DONALD GEORGE MITCHELL AND MILTON MANAGEMENT LTD. (Appellants) v. PEGUIS INDIAN BAND, LOUIS J. STEVENSON, ALBERT THOMPSON, OLIVER SUTHERLAND, RONALD WILLIAMS AND ROBERT SUTHERLAND, as the CHIEF and COUNCILLORS, respectively of the BAND (Respondents)

Indexed as: [**Mitchell v. Peguis Indian Band**]

Supreme Court of Canada, Dickson C.J., Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ., June 21, 1990

P.R. Anderson and K.G. Houston, Q.C., for the appellants
P.B. Forsyth, for the respondents

The government of Manitoba, over a period of several years, imposed a sales tax on sales of electricity by Manitoba Hydro to Indians and Indian bands on reserves in the province. Manitoba Hydro was and is a provincial Crown corporation. The First Nations Confederacy, as representative of the bands, retained the appellant Mitchell to act on its behalf in negotiating a rebate from the government of the sales tax paid. A term of the agreement provided that the appellant would be paid 20 per-cent of the sales tax recovered. In the fall of 1982 Mitchell, through the appellant Milton Management, negotiated sales tax rebates of $953,432.00, entitling Mitchell to a fee of $190,668.00. The government passed an order-in-council in March 1983 to provide for the payment of the rebate.

The respondent bands deny any entitlement under the contingency fee agreement asserting, inter alia, that the rebate resulted from the government's own initiative, and not those of the appellants, to refund to the band the taxes improperly collected from them. The appellants issued a statement of claim to recover the contingency fee, and in March 1983 obtained a prejudgment garnishing order against the tax rebate funds held by the government to the amount of the fee claimed. The garnishee government paid the garnished amount into court. The respondents applied to have the garnishing order set aside arguing that the Manitoba *Garnishment Act*, R.S.M. 1970, c.G20, C.C.S.M., c.G20 under which the order was made was not applicable to Indians and that the order was inconsistent with ss.89(1) and 90(1) of the *Indian Act*, R.S.C. 1985, c.I-5. Further they argued that the money disposed of in the order-in-council was a debt owing to them and as such constituted within the meaning of s.90(1)(b) "personal property that was . . . given to Indians or to a band under a treaty or agreement between a band and Her Majesty." As a result, they said that the debt was deemed by s.90(1)(b) to be situated on a reserve and, therefore, by s.89(1), could not be subject to attachment at the instance of a non-Indian.

The Manitoba Court of Queen's Bench set aside the order holding that ss.89(1) and 90(1)(b) prevented the moneys from being subject to attachment ([1983] 4 C.N.L.R. 50). The Court of Appeal upheld the trial judgment ([1986] 2 C.N.L.R. 71). The appellants appealed to the Supreme Court of Canada.

Held: Appeal dismissed.

per La Forest J. (Sopinka and Gonthier JJ., concurring)

1. A reading of the *Indian Act* as a whole leads to the conclusion that "Her Majesty" is meant to refer solely to the federal Crown; whenever Parliament intended to refer to a provincial Crown the reference is made explicitly, and "Her Majesty" is used when it can only, on account of the constitutional division of power, refer to the federal Crown.

2. This argument is all the stronger in the context of section 90. The reference to "Parliament" in s.90(1)(a) makes it clear that "Her Majesty" in that subsection must be limited to the federal Crown, and there is a strong indication that the same meaning was intended in s.90(1)(b). The terms "treaty" and "agreement" in s.90(1)(b) take colour from one another, and Indian treaties are matters of federal concern.

3. "Her Majesty" bears uniform meaning throughout s.90. Section 90 applies solely to such personal property as the federal Crown confers on Indians in the course of fulfilling its obligations to native people, whether pursuant to its treaty commitments, or its responsibilities under s.91(24) of the *Constitution Act, 1867*. Any other interpretation does not accord with the terms of the obligations the Crown has historically assumed vis-à-vis the property of native peoples.

4. Sections 87, 89 and 90 are part of a "legislative package" which bears the impress of an obligation to native peoples which the Crown had recognized at least since the *Royal Proclamation of 1763*. From that time, the Crown had 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* Indian, i.e. their land base and the chattels on that land base.
   (a) The obligation is evident in the historical record of legislation and in the terms of the agreements on which the aboriginal peoples ceded their traditional homelands.
   (b) An example is evident in the "numbered treaties" whereby "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."

5. There is a corollary to this conclusion, the fact that modem-day legislation, like its historical counterparts, underlines that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the object of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens.

6. Indians deal in property outside the reserves on the same basis as all other Canadians. To gain the protection of section 87 and 89 there must be a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property. It is appropriate to take a fair and liberal approach to the problem of determining whether the paramount location is on the reserve.

7. The statutory notional situs of s.90(1)(b) operates to protect personal property that is given to Indians by "Her Majesty" pursuant to a "treaty or agreement" and is deemed always situated on a reserve and therefore protected regardless of its actual situs. If the term "Her Majesty" in s.90(1)(b) is limited to the federal Crown, then it follows that the exemptions and privileges of ss.87 and 89 apply, regardless of situs, solely in respect of property the federal Crown gives to Indians in acquitting itself of its responsibilities pursuant to treaties and their ancillary agreements. This conclusion is consistent with the historical antecedents to the section and the sense in which the Indians would have understood the treaty promises with respect to property or to payments in spheres such as education, housing, and health and welfare. The report of the Treaty Commissioner of Treaty No. 8 confirms the view that the Indians understood that treaty benefits were given unconditionally and "leaves no doubt that Indians were promised that their entitlements would be exempt from taxation."

8. If "Her Majesty" is interpreted to include provincial Crowns then all agreements are included, including purely commercial agreements, because there is no basis in logic to distinguish between them. It would lead to a distinction in ordinary commercial matters between Indians and non-natives, and between dealings by an Indian with a private person and a provincial Crown. Such a result would be implausible. Any interpretation of s.90(1(b) that sees the purpose of that section as extending beyond that of preventing non-natives from interfering with property that enures to Indians as a result of the Crown's obligations under treaties and ancillary agreements gives a novel and unprecedented extension to the protection historically conferred by the Crown on the property of Indians.

9. Pursuant to s.91(24) of the *Constitution Act*, *1867* it is the federal Crown who bears the sole responsibility for conferring property under treaty or ancillary obligations, therefore the term "Her Majesty" as used in s.90(1(b) is limited to the federal Crown. The provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples.

10. The *Nowegijick* principle that statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians is affirmed but does not lead to a different result.

a. Unlike a treaty it is not helpful to determine Indian understanding of a statute. A treaty is a product of bargaining between two parties whereas statutes are an expression of the will of Parliament. This is not a jettisoning of the liberal interpretative method.
b. It would be a distortion of the Indian perception if the protection of s.90(1)(b) extended to commercial agreements with a provincial Crown.
c. Moreover such an interpretation would not necessarily be in favour of the Indians as it would have the potential to impede commercial dealings by limiting the availability of credit.

d. The textual and historical arguments for a contrary interpretation are irrefragable. The inclusion of the provincial Crowns in the meaning of "Her Majesty" would subvert the commitments historically undertaken. There is only an ambiguity if one turns a blind eye to the compelling historical and textual arguments.

11. Since "Her Majesty" in s.90(1)(b) is limited to the federal Crown, the subsection has no application to the agreement between the provincial government and the respondents.

12. The garnishment order should not have issued. It would be tantamount to allowing provincial law to do in a circuitous and indirect route what s.89 of the *Indian Act* explicitly prohibits it from doing directly, i.e. attach the personal property of Indians situated on a reserve - the moneys used to pay the ultra vires tax. This result would be inconsistent with the operation of the *Indian Act.*

12. Section 3 of the *Garnishment Act* applies only to government debts arising from the provision of work or services and is accordingly inapplicable to the agreement in the instant case.

per Wilson J. (Lamer and L'Heureux-Dubé JJ., concurring)

1. Mr. Justice La Forest's interpretation of s.90(1)(b) that it does not protect the moneys from garnishment and his conclusion that as between the Manitoba government and the Indians the Indians are entitled to the moneys were agreed with.

2. Once it is held that the moneys are not in fact situate on the reserve or deemed to be so and that they do constitute a debt then that debt may be subject to garnishment at the hands on an innocent third party. There is no legal principle that suggests that the way in which the debt arose (in this case from the imposition of an ultra vires tax) can affect an innocent third party from seeking to initiate garnishment proceedings with respect to that debt.

3. Section 3 of the *Garnishment Act* does not apply on the facts. The words "moneys due or accruing due to persons employed or paid by the government" in s.3 refers solely to agreements relating to the provision of work and services. These words do not extend to the agreement at issue and accordingly do not extend to lift the Crown's historic immunity. Crown immunity in garnishment proceedings may be an anachronism but it is for the legislature to effect change in the law in this area.

per Dickson C.J.

1. The interpretative principle derived from *Nowegijick* applies to the case. Ambiguities in the interpretation of treaties and statutes relating to Indians should be resolved in favour of the Indians, and aboriginal understandings are to be preferred over more legalistic constructions. An ambiguity might only be perceived upon invoking the aboriginal understanding.

2. The *Nowegijick* principle is applicable even if it is a private citizen or other civil party, and not the State who will lose out if the Act is interpreted in favour of aboriginal litigants. Section 89(1) provides that a non-Indian cannot, in certain circumstances, attach personal property of an Indian. The section clearly contemplates that Indians will be favoured vis-à-vis non-Indians. Therefore, it would be inconsistent with *Nowegijick* to interpret s.90, which extends s.89's protection, in a restrictive manner.

3. It was assumed, without deciding, that s.3 of the *Garnishment Act* applied to the moneys.

4. It was assumed, for the purposes of the appeal and in the absence of argument on the point, that the situs of the debt, apart from s.90, was located off the reserve.

5. The meaning of "Her Majesty" in s.90(1)(b):
   a. Merely because there is a single Queen does not require that the words "Her Majesty" must refer to the Crown in right of Canada and Crown in right of Manitoba. There is a divisibility of the Crown and a corresponding division of legislative and executive power.
   b. The words "Her Majesty" in the federal *Indian Act* are constitutionally capable of including provincial Crowns.
   c. Usage throughout the *Indian Act* argues that "Her Majesty" is confined to the Crown in right of Canada; "Her Majesty in right of a province" is the expression used when references to provincial Crowns are necessary, and "Her Majesty" when it can only refer to the Crown in right of Canada. The language of s.90(1)(b) is consistent with such an argument. But the contextual argument is far from conclusive and ambiguity in interpretation therefore arises. It is accordingly appropriate here to apply the *Nowegijick* principle.
   d. *Nowegijick* directs the courts to resolve any doubtful expression in favour of the Indians where more than one reasonable interpretation is available. *Nowegijick* requires the resolution of the ambiguity in favour of the Indians and accordingly "Her Majesty" in s.90(1)(b) includes the provincial Crown.
   e. The second aspect of *Nowegijick,* a regard for the aboriginal understanding of words, supports that interpretation and is an appropriate part of the generous liberal approach dictated by *Nowegijick.* The aboriginal understanding of "Her Majesty" is rooted in pre-Confederation realities. Since 1763 the European colonizers have been represented by the Crown, and from the aboriginal perspective any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.

6. The meaning of "personal property" in s.90(1)(b) includes intangible property such as the right to payment of the money at issue in this case. There is no compelling reason why the words "personal property" must be given a common meaning fitting both s.90(1)(a) and (b).

7. The personal property in question was a debt, not money per se. The respondents were "given" personal property because they were given the right to be paid money. This right or debt was in existence when the garnishing order was issued. It was not necessary that actual money be paid before s.90(1)(b) could be applicable.

8. The argument that the ejusdem generis rule of interpretation requires that "agreement" in s.90(1)(b) refers to an agreement similar to a "treaty" with the federal government should not prevail over the *Nowegijick* principle of resolving ambiguities in favour of Indians.

9. As "Her Majesty" in s.90(1)(b) refers to both federal and provincial Crowns, the moneys in questions are protected from garnishment by virtue of s.89(1) of the Act.

10. It would be an odd result if a rebate of a tax that should never have been levied in the first place could be garnisheed on its way back to where it never should have left.

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LA FOREST J. (SOPINKA and GONTHIER JJ., concurring): I have had the advantage of reading the reasons of the Chief Justice. I agree with his proposed disposition of this case, but I do so for quite different reasons. With respect, I am unable to agree with his approach and, in particular, with his adoption of the trial judge's interpretation of s.90(1)(b) of the *Indian Act,* R.S.C. 1970, [now R.S.C. 1985, c.I-5].

The Chief Justice has summarized the facts and the judicial history and I need not repeat them. In broad terms, the issue to be determined involves funds in the hands of the Government of Manitoba which it agreed to pay to the respondent Indians in settlement of a claim for the return of taxes paid by the Indians to Manitoba Hydro in respect of sales of electricity on reserves. The question is whether those funds may be garnisheed by the appellants who are suing the Indians for fees for representing the Indians in negotiating the settlement.

Both the trial judge [reported [1983] 4 C.N.L.R. 50, [1983] 5 W.W.R. 117, 22 Man. R. (2d) 286] and the Court of Appeal [reported [1985] 2 C.N.L.R. 90, [1986] 2 W.W.R. 477, 39 Man. R. (2d) 180] held the funds were not subject to garnishment. These decisions, as the Chief Justice has noted,

were based on the interpretation given by those courts to s.90(1)(b) of the *Indian Act.* In my respectful view, this interpretation not only goes beyond the clear terms and purposes of the Act, but flies in the face of the historical record and has serious implications for Indian policy that are harmful both for government and native people.

Textual Argument

I proceed first to the textual argument. Section 90(1) reads as follows:

> 90.(1) For the purposes of sections 87 and 98, personal property that was
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> > (a)purchased by *Her Majesty* with Indian moneys or money appropriated by *Parliament* for the use and benefit of Indian or bands, or
> > (b) *given* to Indians or to a band under a *treaty or agreement* between a band and *Her Majesty,*
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> shall be deemed always to be situated on a reserve. [Emphasis added.]

It will be obvious that this provision cannot be fully understood without reference to ss.87 and 89, the first exempting lands and personal property on a reserve from taxation, and the second protecting real and personal property of Indians on a reserve from attachment. It is sufficient for me to show the interrelationship of these provisions to reproduce here only their first subsections. They read:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
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> > (a) the *interest of an Indian or a band in reserve or surrendered lands;* and
> >
> > (b) the *personal property* of an Indian or band *situated on a reserve;* [Emphasis added.]
> >
> > . . .
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> 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. [Emphasis added.]

I will, however, have occasion to refer to other portions of these sections as well as to other provisions of the *Indian Act.*

I shall begin with a consideration of the meaning of the phrase "Her Majesty" in s.90(1)(b) of the Act, which, as noted by the Chief Justice, formed the crux of the dispute as presented by the parties.

The Chief Justice concedes in his reasons that by the traditional canons of statutory interpretation a convincing case can be made for limiting the meaning of the term "Her Majesty" in s.90(1)(b) to Her Majesty in right of Canada. This concession rests on the fact that reading of the Act, as a whole, leads to the conclusion that the term "Her Majesty," unless specifically qualified, is meant to refer solely to the federal Crown. As the Chief Justice notes, the constitutional division of powers precludes interpreting "Her Majesty" as including the provincial Crowns in many sections of the Act. To take one example, reading "Her Majesty" as including the provincial Crowns in the context of ss.18 and 37-41 of the Act would be to deny the federal Crown's plenary responsibility respecting "Indian Lands." Moreover, provisions such as ss.35(1) and 114(1) also make it clear that 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, and remembering that the *Indian Act* defines an area of federal responsibility, one would expect that an unqualified reference to "Her Majesty" should be taken as limited to the federal Crown.

This argument is all the stronger in the context of s.90(1)(b). The reference to "moneys appropriated by *Parliament*" in s.90(1)(a) makes it clear that "Her Majesty" must be limited to the federal Crown in that subsection. The absence of specific terms expanding the meaning of the

expression in s.90(1)(b), is, in my view, a strong indication that Parliament intended that the term "Her Majesty" bear the same meaning in the whole of s.90. It seems passing strange that the same words should be accorded different meanings in the same sentence. Paragraphing is, of course, used only as a convenient device to assist understanding.

Similarly, Indian treaties are matters of federal concern and, as I see it, the terms "treaty" and "agreement" in s.90(1)(b) take colour from one another. It must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown; see for an example of such an agreement *Greyeyes v. The Queen,* [1978] 2 F.C. 385, 84 D.L.R. (3d) 196, [1978] C.T.C. 91, 78 D.T.C. 6043, [1978] C.N.L.B. (No. 4) 47 (T.D.).

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

The Cases Relied On

The Chief Justice finds support for the trial judge's interpretation of s.90(1)(b) in the decision of the Privy Council in *Attorney-General for Quebec v. Nipissing Central Railway* Co., [1926] A.C. 715, and that of Spence J. on a motion in this Court in *Nickel Rim Mines Ltd. v. Attorney General for Ontario,* [1967] S.C.R. 672, 63 D.L.R. (2d) 668. In both those cases, the courts were able to find that an unqualified reference to the "Crown" or "Her Majesty" in a federal statute was not necessarily limited to "Her Majesty in right of Canada." On my reading of these decisions, however, I fail, with deference, to see how they assist the position of the respondent in this appeal.

In *Nipissing,* the Privy Council had to deal with the meaning of s.189 of the *Railway Act, 1919*, S.C. 1919, c.68. That section provided, in essence, that any railway company could, upon terms prescribed by the Governor-in-Council, take and appropriate "so much of the lands of the *Crown* lying on the route of the railway" as were necessary to its purposes (emphasis added). The Chief Justice advances the view that the Privy Council, in deciding that s.189 of the Act made no distinction between federal and provincial lands, was primarily influenced by the fact that s.189 traced its origins to a pre-Confederation Act of the Province of Canada which could therefore not have intended to differentiate between the two categories of lands. I do not see this as a prime consideration in their Lordship's opinion. When it is remembered that the provinces own most of the land across the country, the decision of the Privy Council must be seen to rest on the recognition that limiting the "Crown" to the Government of Canada would, in effect, have sterilized the ability of Canada to provide for the effective operation of the "Works . . . for the general advantage of Canada" constituted by the interprovincial railways. In giving this interpretation to the meaning of the "Crown" in s.189 of the *Railway Act,* the Privy Council was simply reading the provision so as to give effect to the obvious purpose of the statute.

Turning to *Nickel Rim Mines, supra*, the question before the Court there involved the interpretation of s.105 of the *Supreme Court Act,* R.S.C. 1952, c.259, dealing with the taxation of costs. Section 105 brought about a change to the common law rule that it is improper, on the taxation of costs in favour of the Crown, to allow counsel fees in respect of services rendered by salaried officers representing the Crown. Spence J., in Chambers, was called on to deal with the narrow question whether the unqualified reference to "Her Majesty" in s.105 of the Act was to be taken as limiting the application of this change to the Crown in right of Canada. The issue accordingly raised a simple point of practice and procedure, and, as I read the result, Spence J. approached the matter in very much the same spirit as if dealing with a problem involving the interpretation of Rules of Court. He viewed the section of the Act essentially as a guide to the Court in its use of discretion and, having concluded that the policy grounds for the awarding of costs were the same for both federal and provincial Crowns, he held that s.105 would apply to both. It is difficult to see what policy grounds there could be for concluding that it was the intention of Parliament that the federal Crown should stand in a position of privilege with respect to the taxation of costs awarded in its favour.

In summary, the two decisions really stand for little more than the proposition that an unqualified reference to "Her Majesty" in a federal statute can indeed refer to the provincial Crowns when to hold otherwise is not rationally defensible, or leads to an implausible result. But this conclusion has no bearing on the interpretative problem facing us in this appeal. There is no conceptual difficulty or implausibility in concluding that "Her Majesty" bears a uniform meaning throughout s.90, and proceeding on the basis that the section applies solely to such personal property as the federal Crown confers on Indians in the course of fulfilling its obligations to native peoples, be it pursuant to its treaty commitments, or its responsibilities flowing from s.91(24) of the *Constitution Act, 1867.* Indeed, for reasons to be developed later, I am of the view that any other interpretation does not concord with the tenor of the obligations the Crown has historically assumed vis-à-vis the property of native peoples.

The Historical Record: Section 87 and 89

Sections 87 and 89, the sections to which the deeming provision of s.90 of the *Indian Act* applies, confer protection on certain categories of property held by Indians. An examination of the history of these sections is illuminating for it demonstrates that, while the Crown has traditionally recognized an obligation to protect the property of native peoples, this obligation has always been limited to certain well-defined classes of property. Though it might seem somewhat of an oblique approach to the problem, a review of this historical classification of property sheds considerable light on the meaning to be ascribed to "Her Majesty" in s.90(1)(b). I turn therefore to a consideration of each of the sections to which the deeming provision of s.90(1)(b) applies.

Section 87, we saw, confers a tax exemption on Indians with respect to their interest in reserve lands or surrendered lands, and their personal property situated on reserve. It is instructive to note that such exemptions from taxation predate Confederation. Professor Bartlett in his monograph *Indians and Taxation in Canada,* 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1987), traces the origins of statutory tax exemptions for natives to an Act of the Province of Canada passed in 1850. Section 4 of this statute, entitled *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury,* S.C. 1850, c.74 provides:

> IV. That no taxes shall be levied or assessed upon any Indian or any person inter-married with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person inter-married with any Indian so long as he, she or they shall reside on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians.

As Professor Bartlett notes, this exemption from taxation remained unchanged until the passage of Canada's first *Indian Act,* S.C. 1876, c.18. In that Act, which effected a comprehensive consolidation of laws respecting Indians, Parliament, in terms that presage the wording of the present day s.87, provided in ss.64 and 65:

> 64. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.
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> 65. All land vested in the Crown, or in any person or body corporate, in trust for or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians or non-treaty Indians shall be exempt from taxation.

Section 89 weaves another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process. In terms that call to mind the present day section, Parliament in 1876 stated in s.66 of the first *Indian Act:*

> 66. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian within Canada, *except on real or personal property subject to taxation under section sixty-four of this Act:* Provided always, that any person selling any article to an Indian or

non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid. [Emphasis added.]

I draw attention to the fact that s.64, reproduced above, provides that Indians holding lands or personal property in their own right outside the reserve hold that property on the same basis as all other similarly situated property holders.

Section 90 first appeared in its present form in the *Indian Act,* S.C. 1951, c.29. Professor Bartlett in his monograph, *supra, at* p. 46, points out that this section has as its historical antecedents provisions in early Indian legislation which exempted from seizure "presents" and "annuities" given to Indians. Thus s.69 of the *Indian Act* of 1876 provides as follows:

> 69. No presents given to Indians or non-treaty Indians, nor any property purchased, or acquired with or by means *of* any annuities granted to Indians or any part thereof or otherwise howsoever, and in the possession of any band of such Indians or of any Indian of any band or irregular band, shall be liable to be taken, seized or distrained for any debt, matter or cause whatsoever. Nor in the province of British Columbia, the province of Manitoba, the North-West Territories or in the territory of Keewatin, shall the same be sold, bartered, exchanged or given by any band or irregular band of Indians or any Indian of any such band to any person or Indian other than an Indian of such band; and any such sale, barter, exchange or gift shall be absolutely null and void, unless such sale, barter, exchange or gift be made with the written assent of the Superintendent-General or his agent; and whosoever buys or otherwise acquires any presents or property purchased as aforesaid, without the written consent of the Superintendent-General, or his agent as aforesaid, is guilty of a misdemeanour, and is punishable by fine not exceeding two hundred dollars, or by imprisonment not exceeding six months, in any place of confinement other than a penitentiary.

Similar provisions appear in all the versions of the *Indian Act* until 1951 when s.90 first appeared.

The above-noted sections should be read alongside other provisions in the early *Indian Acts* which set important constraints on the alienability of lands that had been set aside for the use of Indians. Sections 25 *et seq.* of the *Indian Act* of 1876, for example, provide for the surrender of lands set aside for the "use of the Indians" under conditions that are essentially the same as those set out in ss.37 and 39 of the present day Act. By these terms, the alienation, lease, or other disposal of lands set aside for Indians is conditional on the transfer first being made to "Her Majesty", and on approval being accorded by the Governor-in-Council.

As is clear from the comments of the Chief Justice in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 383, [1985] 1 C.N.L.R. 120 at 136, [1984] 6 W.W.R. 481, 36 R.P.R.1, 20 E.T.R. 6, 13 D.L.R. (4th) 321, 55 N.R. 161, these legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the *Royal Proclamation of 1763.* The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use; see the comments of Professor Slattery in his article "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 753. The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands. This Court, in its recent decision of *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47, alluded to this point when it noted, at p. 677 [pp. 59-60 C.N.L.R.], that the feature of inalienability was adopted as a protective measure for the Indian population lest it be persuaded into improvident transactions.

I take it to be obvious that the protections afforded against taxation and attachment by ss.87 and 89 of the *Indian Act* go hand-in-hand with these restraints on the alienability of land. I noted above that the Crown, as part of the consideration for the cession of Indian lands, often committed itself to giving goods and services to the natives concerned. Taking but one example, 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; see Brennan J.'s discussion of the purpose served by Indian tax immunities in the American context in *Bryan v. Itasca County,* 426 U.S. 373 (1976), at p. 391.

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*. From that time 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.

It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

The Cases

The approach I have taken is fully supported by the cases. In *Francis v. The Queen,* [1956] S.C.R. 618, 3 D.L.R. (2d) 641, 56 D.T.C. 1077, this Court made it clear that Indians were liable to pay custom duties in respect of goods brought directly over the international border onto a reserve. The tax exemption conferred by the then s.86 (now s.87) was held to have no application because of the fact that the excise tax attached at the international border, and hence before the property in question could become situated on a reserve.

Reference should also be made to the decision of the British Columbia Court of Appeal in *Leonard v. R. in Right of British Columbia,* [1984] 4 C.N.L.R. 21, 52 B.C.L.R. 389, [1984] 4 W.W.R. 37, 11 D.L.R. (4th) 226, leave to appeal to this Court refused, [1984] 2 S.C.R. viii. There it was held that Indians could be assessed provincial sales tax in respect of purchases made on portions of their lands that they had conditionally surrendered to Her Majesty in right of Canada for the purpose of attracting commercial leases. I find myself in respectful agreement with the following observation of Macfarlane J..A. as to the limits of s.87(b), at p. 395 B.C.L.R. [p. 26 C.N.L.R.]:

> It is a reasonable interpretation of the section to say that a tax exemption on the *personal* property of an Indian will be confined to the place where the holder of such property is expected to have it, namely on the lands which an Indian occupies as an Indian, the reserve. Indians who surrender their lands to non-Indians on lease give up the right to occupation, and when they own or possess personal property on those surrendered lands I think that they are in no different position than any other citizen. [Emphasis in original.]

In another recent decision, *Leighton v. B.C. (Gov't),* [1989] 3 C.N.L.R. 136, [1989] 4 W.W.R. 654 the British Columbia Court of Appeal again had occasion to consider the significance of the phrase "situated on a reserve" in s.87(b) of the *Indian Act.* In what I take to be a sound approach, Lambert J.A. held that when considering whether tangible personal property owned by Indians can benefit from the exemption from taxation provided for in s.87, it will be appropriate to examine the pattern of use and safekeeping of the property in order to determine if the paramount location of the property is indeed situated on the reserve. I have no doubt that it will normally be appropriate to take a fair and liberal approach to the problem whether the paramount location of tangible property or a chose-in-action is situated on the reserve; see *Metlakatla Ferry Service Ltd. v. B.C. (Gov't),* [1987] 2 C.N.L.R. 95, 12 B.C.L.R. (2d) 308, 37 D.L.R. (4th) 322 (C.A.). But I would reiterate that in the absence of a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property, the protections and privileges of ss.87 and 89 have no application.

I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss.87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. The Alberta Court of Appeal in *Bank of Nova v. Blood,* [1990] 1 C.N.L.R. 16, 60 D.L.R. (4th) 449, captures the essence of the matter when it states, at p.18, in reference to s.87, that: "In its terms the section is intended to prevent interference with Indian property on a reserve."

If any additional evidence is needed to confirm this conclusion, it may be found in an examination of s.89(2). By the terms of this provision, personal property sold to an Indian may still be subject to attachment, even when situated on a reserve, in that a persons who sells to an Indian purchaser under a conditional sales agreement retains his right to the property pending completion of the agreement. There could be no clearer illustration of the fact that s.89 is not meant to arm Indians with privileges they can exercise in acquiring and dealing with property in the general marketplace, but, rather, is simply limited in its purpose to preventing non-natives from interfering with the ability of Indians to enjoy such duly acquired property as they hold on their reserve lands. That, of course, is why s.89 places no constraints on the ability of Indians to charge, pledge, or mortgage property among themselves.

The Deeming Provision of s.90

The next question to be asked is how the deeming provision of s.90(1)(b) compliments this scheme for the protection of native property. As we have seen, ss.87 and 89 protect the personal property of Indians from taxation and distraint provided that property is situated on a reserve. Section 90(1)(b) superadds an additional layer of protection to a subset of the personal property possessed by Indians. By operation of the statutory notional *situs* of s.90(1)(b), personal property that is given to Indians by "Her Majesty" pursuant to a "treaty or agreement" is deemed always to be situated on a reserve, and is therefore protected regardless of its actual *situs*. The range of the property protected in this fashion will vary greatly, according to whether one construes the term "Her Majesty" in s.90(1)(b) as referring solely to the federal Crown, or as including the provincial Crowns as well. I consider the ramifications of each alternative in turn.

If, as I believe, the term "Her Majesty" in s.90(1)(b) is limited to the federal Crown, it follows that the exemptions and privileges of ss.87 and 89 will apply, regardless of *situs*, solely in respect of such property as the federal Crown gives to Indians in acquitting itself of its responsibilities pursuant to treaties, and their ancillary agreements. This interpretation is consistent with the historical antecedents to the section inasmuch as I interpret the terms "presents" and "annuities" in those sections as a reference to moneys the Crown has committed itself to giving Indians pursuant to the cession by Indians of their native lands.

The reason why Parliament would have chosen to provide that personal property of this sort should be protected regardless of where that property is situated is obvious. Simply put, if treaty promises are to be interpreted in the sense in which one may assume them to have been naturally understood by the Indians, one is led to conclude that the Indian signatories to the treaties will have taken it for granted that property given to them by treaty would be protected regardless of *situs*. In the case of chattels, I am aware of no historical evidence that would suggest that Indians ever expected that their ability to derive the full benefit of this property could be placed in jeopardy because of the ability of non-natives to impose liens or taxes on it every time it was necessary to remove this property from the reserve. Similarly, when the Crown acquits treaty and ancillary obligations through the payment of moneys relating to assistance in spheres such as education, housing, and health and welfare, it cannot be accepted that Indians ever supposed that their treaty right to these entitlements could be compromised on the strength of subtle legal arguments that the property concerned, though undoubtedly property to which the Indians were entitled pursuant to an agreement engaging the honour of the Crown, was notionally situated off the reserve and therefore subject to the imposition of taxes or to attachment. It would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted, through the imposition of taxes, to diminish in significant measure the ostensible value of the benefits conferred.

I think it was precisely this reasoning that led the Federal Court Trial Division in *Greyeyes v. The Queen, supra,* to conclude that a scholarship paid to an Indian student pursuant to an agreement

setting out the details of the federal government's promise in Treaty No. 6 to provide assistance for education, should be deemed to be situated on a reserve by the operation of s.90(1)(b).

In support of my view that Indians will have perceived that their treaty benefits were given unconditionally, I would point to the following extract from the report of the Treaty Commissioners in respect of Treaty No. 8. The passage is eloquent testimony to the fact that native peoples feared that the imposition of taxes would seriously interfere with their ability to maintain a traditional way of life on the lands reserved for their use, and, additionally, leaves no doubt that Indians were promised that their entitlements would be exempt from taxation:

> There was expressed at every point the fear that the making of the Treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the Treaty would lead to taxation and enforced military service.
>
> We assured them that the Treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. [Treaty No. 8, 1899 (Queen's Printer, Ottawa), as quoted in Bartlett, *supra*, at p. 5]

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 benefitting 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.

Section 90(1)(b) as including the Provincial Crowns

I turn next to the second of the two alternative readings of "Her Majesty" in s.90(1)(b). If this term is meant to include the provincial Crowns, the exemptions and privileges of ss.87 and 89 will apply to a much wider range of personal property. In effect, it would follow inexorably that the notional *situs* of s.90(1)(b) will extend these protections to any and all personal property that could enure to Indians through the whole range of agreements that might be concluded between an Indian band and Her Majesty in right of a province.

As I see it, if one is to reject the interpretation advanced above, that s.90(1)(b) refers solely to property which enures to Indians from the federal Crown through operation of the treaties and ancillary agreements, there is no basis in logic for the further assumption that some, but not all agreements, between Indian bands and provincial Crowns would be contemplated by the provision. 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.

It follows inexorably that if an Indian band, pursuant to a purely commercial agreement with a provincial Crown, acquires personal property, that property will be exempt from taxation and distraint, regardless of its *situs*. Moreover, the protections of ss.87 and 89 would apply in respect of any subsequent dealings by the Indian band respecting that property, even if those dealings were confined to ordinary commercial matters. This would have broad ramifications, and I cannot accept the notion that Parliament, in fulfilling its constitutional responsibility over Indian affairs, intended that the protective envelope of ss.87 and 89 should apply on such a broad scale.

My conclusion rests on the fact that such a result cannot be reconciled with the scope of the protections that the Crown has traditionally extended to the property of natives. As I stated earlier, a review of the obligations that the Crown has assumed in this area shows that it has done no more than seek to shield the property of Indians that has an immediate and discernible nexus to the occupancy of reserve lands from interference at the hands of non-natives. The legislation has always distinguished between property situated on reserves and property Indians hold outside reserves. There is simply no evidence that the Crown has ever taken the position that it must protect property simply because that property is held by an Indian as opposed to a non-native.

Indeed, unless one were to take the view that there exist two laws of contract, one applying to Indians and one to non-Indians, it would be difficult to rationalize a result that saw exemptions against taxation and distraint apply in respect of property simply because the person acquiring it happened to be an Indian. But, as I have intimated above, the interpretation of s.90(1)(b) advanced by the trial judge and affirmed by the Chief Justice must, in logic lead precisely to this result.

When Indian bands enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements with the provincial Crowns in the same way as with private interests. The provincial Crowns are, after all, important players in the marketplace. If, then, an Indian band enters into a normal business transaction, be it with a provincial Crown, or a private corporation, and acquires personal property, be it in the form of chattels or debt obligations, how is one to characterize the property concerned? To my mind, it makes no sense to compare it with the property that enures to Indians pursuant to treaties and their ancillary agreements. Indians have a plenary entitlement to their treaty property; it is owed to them *qua* Indians. Personal property acquired by Indians in normal business dealings is clearly different; it is simply property anyone else might have acquired, and I can see no reason why in those circumstances Indians should not be treated in the same way as other people.

There can be no doubt, on a reading of s.90(1)(b), that it would not apply to any personal property that an Indian band might acquire in connection with an ordinary commercial agreement with a private concern. Property of that nature will only be protected once it can be established that it is situated on a reserve. Accordingly, any dealings in the commercial mainstream in property acquired in this 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. In addition, provided the property is not situated on reserve lands, third parties will be free to issue execution on this property. I think it would be truly paradoxical if it were to be otherwise. As the Chief Justice has pointed out in *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29 at 36, [1983] 2 C.N.L.R. 89 at 93-94, 144 D.L.R. (3d) 193, [1983] C.T.C. 20, 83 D.T.C. 5042, 46 N.R. 41:

> Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act,* they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

But, in my respectful view, the implications flowing from the interpretation the trial judge advanced of s.90(1)(b) go counter to this statement, for as I have pointed out earlier, as a logical consequence of that interpretation, any time Indians acquired personal property in an agreement with a provincial Crown, even one of a purely commercial character, the exemptions and protections of ss.87 and 89 would apply in respect of that particular asset, regardless of *situs*.

It would follow that if an Indian band concluded a purely commercial business agreement with a private concern, the protections of ss.87 and 89 would have no application in respect of the assets acquired pursuant to that agreement, except, of course, if the property was situated on a reserve. It must be remembered that the protections of ss.87 and 89 will always apply to property situated on a reserve. But the protections of ss.87 and 89 would attach, regardless of *situs*, if the same band concluded a similar commercial agreement and acquired the same property for the same business ends, but happened to conclude the agreement with a provincial Crown acting in a purely commercial capacity. In other words, the statutory notional *situs* of s.90(1)(b) would apply or not apply according as to whether an Indian band concluded a purely commercial agreement with one party as opposed to another. This result, in my respectful view, defies plausible explanation.

I think it can be seen that any interpretation of s.90(1)(b) that sees the purpose of that section as extending beyond that of preventing non-natives from interfering with property that enures to Indians as a result of the Crown's obligations under treaties and ancillary agreements, gives a novel and unprecedented extension to the protections that have up to now been conferred by the Crown on the property of Indians. Property acquired pursuant to agreements with a provincial Crown and an Indian band will fall to be protected, regardless of *situs*, simply because it has been acquired by an Indian as opposed to a non-native citizen. The question whether the property has its paramount location on reserve lands, or is property to which Indians have an entitlement *qua* Indians will be irrelevant. As I see it, if Parliament had intended to cast aside these traditional constraints on the Crown's obligations to protect the property of Indians, it would have expressed this in the clearest of terms. I am loathe to conclude that this result can be made to rest on the strength of a supposed ambiguity in s.90(1)(b), which as I have suggested above, can only arguably be an ambiguity if one turns a blind eye to compelling historical and textual arguments.

To reiterate, I simply cannot reconcile the implications that flow from reading the term "Her Majesty" in s.90(1)(b) as including the provincial Crowns with the scope of the protections that the Crown has accorded Indian property to date. The historical record that so clearly reveals a cogent rationale for protecting the personal property that enures to Indians by operation of treaty obligations regardless of *situs*, is silent as to any reason why personal property that Indian bands acquire from the provincial Crowns should receive the same extraordinary level of protection.

Moreover, an examination of s.90(2) confirms that it is fallacious to interpret s.90(1)(b) as intended to expand on the scope of the protections that the Crown has traditionally assumed with regard to the protection of native property.

Section 90(2) provides that the Minister of Indian Affairs must approve any transaction purporting to transfer title or any interest in any property to which s.90(1)(b) applies:

> 90. . . .
>
> (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.

A reading of the *Indian Act* shows that this provision is but one of a number of sections which seek to protect property to which Indians may be said to have an entitlement by virtue of their right to occupy the lands reserved for their use. In addition to the protections relating to Indian lands to which I have already drawn attention, the range of property protected runs from crops raised on reserve lands to deposits of minerals; see ss.32, 91, 92, 93. These sections restrict the ability of non-natives to acquire the particular property concerned by requiring that the Minister approve all transactions in respect of it. As is the case with the restrictions on alienability to which I drew attention earlier, the intent of these sections is to guard against the possibility that Indians will be victimized by "sharp dealing" on the part of non-natives and dispossessed of their entitlements.

If the meaning of her "Her Majesty" in s.90(1)(b) is interpreted in the manner I am proposing, there is no difficulty in finding an explanation for the presence of s.90(2). 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.

By contrast, if "Her Majesty" is to bear the broad meaning that flows inexorably from the interpretation that the trial judge would ascribe to it, I am unable to find any cogent reason why Parliament would interpose the protective mantle of the federal Crown in this manner. It seems to me to be an extraordinary proposition that Indian bands which conclude ordinary business dealings in the commercial marketplace with provincial Crowns, would thereafter be precluded from dealing as free agents in respect of any personal property accruing to them as a result of such agreements. But on a plain reading of s.90(2), it would fall to the Minister to supervise every commercial transaction purporting to transfer any interest in respect of any property deemed by s.90(1)(b) to be situated on a reserve. Indeed, by the terms of s.90(3), a person who enters into any such transaction without the Minister's seal of approval actually commits an offence.

My examination of ss.90(2) and 90(3) only reinforces me in my conclusion that to endorse the trial judge's interpretation of s.90(1)(b) and to regard that section as being anything more than a protective measure having the specific and limited purpose of ensuring that non-natives do not dispossess Indians of the entitlements that flow to them by operation of their treaties and ancillary agreements, is to prefer an abstruse and strained reading of the section to a plain and ordinary interpretation fully supported by the historical record.

I conclude that the statutory notional *situs* of s.90(1)(b) is meant to extend solely to personal property which enures to Indians through the discharge by "Her Majesty" of her treaty or ancillary obligations. Pursuant to s.91(24) of the *Constitution Act, 1867,* it is of course "Her Majesty" in right of Canada who bears the sole responsibility for conferring any such property on Indians, and I would, therefore, limit application of the term "Her Majesty" as used in s.90(1)(b) to the federal Crown.

Nowegijick v. The Queen

While the textual and historical arguments to be made for limiting the meaning of "Her Majesty" in s.90(1)(b) to the federal Crown appear to me to be irrefragable, I recognize that it is necessary to ask whether the canons of construction generic to the interpretation of statutes relating to Indians change this result. These canons are, or course, those set out by the Chief Justice in *Nowegijick, supra,* at p. 36 S.C.R. [p. 94 C.N.L.R.].

I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.

But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act,* it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers,* 305 U.S. 527 (1939), at p. 533.

At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.

It is consideration of this factor that leads me to reject the interpretation the trial judge would give to s.90(1)(b). The provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples, and I am not prepared to accept that Parliament, in enacting s.90(1)(b), intended that the privileges of ss.87 and 89 exempt Indian bands from taxation and civil process in respect of *all* personal property that they may acquire pursuant to *all* agreements with that level of government, regardless of where that property is located. This interpretation is simply too broad. As I have attempted to show, it would take in any agreement relating to purely commercial dealings Indian bands might conclude with the provincial Crowns when competing in the economic mainstream of society. To my mind, such an interpretation takes one beyond the liberal and the generous and subverts the very character of the commitments that the Crown has historically undertaken vis-à-vis the protection of native property. I have already stated that I find no evidence in the historical record that the Crown has ever taken upon itself the obligation of protecting the property of natives without regard to the fact whether the "paramount location" of that property can be said to be reserve lands, or whether the property concerned enures to Indians as an incident of their status.

In arriving at his conclusion that the trial judge was correct in interpreting "Her Majesty" in s.90(1)(b) as including the provincial Crowns, the Chief Justice sets considerable store on what he takes to be the aboriginal perception of "Her Majesty." With deference, I question his conclusion that it is realistic, in this day and age, to proceed on the assumption that from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are simply internal to itself, such that the Crown may be considered what one might style an "indivisible entity." But even accepting that assumption, it does not follow that fairness requires one to proceed on the basis that Indians would be justified in concluding that *all* property they may acquire pursuant to agreements with that "indivisible entity" should be automatically protected, regardless of *situs*, by the exemptions and privileges conferred by ss.87 and 89 of the *Indian Act.* I have no doubt that Indians are very much aware that ordinary commercial dealings constitute "affairs of life" that do not fall to be governed by their treaties or the *Indian Act.* Thus I take it that Indians, when engaging in the cut and thrust of business dealings in the commercial mainstream are under no illusions that they can expect to compete from a position of privilege with respect to their fellow Canadians. This distinction, it is fair to say, will be driven home every time Indians do business off their reserve lands. Professor Slattery puts the matter plainly when he notes, *supra,* at p. 776, that the purchases made by Indians in a normal drugstore are governed by laws of general application.

The conclusion I draw is that it is entirely reasonable to expect that Indians, when acquiring personal property pursuant to an agreement with that "indivisible entity" constituted by the Crown,

will recognize that the question whether the exemptions of ss.87 and 89 should apply in respect of that property, regardless of *situs*, must turn on the nature of the property concerned. If the property in question simply represents property which Indians acquired in the same manner any other Canadian might have done, I am at a loss to see why Indians should expect that the statutory notional *situs* of s.90(1)(b) should apply in respect of it. In other words, even if the Indians perceive the Crown to be "indivisible," it is unclear to me how it could be that Indians could perceive that s.90(1)(b) is meant to extend the protections of ss.87 and 89 in an "indivisible" manner to all property acquired by them pursuant to agreements with that entity, regardless of where that property is held. What if the property concerned is held off the reserve, and was acquired by the Indian band concerned simply with a view to further business dealings in the commercial mainstream?

This brings me back to the objection I voiced earlier, and which was to the effect that on the interpretation of s.90(1)(b) advanced by the trial judge, it must follow, as a matter of simple logic, that the section is meant to apply to the whole range of agreements between Indian bands and provincial Crowns. 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. I conclude that by necessarily taking in purely commercial dealings, the broad interpretation proposed by the trial judge would distort the very perception that Indians themselves can, in fairness, be expected to hold of the limits of the extraordinary protection conferred by s.90(1)(b).

Moreover, I would question the conclusion that interpreting "Her Majesty" as including the provincial Crowns in the context of s.90(1)(b) is tantamount to resolving the ambiguity of the meaning of this term in favour of the Indians. Section 87 and 89, as I have shown above, have been crafted so as to place obstacles in the way of non-natives who would presume to dispossess Indians of personal property that is situated on reserves. But when Indians deal in the general marketplace, the protections conferred by these sections have the potential to become powerful impediments to their engaging successfully in commercial matters. Access to credit is the lifeblood of commerce, and I find it very difficult to accept that Indians would see any advantage, when seeking credit, in being precluded from putting forth in pledge property they may acquire from provincial Crowns. 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.

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

In summary, while I of course endorse the applicability of the canons of interpretation laid down in *Nowegijick,* it is my respectful view that the interpretation proposed in this particular instance takes one beyond the confines of the fair, large and liberal, and can, in fact, be seen to involve the resolution of a supposed ambiguity in a manner most unfavourable to Indian interests.

Applicability of the *Garnishment Act*

It follows from my conclusion that the term "Her Majesty" in s.90(1)(b) is limited to the federal Crown that this section has no application to the agreement that was entered into between the Government of Manitoba and the respondents. This conclusion still leaves to be resolved the question whether it was proper, in the circumstances, to garnish the moneys in question.

It must be remembered that the moneys concerned represent the proceeds of a sales tax which, by virtue of s.87 of the *Indian Act,* was improperly levied by the Government of Manitoba in that it related to "personal property" of an Indian or band "situated on a reserve." In effect, but for the failure to observe the requirements of the *Indian Act,* these moneys would never have left the reserve and flowed to the provincial coffers. And, given the terms of the agreement between the

parties, it is clear that the moneys would have been returned *in toto* to the respondents but for application of the *Garnishment Act,* R.S.M. 1970, c.G20, C.C.S.M., c.G20.

The trial judge declined to interfere with the garnishment order on the ground that it was necessary to interpret the *Garnishment Act* in a "fair, large, and liberal" manner. While I take no issue with this as a general proposition, I cannot accede to the view that the *Garnishment Act* may operate so as to attach moneys having the specific provenance I have noted above. Section 88 of the *Indian Act* makes it clear that laws of general application are applicable to, and in respect of Indians except to the extent that such laws are inconsistent with the provisions of the *Indian Act.* The purpose of s.87(b) of that Act is to protect the personal property of Indians from taxation so as to prevent any impairment by the provincial or federal Crowns with the ability of Indians to possess and enjoy that property. Given the broad social purpose behind this exemption, it would be truly anomalous if, as a result of the imposition of an *ultra vires* tax, the application of provincial law were to impair the ability of Indians to be placed in the same position as they would have been but for the improper tax. In other words, I think it makes no sense to proceed on the basis that Parliament meant to say to Indians, "We will protect you against all taxes in respect of such personal property as is situated on reserves, but if you are taxed improperly that illegal tax is liable to be attached." As I see it, this would be tantamount to allowing provincial law to do via a circuitous and indirect route what s.89 of the *Indian Act* explicitly prohibits it from doing directly, i.e., attach the personal property of Indians situated on a reserve. In my view, this result would be inconsistent with the operation of the *Indian Act,* and I therefore conclude that the garnishment order should not have issued.

Moreover, were it necessary to decide the matter on this point, I would hold that Morse J. misconstrued the clear import of s. 3 of the *Garnishment Act* when he held it would apply to the agreement in question here. That section provides:

> 3. The Government of Manitoba may be garnished under any Act of the Legislature, the same as ordinary persons, with regard to moneys due or accruing due to persons employed or paid by the government.

The words "moneys due or accruing due to persons employed or paid by the government" in s.3 of that Act, in my respectful view, can be seen to refer solely to debts of the government arising pursuant to agreements relating to the provision of work or services. It is clear that the nature of the obligation existing between the Government of Manitoba and the respondents here cannot be said to have its origins in an agreement of this nature.

Disposition

I would dismiss the appeal with costs throughout.

WILSON J. (LAMER and L'HEUREUX DUBÉ JJ., concurring): Manitoba Hydro invalidly imposed a tax upon the Peguis Indians in respect of the sale of electricity on a reserve. The Government of Manitoba subsequently settled the Indians' claim for the return of the taxes paid and the issue on this appeal is whether the proceeds of that settlement may be garnisheed by the appellant lawyers in payment of their fees for representing the Indians in the settlement negotiations.

As the Chief Justice and Justice La Forest point out, both the trial judge [reported [1983] 4 C.N.L.R. 50, [1983] 5 W.W.R. 117, 22 Man. R. (2d) 286] and the Court of Appeal [reported [1985] 2 C.N.L.R. 90, [1986] 2 W.W.R. 477, 39 Man. R. (2d) 180] held that the funds could not be garnisheed. Their conclusion was based on their interpretation of s.90(1)(b) of the *Indian Act,* R.S.C. 1970, c.I-6 [now R.S.C. 1985, c.1-5]. My colleagues differ as to the interpretation of that provision but they reach the same result, namely that the moneys cannot be garnished by the appellants.

I agree with my colleague La Forest J.'s interpretation of s.90(1)(b) and my only concern is with the application of the *Garnishment Act,* R.S.M. 1970, c.G20, C.C.S.M., c.G20 to those monies which are, according to my colleague's interpretation, not situate on a reserve or deemed to be so situate. On what basis then are they exempt from seizure?

I should say at once that I take no issue with my colleague that as between the Government of Manitoba and the Indians the Indians are entitled to the moneys for the reasons he gives. My concern is with the claim of a third party to the proceeds in transit if those proceeds are not

protected by the *Indian Act.* I assume for this purpose that the claim of the appellants is a perfectly valid third party claim.

My colleague suggests that but for the Government of Manitoba's failure to observe the requirements of the *Indian Act* the moneys would never have left the reserve. He feels that it would be truly anomalous if, as the result of the imposition of an *ultra vires* tax, the application of the provincial law were to impair the ability of Indians to be placed in the same position as they would have been in but for the improper tax. The problem I have is how does one get to this admittedly very desirable result in the face of an intervening third party claim? Once it is held that the moneys are not in fact situate on the reserve or deemed to be so and that they do constitute a debt, why may that debt not be subject to garnishment at the hands of an innocent third party? I know of no legal principle (subject to what will be said hereafter about s.3 of the *Garnishment Act*) that suggests that the way in which the debt arose can affect an innocent third party seeking to initiate garnishment proceedings with respect to that debt.

LaForest J. also states that, were it necessary to decide the point, he would hold that Morse J. misconstrued s.3 of the *Garnishment Act* when he held that it applied to the agreement in this case. Although the law in this area is somewhat anachronistic, I agree with my colleague that the *Garnishment Act* does not apply on the facts of this case. But it seems to me important to explain why this is so, particularly since the legislature may wish to reconsider aspects of the doctrine of Crown immunity that lead to this conclusion.

It has long been the position of the common law that the Crown is immune from garnishment proceedings. Duff J. (as he then was) explained the reason for the common law's approach in *Canadian National Railway Co. v. Croteau*, [1925] S.C.R. 384 at 388:

> The real difficulty in attaching moneys payable by the Crown to a third person lies in the inability of the courts to make an order against the Crown.

Duff C.J. had occasion to develop this point several years later in *The King v. Central Railway Signal Co.,* [1933] S.C.R. 555 at 563:

> Apart, however, from such remedies as the subject has by way of petition of right and in some special cases by statute, the rule is a rigorous one that His Majesty cannot be impleaded in any of His courts and this rule is just as rigorous in the case of an action *in rem* in which the proceeding is against some property belonging to His Majesty *(The Scotia).* It is true that under modern procedure in certain cases a proceeding may be taken for a declaration of right by a subject against the Attorney General and in other cases where the interests of the Crown appear to be involved in litigation the Attorney General may be made a party *(Dyson v. Attorney General; E. & N. Rly. Co. v. Wilson);* but the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against any of His Majesty's property is competent in any of His Majesty's courts.

Duff C.J. went on to explain that Blackstone had set out the rationale for the common law's strict approach in his *Commentaries on the Laws of England* (1876, 1 Kerr 214-15):

> Hence it is, that no suit or action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it; but who, says Finch, shall command the king? Hence it is, likewise, that by the law the person of the sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.

The Crown's immunity from garnishment proceedings has been retained in contemporary legislation regulating proceedings against the Crown. In Manitoba, for example, s.16(6) of *The Proceedings Against the Crown Act,* R.S.M. 1987, c.P140 states that "[n]o execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of money or costs." This language mirrors that seen in other jurisdictions in which the Crown retains immunity in garnishment proceedings (see the Ontario Law Reform Commission, *Report on The Enforcement of Judgment Debts And Related Matters* (1981), at p. 146).

One unfortunate consequence of the Crown's immunity from a garnishment order used to be that when a Crown servant failed to pay a judgment debt, the judgment creditor could not attach the servant's wages. Over the years efforts have been made to mitigate the harshness of this rule by qualifying the scope of the Crown's immunity in garnishment proceedings. Professor Hogg observes that in most jurisdictions it is now expressly provided by statute that the wages of Crown employees may be garnisheed, although such legislation has rarely gone so far as to allow the garnishment of all debts owed by the Crown (*Hogg, Liability of the Crown,* 2nd ed. (Toronto: Carswell, 1989), at 53). It is this kind of limited change that Manitoba's legislature sought to achieve when it passed s.3 of its *Garnishment Act.*

> 3. The Government of Manitoba may be garnished under any Act of the Legislature, the same as ordinary persons, with regard to moneys due or accruing due *to persons employed or paid by the government.* [Emphasis added.]

I agree with my colleague La Forest J. that the words "moneys due or accruing due to persons employed or paid by the government" refer solely to debts of the government arising pursuant to agreements relating to the provision of work or services. I also agree that these words do *not* extend to lift the government's immunity in respect of the garnishment proceedings which the appellant sought to initiate.

But I think it important to note that it is precisely because changes brought about by provisions such as s.3 of Manitoba's *Garnishment Act* have been quite limited in nature that the law on Crown immunity has become the target of considerable criticism. For example, in *R. v. Eldorado Nuclear Ltd*., [1983] 2 S.C.R. 551 at 558, 4 D.L.R. (4th) 193, 8 C.C.C. (3d) 449, 50 N.R. 120 Dickson J. (as he then was) observed:

> It [i.e. the doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.

More recently, the Ontario Law Reform Commission has called for a major overhaul of the law relating to Crown immunity. Noting that the "present law of Crown liability is a hodge podge of rules, presumptions, privileges and immunities, largely based on an anachronistic historical rationale, rather than a rational and carefully designed set of rules appropriate to contemporary notions of government and citizen rights," the Commission states that "the present law governing liability of the Crown, insofar as it still provides privileges and immunities not enjoyed by ordinary persons, is opposed to popular and widely-held conceptions of government" (Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto, 1989), at 2-3). The Commission's general recommendation is noteworthy (at 6):

> However, at this point we think it is important to indicate that, as a matter of general principle, *we believe that the Crown should be subject to the same law as any other person, and that any exception to this general rule must be clearly justified.* Accordingly, our general and central recommendation is that the privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity. [Emphasis added.]

Criticism has also been directed specifically at the role of Crown immunity in the context of garnishment proceedings. In 1981 the Ontario Law Reform Commission recommended that all debts for which the Crown might be liable, not only wages payable by the Crown, should be available to a judgment creditor by way of garnishment *(Report on The Enforcement of Judgment Debts and Related Matters,* (Toronto, 1981) at 147). The same recommendations have been made by the Law Reform Commission of British Columbia *(Report on Attachment of Debts Act* (1978), at 53) and the Law Reform Division of the New Brunswick Department of Justice *(Third Report of the Consumer Protection Project,* Vol. II*, Legal Remedies of the Unsecured Creditor After Judgment* (Fredericton, 1976), at 39).

More recently Professor Hogg has observed that it is difficult to see why a garnishment order should not be available against the Crown. "The purpose of the order is to enforce a judgment debt owed by a private debtor, not the Crown itself. No public interest seems to be impaired when a debt owed by the Crown is attached, because the only result is that the Crown is required to pay the debt to the sheriff instead of to the Crown's original creditor (who is now a judgment debtor in default)" (Hogg, *Liability of the Crown,* at 52-53). The Ontario Law Reform Commission reiterated

these objections in 1989 and recommended that the Ontario legislature remove the residual immunity from garnishment of debts owed by the Crown *(Report on the Liability of the Crown,* at 88).

These observations strongly suggest that the doctrine of Crown immunity in the context of garnishment proceedings is an anachronism when the Crown is the garnishee. However, I think it clear that it is for the legislature to effect the kind of fundamental reforms to the law of Crown immunity that it has become increasingly apparent are necessary. Because these issues concern fundamental questions about the relationship between the courts and government, this Court is ill-equipped to engage in the delicate task of rewriting law in this area. As a general rule, change has resulted from the passage of Crown Proceedings Acts and subsequent amendments to these Acts. In my view, this remains the appropriate avenue for change. Haphazard attempts on the part of the judiciary to reformulate the law on Crown immunity not only raise delicate constitutional issues but they risk producing even more of a "hodge podge" of rules instead of producing the rational and carefully designed set of rules appropriate to contemporary notions of government and citizen rights that the Ontario Law Reform Commission has called for.

Disposition

I would dismiss the appeal on the basis that the *Garnishment Act* does not apply to the Crown so to permit the garnishment by the appellants of moneys owing by the Crown to the Indians under the settlement.

DICKSON C.J.: The broad issue in this appeal is whether certain monies agreed to be paid by the Government of Manitoba to 54 Indian bands, and garnished before judgment by the appellants, Mr. Mitchell and Milton Management Ltd., can be considered "personal property of [a] . . . band situated on a reserve" within the meaning of s.89(1) of the *Indian Act,* R.S.C. 1970, c.I-6 [now R.S.C. 1985, c.I-5] (the Act), and therefore not subject to attachment. Section 89(1) reads:

> 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.

The following section of the Act contains a "deeming" provision crucial in deciding the issue presented by this appeal:

> 90.(1) For the purposes of section 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.

Can the garnished monies be said to be "personal property that was given to . . . a band under . . . an agreement between a band and Her Majesty"? This gives rise to the further question whether the words "Her Majesty" in s.90(1)(b) of the Act can include the provincial Crown or are referable only to the federal Crown. If the monies in question are found to be "personal property" within the meaning of s.90(1)(b), they would be deemed to be situated on a reserve and, therefore, protected from garnishment under s.89(1).

I

The Facts

The appellants issued a statement of claim in which it was alleged that (i) the First Nations Confederacy Inc. as representative of its member bands retained Mr. Mitchell to act on its behalf in negotiating a rebate from the Government of Manitoba of sales tax paid by the bands over several years to Manitoba Hydro; (ii) it was a term of the agreement that Mr. Mitchell would be paid fees equivalent to 20 per cent of sales tax recovered, assessable to each band on a prorated basis, less such funds as might be received against fees from the federal Department of Indian Affairs; (iii) Mr. Mitchell, through Milton Management Ltd., negotiated Hydro sales tax rebates with the

Government of Manitoba and in the fall of 1982, the Government of Manitoba agreed to pay the Indian bands sales tax rebates in the amount of $953,432.00, entitling Mr. Mitchell to a fee of $190,668. The federal Department of Indian Affairs contributed $5,493 to Mr. Mitchell's fees, leaving a claim against the bands of $185,175.

The respondent bands, in their statement of defence, deny the retainer. They allege that the Government of Manitoba, on its own initiative, and not as a result of the appellants' efforts, decided to refund to the Indian bands in Manitoba certain taxes which had been improperly collected from them. They say that the fee is so oppressive and excessive as to be unconscionable and, finally, that Mr. Mitchell is a member of the Institute of Chartered Accountants of Manitoba and as such is precluded from charging a fee contingent on the results of professional services.

On March 9, 1983, the Lieutenant Governor in Council of Manitoba passed Order-in-Council No. 253, on the submission of the Minister of Finance, which reads in part:

> AND WHEREAS the minister has received advice from a legal officer of the government advising him that taxes paid under The Revenue Act 1964 by Indians and Indian Bands were improperly collected since Section 87 of the Indian Act prohibited provinces from taxing electricity provided to Indians and Indian Bands which electricity was consumed by them on an Indian reservation;
>
> AND WHEREAS it has been determined by the staff of his department and agreed to by representatives of those Indians and Indian Bands that a settlement amount of money for the period December 1, 1964, the date of the inception of The Revenue Act 1964 Part I which imposed the tax on electricity, up to and including March 20, 1980, at which time Manitoba Hydro exempted from tax those accounts of Indians and Indian Bands for which no tax is exigible under this Act, including interest totals $994,840.00.
>
> AND WHEREAS it is deemed advisable to establish a trust for the settlement of the claims of Indian Bands in respect of tax paid on electricity and provide for the administration of the trust;
>
> . . . the Minister recommends:
>
> THAT the amount of $994,840. be transferred in the books of the government from appropriation (VII (Finance) (4) (Taxation Division) (c) (Mining & Use Taxes Branch) (3) (Refunds) to a trust account to be held by the Minister of Finance on behalf of those Indians and Indian Bands as described on Schedule "A" attached, and paid out by him upon being satisfied that each Indian Band provides the Minister with satisfactory releases and assignments of their claims to their respective organizations;
>
> THAT the Minister retain a holdback of 3% of the amount shown as payable in Schedule "A" from any payment made as provided above for a period of six years from March 9, 1983 to satisfy, if any, further claims made by Indians or Indian Bands for indemnification related to the payment of taxes on electricity for the above described period of time;

The appellants' claim has not yet come to trial. Rather, the substance of the current appeal, as I have indicated, stems from garnishment proceedings prior to judgment. After agreeing to allow an original garnishing order (obtained on January 10, 1983) to lapse because it was tying up the flow of important funds designated for social purposes, the appellants (on March 10, 1983, the day after the Order-in-Council established the trust fund) obtained a second prejudgment garnishing order against the tax rebate funds held in trust by the government to the amount of the fee claimed by the appellants, that is, $185,175. In accordance with the garnishing order, the garnishee government paid the garnished amount into court. The respondents applied to have the garnishing order set aside, and the monies paid out of court, on the basis that such an order was inconsistent with ss.89(1) and (90)(1)(b) of the *Indian Act.* The respondents' contention was that s.3 of the Manitoba *Garnishment Act,* R.S.M. 1970, c.G20, permitting garnishment of the Government of Manitoba, was not a provincial law applicable to Indians within the terms of s.88 of the *Indian Act.* Section 88 of the *Indian Act* reads as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, 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 such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the

extent that such laws make provision for any matter for which provision is made by or under this Act.

In further support of their application to set aside the garnishing order, the respondents contend that the money disposed of in the Order-in-Council is a debt owing to the respondents and, as such, constitutes, within the meaning of s.90(1)(b) of the *Indian Act,* "personal property that was . . . given to Indians or to a band under a treaty or agreement between a band and Her Majesty." As a result, it is said, that debt is deemed by s.90(1)(b) to be situated on a reserve and, therefore, by s.89(1), cannot be the subject of attachment at the instance of a non-Indian. The respondents succeeded in their application before Morse J. ([1983] 4 C.N.L.R. 50, [1983] 5 W.W.R. 117, 22 Man. R. (2d) 286 (Man. Q.B.)). The appellants now appeal from a decision of the Manitoba Court of Appeal ([1985] 2 C.N.L.R. 90, [1986] 2 W.W.R. 477, 39 Man. R. (2d) 180), which upheld the judgment of Morse J.

II

Judgments

Manitoba Queen's Bench - Morse J.

The Trial Judge, Morse J., first determined that s.3 of the *Garnishment Act* applies to the money owing to the bands as "moneys due to persons . . . paid by the government." He then went on to find that, were it not for the deeming provision, s.90(1)(b), the debt owing to the respondents would be susceptible to garnishment, as the *situs* of the debt was off the reserve due to the fact that the place of the debtor was off the reserve. Relying on s.90(1)(b), Morse J. held that the debt could be deemed situated on the reserve and, therefore, was not subject to attachment.

Morse J. interpreted s.90(1)(b) by breaking down the phrase "personal property . . . given to Indians or to a band under a treaty or agreement between a band and Her Majesty" into its constituent parts. Morse J. first rejected the argument that "personal property" in s.90 had to be given a uniform meaning for both of its subsections. Therefore, for purposes of s.90(1)(b), the words could encompass intangible property such as a money debt even if the words had to be given a more restricted meaning for purposes of s.90(1)(a). Second, he found that the word "agreement" does not have to be read *ejusdem generis* with the word "treaty," also found in s.90(1)(b); nor did he accept that between the respondents and the Government of Manitoba there was merely an appropriation of money, rather than an agreement. Third, he held that the words "Her Majesty" should be interpreted to refer not only to Her Majesty in right of Canada, but also to Her Majesty in right of the province of Manitoba. Finally, Morse J. found that the use of the past tense in the phrase "was given" did not require that the money had to have been given to the respondents; rather, since the personal property in question was the right to be paid money, not money itself, the respondents had been given that right prior to the garnishment.

Having found that the debt owing to the respondents was not susceptible to garnishment, Morse J. extended the garnishing order for thirty days to allow the appellants to find funds not protected by the *Indian Act* which could be garnished, after which period the order was to be set aside.

Manitoba Court of Appeal - (Matas, O'Sullivan and Philp JJ.A.)

Writing for the court, O'Sullivan J.A. upheld the trial judge. The Court of Appeal appeared to see the only real issue as being whether the provincial Crown was "Her Majesty" within the terms of s.90(1)(b). The court held that since there is only one Sovereign in the sense of only one Queen, the Sovereign or Crown in Canada is indivisible and, therefore, the reference to "Her Majesty" had to include both the Crown in right of Canada and the Crown in right of Manitoba.

III

The Applicable Interpretive Principles

I should say at the outset that I find the reasons and reasoning of Morse J. persuasive. In particular, he was correct in resorting to the principle enunciated by this Court in *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29 at 36, [1983] 2 C.N.L.R. 89 at 94, 144 D.L.R. (3d) 193, [1983] C.T.C.

20, 83 D.T.C. 5042, 46 N.R. 41, when he found it necessary to resolve interpretive difficulties. In *Nowegijick,* the Court had the following to say:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan,* 175 U.S. 1 (1899), it was held that Indian treaties "must . . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians."

Two elements of liberal interpretation can be found in this passage: (1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. In some cases, the two elements are indistinguishable, but in other cases the interpreter will only be able to perceive that there is an ambiguity by first invoking the second element.

The appellants maintain that the *Nowegijick* principle should not govern the present appeal. Rather, it is asserted that the normal principle that derogations from the civil rights of a creditor should be strictly construed, is applicable. The appellants attempt to distinguish *Nowegijick* in part by saying that the case was concerned with trying to resolve a conflict between the State and an Indian, in which case it was appropriate to resolve any ambiguity against the author of the doubt. The appellants are in effect arguing that *Nowegijick* is not applicable when it is a private citizen or other civil party, and not the State (the author of the doubt or ambiguity) who will lose out if the Act is interpreted in favour of aboriginal litigants.

I cannot accept that the comments in *Nowegijick* were implicitly limited in this way. The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. The above-quoted statement is clearly concerned with interpreting a statute or treaty with respect to the persons who are its *subjects* - Indians - not with interpreting a statute in favour of Indians simply because it is the State that is the other interested party. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility, and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.

In oral argument, the appellants also sought to distinguish *Nowegijick* on the basis that the case dealt only with laws touching upon the particular status or qualities of Indians, thus providing a policy basis for the interpretive principle. *Nowegijick* dealt with tax exemptions under s.87 of the Act, while this case deals with exemptions from garnishment ("attachment") under s.89. Both provisions reflect the policy of the Act that Indians should be protected from the operation of laws which otherwise might allow Indians to be dispossessed of their property. In *Nowegijick,* the Court was concerned with whether a provincial law was applicable to Indians as a law of general application (s.88, *Indian Act).* The only limitation to the principle articulated in *Nowegijick* was that the treaties or statutes must "relat[e] to Indians" for the liberal interpretive principle to apply. The *Indian Act* is the quintessential Act relating to Indians and the interpretation of any provision in it is, therefore, subject to the *Nowegijick* principle.

I would finally note that the appellants' argument to the effect that as against a private party the Court should not create privileges where Parliament has not explicitly done so, even if accepted, would not avail them in this case. Section 89(1) provides that a non-Indian cannot attach personal property of an Indian in certain circumstances. It clearly contemplates that Indians will be favoured vis-à-vis non-Indians. Therefore, it would be inconsistent with *Nowegijick* to interpret s.90, which extends s.89's protection, in a restrictive manner.

IV

First Preliminary Issue: Applicability of the *Garnishment Act*

As a preliminary matter, it is necessary to determine whether s.3 of the *Garnishment Act* is available to the appellants. The section reads:

> 3. The Government of Manitoba may be garnished under any Act of the Legislature, the same as ordinary persons, with regard to moneys due or accruing due to persons employed or paid by the government.

Morse J. adopted a broad interpretation which would best suit the purpose of the *Garnishment Act* and this particular provision - to allow and facilitate the garnishing of government. The respondents have not argued against Morse J.'s interpretation and I shall thus assume, without deciding, its validity for the purposes of this appeal.

Second Preliminary Issue: The Situs of a Debt

It appears to have been conceded by all parties that, without s.90, the respondents would fail, because the situs of a debt is the location of the debtor, which, in this case, is off the reserve: see the authorities cited by Morse J., *supra,* at p. 122 W.W.R. [p. 54 C.N.L.R.]. As no argument has been addressed on the point this rule will be assumed to be valid for purposes of this appeal.

VI

The Main Issue - The Meaning of "Her Majesty"

The main issue, as I have noted, is whether the criteria in s.90(1)(b), have been met so as to deem the debt situated on the reserves of the respondents and therefore immune from attachment under s.89(1). I shall proceed in the same fashion as Morse J. and break down the subsection into its component parts. By far the most contentious element, and that which occupied almost the entirety of each factum, is the question of whether "Her Majesty" in s.90(1)(b) is limited to the federal Crown or also comprises the provincial Crowns, with Manitoba being thereby included.

Morse J., at p. 127 W.W.R. [p. 59 C.N.L.R.] prefaced his observations on the point with these words:

> Apart from the fact that the *Indian Act* is a federal statute, I can see no compelling reason why these words should be taken to refer only to Her Majesty in right of Canada. In my view, there is no constitutional or other impediment which would prevent the federal Parliament from providing that personal property given to an Indian or to a band under an agreement between a band and a provincial government should be deemed to be situated on a reserve.

The Court of Appeal relied on the idea that the Crown was indivisible to hold that "Her Majesty" had to apply to both levels of government. With respect, I cannot adopt that approach. The Court of Appeal's interpretation seems grounded in the belief that there cannot be "two Queens." As Professor Hogg succinctly notes in *Constitutional Law of Canada,* 2nd ed. (Toronto: Carswell, 1985) at p. 216, divisibility of the Crown in Canada does not mean that there are eleven Queens or eleven Sovereigns but, rather, it expresses the notion (at p. 217) of ". . . a single Queen recognized by many separate jurisdictions." Divisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power. If a principle so basic needed the confirmation of high judicial authority, it can be found as far back as the Privy Council decision in *The Liquidators of the Maritime Bank v. Receiver General of New Brunswick,* [1892] A.C. 437, in which Lord Watson said, at pp. 441-42:

> The object of the [British North America] Act [1867] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces . . .

See also the extensive discussions of the divisibility of the Crown, both within the Commonwealth and within Canada, by Lord Denning, M.R., May L.J. and Kerr L.J. in the recent *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta,* [1981] 4 C.N.L.R. 86, [1982] 1 Q.B. 892, [1982] 2 All E.R. 118, and Hogg, *supra,* at pp. 215-17.

The divisibility of the Crown in the sense just noted does not determine the interpretation to be given to the words "Her Majesty." Even if the Court of Appeal had been correct as a matter of constitutional law regarding indivisibility of the Crown, this would not necessarily have determined the correct statutory interpretation of "Her Majesty" in s.90(1)(b): see, for example, *Nickel Rim Mines Ltd. v. Attorney General for Ontario,* [1967] S.C.R. 672, 63 D.L.R. (2d) 668 in which Spence J. (in Chambers) interpreted "Her Majesty" in s.105 of the *Supreme Court Act,* R.S.C. 1952, c.259, as including both the federal and provincial Crowns despite his constitutional premise that "[t]here is only one Crown although there are two separate statutory purses" (at p. 674). Instead, Morse J.'s approach commends itself in all material respects (at pp. 127-28 W.W.R.) [p. 59 C.N.L.R.]:

> In the *Interpretation Act* of Canada (s.28) it is provided that " 'Her Majesty,' 'His Majesty,' 'the Queen,' 'the King,' or 'the Crown' means the Sovereign of the United Kingdom, Canada, and Her other Realms and Territories, and Head of the Commonwealth." In *A.G. Que. v. Nipissing Central Ry. Co.,* [1926] A.C. 715 . . . , it was held by the Privy Council that s.189 of the *Railway Act, 1919* (Can.), c.68, which empowered any railway company, with the consent of the Governor General, to take Crown lands for the use of the railway, applied to provincial Crown lands as well as to Dominion Crown lands. It was also held that the enactment was constitutionally valid by reason of the exclusive power to legislate in respect of interprovincial railways reserved to the Dominion Parliament by ss.91(29) and 92(10) of the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*).
>
> Giving a liberal construction to the words "Her Majesty" and resolving any doubt in favour of the defendants, I think that the words include Her Majesty in right of the Province of Manitoba.

In my view, the trial judge adopted the correct approach. "Her Majesty" *can* refer to the province; the question is whether it *does* so refer.

First, Morse J. was correct in finding that the words "Her Majesty" in a federal statute are not necessarily limited to the Crown in right of Canada. "Her Majesty" is not defined anywhere in the *Indian Act* itself, but, rather, is defined in s.28 of the federal *Interpretation Act,* R.S.C. 1970, c.I-23:

> 28. In every enactment
> . . .
>
> "Her Majesty," "His Majesty," "the Queen," "the King," or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth;
>
> "Her Majesty's Realms and Territories" means all realms and territories under the sovereignty of Her Majesty;

This open-minded definition is inconclusive as to whether these words include both Crowns in a given statutory context. In *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission),* [1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385 this Court recently had the following to say with respect to s.16 of the *Interpretation Act,* dealing with Crown immunity (at pp. 271-72):

> As a result of the 1967-68 amendment, s.16 of the *Interpretation Act* took on its present form:
>
> > 16.No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's right or prerogatives in any manner, except only as therein mentioned or referred to.
>
> The issue, therefore, is whether the reference to "Her Majesty" in a statute enacted by Parliament to aid in the interpretation of other federal statutes is to be taken as referring only to the Crown in right of Canada or, as referring as well to the Crown in right of a province. The definition of "Her Majesty" contained in s.28 of the *Interpretation Act,* and made applicable to the interpretation of s.16 by virtue of s. 3(2) of the same Act, adds little insight into whether it should encompass the Crown in right of a province.
>
> . . .
>
> In *PWA*, Laskin C.J. made the following observation regarding the definition of "Her Majesty" in s.28, at pp. 70-71:

> Although the definition above-quoted refers to "Canada," the reference is in the context of a recital, substantially, of the Royal Style and Titles, as prescribed by the *Royal Styles and Titles Act,* R.S.C. 1970, c.R-12. I do not think that the definition itself establishes a limitation of the reference to "Her Majesty" as being a reference only to the Crown in right of Canada. If it is so, it would be by reason of the constitutional organization of our federal system.

Laskin C.J. concluded as follows, at pp. 75-76:

> In the present case, I find it unnecessary to come to any conclusion on whether the definition of "Her Majesty" in s.28 of the federal *Interpretation Act* should be limited, *for constitutional reasons,* to the Crown in right of Canada. I am content to proceed on the traditional view that it covers the Crown in whatever aspect its subjection to federal legislation arises. [Emphasis in original.]

In *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission),* the Court found, following a solid line of authority, that "Her Majesty" in s.16 of the federal *Interpretation Act* includes the provincial Crowns.

Accepting that the words are *capable* of including the provincial Crown, where does statutory interpretation of the *Indian Act* lead us? A case could certainly be made that "Her Majesty" refers only to the federal Crown by reading s.90 in the context of other provisions in the statute. There are numerous references to "Her Majesty" throughout the *Indian Act:* see ss.4(3), 15, 16(2), 16(3), 18, 31(3), 34(2), 35(1), 36, 37, 39, 41, 48(8), 53(3), 59(a), 67, 72, 90(1), 103(3), 104(1), and 114(1). Section 35(1) specifically refers to "Her Majesty in right of a province, while s.114(1) contrasts "Her Majesty" to "the government of a province" and s.4(3) speaks of "lands belonging to Her Majesty in right of Canada or a province." Taken together with the other provisions in which it is clear that "Her Majesty" must refer only to the federal Crown lest the constitutional responsibility of Parliament for Indians and Indian lands be thrown into question (see for instance, ss.18 and 37-41), it could be argued that "Her Majesty" is used throughout the *Indian Act,* including in s.90(1)(b), to refer solely to the federal Crown. Such an interpretation would accord with the fact that the Act is the central statutory instrument emanating from the power conferred by s.91(24) of the *Constitution Act, 1867*. Section 90(1)(b) itself refers to personal property "given . . . under a treaty or agreement between a band and Her Majesty," which is consistent with the fact that the cession of Indian rights has historically been accomplished by way of treaty or agreement with the federal Crown. Another indication that the meaning of "Her Majesty" in s.90(1)(b) is limited to the federal Crown can be found in s.90(1)(a), immediately preceding the subsection at issue, which speaks of "Her Majesty" and "moneys appropriated by Parliament" in the same clause.

However, the contextual argument is far from conclusive and ambiguity in interpretation therefore arises. Similar indicators in both *Attorney General for Quebec v. Nipissing Central Railway Co.,* [1926] A.C. 715 (P.C.), and *Nickel Rim Mines, supra,* were not enough to limit the reference to "Her Majesty" in a federal statute to the federal Crown.

In *Nipissing,* the issue was whether s.189 of the *Railway Act, 1919,* S.C. 1919, c.68, allowed a railway company to take provincial Crown lands. Section 189 read in part:

> 189.(1) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.
>
> (2)Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway. . . .
>
> . . .
>
> (4)Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefore shall be held or applied by the Governor in Council for the like purpose or trust.

The role of the federal Governor in Council, which even included receiving compensation monies paid in respect of Crown lands, as expressly set out in the same section, and indeed the same subsection, suggested that the reference to the Crown included only the federal Crown. However,

the Privy Council did "not feel any doubt" (at p. 720) that the words, "lands of the Crown" included provincial Crown lands as well as federal Crown lands. The Privy Council was persuaded primarily, it appears, by the fact that s.189 traced its origins to a pre-Confederation Act of the Province of Canada which could therefore not have intended any distinction between Dominion and provincial Crown lands. In essence then, because the Crown was not divided, at least along the same lines, prior to 1867, reference to the Crown in the post-Confederation statute replicating to some extent the pre-1867 language was to be taken - as a matter of statutory interpretation - to be a reference to an undivided Crown vis-à-vis the subject matter in question.

In *Nickel Rim Mines, supra,* Spence J. found similar contextual references not to prejudice the interpretation of "Her Majesty" in s.105 of the *Supreme Court Act,* R.S.C. 1952, c.259, which read:

> 105. In any proceeding to which Her Majesty is a party, either as represented by the Attorney General of Canada or otherwise, costs adjudged to Her Majesty shall not be disallowed or reduced upon taxation merely because the solicitor or the counsel who earned such costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered, and the costs recovered by or on behalf of Her Majesty in any such case shall be paid into the Consolidated Revenue Fund.

Notwithstanding the reference to the "Consolidated Revenue Fund," Spence J. (in Chambers) held that "Her Majesty" included Her Majesty in right of a province. In order to overcome the difficulties provided by these contextual references, he appeared to rely heavily on the principle of remedial interpretation set out in s.15 of the federal *Interpretation Act,* R.S.C. 1952, c.158.

Nowegijick directs the courts to resolve any "doubtful expression" in favour of the Indian where more than one reasonable interpretation is available. There is no doubt in my mind that it is fully in keeping with *Nipissing* and *Nickel Rim Mines* to turn to the *Nowegijick* principle in this case, given the ambiguity that exists. In each of those cases, it was found necessary to resort to some further argument beyond the text itself in order to determine the issue. In light of *Nipissing* and *Nickel Rim Mines,* I would turn to *Nowegijick* for the resolution of the ambiguity here and would accordingly choose an interpretation that favours the Indians. I would, therefore, find that "Her Majesty" includes the provincial Crown.

This interpretation is also supported by the second aspect of the *Nowegijick* principle, namely that aboriginal understanding of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. This concern with aboriginal perspective, albeit in a different context, led a majority of this Court in *Guerin v. The Queen,* [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, 13 D.L.R. (4th) 321, 55 N.R. 161, to speak of the Indian interest in land as a *sui generis* interest, the nature of which cannot be totally captured by a lexicon derived from European legal systems.

While this appeal does not involve the interpretation of a treaty, I find it helpful to consider the aboriginal perspective in illustrating the ambiguity of "Her Majesty" in s.90(1)(b). *Nowegijick* dictates taking a generous liberal approach to interpretation. In my opinion, reference to the notion of "aboriginal understanding," which respects the unique culture and history of Canada's aboriginal peoples, is an appropriate part of that approach. In the context of this appeal, the aboriginal understanding of "the Crown" or "Her Majesty" is rooted in pre-Confederation realities. The recent case of *Guerin* took as its fundamental premise the "unique character both of the Indians' interest in land and of *the historical relationship with the Crown.*" (at p. 387 S.C.R. [p.139 C.N.L.R.] emphasis added.) That relationship began with pre-Confederation contact between the historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown. On its facts, *Guerin* only dealt with the obligation of the *federal* Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.

One can over-emphasize the extent to which aboriginal peoples are affected only by the decisions and actions of the federal Crown. Part and parcel of the division of powers is the incidental effects doctrine according to which a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other; as recently stated in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra,* at p. 275, "Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects. . . ." As long as Indians are not affected *qua* Indians, a provincial law may affect Indians, and significantly so in terms of everyday life. Section 88 of the *Indian Act* greatly increases the extent to which the provinces can affect Indians by acknowledging the validity of laws of general application, unless they are supplanted by treaties or federal law. This fluidity of responsibility across lines of jurisdiction accords well with the fact that the newly entrenched s.35 of the *Constitution Act, 1982*, applies to all levels of government in Canada.

I conclude, therefore, that "Her Majesty" in s. 90(1)(b) of the *Indian Act* is to be interpreted as referring to both the federal and provincial Crowns.

VII

The Secondary Points at Issue

As already mentioned, the appellants rest their case almost entirely on the interpretation of "Her Majesty". That was the only point addressed by the Court of Appeal. There were, however, other points advanced in oral argument before this Court. They concern whether the s.90(1)(b) criteria of "personal property", "was given" and "agreement" were met. I am wholly in agreement with the disposition of the trial judge on all of these points and can add little to his analysis. I will limit myself to a brief discussion of each point.

(a) *"Personal property"*

The meaning of "personal property" in s. 87 of the *Indian Act* was the subject of decision in *Nowegijick.* It was held that one form of intangible property, taxable income, came within the words "personal property" in that section of the Act. See also the judgment of McLachlin J.A., as she then was, in *Metlakatla Ferry Service Ltd. v. B.C. (Gov't.),* [1987] 2 C.N.L.R. 95, 12 B.C.L.R. 308, 37 D.L.R. (4th) 322 (B.C.C.A.), in which she partly relies on *Nowegijick* for the finding that a lease and a debt owing under it constitute "personal property" in s.87 and notes that s.87 covers both tangible and intangible personal property; and see *Brown v. The Queen in Right of British Columbia,* [1979] 3 C.N.L.R. 67, [1980] 3 W.W.R. 360, 20 B.C.L.R. 64, 107 D.L.R. (3d) 705 (B.C.C.A.), in which electricity delivered to Indians on a reserve was found to be s.87 "personal property". I would adopt the following statement of Morse J., *supra,* at p. 121 W.W.R. [p. 54 C.N.L.R.]:

> If intangibles such as electricity and taxable income are personal property, clearly the right of the defendants to payment of the moneys agreed to be paid by the government of Manitoba must be considered as personal property, and it seems to me there is no good reason to give the words "personal property situated on a reserve" in s. 89 a meaning different to the same words in s.87.

Of course, the debt owing from the Manitoba government must also constitute "personal property" under s.90(1)(b) for the respondents to succeed. The argument of the appellants is that "personal property", appearing only once in the introductory clause of s.90(1) and applying to both subsequent subsections, must be given a common meaning that fits both s.90(1)(a) and s.90(1)(b). Since, the argument continues, s.90(1)(a) limits the meaning to tangible or physical property and, as well, since s.90(3) speaks of the destruction of personal property, then "personal property" in s.90(1)(b) must be similarly limited to tangible property. Two cases have found that s.90(1)(b) is restricted to tangible property on the above reasoning: *Kuhn v. Starr,* Ferg J., Man. Q.B., unreported, October 28, 1976 [reported [1978] C.N.L.B. (No.4) 89] and *Mintuck v. Valley River Band* 63A, [1978] 2 W.W.R. 159, 83 D.L.R. (3d) 324 (Man. Q.B.), (following *Kuhn, supra).* It is not evident on the facts that Ferg J. had to address the scope of s.90(1)(b) in that case, but it is nonetheless clear that his reasoning is the only judicial exposition available of the case for restrictive interpretation of "personal property" in s.90(1)(b). Prior to Morse J.'s decision, one case had decided that the words in s.90(1)(b) included intangible property (a scholarship being the property in question), without, however, explicit consideration of the point: *Greyeyes v. The*

Queen, [1978] 2 F.C. 385, 84 D.L.R. (3d) 196, [1978] C.T.C. 91, 78 D.T.C. 6043, [1978] 1 C.N.L.B. (No.4) 47 (T.D.), *per* Mahoney J. Shortly thereafter, Thurlow A.C.J., found that "personal property" in s.90(1)(a) could not include a right to a salary because of the effect of the words "purchased by Her Majesty" which followed in the subsection: *The Queen v. National Indian Brotherhood,* [1979] 1 F.C. 103 at 108, 92 D.L.R. (3d) 333, [1978] C.T.C. 680, 78 D.T.C. 6488, [1978] C.N.L.R. (No.4) 107 at 112-13 (T.D.). However, Thurlow A.C.J. implicitly held that "personal property" in s.90(1)(b) could be given a different interpretation due to the qualifying words in the rest of that subsection; this follows from his view that *Greyeyes* was good law (at p.108 [pp.112-13 C.N.L.R.]. Since the Morse J. decision, two cases have explicitly followed him on this point: *Fricke and Seaton Timber Ltd. v. Mitchell* (1985), [1986] 1 C.N.L.R. 11, [1986] 1 W.W.R. 544, 67 B.C.L.R. 227 (B.C.S.C.); and *Fayerman Bros. Ltd. v. Peter Ballantyne Indian Band,* [1986] 1 C.N.L.R. 6, 36 Sask. R. 76 (Sask. Q.B.). A third case has also implicitly agreed with Morse J., although there is no explicit discussion of the point: *Williams v. Canada,* [1989] 1 C.N.L.R. 184, 89 D.T.C. 5032, 24 F.T.R. 169 (F.C.T.D.) (unemployment insurance benefits paid to a worker on a job creation project). In my view, these cases have correctly held that the "personal property" in s.90(1)(b) include intangible property such as the right to payment of money at issue in this case. I would, again, endorse the reasoning of Morse J., *supra,* at p.125 W.W.R. [p. 57 C.N.L.R.]:

> I am, with respect, unable to reach the same conclusion as did Ferg L.J.Q.B. with respect to the meaning of the words "personal property" so far as s. 90(1) is concerned. In my judgment, there is no compelling reason why the words "personal property" must be given the same meaning in para. (b) as in para. (a). The section is meant to extend the meaning of the words "personal property situated on a reserve". Section 90(1)(a) uses the words "personal property . . . purchased", while s.90(1)(b) uses the words "personal property . . . given", and the two sub-sections are separated by the disjunctive preposition "or". It is true, as was pointed out by Ferg L.J.Q.B., that s.90(3) has reference to tangible personal property, but I do not see why making the destruction of property an offence necessarily restricts the meaning of "personal property" in s.90(1). So far as s.90(2) is concerned, that subsection is, I think, broad enough to cover not only tangible but intangible personal property such as a debt or a right to payment.
>
> . . .
>
> . . . a liberal construction may, in my view, be given to the meaning of the words "personal property" in s.90. The right of the defendants in this case to payment of the money agreed to be paid to them by the government of Manitoba should, in my opinion, be held to be personal property within the meaning of s.90(1).

(b) *"was . . . given"*

The appellants' argument is that since the money owed was not actually given to the various respondents, personal property was not "given". This argument is manifestly flawed. The personal property in question is a debt, not money *per se.* As Morse J. succinctly put it, *supra*, at p. 128 W.W.R. [p.59 C.N.L.R.], "the defendants have been given personal property because they have been given the right to be paid money. This right or debt was in existence when the garnishing order was issued. It is not, in my view, necessary that actual money be paid to the defendants before s.90(1)(b) is applicable."

(c) "agreement"

Finally, it was argued before Morse J., although not explicitly before this Court, that the word "agreement" in s.90(1)(b) must be read *ejusdem generis* with the word "treaty" which also appears in the subsection; because treaties are only with the federal government, such agreement must be similar to a treaty with the federal government. All of the cases to date which found a s.90(1)(b) agreement have indeed involved agreements with the federal government: see *Greyeyes, supra* (scholarship funds paid out in accordance with an agreement to assist the band members in their education pursuant to treaty obligations), *Fayerman, supra* (money paid to a bank pursuant to a signed agreement between the Department of Indian Affairs and a band), *Fricke, supra* (a similar agreement to that in *Fayerman),* and *Williams, supra* (an agreement between a band and the federal government creating a job creation project pursuant to which benefits were paid).

Apart from amounting to an indirect challenge to the meaning of "Her Majesty", a matter already disposed of, I can see no reason why the *ejusdem generis* rule of interpretation, assuming that it is

applicable, should prevail over the *Nowegijick* principle of resolving ambiguities in favour of Indians. I have no difficulty in accepting that there was an agreement to refund the tax in exchange for the execution of releases by the 54 Indian bands involved; see Order-in-Council No. 253. Indeed, the very action instituted by the appellants against the respondents is premised on the existence of an agreement which the appellants claim to have negotiated on behalf of the respondents. Paragraph 65 of the appellants' Amended Statement of Claim reads in part: "In the Fall of 1982, the Government of Manitoba, as a result of the efforts of the plaintiff, *agreed to* pay the Defendant Indian bands sales tax rebates as hereinafter set out." (Emphasis added).

I would note that the appellants also argue for combining the interpretation of the words "was given" with the word "agreement" and suggest that any agreement must be one that is not accompanied by consideration (in this case, the releases of the bands) which are said to give it the tinge of a commercial bargain and not a gift. Such an interpretation would be the antithesis of a liberal interpretation, and cannot be endorsed.

An additional point in favour of the respondents is that the money in question was a tax rebate. One can only assume that this money should never have been taxed in the first place (per s.87 of the *Indian Act)* and should never have left Indian hands. It would be an odd result if that money could be garnished on its way back to where it never should have left.

VIII

Conclusion

I find that the Court of Appeal was correct in the disposition of this case and the trial judge was correct in his reasoning and interpretation of the elements of s.90(1)(b). "Her Majesty" in s.90(1)(b) of the *Indian Act* refers to both the federal and provincial Crowns. Therefore, the moneys in question are protected from garnishment by virtue of s.89(1) of the Act. The scope of this protection is defined according to the terms of the Act. General commercial transactions involving Indians are not meant to be limited by this interpretation. In this case, the substance of the appellants' claim has, of course, not been determined, and it is clearly open to the appellants to continue legal action. In the circumstances, however, the appellants are prevented from garnishing moneys owed to the respondents by the provincial Crown.

I would dismiss the appeal with costs in this Court and both courts below.