REFORMING SECTION 89 OF THE *INDIAN ACT*: TINKER, WAIVER, SOLDIER (ON), SIGH?

*Adrian Pel**

CONTENTS

I INTRODUCTION

Section 89 of the *Indian Act* is a unique exception to the application of provincial property and civil rights law on reserves.[1] This provision establishes that the property of an Indian or Indian band (as defined in the *Act*[2]) that is "situated on a reserve" is exempt from seizure or the attachment of a security interest by anyone other than an Indian or Indian band. The (ostensible) rationale behind section 89 is to protect the reserve land base and personal property of Indians and Indian bands. In practice, however, this provision also has the effect of severely curtailing access to secured loans, both because of the inability of lending institutions to seize collateral and uncertainty as to whether property is "situated on a reserve."

---

* The author articled at Borden Ladner Gervais LLP in Toronto and will be returning as an Associate in October 2020. BCL/LLB, 2019 (McGill). The author would like to thank Professor Catherine Walsh of the McGill Faculty of Law (whose "Secured Transactions" course was the genesis of an early draft of this article), Anna Goldfinch, and the two anonymous peer reviewers for their helpful comments. The views expressed in this article are the author's alone.

1. *Indian Act,* RSC 1985, c I-5, s 89 [*Indian Act*].

2. *Ibid*, s 2.

Unsurprisingly, the economic impacts of section 89 consistently (but not universally[3]) attract vociferous criticism and calls for its reform or abolition.[4] In this article, I consider several possible reforms. I begin by surveying section 89's purpose, as well as the problems it creates in the context of secured lending. Having highlighted these problems, I draw from the Supreme Court of Canada's judgment in *McDiarmid Lumber Ltd v God's Lake First Nation* (*God's Lake*)[5] to further furnish the case for reform. I then examine three possible reforms: (1) abolishing section 89; (2) amending section 89 to rely on a residence-based test; and (3) codifying the ability to waive section 89. I contend that, among these three options, codifying the ability to waive section 89 is preferable because this approach is incremental, respects economic autonomy, and is simple to apply.

I conclude with critical reflections about relying on codifying the ability to waive section 89 as a solution. I concede that while legislatively ensconcing a waiver-based system is a positive step, such minor tinkering with section 89 leaves problems such as discrimination in credit markets unaddressed, risks adopting a misguided "silver-bullet" approach, and overlooks the possibility of pursuing bolder self-government arrangements respecting on-reserve property rights. I contend, however, that there is a pragmatic case for codifying a waiver-based system immediately while concurrently pursuing other measures and thinking of novel ways of governing property rights on reserves.

II SECTION 89: PURPOSE AND PROBLEMS

Section 89 of the *Indian Act* reads as follows:

> **89 (1)** Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> 1. Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.
>
> **(2)** A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his

---

3. See e.g. Terry Lynn Fox (Poucette), *Effective First Nations Governance: Navigating the Legacy of Colonization* (PhD Thesis, University of Victoria School of Public Administration, 2017) [unpublished] at 180–184, online: <dspace.library.uvic.ca/handle/1828/7995>; Thomas McMorrow, "Why New Laws Alone Won't Yield Indigenous Economic Autonomy" in Roderick A Macdonald & Véronique Fortin, eds, *Dimensions of Indigenous Economic Autonomy* (Montreal: Éditions Thémis, 2015) 59 at 62 [McMorrow]; Pamela D Palmater, "Opportunity or Temptation?" Book Review of *Beyond the Indian Act: Restoring Aboriginal Property Rights* by Tom Flanagan, Christopher Alcantara & André Le Dressay, *Literary Review of Canada* (April 2010), online: <reviewcanada.ca>.

4. See e.g. Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010) at 69–70; Scott Hitchings, "Real Property Security Interests on First Nations Reserved Lands" (2017) 80:1 Sask L Rev 125 at 126–127 [Hitchings]; Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the *Indian Act*" (2014) 39:2 Queen's LJ 511 at 535 [Sanderson, "Consensus"]

5. 2006 SCC 58, [2006] 2 SCR 846 [*God's Lake*].

> rights under the agreement notwithstanding that the chattel is situated on a reserve.

According to the Supreme Court of Canada, the purpose of section 89 is "not to confer a general economic benefit" upon Indians and Indian bands.[6] Rather, it is intended 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."[7] Although section 89 is patently paternalistic, the Supreme Court has stated that its prophylactic nature is an extension of Canada's treaty promises "to protect what the Indian band[s were] 'given' in return for the surrender of Indian lands."[8]

A. Negative Effects on Access to Credit

While section 89's purpose may ostensibly be noble, it has the effect of severely limiting the ability of Indians and Indian bands to access credit. This is because section 89 creates unique legal risks to creditors' security interests.[9] As Douglas Sanderson notes, "secured transactions like loans are impossible when the assets of a person or business are located on reserve."[10] This restriction has contributed, alongside other factors, to significant economic development issues for Indians living on reserves.[11]

Section 89 does admit some exceptions. It is possible to secure or seize the property of an Indian or Indian band that is situated on a reserve where the creditor is an Indian or an Indian band,[12] the debtor is a corporation,[13] a leasehold is charged,[14] or a transaction involving personal property takes the form of a conditional sale.[15] However, these exceptions are of somewhat limited utility. In particular, while it is possible to mortgage a leasehold, this is far from ideal because the process is onerous—the land must be properly "designated" under the *Indian Act*—and borrowers do not obtain terms as favourable as freehold mortgages because leaseholds are far less valuable.[16]

As leaseholds are of limited use as collateral in secured transactions, what about using personal property as collateral? Unfortunately, the "situated on a reserve" element of section

---

6. *Williams v Canada*, [1992] 1 SCR 877 at 885, 90 DLR (4th) 129 [*Williams*].
7. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 133, 71 DLR (4th) 193 [*Mitchell*].
8. *God's Lake*, *supra* note 5 at para 27.
9. See Anna Lund, "Judgment Enforcement Law in Indigenous Communities: Reflections on the *Indian Act* and Crown Immunity from Execution" in Dwight Newman, ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) 279 at 279 [Lund, "Reflections"].
10. Sanderson, "Consensus," *supra* note 4 at 546.
11. See e.g. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol 2, (Ottawa: RCAP, 1996) at 913 [RCAP, "Volume 2"].
12. See *Mitchell*, *supra* note 7 at 133–134.
13. See *Robertson v Canada,* 2017 FCA 168 at para 56 [*Robertson* FCA]; *Reference re Stony Plain Indian Reserve No 135* (1981), 130 DLR (3d) 636 at 656–657.
14. *Indian Act*, *supra* note 1, s 89(1.1).
15. *Ibid*, s 89(2).
16. See Fraser Milner Casgrain, "Federal Security Interests Research Study and Report 2000" [2000] Unif L Conf Proc 1 at 64–65; Hitchings, *supra* note 4 at 144.

89 creates uncertainty for lenders seeking to secure personal property. For tangible personal property it is difficult to know *ex ante* whether property is "situated on a reserve" under the applicable "paramount location" test. This test examines the "pattern of use and safekeeping of the property" to determine whether there is a "discernable nexus" with a reserve.[17] Lenders dislike this test because it puts them in the "impossible position of having to evaluate the purchaser's circumstances and intentions in relation to the property" at the time security is granted.[18] While due diligence and ongoing supervision by a lender can increase certainty, such costs are liable to be passed on to Indians and Indian bands through higher interest rates.

The uncertainty of whether property is "situated on a reserve" is even more marked for intangible property.[19] In *Williams v Canada*, the Supreme Court rejected a "single strict rule" as to the location of intangible property for the purposes of the related section 87 of the *Indian Act*.[20] Instead, the court endorsed a "fact-specific analysis" that "requires a court to evaluate various connecting factors which tie the property to one location or another" and then determine how these factors should be weighed in the circumstances.[21] Such factual specificity, coupled with the "artificial"[22] judicial discretion to weigh factors, creates uncertainty for creditors, causing them to either refrain from providing credit or to do so on more onerous terms. Indeed, the Federal Court of Appeal has expressed dissatisfaction with the test, noting that "absent a clearer sense of legislative objective, the juggling of multiple connecting factors is apt to result in arbitrary results."[23] While it is true that in *God's Lake* the Supreme Court rejected the application of this multi-factor test to determine the *situs* of a bank account, instead relying on the "well-settled" common law rule,[24] uncertainty still abounds. In *God's Lake*, the Supreme Court did not repudiate the applicability of the *Williams* approach to section 89, only doing so where the *situs* of property is "objectively easy to determine."[25] Moreover, in its subsequent decision in *Bastien*, the Supreme Court referred to section 89 and emphasized that the term "situated on a reserve . . . should be given the same construction wherever it is used throughout the *Indian Act*," heading off any argument that the connecting factors approach only applies under section 87 of the *Act* (a provision respecting taxation).[26]

B. Signalling From the Supreme Court: *God's* Will?

In addition to the reasons for reform described above, the Supreme Court has itself signalled that the "package" of *Indian Act* provisions that includes section 89 requires revision. In *God's Lake*, the Supreme Court observed that these provisions are plagued with

---

17. See *Mitchell*, *supra* note 7 at 132–133.

18. See Martha O'Brien, "Income Tax, Investment Income, and the *Indian Act*: Getting Back on Track" (2002) 50:5 Can Tax J 1571 at 1575.

19. See Lund, "Reflections," *supra* note 9 at 288.

20. *Williams*, *supra* note 6 at 891–893. See also *Bastien Estate v Canada*, 2011 SCC 38 at para 17 [*Bastien*].

21. *Williams*, *supra* note 6 at 899; *Bastien*, *supra* note 20 at para 15.

22. *Bastien, supra* note 20 at para 89. See also MH Oglivie, "How Not to Situate Investment Income on a Reserve: *Bastien Estate v Canada* and *Dubé v Canada*" (2012) 28:1 BFLR 127 at 131–132.

23. *Canada v Robertson*, 2012 FCA 94 at para 51.

24. *God's Lake*, *supra* note 5 at paras 13–15.

25. *Ibid* at para 18.

26. *Bastien*, *supra* note 20 at para 14.

"tension" between paternalism and the autonomy of Indians and Indian bands, albeit a form of autonomy conceptualized in individual, economic terms (as opposed to collective autonomy).[27] Citing acute access to credit problems, the majority, led by McLachlin CJ, adopted a strict construction of the economic provisions in the *Indian Act* to promote access to credit, something described as "an important part of economic life in Canada."[28] In doing so, the majority rejected a liberal and generous interpretation of such provisions as *rights-protecting* measures and instead treated them as measures that effectively compromise economic rights.[29]

The Supreme Court's signalling for reform in *God's Lake* is also evident in *obiter* comments. In expressing concerns about limits on access to credit, the majority noted that while the courts cannot "abolish the *Indian Act* restrictions," it is "open to [Parliament] to amend the *Indian Act*."[30] Moreover, the majority underscored that although "in the case of a credit regime, courts have a responsibility to ensure a degree of certainty and predictability in the law," the interaction of the *Indian Act* and provincial personal property regimes is ultimately a Parliamentary "policy choice."[31]

III POSSIBLE RESPONSES TO THE PROBLEMS OF SECTION 89

There are a number of possible legislative reforms that Parliament could pursue to to remedy the problems with section 89 mentioned above. In this Part, I examine three such remedial measures.

A. Repeal Section 89

One response to the aforementioned problems is to simply abolish section 89. This would placate creditors and hopefully incentivize them to extend greater credit secured by on-reserve property. A fundamental problem with this proposal, however, is that abolishing section 89 would disregard the desires of Indians and Indian bands themselves. The package of provisions that includes section 89 remain "generally valued by Indian people, who see them as a bulwark against erosion of the reserve land base."[32] In fact, Indigenous groups not subject to the *Indian Act*—such as Métis peoples and Indigenous groups subject to legislative regimes other than the *Indian Act*—have "all insisted on legislation that offers protection against the loss of land, even at the cost of increased difficulty in obtaining capital."[33] This might, in part, be understood in light of the fact that some Indigenous peoples conceptualize land as a form of collective

---

27. *God's Lake*, *supra* note 5 at paras 55, 66.

28. *Ibid* at paras 38, 40, 42, 68.

29. See e.g. *Mitchell*, *supra* note 7 at 142; *Houston v Standingready*, [1991] 1 WWR 744, 1990 CarswellSask 194 (CA) ("given the beneficial nature of s 89(1) it obviously falls to be interpreted liberally" at para 12) [*Houston*].

30. *God's Lake*, *supra* note 5 at paras 42, 63.

31. *Ibid* at para 41.

32. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol 1 (Ottawa: RCAP, 1996) at 248, 256 [RCAP, "Volume 1"].

33. RCAP, "Volume 2," *supra* note 11 at 889.

identity and symbol of sovereignty, rather than as a form of readily alienable property that can be situated in the broader market economy.[34]

A subsidiary concern is that abolishing section 89 would not simply expose on-reserve property and land to seizure by secured creditors that Indians and Indian bands have consented to. Rather, it would also expose such property to judgment creditors. A further, perhaps more fundamental concern is that repealing section 89 without a broad consensus would be an unsolicited move not unlike the infamous 1969 White Paper that proposed abolishing the *Indian Act* under a (warped) logic of liberalism and equality.[35]

B. Amend Section 89 to Employ a Residence-Based Test

Another possible response is to amend section 89 to rely on a "residence of the debtor" test. Under such a test, the application of section 89 to an Indian debtor's property would depend on whether they reside on a reserve. This simple, single-factor test would reduce uncertainty compared to a test based on the *situs* of property, thereby encouraging lending. However, several reasons weigh against this approach.

First, a residence-based test would arguably confer a unique economic privilege by protecting all property belonging to Indians who live on a reserve. This could incentivize manipulation and "miss the purpose of the *Indian Act* exemption"[36] by ignoring the Supreme Court's dictum in *Mitchell* that section 89 "[is] not intended to confer privileges on Indians in respect of any property they may acquire and possess, *wherever situated*."[37]

Second, a residence-based test would be conceptually difficult to apply to Indian bands. While Indian bands have certain rights and obligations (e.g., they may enter into contracts and be a party to litigation),[38] their status as legal entities remains unclear.[39] This creates undesirable uncertainty for prospective lenders. For instance, if bands are not legal entities with a residence distinct from their members, how is their residence to be determined? Moreover, how would a band even adopt residence off reserve to avoid an amended section 89 application (itself an almost absurd idea)?

Third, a residence-based test would pose practical difficulties. Some Indians may lack the financial means to move off reserve. This creates a catch-22. Some Indians may only be able to obtain a secured loan *if* they live off reserve. However, as a practical matter, they may need a secured loan *in order to* finance their move off reserve. This perverse scenario would mirror that which Justice Binnie highlighted in his dissent in *God's Lake*. While the bank accounts of wealthier Indian bands were protected by section 89—their wealth had attracted bank branches to their reserves (thus locating their accounts on-reserve)—this protection was not

---

34. See Roderick A MacDonald & Thomas McMorrow, "Rabbits, Ravens, Snakes, Turtles: Analyzing the Political Economy of Aboriginal Communities from the Inside Out" in Pierre Noreau, ed, *Gouvernance Autochtone: reconfiguration d'un avenir collectif* (Montreal: Éditions Thémis, 2010) 213 at 220–221.

35. See RCAP, "Volume 1," *supra* note 32 at 238.

36. See *Bastien*, *supra* note 20 at para 17; *Williams*, *supra* note 6 at 892.

37. *Mitchell*, *supra* note 7 at 133 [emphasis added].

38. See *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 75.

39. See *ibid* at para 76; *Blueberry River Indian Band v Canada (Indian Affairs and Northern Development)*, 2001 FCA 67 at paras 15–16.

available to the appellant band, which was "too poor . . . and too remote to attract a branch of a deposit-taking financial institution."[40] Furthermore, requiring Indians to move off-reserve to gain improved access to credit markets is a demanding expectation, one arguably so onerous that a so-amended section 89 might violate section 15 of the *Canadian Charter of Rights and Freedoms* on the basis of the (putative) analogous ground of "residence on a reserve," whose existence was left open in the Supreme Court's decision in *Kahkewistahaw First Nation v Taypotat*.[41]

C. Relying on A Waiver-Based System

A third approach is to allow Indians and Indian bands to waive the application of section 89. Through such a waiver-based system, Indians and Indian bands could choose whether or not to expose their on-reserve property to creditors on a case by case basis.[42]

For one thing, this approach is consistent with the *consensual* nature of section 89. In *Williams*, the Supreme Court observed that Indians have "a *choice* with regard to [their] personal property": They may "situate this property on the reserve, in which case it is within the protected area and free from seizure," or alternatively they may "situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society."[43] A waiver-based system is a natural extension of this architecture of choice and avoids *situs*-based litigation that can "seem at times to be more the stuff of metaphysics than of law."[44]

One key advantage of a waiver-based system is that it removes the need for convoluted workarounds. Currently, lenders are incentivized to structure transactions as tripartite conditional sales to fit into the conditional sale exception provided for under section 89(2).[45] Excessive reliance on this technicality has led courts to reject some transactions as unenforceable "shams."[46] By affirming the permissibility of waiving section 89, Parliament can both enhance commercial certainty and eliminate section 89's unjustifiable favouring of the *form* over *substance*, something that is contrary to secured transactions law's modern tenor.[47]

Permitting section 89 to be waived is also a favourable solution because it respects Indians' individual autonomy by bringing Indians and Indian bands into the decision-making process

---

40. *God's Lake*, *supra* note 5 at para 90.

41. *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 at para 26 (criticizing the Federal Court of Appeal for recognizing "residence on a reserve" as an analogous ground on appeal due to a lack of evidence at first instance and refusing to decide the matter, but not rejecting this analogous ground outright).

42. See Anna Lund et al, "Reconciliation in the Corporate Commercial Classroom" (2016) 2:1 Lakehead LJ 49 at 51 [Lund et al].

43. *Williams*, *supra* note 6 at 887 [emphasis added].

44. *Bastien*, *supra* note 20 at para 16.

45. See Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Toronto: Irwin Law, 2012) at 178.

46. See *Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80 at para 28.

47. See James I Reynolds, "Taking and Enforcing Security under the *Indian Act* and Self-Government Legislation" (2002) 18:1 BFLR 49 at 54 [Reynolds]; Anita G Wandzura, "The Enforcement of Security Interests against the Personal Property of First Nations Persons on a Reserve" (2007) 39:1 Ottawa L Rev 1 at 9–10 [Wandzura].

about a paternalistic protection and does not impose a "one-size-fits-all" approach that is inappropriate to the significant economic variation between reserves.[48]

A final benefit of using a waiver-based system is that it is practical: Section 89's application can be waived through a simple contractual provision. While an Indian or Indian band can ask the Minister of Indigenous Services to declare section 89 inapplicable under section 4(2) of the *Indian Act*, as noted by Justice Binnie in *God's Lake*,[49] the minister has a long-standing policy of refusing all such requests.[50] Thus, although an alternative exists under section 4(2), a waiver by contract between parties is far simpler.

While the Supreme Court has not directly addressed the validity of waiving section 89, there is substantial jurisprudence—much of it following *God's Lake*—supporting this position.[51] Further support can be gleaned from the ability to circumvent section 89 through the use of an incorporated entity,[52] as well as the Court of Appeal of Alberta's suggestion (albeit in *obiter*) that parties may, in some circumstances, be able to deem the *situs* of property, thereby opting out of section 89's application.[53]

If Parliament believes a waiver-based system is the best solution, it could either leave the common law to continue developing in this direction or amend section 89 to expressly permit the waiving of section 89. It is submitted, though, that the latter is preferable. Although amending section 89 may be politically difficult,[54] it is a worthwhile endeavour. At least three reasons support codifying the ability to waive section 89.

First, codification would provide certainty that section 89 can indeed be waived. This would help to immediately reduce the incidence of litigation, a key goal of provincial personal property security acts,[55] and avoid an adverse ruling by the Supreme Court. While there are appellate authorities establishing that section 89 may be waived, it has been argued that there is a "serious question" as to whether these cases were rightly decided,[56] and suggested that

---

48. See Lund, "Reflections," *supra* note 9 at 281; Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, But How Do You Build It In Canada?" (2012) 53:1 Can Bus LJ 94 at 112 [Sanderson, "Commercial Law"].

49. *God's Lake*, *supra* note 5 at paras 68, 90, 107, 148.

50. See Casgrain, *supra* note 16 at 70; Canada, Royal Commission on Aboriginal Peoples, "The *Indian Act*: Evolution, Overview and Options for Amendment and Transition" by John Giokas (Ottawa: RCAP, 1995) at 255.

51. See e.g. *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 72aff'g 2009 MBQB 32; *Tobique Indian Band v Canada*, 2010 FC 67; *Robertson* FCA, *supra* note 13; *Corporation de développement* économique *Montagnaise v Robertson*, 2017 QCCS 2736 [*Robertson* QCCS]; *Kingsclear First Nation v JE Brooks & Associates Ltd*, 118 NBR (2d) 290, [1991] NBJ No 816 (QL); *Shubenacadie Band v Francis* (1995), 144 NSR (2d) 241, 1995 CanLII 4259 (CA).

52. See *Robertson v The Queen*, 2011 TCC 83 at paras 49, 53, 73 [*Robertson*].

53. See *Alberta (Workers' Compensation Board) v Enoch Band* (1993), 106 DLR (4th) 279 at 284–85, 290–91.

54. See John Provart, "Reforming the *Indian Act*: First Nations Governance and Aboriginal Policy in Canada" (2003) 2:1 Indigenous LJ 117 at 121.

55. See Thomas GW Telfer, "Preliminary Paper on the Law of Personal Exemptions from Seizure: A Report for the Uniform Law Conference of Canada" [2004] Unif L Conf Proc 1 at 5.

56. See Reynolds, *supra* note 47 at 56; Murray Teitel, "Contracting Out of the *Indian Act*: Traditional Protections v 21st Century Commercial Forces" (14 November 2016) in Bernd Christmas, chair, *Indigenous Law Issues 2016* (Toronto: Law Society of Upper Canada, 2016) at 8–9 to 8-10.

they could yet be overturned by the Supreme Court.[57] Three reasons appear to undergird these concerns. First, the most explicit appellate decision, *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson,*[58] is thinly reasoned and relies heavily on remarks by McLachlin CJ in *God's Lake* that addressed the construction of related exemptions explicitly enumerated in the *Indian Act* rather than the validity of waiving the application of the *Act*'s provisions.[59] In fact, the only mention of a waiver in *God's Lake* was Justice Binnie's passing mention of ministerial waivers.[60] Second, the Supreme Court's emphasis on section 89 as a unique "protection" could be dispositive.[61] The Supreme Court has recognized that there is a "long standing principle that parties cannot contract out of statutory provisions enacted in the public interest."[62] In this vein, it has been suggested that, because section 89 was enacted pursuant to what the Supreme Court described in *Mitchell* as the Crown's "honour-bound" duty to protect Indians' land base and chattels,[63] the provision is "deserving of special regard."[64] Indeed, the purpose of section 89—creating an insulated economic sphere for Indian bands and their members—is at least arguably undermined by allowing the piece-meal stripping away of the provision's protection through individuals waiving its application. A third reason is also based on language found in the Supreme Court's decision in *Mitchell*. Writing for a plurality of Justices, Justice La Forest used rather categorical language when discussing the applicability of section 89:

> [I]f an Indian band concluded a purely commercial business agreement with a private concern the protections of ss. 87 and 89 would have no application . . . 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*.[65]

While Justice La Forest did not explicitly address a waiver-based system, his strict application of section 89 to commercial transactions is consistent with section 89's irrevocability. Moreover, the Supreme Court cited this passage with approval in *Bastien*, a case decided after *Tribal Wi-Chi-Way-Win Capital Corp*.[66]

A second reason to codify a waiver-based system is that Parliament could enact policy choices that courts may not implement. For instance, Parliament could amend section 89 to require that the waiving party receive independent legal advice for a waiver to be effective,[67]

---

57. See Lund, "Reflections," *supra* note 9 at 307.

58. Reynolds, *supra* note 47.

59. *God*'s *Lake*, *supra* note 5 at paras 38–41.

60. *Ibid* at paras 107, 148.

61. See *Bastien*, *supra* note 20 at para 4; *Mitchell*, *supra* note 7 at para 131.

62. *Potash v Royal Trust Co*, [1986] 2 SCR 351 at 371. See also *Parlee v. College of Psychologists of New Brunswick*, 2004 NBCA 42 ("The legal maxim *quilibet potest renunciare juri pro se inducto* stands for the proposition that Ms. Parlee could waive the provision of a law made for her own benefit. However, the opposite is also true: if the provision one seeks to waive has been enacted for the purpose of protecting or benefiting others, (i.e., the public), it cannot be waived" at para 35).

63. *God's Lake, supra* note 5 at 131.

64. O'Brien, *supra* note 18 at 1582.

65. *Mitchell*, *supra* note 7 at 139 [emphasis added].

66. *Bastien*, *supra* note 20 at paras 22, 54.

67. See Casgrain, *supra* note 16 at 67.

prohibit waiving interests in reserve land while allowing it for personal property, or require a band council to approve an Indian's waiving of section 89 over an interest in reserve land—with the latter two points addressing concerns about the erosion of the land bases of reserves. Alternatively, Parliament could permit a waiver only in the context of commercial activity, thereby providing a form of consumer protection.[68] Crucially, such changes should only follow careful consultation. It is true that the Supreme Court recently held in *Mikisew Cree First Nation v Canada (Governor General in Council)*[69] that no such consultation can be *required* by the duty to consult—in effect confirming the Court of Appeal for Alberta's previous holding that "it cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*."[70] At the same time, amending section 89 without meaningful consultation is highly objectionable because it would both perpetuate paternalism and continue to effectively preclude many Indians and Indian bands from ordinary consumer transactions such as mortgages or secured lines of credit. Consultation would also bring the voices of Indians and Indian bands to the drafting table, a place they have long been conspicuously absent from despite being the parties most affected by section 89. At the same time, because amending section 89 of the *Indian Act* would impact all Indians and Indian bands, rather than simply those that wish to obtain greater access to credit, thoughtful deliberation must be given to the design, process, and composition of consultation.

Third and finally, focusing on a waiver-based system is sensible because parties seizing property on a reserve generally seek to obtain a related variety of waiver already: the agreement of the band council that enforcement proceedings will not be "frustrated".[71] Indians and Indian bands have several means that could be employed to inhibit enforcement efforts, such as the *Indian Act*'s trespass provisions and the enactment of bylaws or resolutions.[72] It bears noting that waiving section 89 and granting permission to enter a reserve are not co-extensive. Notably, an individual member of a band can waive the application of section 89 over their property, but they cannot grant the creditor permission to enter the reserve.[73] Accordingly, codifying a waiver-based system will not prevent Indian bands from employing measures to "frustrate" enforcement. However, if a waiver-based system is codified through a meaningful consultation process, Indian bands may be less inclined to "frustrate" enforcement because they view the waiver of section 89 as a legitimate, fair policy measure whose applicability has been opted into on a case-by-case basis.[74]

---

68. See Teitel, *supra* note 56 at 8-8.

69. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

70. *R v Lefthand*, 2007 ABCA 206 at para 38.

71. See Catherine Walsh, "Section 89 of the *Indian Act*: Personal Property Financing and Creditors' Rights" (paper prepared for the Centre for Property Studies, Faculty of Law, University of New Brunswick, 1999) at 14 [unpublished].

72. See Wandzura, *supra* note 47 at 15.

73. *Ibid*.

74. For a discussion of finding common ground between Indian bands and governments in reforms to the *Indian Act*, see Sanderson, "Consensus," *supra* note 4 at 549–550.

IV PROBLEMATIZING A SILVER-BULLET SOLUTION

Despite the advantages of a waiver-based system, it must be conceded in closing that this solution only addresses *one* of the numerous sociopolitical factors affecting reserve economies, that it may not achieve its goal, and that it is somewhat normatively dissatisfying. Despite these concerns, a pragmatic defence can be made to support codifying a waiver-based system.

One major concern is that focusing reform efforts on waiving section 89 alone risks obfuscating the complex reality that section 89 is but one causal factor of economic disadvantages faced by Indigenous peoples. In fact, "access to credit is really just the tip of the iceberg" of the economic issues that Indigenous peoples in Canada face.[75] This complex reality is one that Justice Binnie dourly described in *God's Lake*. In his powerful dissent, Justice Binnie drew a stark line between the promise of greater access to credit and the reality that many reserve economies are socially and geographically isolated.[76] Justice Binnie's wry response to Chief Justice McLachlin's liberal interpretation of the *Indian Act*'s economic provisions applies equally forcefully to relying on a waiver-based system of section 89 as a stand-alone, silver-bullet solution: "There is the attractive concept, but then there is the reality."[77]

Another objection to a waiver-based system is that it is a facile solution. Even when Indians and Indian bands waive section 89, they only achieve theoretical equality in credit markets. Despite the removal of a legal impediment (section 89), factors such as the "latent, subconscious, or even overt racism and stereotyping that informs the credit granting decisions"[78] will continue to limit access to credit. Moreover, unsophisticated lenders, security holders, and creditors that are not Indians and who are owed small sums of money—a recurring type of party in section 89 cases[79]—may take time to learn about this change, continue to harbour suspicion that this alleged "loop-hole"[80] has been closed, or be unwilling to spend money consulting a lawyer to ensure that a waiver is properly obtained.

A final objection is that leaving section 89 in place and relying on a waiver-based system to overcome its deleterious effects is an unprincipled, timid approach. Rather than rejecting this much-maligned provision, Parliament would instead affirm it while concurrently inviting the "circumvention of a statutory scheme aimed, ostensibly, at protecting reserve property and resources."[81] Beyond the subtle hypocrisy of this approach, a question arises: Why tinker with the status quo when bolder approaches could be pursued, such as abolishing section 88 of the *Indian Act*—which applies provincial property and civil rights laws to reserves—and

---

75. McMorrow, *supra* note 3 at 62, 78–89.

76. *God's Lake*, *supra* note 5 at paras 82, 89, 107.

77. *Ibid* at para 82.

78. Lund et al, *supra* note 42 at 52.

79. See e.g. *Taylor's Towing v Intact Insurance Company*, 2017 ONCA 992 (towing company with a statutory repair lien of less than $25,000); *Houston*, *supra* note 29 (dismissed employee owed arrears of $3,052); *David Electrical Contractor v Garden River First Nation* (2004), 73 OR (3d) 28, [2005] 1 CNLR 31 (SC) (contractor owed arrears of $7,200); *Dykstra v Monture* (1999), 47 OR (3d) 129, [2000] 3 CNLR 59 (SC) (creditor loaned Indian debtor $10,269).

80. See e.g. Tanis Fiss, "The Lost Century: Moving Aboriginal Policy From the 19th Century to the 21st Century" (2002), online (pdf): *Centre for Aboriginal Policy Change, Canadian Taxpayers Federation* <www.taxpayer.com/media/26.pdf>.

81. Lund et al, *supra* note 42 at 51.

empowering Indian bands to enact their own rules governing security interests and seizure of on-reserve property, as exists in the United States?[82] Indeed, it has even been argued that reforms to the *Indian Act* are unlikely to be an effective means of promoting self-government because the *Act* is itself "wholly inconsistent with the inherent nature of Indian self-government."[83]

Clearly, even the proposal I have advanced in this article is not without practical and normative concerns. Nonetheless, a qualified defence can be made on the basis of pragmatism. Codifying a waiver-based system can be done expeditiously and may be understood as a stop-gap measure that provides an immediate degree of certainty without suddenly undermining the status quo protection that section 89 affords. Crucially, there is nothing to prevent (and nothing inconsistent about) codifying the validity of waiving section 89 in the interim while actively pursuing other important projects, such as addressing credit market discrimination and thinking about bolder, more comprehensive reforms to property law.

---

82. See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 17 at 25–27; Sanderson, "Commercial Law," *supra* note 48 at 94–96; Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013) 58:3 McGill LJ 607 at 631–635.

83. Frankie Young, "A Trojan Horse Can Indian Self-Government Be Promoted Through The *Indian Act*?" (2019) 97:3 Can Bar Rev 697 at 720.