COURT OF APPEAL FOR ONTARIO

CITATION: Bogue v. Miracle, 2022 ONCA 672

DATE: 20220929

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Doherty, Tulloch and Miller JJ.A.

BETWEEN

Glenn Bogue

Applicant (Respondent)

and

Andrew Clifford Miracle, Andrew Clifford Miracle III, Smokin' Joes and Smokin' Speedway, Virginia Maracle, Lisa Sexsmith Maracle operating as Smokin' Speedway and Yolanda Maracle

Respondents (Appellant)

Ian J. Collins, for the appellant

Greg Roberts, for the respondent

Heard: June 10, 2022

On appeal from the order of Justice Stanley J. Kershman of the Superior Court of Justice, dated November 15, 2021.

Tulloch J.A.:

I. OVERVIEW

[1] This appeal involves the interpretation of s. 89 of the *Indian Act*, R.S.C. 1985, c. I-5, and the question of whether a court can place an on-reserve business into receivership.

[2] In writing this decision, I adopt the same terminology as LaForme J.A. in *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565, 121 O.R. (3d) 561, at para. 2. I will use the term "Indian" when I would otherwise use the term "Indigenous". While "Indigenous" is the most respectful and modern reference – having now supplanted the historical term "Aboriginal" – this entire appeal requires an exclusive consideration of the *Indian Act*. As such, I wish to avoid any confusion by using the language specifically used in the *Act*. The same applies to references to a "band" as opposed to the more respectful "First Nation."

[3] The appeal originated as a dispute between father and son. Both are Mohawks of the Bay of Quinte and thus qualify as Indians under the relevant definitions in the *Indian Act*. The initial dispute focused on the right to profits and ownership over an on-reserve business, Smokin' Joes. The Superior Court of Justice ordered that the issue go to arbitration.

[4] Mr. Andrew Miracle is the father and appellant in this matter. He retained the respondent, Mr. Glenn Bogue, to act for him on the arbitration on a contingency fee basis. Mr. Bogue is not an Indian for the purposes of the *Indian Act*.

[5] The contingency agreement stipulated that Mr. Bogue would receive 25 percent of any amount awarded in arbitration. The arbitrator ultimately awarded Mr. Miracle over $11 million as well as the right to take over Smokin' Joes from his son, Andy Maracle. This award was confirmed by the Superior Court, and an order was issued to that effect.

[6] To date, Mr. Miracle has only paid Mr. Bogue $12,500, an amount much less than what Mr. Bogue would be owed if his interpretation of the contingency agreement is correct.

[7] The Superior Court appointed a receiver and manager over Mr. Miracle's property on October 11, 2019. Mr. Miracle appealed that decision. This court heard the appeal and returned the matter to the application judge to determine whether appointing a receiver contravened s. 89 of the *Indian Act*.

[8] The application judge held that the appointment of the receiver constituted an exception to s. 89. Hence, the receiver had the power to operate two of Mr. Miracle's businesses on-reserve – Smokin' Joes and the Canna Kure marijuana dispensary. The receiver would collect the profits of those businesses until the debt to Mr. Bogue and the receiver fees and disbursements were satisfied. Mr. Miracle now appeals from that order.

[9] For the reasons that follow, I would allow the appeal.

II. PROCEDURAL HISTORY

[10] The procedural history of this appeal is complex.

[11] On October 11, 2019, the Superior Court granted the respondent's application for an order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and appointed Schwartz Levitsky Feldman Inc. ("SLF") as the receiver over "all of the assets, undertakings and properties" of Mr. Miracle.

[12] Mr. Miracle appealed that decision to this court, alleging three errors in the application judge's reasoning. The third alleged error, and the one relevant on this appeal, is that the order contravened s. 89 of the *Indian Act*, which prohibit the enforcement by anyone who is not an "Indian or a band" against the assets of an Indian situated on a reserve.

[13] Mr. Miracle argued that since Mr. Bogue is not an Indian for the purposes of the Indian Act, this section prevented the receiver appointed at Mr. Bogue's request from seizing the proceeds of Mr. Miracle's businesses that he operated on the reserve. This court determined that this was a threshold issue which needed to be decided before the appeal could be heard:

Bogue v. Miracle, 2021 ONCA 278, at para. 7. The court directed that the matter be returned to the application judge.

[14] The application judge held a case conference with the parties. He ordered the parties to address the evidence that was before the court during the initial application in 2019 and how such evidence interacted with the *Indian Act*.

[15] The parties argued the *Indian Act* threshold issue before the application judge on July 23, 2021. On November 15, 2021, the application judge entered the order under appeal, which held that the appointment of SLF as receiver constituted an exception to s. 89 of the *Indian Act*.

III. THE ORDER UNDER APPEAL

[16] In his reasons, the application judge reviewed s. 89 of the *Indian Act* and the jurisprudence interpreting the provision. He drew in part upon *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846. That case addressed the issue of whether the immunity offered under ss. 89 and 90(1) of the *Indian Act* extends to funds in an off-reserve account pursuant to a Comprehensive Funding Agreement between a band and the federal government, where those funds are to be spent exclusively for certain designated purposes. The application judge interpreted the reasons of McLachlin C.J., and in particular her observation at para. 27, as creating a broad "commercial mainstream" exception to the prohibition against the seizure of property on a reserve set down in s. 89.

[17] The application judge was satisfied this "commercial mainstream" exception to s. 89 applied in the circumstances of this case. Since the sales of Smokin' Joes and the Canna Kure marijuana dispensary were in the commercial mainstream and amounted to normal business transactions, they were not protected by s. 89 from being placed into receivership.

[18] The application judge added: "it is important that non-reserve vendors who provide commercial goods and/or services to Indians on a reserve know that they have a method to get paid for them when provided in the commercial mainstream with respect to normal business transactions".

[19] In the alternative, the application judge held that any potential off-reserve assets held by Mr. Miracle would be subject to seizure. It would be up to the receiver to determine the exact scope of Mr. Miracle's assets, but off-reserve assets might consist, *inter alia*, of offshore accounts, stock portfolios, and cryptocurrency.

IV. ISSUES ON APPEAL

[20] The appellant raises a litany of grounds, ranging from the application judge's treatment of specific case law to whether the application judge's decision caused harm to the appellant.

[21] In my view, the central question on appeal is whether the application judge erred in concluding that a receiver's recoup of profits generated by on-reserve businesses constitutes an exception to s. 89. Given my determination on that central issue, I need not address the other grounds of appeal.

V. ANALYSIS

1. Overview of the relevant provisions in the *Indian Act*

(a) Section 89 of the *Act*

[22] Section 89 of the *Indian Act* states as follows:

> (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

[23] Courts have previously dealt with the purpose of s. 89. In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 131, La Forest J., referring to ss. 87 and 89, explained that:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*… 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. [Emphasis added.]

[24] Importantly, the purpose of s. 89 is not to confer a general economic benefit upon Indians. Rather, it aims to preserve the entitlements of Indians to their reserve lands and ensure that the use of their property would not be eroded by the ability of governments to tax, or creditors to seize: *Williams v. Canada,* [1992] 1 S.C.R. 877, at p. 885. This limitation to the purpose of s. 89 traces back to *Mitchell v. Peguis Indian Band,* where La Forest J. explained, at p. 133:

> 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.

[25] This court has had the opportunity to apply this articulation of the purpose and function of s. 89 in multiple cases: see e.g., *Tyendinaga Mohawk Council*, at para. 85; *Benedict v. Ohwistha Capital Corporation*, 2014 ONCA 80, 372 D.L.R. (4d) 484, at para. 15.

(b) Section 90(1) of the *Act*

[26] While the current appeal does not turn on s. 90(1) of the *Indian Act*, this provision will play an integral role in my analysis below on the "commercial mainstream" exception. I believe a brief discussion on how s. 90(1) relates to s. 89 of the *Act* is merited.

[27] The text of s. 90(1) is as follows:

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

[28] Section 90(1) functions as an extension of the protective scheme created by ss. 87 to 89 of the *Indian Act*, as it provides an additional layer of protection to a certain class of personal property: *Mitchell*, at p. 134. However, unlike s. 89, the application of s. 90(1) does not depend on the location of the asset. Instead, any personal property that is purchased or given by "Her Majesty" is "deemed always to be situated on a reserve", and therefore protected regardless of its actual *situs*: *Mitchell*, at p. 134. This means that off-reserve assets, by virtue of meeting the requirements in s. 90(1), can fall within s. 89.

2. Are actions of the Receiver covered by s. 89?

[29] The respondent raises a preliminary question of scope. They submit that the actions of the receiver are not covered by s. 89, as the receiver is neither a creditor nor the Crown. I disagree with this assessment.

[30] While s. 89 does not expressly refer to receiverships, it does cover a wide variety of procedures involving execution by creditors on the property of debtors. Notably, s. 89 references seizures and restraints of property, which, in my view, captures the substance of the current order under appeal. The Superior Court had appointed a receiver to take control of the appellant's businesses located on reserve. Furthermore, the receiver was to recoup the proceeds from the operation of these businesses for the benefit of Mr. Bogue, a creditor. Overall, the appointment of a receiver in this case is closely akin to an order for the seizure or restraint of the debtor's property, which brings it into the scope of s. 89.

[31] I am not aware of a case which specifically holds that the appointment of a receiver, and the subsequent seizure of property, fall within s. 89. However, in *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson et al.*, 2009 MBCA 72, 240 Man. R. (2d) 122, at para. 7, the Manitoba Court of Appeal, in addressing the possibility of waiving s. 89 rights, implicitly accepted that s. 89 applied to the appointment of a receiver manager.

[32] I am satisfied that the conduct of the receiver is captured by the prohibition against "seizure, distress or execution" in s. 89. The appellant has passed this preliminary stage.

3. Is there a "commercial mainstream" exception to s. 89?

[33] The application judge interpreted *McDiarmid Lumber* to find that s. 89 did not extend to "contractual arrangements in the commercial mainstream that amount to normal business transactions": at para. 27. Consequently, since Mr. Miracle's on-reserve businesses – Smokin' Joes and Canna Kure – operated in the commercial mainstream, they were not protected by s. 89. It was therefore open to the receiver to take control of, and recoup profits from, both businesses.

[34] I agree with the appellant that the application judge committed a reversible error in so holding. In my view, his reasoning relies heavily on an inaccurate summary of the jurisprudence on s. 89. While the Supreme Court of Canada has recognized the existence of a "commercial mainstream" exception in relation to s. 90(1) of the *Indian Act*, this exception has not been extended to s. 89.

[35] The exception was first discussed in *Mitchell v. Peguis Indian Band*. The question was whether Mitchell, a creditor, could garnish funds owed by the provincial government to the Indian band, the debtor. The court unanimously agreed that the funds could not be garnished, but for a plurality of reasons.

[36] La Forest J., writing for himself and Sopinka and Gonthier JJ., discussed the existence of a "commercial mainstream" exception in relation to s. 90(1)(b) of the *Indian Act*. La Forest J. relied on extensive textual and historical evidence to find that s. 90(1)(b) only protected personal property purchased or given by the federal Crown. The corollary to this conclusion is that debts owed to a band under a commercial contract with the provincial Crown – or anyone else – would not be exempt from seizure. La Forest J. reasoned, at pp. 138-139, that finding otherwise would be inconsistent with the *Indian Act* as the *Act* was not designed to give Indians a competitive advantage in commercial dealings. Thus, any dealings in the "commercial mainstream" will "be regulated by the laws of general application." There is no reason why in those circumstances Indians should not be treated the same as other people.

[37] Yet, despite finding such an exception to s. 90(1), La Forest J. emphasized that "the protections of ss. 87 and 89 will always apply to property situated on a reserve": *Mitchell,* at p. 139. I interpret this to mean that s. 89 protects all on-reserve assets, regardless of whether they are part of the "commercial mainstream" or not, from seizure by non-Indians.

[38] Following *Mitchell,* some courts have attempted to extend the "commercial mainstream" exception to s. 89: see e.g., *Maracle v. Ontario (Minister of Revenue)*, [1993] O.J. 1173 (Gen. Div.); *Shubenacadie Band v. Francis*, [1995] 144 N.S.R. (2d) 241 (C.A.); *Brant (c.o.b. Free Flow Gas Bar) v. Canada,* [1998] F.C.J. No. 1314. However, the weight of the jurisprudence is against this. Professor A. Lund reviews this jurisprudence in great detail in "Judgment Enforcement Law in Indigenous Communities – Reflections on the *Indian Act* and Crown Immunity from Execution" (2018) 83 S.C.L.R. (2d) 279 at pp. 302-7. As Professor Lund demonstrates, a careful reading of the Supreme Court of Canada jurisprudence, including *McDiarmid Lumber* and *Mitchell*, stands against the claim that s. 89 does not protect business transactions in the commercial mainstream. I agree with this proposition.

[39] I find that the application judge misinterpreted *McDiarmid Lumber* to stand for a broad application of the "commercial mainstream" exception. The application judge relies on para. 27 in McLachlin C.J.'s decision in *McDiarmid Lumber* to support his finding:

> As Gonthier J. stated in *Williams*, "the purpose of the sections was not to confer a general economic benefit upon the Indians" (p. 885). For example, they do not exempt from seizure or taxation contractual arrangements in the commercial mainstream that amount to normal business transactions, but only "property that enures to Indians pursuant to treaties and their ancillary agreements": *Mitchell*, at p. 138. Only the latter is protected by s. 90(1)(b).

[40] In my view, when read in context, it is clear that McLachlin C.J. was referring to s. 90(1) of the *Indian Act* and not s. 89. The analysis in *McDiarmid Lumber* is bifurcated into two parts – one for s. 89, the other for s. 90. The paragraph above falls in the latter part of the analysis. Furthermore, contextual clues within the paragraph point to s. 90. First, the pinpoint citation from *Mitchell* in the second sentence had been originally made in reference to s. 90(1)(b) of the *Act*. Second, the paragraph concludes that "only the latter is protected by s. 90(1)(*b*)." This confirms that McLachlin C.J. was discussing the "commercial mainstream" exception to s. 90(1) and not to s. 89.

[41] Moreover, the Supreme Court of Canada reaffirmed that the "commercial mainstream" exception does not apply to s. 89 in *Bastien Estate v. Canada,* 2011 SCC 38, [2011] 2 S.C.R. 710. Cromwell J., writing for the majority, noted that in *Mitchell,* La Forest J. "was clear that, even if an Indian acquired an asset through a purely commercial business agreement with a private concern, the [ss. 87 and 89] exemption[s] would nonetheless apply if the asset was situated on a reserve": *Bastien Estates*, at para. 54.

[42] Apart from the case law, I see nothing in the language of s. 89 that offers any support for a broad "commercial mainstream" exception. As I read the language, s. 89 draws distinctions between: (1) the property of an Indian or band, and the property of others; (2) property located on, and off, reserve; and (3) execution-type measures taken by Indians or Indian bands, and those taken by everyone else. Foreclosing commercial property located on reserve from s. 89 would undermine both the text and purpose of the provision.

[43] I therefore find that the application judge erred in holding that the appellant's businesses fell under the "commercial mainstream" exception. Where an Indian's assets are "situated on a reserve", they fall under the protection of s. 89. This will be the case regardless of whether these assets are part of a commercial enterprise or not.

[44] In concluding this stage of my analysis, I am aware that this interpretation of s. 89 fetters the economic independence of Indigenous peoples on reserves. In *McDiarmid Lumber*, at para. 42, the Supreme Court of Canada referred to the 1996 *Report of the Royal Commission on Aboriginal Peoples*, which stated that the *Indian Act* limits the ability of Indigenous peoples to access credit. Professor Lund echoes this concern in her article, noting that the restricted ability of creditors to compel payment of legal obligations makes them hesitant to advance credit to Indigenous peoples: see Lund, at p. 297.

[45] These are pressing and substantial concerns, but they involve a complex series of political, social and economic considerations that this court is not equipped to address. As the judiciary, our role is to answer the legal question of whether the existing s. 89 can be interpreted to exclude commercial properties situated on reserve. We have found that it does not. Whether s. 89 *ought* to exclude such assets is a larger policy question which we leave to Parliament to address through the legislative process.

4. Are Mr. Miracles' on-reserve businesses "situated on reserve"?

[46] It is unnecessary to engage in any extensive analysis on this issue. The locations of both Smokin' Joes and Canna Kure are "objectively easy to determine": *McDiarmid Lumber*, at para. 18. Both businesses are firmly located on the Tyendinaga Mohawk Territory and owned by Mr. Miracle, who is an Indian within the meaning of the *Indian Act*. As such, neither property is "subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band": *Indian Act*, s. 89(1). This means Mr. Bogue's receiver, acting on behalf of a creditor who is not an Indian for the purposes of the *Indian Act*, cannot recoup profits from Mr. Miracle's on-reserve businesses.

[47] I agree with the application judge, however, that s. 89 does not protect Mr. Miracle's off-reserve assets from seizure. Such assets – the existence and location of which must be determined by the receiver – might include, *inter alia*, real or personal property, offshore accounts, and stock portfolios.

5. Did Mr. Miracle waive his s. 89 rights?

[48] Finally, I am not persuaded by the respondent's submission that Mr. Miracle waived his s. 89 rights. The respondent cites *Tribal Wi-Chi-Way-Win Capital Corp.* to support their argument. In that case, the debtor had signed a promissory note that included an express provision stating he would not exercise his rights under the *Indian Act*. The Manitoba Court of Appeal found that this constituted a valid waiver and as such, the debtor could not prevent the receiver manager from seizing his on-reserve assets.

[49] The respondent asks this court not only to accept the holding from *Tribal Wi-Chi-Way-Win Capital* but to take it one step further. They submit that it is possible to implicitly waive one's rights under the *Act*. I am not prepared to make this finding on the present set of facts. I cannot see how Mr. Miracle's actions – written or otherwise – implicitly amount to a waiver of s. 89.

VI. DISPOSITION

[50] For these reasons, I would allow the appeal, overturn the application judge's order with respect to the receiver's right to recoup profits from on-reserve businesses, and hold that the receiver is entitled to seize Mr. Miracle's off-reserve property.

[51] At the hearing, the parties were asked for submissions with respect to costs. The appellant sought to be granted $15,000 for the appeal, $5,000 for the motion before Gillese J.A., and $10,000 for the application; all of which was contingent on their success in this appeal. The respondent requested $65,000 if successful on this appeal and $5,000 for the motion regardless of the outcome. In addition, the respondent asked this court to remit the costs of the application back to the application judge for determination. Subsequent to the hearing, the appellant provided an updated costs submission of approximately $61,000.

[52] Having considered the totality of submissions, I would grant the appellant the original costs requested, that is, $30,000, inclusive of HST and disbursements.

Released: September 29, 2022 "D.D."

"M. Tulloch J.A."

"I agree. Doherty J.A."

"I agree. B.W. Miller J.A."