Creditors' Remedies On-Reserve – Case Law Update

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published 10/11/2022

***Bogue v Miracle*, 2022 ONCA 672**



On September 29, 2022, the Ontario Court of Appeal (the "ONCA") in ***Bogue v Miracle*, 2022 ONCA 672** [*Bogue v. Miracle*] affirmed the protections under section 89 of the *Indian Act* (the "Act") apply to the conduct of a receiver. The receiver in this case could *not* recoup the profits from the two on-reserve businesses to satisfy a debt owed to a non-First Nation**[1]** creditor but could seize property located off-reserve. In addition, the ONCA reaffirmed that section 89 of the Act "…protects all on-reserve assets, regardless of whether they are part of the 'commercial mainstream' or not, from seizure by non-Indians."**[2]**

Background

In this case, a dispute arose between Andrew Miracle (the "Appellant") and his son regarding the ownership and profits of an on-reserve business. The Appellant retained Mr. Glenn Bogue (the "Respondent") to represent him on a contingency basis and was successful, but paid the Respondent significantly less than the percentage the Respondent believed was owed.

The Respondent sought and received an order from the Ontario Superior Court of Justice appointing a receiver and manager over the Appellant's property. The order would have given the receiver the power to operate the Appellant's two on-reserve businesses and collect the profits until the debt to the Respondent had been satisfied.

The Appellant appealed, arguing that the order would contravene section 89 of the Act, among other things. Before the broader appeal could proceed, the ONCA decided that the application judge should address this threshold issue. The application judge held that the commercial mainstream exception applied to section 89, and the appointment was therefore valid. The Appellant was then able to proceed with his appeal, which is the subject of this case summary.

Section 89 and 90 of the Act

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Section 89 of the Act protects the on-reserve assets (whether personal property or real property) owned by a First Nation person (i.e. someone with "Indian" status under the Act) or a First Nation (i.e. a "band" as defined in the Act) from the usual remedies available to creditors. Therefore, property located on-reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than a First Nation person or a First Nation.

The purpose of section 89 is to fulfill the Crown's obligation to "shield Indians from efforts by non-natives to dispossess them of the property they hold as Indians *qua* Indians"**[3]** by excluding it from the provincial creditor scheme. Section 89 "…aims to preserve the entitlements of Indians to their reserve lands and ensure that the use of their property would not be eroded by the ability of governments to tax, or creditors to seize."**[4]** Therefore, section 89 protects property located on-reserve held by a First Nation person or a First Nation against non-First Nation creditors.

Section 90(1) extends that protection to off-reserve assets in limited circumstances by deeming certain property to always be situated on a reserve.**[5]** This means that certain off-reserve assets, if they meet the requirements under section 90(1), can fall within the protections of section 89.

Section 89 applies to the actions of the receiver

During the appeal, the Respondent argued that the actions of a receiver are not covered by section 89, since the receiver is neither a creditor nor the Crown. The ONCA disagreed, holding that the language in section 89 captures the order under appeal.

In short, the Superior Court appointed a receiver to take control of the Appellant's businesses located on-reserve in order to recoup the profits from those businesses for the benefit of the Respondent, a non-First Nation creditor. While section 89 does not expressly refer to receiverships, it does reference "seizure, distress or execution" of property, which the ONCA found is similar to a receivership and therefore brings it within the scope of section 89.

While the ONCA noted that it was not aware of any case which expressly holds that the appointment of a receiver and subsequent seizure of property fall within the language of section 89, the ONCA referenced *Tribal Wi-Chi-Way-Win Capital Corp. v Stevenson et al*, 2009 MBCA 72 [*Tribal Wi-Chi-Way-Win Capital Corp.*], which implicitly accepts that section 89 applied to the appointment of a receiver manager.

The commercial mainstream exception does not apply to section 89 of the Act

The bulk of the decision discussed whether the commercial mainstream exception applies to section 89 of the Act. The application judge determined that it does, and concluded that the Respondent could execute against the Appellant's on-reserve businesses since they operated within the "commercial mainstream." The ONCA overturned this decision, stating it was a

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fundamental error that would undermine the text and purpose of the protections under section 89. While there is a commercial mainstream exception to section 90(1) of the Act, such an exception does not extend to section 89.

The ONCA acknowledged, as has been acknowledged by other courts and the Royal Commission on Aboriginal Peoples, that this interpretation fetters the economic independence of Indigenous peoples on-reserve. The inability to compel payment of legal obligations by enforcing against a debtor's assets makes creditors hesitant to lend. This can represent a significant barrier for First Nations and First Nations persons living on-reserve to participate in the broader economy, which relies heavily on the ability to obtain credit. Given the social and political policy implications, the ONCA held that it can only answer the legal question of whether section 89 can be interpreted to exclude commercial properties on-reserve, not whether it ought to, which, the ONCA held, is a question better left to Parliament.

Waiver as a possible exception to Section 89

The Respondent argued that the Appellant implicitly waived his section 89 rights and relied on *Tribal Wi-Chi-Way-Win Capital Corp.* The ONCA disagreed with the Respondent's submission as it could not see how the Appellant's actions – whether written or otherwise – implicitly amounted to a waiver of section 89.

Key Takeaway

Bogue v Miracle confirms that section 89 protections extend to the actions of a receiver, and the default position remains that a non-First Nation creditor cannot enforce against either a First Nation person or a First Nation's on-reserve assets, regardless of how they were obtained. Although this interpretation can create a barrier to economic participation, limited exceptions to the general rule against seizure of on-reserve assets exist, including the possibility to waive the protections under section 89 in certain circumstances.

Learn more about the author(s)

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[1] To the extent possible, the term "First Nation person" is used in place of the term "Indian" and the term "First Nation" is used in place of a "band", but with the same intended meaning as set out under the Act. However, this article may refer to the terms "Indian" or "band" and "reserve" with the specific legal meanings attributed to them by the Act.

[2] *Bogue v Miracle*, 2022 ONCA 672 at para 37.

[3] *Ibid* at para 23 citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 131.

[4] *Ibid* at para 24 citing *Williams v Canada,* [1992] 1 SCR 877 at 885.

[5] *Ibid* at para 28 citing *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 134.

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