



## Court Upholds Protections of First Nations in Commercial Dispute

by Domenico Magisano

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*Blaney McMurtry has a long-standing, respected record of committed counsel and service to Canadian Aboriginal communities. The following article concerns the firm's effort in court to secure statutory protections under the Indian Act for the Temagami First Nation in its dispute over fees with a professional service provider.*

The *Indian Act* has been the source of numerous disputes, some of which have made their way to the Supreme Court of Canada. In *Borden Ladner Gervais v. Temagami First Nation et. al.*, the Ontario Superior Court of Justice was asked whether assets of an Indian Band situated on a reserve can be garnished under the Ontario *Rules of Civil Procedure* to pay fees owing to a professional service provider.

### Background

Temagami First Nation (TFN) is a band under the *Indian Act*. During the late 1980s and early 1990s it retained Borden & Elliot (now Borden Ladner Gervais, or BLG) to help it with appeals and subsequent land claim negotiations involving the provincial and federal governments. At first, BLG's fees were paid by the government through a fund, but eventually the fund no longer paid the accounts. BLG asserted that it continued to act on behalf of TFN and in the process amassed an outstanding account of over \$1.1 million.

### The Litigation

In 1996 BLG began an action against TFN and Teme-Auguama Anishanabai (TAA). When it served the claim, BLG advised TFN that this was merely a procedural step and that BLG had no intention of enforcing on any judgment it might obtain. As a result, TFN and TAA did not defend the claim. Shortly thereafter, BLG noted both in default.

In 1999, BLG, TFN and TAA consented to an Order granting BLG a charge in the amount of their claim over any proceeds TFN or TAA might obtain through settlement of their land claims. The order concerned assets arising from land claims only, and not from any other sources. Nothing further occurred until 2003 when BLG sought and obtained default judgment against both TFN and TAA

### The Garnishment

Consistent with the letter that accompanied its statement of claim in 1996, BLG did not take any steps to enforce its judgment for almost five years. However, in July 2008, BLG obtained on motion to the court (without notice to TFN) an order for a garnishment of funds payable to TFN by the Ontario First Nation General Partnership Inc. (OFNGP), which distributes monies from Casino Rama to Ontario bands. The funds at issue were situated in a bank account on a Reserve (specifically, the Six Nations of the Grand River Reserve). BLG issued and served its garnishment on the OFNGP.

Blaney McMurtry LLP lawyers Domenico Magisano and Catherine DiMarco were retained by TFN to set aside BLG's garnishment on the basis that the garnishment contravened section 89 of the Indian Act (the Section 89 argument) and that the garnishment was contrary to a settlement reached between BLG, TFN and TAA regarding payment of BLG's outstanding accounts (the settlement argument).

When the case came before the Honourable Madam Justice Lois Roberts, the settlement argument was adjourned so that counsel could argue whether BLG could act on its own behalf with respect to this issue. The Section 89 Argument proceeded before Madam Justice Roberts.

#### **The Section 89 Argument**

BLG did not dispute that the funds at issue were situated on a reserve. The main argument advanced by BLG was that a "debt" subject to garnishment under the Ontario *Rules of Civil Procedure* was not personal property as contemplated under the *Indian Act*.

Section 89 of the *Indian Act* states:

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

Rule 60.08(1) of the Ontario *Rules of Civil Procedure* states:

A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons.

Recent case law interpreting section 89 of the *Indian Act* had consistently narrowed its scope. Accordingly, a decision adverse to TFN stood to have broad ramifications by further constricting the protections offered by section 89 to bands and band members.

After a two day hearing, Madam Justice Roberts held that section 89 of the *Indian Act* applied to funds held by the OFNGP. As a result she lifted BLG's garnishment. In finding in favor of TFN, the court held that debt is, in fact, a form of personal property that would be caught by section 89 of the Indian Act.

[24] In my view, there can be no question that the funds sought to be garnished by Borden & Elliot, regardless of their origin, should be treated as the property of Temagami.

BLG has appealed Madam Justice Roberts's decision to the Ontario Court of Appeal.

Stay tuned. ■

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After drafting of this article, but prior to publication the parties entered into an interim settlement whereby Borden & Elliot agreed not to proceed with their appeal of the Honourable Madam Justice Roberts' Order.