginal peoples have changed, as they have for the rest of us. Yet it has been recognized since before the *Royal Proclamation* of

1763 (reproduced in R.S.C. 1985, App. II, No. 1) that at some point the process of dispossession has to stop. Accordingly, even in periods when federal government policies favoured assimilation, which is to say for most of the first century of Canada's existence, Parliament's legislative policy was to protect reserves and their contents as a sanctuary for those Indians who wished to stay in their own communities and adhere to their own cultures. The promise in Treaty No. 5 of agricultural supplies is a 19th and 20th century recognition of the need to ameliorate the effects of dispossession. In my view, whatever legislative measures flow out of Parliament's recognition of the impact of that dispossession, and the desire for reconciliation of aboriginal and non-aboriginal peoples arising from that situation, should apply as much to bands dispossessed without a treaty as to those with whom treaties were made.

107 My colleague argues that the exemption from taxation and distraint in ss. 87-90 of the *Indian Act* is at best outdated and at worst paternalistic and harmful to the First Nations themselves, as isolating them from what La Forest J. called "the commercial mainstream" (*Mitchell*, at pp. 131 and 138). However, as the trial judgment makes clear, bands like God's Lake have no access to the commercial mainstream, and no realistic prospect of ever obtaining it. Although RCAP looked for ways to improve the access to capital for bands positioned realistically to participate in the commercial [page897] world, and noted in this respect provisions in the *Indian Act* "that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral", it made no recommendation to amend the *Indian Act* to remove such provisions: *RCAP Report*, vol. 2, at pp. 906-11. RCAP also noted the possibility of "using forms of collateral other than lands or property" but identified this as merely one of several "strategies ... worth considering" (p. 931). Under the existing *Indian Act* s. 90(2), bands with a commercial aptitude and prospects can obtain a ministerial waiver of ss. 88 to 90. In that respect there is no need to amend the Act.

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

109 In *Mitchell* itself, the lead judgment of La Forest J., from which only Dickson C.J. dissented (although he agreed in the result), held that the purpose of [page898] the *Indian Act* exemptions from "taxation and distraint" was to counter the prospect of dispossession as follows:

> ... by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing, and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this

> property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like ... . [pp. 130-31]

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

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

A. *The Facts of the Mitchell Case*

111 The facts of *Mitchell* are important. The Peguis Indian Band had been represented by a lawyer (Mitchell) in negotiations with Manitoba Hydro over a tax invalidly imposed on the sale of electricity on a reserve. The Government of Manitoba subsequently settled the Indians' claim. The band's lawyers were unpaid, and obtained a prejudgment garnishing order against the settlement funds in the [page899] hands of the provincial Crown to the extent of their fees. The Peguis Indian Band applied to have the garnishing order set aside because the money, they argued, was paid by "Her Majesty" to the band and, under s. 90(1)(*b*) of the *Indian Act*, they argued, it was not subject to attachment by a non-Indian. The *Indian Act* defence was rejected by a majority of the Court, Dickson C.J. dissenting, but the band succeeded in the result because all members of our Court agreed that the provincial *Garnishment Act* did not authorize a garnishee against the Crown except in respect of work or services rendered to the Manitoba Crown.

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

(1) Commercial Agreements Are Excluded

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

[page900]

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

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

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

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

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

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

[page901]

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to

> native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. [p. 131]

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

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

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

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

The underlined words are of significance. God's Lake First Nation possesses its reserve by virtue of Treaty No. 5 and its members live there by virtue of their status as Indians. Importantly, as Sinclair J. pointed out, the community at God's Lake, like many other First Nations' communities, would likely not survive without CFA funding of essential services administered by the band government.

[page902]

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

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

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

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

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

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

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

[page903]

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

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

C. *Anomalies Are Created by the Treaty Approach*

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

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

123 Secondly, even among the treaties the enumerated benefits vary greatly. *Greyeyes* dealt with Treaty No. 6 where education happened to [page904] be mentioned but many if not most of the pre-Confederation treaties do not mention education. On what rational basis would Parliament intend scholarship monies to be garnisheed in the case of some Indian students but not others?

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

125 Fourthly, the definition of treaty (to which "agreements" must be found to be "ancillary") is elastic, running the gamut from any "engagements made by persons in authority as may be brought within the term 'the word of the white man'" (*R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649, aff'd [1965] S.C.R. vi) to the elaborate modern land claims settlements such as the *Nisga'a Final Agreement* (1999) or the *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (1993). The range of benefits under the modern comprehensive treaties go well beyond the limited CFA categories of government to government-type funding. On what basis can it be said that the extensive modern treaty benefits should be free of tax and execution (unless the exemptions are negotiated away) whereas the CFA benefits even to *treaty* bands do not enjoy such [page905] exemptions unless they can be said to be "ancillary" to some 19th century Crown negotiator's sense of fairness incorporated in an 1875 document written in a language most of the Indians of God's Lake likely didn't understand?

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

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

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

Either the addition of the words "or agreement" in s. 90(1)(*b*) means something different than "treaty" in s. 88 or it does not. If it does not, the words "or agreement" are surplusage, a result which courts try to avoid. If it does mean something different but only to the extent it covers agreements "fleshing out" treaties, it means that "agreements fleshing out treaties" are not exempted by s. 88

from provincial laws of general application that touch on "Indian-ness". The operation of s. 88 is complicated enough without this added dimension. It is more consistent with the legislative purpose of s. 88, it seems to me, to read the word "agreement" in s. 90(1)(*b*) as going beyond treaties and their modes of implementation.

[page906]

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

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

129 The government identifies what are generally referred to as essential programs and services that include health, housing, education, welfare and community infrastructure. Funding under the CFA is accounted for in accordance with ss. 32 and 34 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. (See *Peace Hills Trust Co. v. Moccasin* (2005), 281 F.T.R. 201, 2005 FC 1364, at para. 12.) In my view the word "agreement" in s. 90(1)(*b*) should include government to government transfers such as the CFA by embracing what I would call "the public sector services approach". Such an approach takes the categories of expenditure identified by La Forest J. at pp. 130 and 135 of *Mitchell* (namely education, housing, health and welfare) in the context of the numbered treaties and simply generalizes them more broadly (as I do not read La Forest J. as intending his list to be exhaustive) and applying them to Indian bands more generally (i.e., whether or not there is a treaty in place and irrespective of the benefits conferred by a particular treaty).

130 The public sector services funding approach would not include monies provided by the federal Crown with a more commercial orientation such as the Resource Partnerships Program, Economic Development Opportunity Fund, Resource Acquisition Initiative, Aboriginal Contract Guarantee Instrument, and Aboriginal Business [page907] Development Initiative. (See generally, *Gathering Strength -- Canada's Aboriginal Action Plan: A Progress Report* (2000), at pp. 18-19.)

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

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

(1) The Text

133 Section 90(1)(*b*) does not qualify the term "agreement", and as pointed out by La Forest J. in *Mitchell* "it would be more an exercise in divination than reasoned statutory interpretation to purport to be able to select from among the full spectrum of agreements that can be concluded between Indian bands and provincial Crowns and conclude that Parliament wished s. 90(1)(*b*) to apply

in one case but not in another" (p. 146). The reason why *Mitchell* ultimately suggested differentiation among "agreements" was not the text of s. 90(1)(*b*) but because of the difference in provincial and federal responsibilities for Indian affairs under s. 91(24) of the *Constitution Act, 1867* and the *Indian Act* and related Crown policies. I turn therefore to context.

(2) The Context

134 As mentioned, *Mitchell* identifies s. 90(1)(*b*) as "part of a legislative 'package' which bears the [page908] impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763" (p. 131). Part of that obligation is to address the issue of potential dispossession (*ibid.*). Much of the *Indian Act* is concerned with the inalienability of reserves and "[t]he exemptions from taxation and distraint have historically protected the ability of Indians to benefit from [reserve] property" (*ibid.*, at p. 130). I agree with my colleague that this context properly limits the scope of the word "agreement" in s. 90(1)(*b*), but I do not agree with where the Chief Justice would draw the line. In my view, the relevant context has little to do with treaties (after all s. 90(1)(*b*) says "treaty or agreement") and much to do with the general problems associated with First Nations' reserves and steps taken to protect and encourage their survival as liveable communities. It also has to do with statutory mechanisms put in place to ensure that public monies "given" to an Indian band for essential public services are used for the intended purposes.

(3) The Purpose

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

136 Firstly, the public sector services funding approach would still exclude commercial dealings (such as those under the Aboriginal Business Development Initiative) as well as monies provided by the Provincial Crown (e.g., the Casino Rama [page909] revenues addressed by the Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37).

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

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

139 Fourthly, the public sector services funding approach avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a depos-

it-taking financial institution. The s. 89 exemption would not be limited to CFA funds on deposit at the Scotiabank branch on the Standoff Reserve of the Blood First Nation in Alberta, or the Royal Bank branch at the Norway House Reserve in Manitoba. By virtue of the deeming provision in s. 90(1)(*b*) the exemption would also cover CFA funds deposit in Winnipeg to the credit of the God's Lake Band (which adhered to Treaty No. 5 at roughly the same time as the Norway House Band).

140 As mentioned, other types of funding (e.g., for economic development) are, with minor exceptions handled outside the CFA framework. Thus, federal government methods of funding make it relatively easy to segregate those funds protected under s. 90(1)(*b*). There will, of course, be issues of interpretation as to whether to characterize some agreements as falling within or outside government to government transfer payments for public on-reserve [page910] services, but these can be resolved on the basis of the "generous and liberal" principles of statutory interpretation favourable to the Indians established in *Nowegijick* and affirmed in *Mitchell*, at p. 142. In the interest of certainty, I would characterize funds flowing under the present CFA model as wholly protected, as discussed below.

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

(4) Is This Outcome "Paternalistic"?

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

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

143 I do not accept, with respect, that this concern should disqualify the CFAs from the protection [page911] of s. 90(1)(*b*). There is a great difference between withholding protection from funds passing under a tax settlement with the Manitoba government from the claim of the band lawyer to be paid his fees (the facts of *Mitchell*), and withholding protection from CFA funds provided by the federal government out of funds appropriated by Parliament for health, education, housing, welfare

and infrastructure on a remote, impoverished, northern reserve (this case) and other disadvantaged reserves across the country.

(5) The CFA Should Be Exempted as a Whole

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

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

146 The objective of predictability and certainty in economic relations between First Nations and non-aboriginal people is better served by a categorical denial of execution or garnishment of CFA funds whether those funds are parked at a financial institution on or off the reserve. The procedure [page912] suggested by my colleague, with respect, simply adds the uncertainties of litigation to an already complicated situation.

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

(6) Protection of Suppliers

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

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

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

VII. Conclusion

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

* * *

APPENDIX

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

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

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

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

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly [page914] or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

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

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

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

shall be deemed always to be situated on a reserve.

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

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

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IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No. C56118 / Superior Court File No. CV-12-9667-00-CL

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SUPERIOR COURT OF JUSTICE
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