

Examining the Provisions of Section 87 of the *Indian Act* as a  
Means to Promote Economic Participation and Treaty Implementation

by

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## ABSTRACT

Canadian courts, despite recognition in the *Canadian Constitution, 1982* that treaties are to govern the Crown-Aboriginal relationship, continue to develop principles of interpretation that narrow Aboriginal and treaty rights, including the taxation provisions of the *Indian Act*. In *Robertson*, the Federal Court of Appeal, building on *Mitchell v Peguis*, articulated a “historic and purposive” analysis, by reliance on a distinctive culture test and an ascribed protection rationale, thereby abrogating the fundamental treaty relationship. As a means to fuller implementation of the spirit and intent of Treaties, taxation provisions must be interpreted in a treaty-compliant manner. The potential for economic participation through a proposed “urban reserve” on the Kapyong Barracks in Winnipeg, Manitoba, as part of a Treaty 1 settlement, is discussed as a case study, and compared with similar developments in New Zealand, under a Waitangi Tribunal settlement, as an example of treaty compliance in economic development.

*Key words:* *Indian Act* s87; Economic development; Historic and purposive; Tax exemption; Numbered Treaties; Treaty interpretation; Treaty implementation; Urban reserves; Native Leasing Services, Kapyong; Waitangi Tribunal.

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Ehara taku toa, he takitahi, he toa takitini—*Success is not the work of one, but of many.*

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## Dedication

I walk a path traversed by a long line of wise leaders, strong women, and insightful negotiators, including my great-great grandfather, Chief Jacob Berens, who signed Treaty 5 at Berens River in 1875. Thus, I dedicate this work to my ancestors who envisioned a peaceful nation, to my relations who continue to toil to realize that vision, and to the 7<sup>th</sup> Generation – our children who follow.

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Mi'kmaq Treaties of 1760-61

## 1760-61 Peace and Friendship Treaties Between His Majesty the King and the LaHave Tribe of Indians

Treaty of March 10, 1760 with Chief Michael Augustine of the Richebuctou Tribe

*Archival Reference:* PRO CO 217/45, ff. 145-146v (or p. 287-290)

*Authenticity Level:* Copy made in 1825 from the 1760 original held by the Richebuctou chiefs; taken by the Aboriginal signatories for presentation in London, England.

Treaty of June 25, 1761 with Chief Joseph Shabecholouest of the Miramichi Tribe

*Archival Reference:* PANS RG 1, vol. 165, p. 162-165.

*Authenticity Level:* Registry copy of treaty terms only, entered by Provincial Secretary and Registrar Richard Bulkeley in his "Commission Book."

The Numbered Treaties of Western Canada

Treaty 1 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions, 3 August 1871.

Treaty 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions, 20 September 1875.

Treaty 11 Between His Most Gracious Majesty George V, King of Great Britain and Ireland and of the British Dominions beyond the Seas, by His Commissioner, Henry Anthony Conroy, Esquire, of the City of Ottawa, of the One Part, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:-- (June 27, 1921) and Adhesion (July 17, 1922) with Reports, etc.

Treaty Texts available at Government of Canada, Indigenous and Northern Affairs Canada, online: <<https://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340>>.

New Zealand

*Treaty of Waitangi Act 1975, Schedule 1 – The Treaty of Waitangi.*

Treaty of Waitangi texts and literal rendition of Māori version available online:

<<http://www.treatyofwaitangi.net.nz/ReadtheTreaty.html>>.

## Chapter 1 – Introduction

“Inevitably, there are distortions, omissions, erasures, and silences in the archive.

Not every story is told”.<sup>1</sup>

There remains a persistent myth, despite living in the ‘information age’, that Indians<sup>2</sup> do not pay taxes. While there is a grain of truth to this belief, it is far from the whole truth. Where Aboriginal peoples fit in Canada’s story, both legally and socially, remains highly contested. Many of the stories that collectively narrate how Canada became the nation it is today have simply passed from memory as insignificant remnants of a time gone by, never to find a way into the annals of Canada’s collective memory. Other stories, however, reflecting the impact of a discourse dominated by colonialism, are distorted or deliberately silenced, resulting in a record that is difficult to integrate into modern law and policy. Situating this examination of Indians and taxation into a fuller historical and legal context, the tax exemptions available to Indians today are more properly understood as a reflection of a treaty relationship and not normative Canadian tax law.

Accounts of the Crown’s dealings with Aboriginal peoples have been told and retold, to reinforce the grand project of colonization. The historic rationale, official or otherwise, for Canada’s ‘Indian policy’ found its expression in Indian Residential Schools, the Pass system, and other law and policy regimes aimed solely at First Nations peoples. Even today, the *Indian Act*<sup>3</sup>

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<sup>1</sup> Rodney GS Carter, “Of Things Said and Unsaid: Power, Archival Silences, and Power in Silence”, 61 *Archivaria* 215 at 216.

<sup>2</sup> The term, “Indian”, is used in its legal sense, as defined by the *Indian Act*, s 2(1) and s 6, and differentiates those to whom the *Indian Act* applies, namely “Indians”, from other Aboriginal peoples, including Inuit, Métis, and other non-registered persons of Aboriginal descent. The Court has made clear distinction as to the applicability of the *Indian Act* in *Reference whether “Indians” includes “Eskimo”* [1939] SCR 104, and *Daniels infra* note 4. Where appropriate, the preferred terms of “First Nations”, “Aboriginal” and “Indigenous” peoples are also used.

<sup>3</sup> *Indian Act* RSC, 1985, c I-5.

governs most aspects of the lives of Indians. Over time, the net effect has been an inaccurate and often denigrating record of Aboriginal peoples, creating a deep well from which lawmakers continue to draw. This perspective has contributed more than any other single factor to the continued uncertainty and confusion regarding the inherent legislative intent and practical application of section 87 of the *Indian Act*.

Throughout Canada's history, as we were most recently reminded in the Final Report of the Truth and Reconciliation Commission, the Crown—first the British and now Canadian—has in so many ways utterly failed Aboriginal peoples. As noted by Supreme Court Justice Abella in *Daniels v Canada (Indian Affairs and Northern Development)*: “As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust.”<sup>4</sup> This is particularly evident in the Crown's failure to uphold its treaties with First Nations as solemn agreements. More specifically, as ‘distortions, omissions, and erasures’ in the legal record concerning treaties compiled from the earliest days of confederation, including the period following recognition of treaties in Canada's *Constitution Act, 1982*,<sup>5</sup> the true nature of the Crown's treaty relationship with First Nations has been obfuscated and misconstrued.

Unsurprisingly, the Crown used legislation to supplant this *sui*<sup>6</sup> relationship, even as the ink was

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<sup>4</sup> [2016] SCC 12 [Daniels] at para 1.

<sup>5</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

<sup>6</sup> The courts use of the legal notion of “*sui generis*” extends beyond the lexical meaning of something being “unique”, although the court has not articulated the full scope or implications of invoking this term. For example, the term has been used in *Guerin* (*infra* note 11) at 385: “*sui generis* fiduciary duty on the part of the Crown”, in *Van der Peet* (*infra* note 10) at para 115: “*sui generis* proprietary interest [in land] which gives native people the right to occupy and use the land at their own discretion”, and in *Delgamuukw* (*infra* note 41) applying *Van der Peet* (at para 3): “In *Van der Peet*, I held that the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal rights.”

It is noteworthy that the court's use of *sui generis* is not confined to Aboriginal law, but also appears in a variety of contexts, including characterizing certain judicial decisions, terms in contract law, and certain facets of civil

drying on the very treaties that were to form the basis of this relationship. DJ Hall points out the inconsistency of the solemnity of the treaty process with the Crown's use of legislation governing Indians:

The assumption that the Indian Act would apply as it stood was reflected in comments made by treaty commissioners at Treaties 6 and 7. Herein lay the basis of a major misunderstanding between the government and treaty commissioners on the one hand, and the Indians on the other: the government assumed that its Indian legislation operated prior to the treaties, framed them, and formed the context within which they would be interpreted; the Indians negotiating these treaties had never heard of that legislation, considered the treaties to be primary, and came to consider the Indian Act as either subordinate to the treaties or an illegal imposition.<sup>7</sup>

Today, however, under the notional protections of section 25 and 35 of the *Constitution Act, 1982*, a more accurate contextualization of Canada's Indian policy should be possible. In other words, even if legislation intended to strip First Nations of their land and rights, the treaties must now be interpreted in a manner consistent with the Honour of Crown, to account for the promises of the treaties.

Such is the case for the tax exemption provisions of the *Indian Act*. Using the lens of the of the historic treaties, and the application of the spirit and intent evident therein, the tax provisions for First Nations peoples—specifically, but not necessarily only Indians so recognized by the *Indian Act*—are best understood as a component of a treaty relationship that was prospective, rather than concessionary at the conclusion of land cession negotiations. It is argued herein that

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liability. See for example: *Gilman v The Worker's Compensation Board*, [1937] SCR 50, which deemed a lower court decision to be “of a special character, but that [the costs order] must be taken to be an order *sui generis*”. In *149244 Canada Inc v Selick*, 1994 CanLII 6132 (QC CA), the court found the contract in question had a “*sui generis* quality”. In *Godbout v Pagé*, 2017 SCC 18, involving an automobile accident and bodily injury, the court stated: “I am of the opinion that the appropriate causal link in the context of the compensation scheme established by the Act cannot be the same as or be derived from the one that prevails in the general law of civil liability: it is *sui generis* in nature. It must be given a large and liberal interpretation that will further the Act's purpose, although that interpretation must also be plausible and logical” (at para 28).

For further consideration of the term “*sui generis*” in Aboriginal law contexts, see: James Sákéj Youngblood Henderson, “Sui Generis and Treaty Citizenship”, 6:4 Citizenship Studies, (2010), 415; and James Sákéj Youngblood Henderson, “Interpreting *Sui Generis* Treaties”, 36:1 Alberta Law Review, (1997) 46.

<sup>7</sup> DJ Hall, *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905*, (Montreal: McGill-Queen's University Press, 2015) at 39.

section 87 of the *Indian Act* is an indication of the underlying spirit and intent of the Numbered Treaties, the latter being *sui generis* agreements, which envisioned both economic participation and continuing prosperity for Canada's First Nations peoples.

Historically, both Parliament and the Court have discounted the treaties, necessarily creating 'distortions, omissions, and erasures' in the meaning and implications of those treaty relationships. With the entrenchment of the treaties in the *Constitution Act, 1982*, the Crown's recognition of existing Aboriginal and treaty rights, at least notionally, must now meet a higher standard. Nevertheless, there remains much work for the Crown to do, in order to uphold its treaty obligations. In the absence of Parliamentary leadership, the Court continues to identify, and inelegantly strain to fill this gap without overstepping its role.

When deliberating upon the tax exemption for Indians pursuant to section 87 of the *Indian Act*, the Federal Court of Appeal was recently confounded by its own lack of appreciation for the historical context that gave rise to the exemption, and was left to speculate on the legislative objectives of the provision. Generally, the *Indian Act* provisions provide an exemption from taxation on an "Indian", as defined by the Act, and certain types of personal property held by that Indian. The primary determinant of the application of the provisions is that property must be located "on a Reserve", which for intangible property like employment or interest income, is difficult to situate precisely. The *Indian Act* further provides protections from seizure or other means of loss of the aforementioned property. In 2012, the question of interpretation of these provisions once again came before the Federal Court of Appeal. Writing for a unanimous court, Justice Evans considered the purpose of section 87 in *Canada v Robertson* but conceded: "It is easier to say what the purpose of section 87 is not, than to state positively what it is. ... Absent a clearer sense of legislative objective, the juggling of multiple connecting factors is apt to result in

arbitrary results. Nonetheless, our job is to apply the settled law to the facts before us as best we can.”<sup>8</sup> Appeal Court Justice Pelletier wrote a concurring opinion:

While the objective of s. 87 of the Indian Act R.S.C. 1985 c. I-5 is far from clear, one can say that it must have been intended to protect or enhance Indians’ economic interest in their reserve...[through] one of the few business activities open to residents of that reserve. ...If s. 87 is intended to protect, in some undefined way, the economic patrimony of Indians in relation to their reserves, I can think of no circumstances in which its application would be more appropriate than it is in this case.<sup>9</sup>

Viewed strictly as a statutory tax provision, the exemption makes little sense. Thus, the gap explicitly identified in *Robertson*, and evidenced throughout jurisprudence dealing with sections 87 to 90 of the *Indian Act*, begs for judicial, if not legislative, clarification.

Identifying the legislative objective of these tax provisions for Indians necessitates a return to the beginning of the story. To borrow the words of Chief Justice Lamer writing for the majority of the Supreme Court of Canada in *R v Van der Peet*:

...when Europeans arrived in North America, aboriginal peoples were already here living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.<sup>10</sup>

Chief Justice Lamer was partly right in this assessment. Aboriginal peoples were here first, which grounds certain land and Aboriginal rights. The more important truth, however, is the fact of the indigeneity of Indians required the Crown to negotiate its presence in Turtle Island. This ‘special legal status’ is now understood to have formed the foundation of Canadian Indian law and policy, albeit one that has been marred by prejudice and ruthless colonial ambition but is nevertheless a relationship that began with treaties. Jurisprudence since 1982 indicates that the Supreme Court of Canada has raised expectations for its own consideration of the treaties, giving

<sup>8</sup> *Canada v Robertson*, 2012 FCA 94 (CanLII) [*Robertson*] paras 45 & 51 (emphasis added).

<sup>9</sup> *Ibid* paras 91 & 92 (emphasis added).

<sup>10</sup> [1996] 2 SCR 507 [*Van der Peet*] at para 30, (emphasis in the original).

recognition to the fact that Aboriginal peoples have their own perspectives, and which the Court suggests are equally legitimate and requiring accommodation. This proposition, one that has consistently been held by Aboriginal peoples, gained traction in 1984 with the *Guerin v The Queen*<sup>11</sup> decision, and continues to resonate in subsequent jurisprudence.<sup>12</sup> While having due regard for ‘Aboriginal’ perspectives—as the Court in *R v Sparrow*<sup>13</sup> termed them—remains to be fully achieved by the Courts, consequently, global Indigenous scholarship and Aboriginal perspectives of the treaties and the rights protected by those special agreements, have much to contribute to understanding the historic basis for the *Indian Act* tax provision. The intrinsic connection between Aboriginal peoples and their traditional territories—beyond *Indian Act* ascribed Reserves—and the rights that flow from that relationship, is slowly becoming apparent to jurists and legislators alike.

Searching for the elusive “purpose” of the provision, various theories have been advanced. The court has focused on determining the location (or *situs*) of property, and indicia that connect that property to a reserve, in order to apply section 87. With the 1992 *Williams v The Queen*<sup>14</sup> decision in hand, wherein the Supreme Court outlined the ‘Connecting Factors Test’, Joel Oliphant, for example, considered the “nature and historical origins” of the present tax exemption. He concluded:

In contemplating the origins of the statutory exemption we are able to account for the existing policy rationale, which must be understood if reforms are to be undertaken on the present system. It is clear that the Crown’s original aim in providing the tax exemption was

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<sup>11</sup> [1984] 2 SCR 335 [*Guerin*].

<sup>12</sup> The Supreme Court continues to retreat from this position. In *Mitchell v Peguis Indian Band* [1990] 2 SCR 85 (*infra* note 21), a tax case discussed below, the Court denied the possibility that the ‘aboriginal perspective’ could ever “alter the basic structure of Sovereign-Indian relations [nor are] aboriginal peoples ... outside the sovereignty of the Crown” (p 109). In *Tsilhqot’in Nation v British Columbia*, *infra* note 26, the Court diminishes the utility of the ‘Aboriginal perspective’ when considering Aboriginal practices, but instead as an understanding of practices needing to be “approached from both the common law and Aboriginal perspectives” (at para 49) and qualified by “the perspective of the broader public” (at para 81).

<sup>13</sup> *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

<sup>14</sup> *Williams v The Queen*, [1992] 1 SCR 877 [*Williams*].

to shield Indians until such time as they were able to be included in Canada's commercial mainstream. The very fact that the exemption still exists, largely unchanged since 1850, would suggest that the original policy was a failure and that it is time to rethink things for the future.<sup>15</sup>

From this perspective, Oliphant dismissed the argument that the *Indian Act* tax exemption should be construed as an Aboriginal or treaty right, and conceded that "the tax exemption is regarded solely as a creature of statute".<sup>16</sup> Moreover, the failure of the Canadian government to fully assimilate First Nations people becomes the justification to end the *sui generis* relationship between the Crown and Indians. Nevertheless, he raises several important jurisprudential developments and persisting issues worthy of further discussion herein.

Similarly, Richard Johnson sought to settle some of the "uncertainty as to when and how the provision applies".<sup>17</sup> He considered the developing Constitutional framework for Aboriginal and treaty rights, but focused squarely on the Crown's "protective" role over First Nations peoples. Writing in 2003, after *Williams*, but before *Bastien*<sup>18</sup> and *Dubé*<sup>19</sup> (which diminished the commercial/economic mainstream analysis discussed below), Johnson settled for the 'protection rationale' as articulated in *Mitchell v Peguis*<sup>20</sup> and applied in *Williams*, and rejected arguments based on treaty rights, inherent Aboriginal sovereignty, or a "loose sort of *quid pro quo* for the surrender of Indian lands".<sup>21</sup> Working from the premise that the "purpose of the provision tells us how the provision ought to work [Johnson concluded that it is] apparent that the main problems are in the judicial interpretation and application of the provision".<sup>22</sup> In his conclusion, Johnson

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<sup>15</sup> Joel J Oliphant, "Analysis of the Positive Tax Law Affecting First Nations in the Context of Canadian Tax Policy" (LLM thesis, University of Manitoba, 2000 [unpublished]) [Oliphant] at 29-30 (footnotes removed).

<sup>16</sup> *Ibid* at 30.

<sup>17</sup> Richard Johnson, "Section 87 of the Indian Act: Purpose, Problems, and Solutions" (LLM thesis, York University, 2003 [unpublished]) [Johnson].

<sup>18</sup> *Infra* note 41.

<sup>19</sup> *Infra* note 42.

<sup>20</sup> *Infra* note 24.

<sup>21</sup> Johnson *supra* note 17 at 6.

<sup>22</sup> *Ibid* at 3.

proposed a simplified *situs* test to determine the location of intangible property, essentially accepting the courts' often conflicting and disparaging rationales.

It is my assertion that the Numbered Treaties envisioned not only economic participation in the broader Canadian economy for First Nations, but also economic prosperity. The present dire socio-economic conditions,<sup>23</sup> so prevalent on today's Indian reserves, should form neither the basis for the continuance, nor the rejection, of an economic benefit to those whom the provisions apply. These conditions are simply irrelevant to the interpretation of the provisions. To interpret treaty promises through the lens of Indigenous peoples' poverty, effectively normalizes the existing impoverishment, which frankly should have no bearing on the analysis. Clearly, there is a "protective" element to the tax exemption provisions for those who are able to benefit from them, but it is important to differentiate between colonial policy and treaty promises. From this vantage, I argue that rather than reflecting an overarching, paternalistic purpose, the provisions are intended to preserve the economic independence of First Nations peoples that existed at the time of treaty, both communally and individually. Simply put, by protecting the lands on which Aboriginal peoples depend, treaties were intended to protect a way of life and an economy built on sustainability. From the viewpoint of the Indians, treaties were a way to accommodate the coming influx of immigrants and settlers, to preserve their autonomy, and not to create perpetual

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<sup>23</sup> See for example: Statistics Canada, "Aboriginal Peoples: Fact Sheet for Canada", 2015, online: <<http://www.statcan.gc.ca/pub/89-656-x/89-656-x2015001-eng.htm>>.

The National Aboriginal Economic Development Board, "The Aboriginal Economic Progress Report 2015", 2015, online: <<http://www.naedb-cndea.com/reports/NAEDB-progress-report-june-2015.pdf>>.

David Macdonald and Daniel Wilson, Canadian Centre for Policy Alternatives, "Shameful Neglect: Indigenous Child Poverty in Canada", 2016, online: <[https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/05/Indigenous\\_Child%20Poverty.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/05/Indigenous_Child%20Poverty.pdf)>.

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dependency. Thus, when treaties were signed, there was no need for an economic “leg up”, or as *Mitchell* puts it, “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”.<sup>24</sup> Ironically, instead of fostering protection of Indians and their property, the provisions are a means to the economic assimilation of Indians.

If treaty relationships, which are now constitutionally acknowledged,<sup>25</sup> are foundational to discerning the legislative intent of the *Indian Act* tax provisions, then a few possibilities emerge. It may be tempting to declare the whole of the *Indian Act* merely a state-sponsored campaign of cultural genocide (supporting those who argue to repeal the entire act), deeming the “protective” elements of the act pure self-serving paternalism. However, to suggest that while the Crown was negotiating treaties with First Nations, its intent to rely on legislation to deliberately dispossess Indians of their lands, strip them of every means to live and prosper, and compulsorily enfranchise them into the larger nation-state,<sup>26</sup> should put the Honour of the Crown into serious question. For by doing so, the Crown is exposed as having complete disregard for its own sacred agreements, rendering the entire treaty process a ruse.<sup>27</sup> It is the very fact that taxation was a consideration from the earliest days of treaty relationships that should lead one to reconsider such a position. From the alternative perspective, if the *Indian Act*, including the tax provisions,

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<sup>24</sup> *Mitchell v Peguis Indian Band* [1990] 2 SCR 85 [*Mitchell v Peguis*] at 131.

<sup>25</sup> This includes the *Royal Proclamation of 1763* *infra* note 109, pre-confederation treaties, the Numbered Treaties, and modern treaties.

<sup>26</sup> Under the *Indian Act*, enfranchisement through military service, attainment of an education, marriage to a non-Indian man, or other stipulations, resulted in the loss of Indian status, loss of membership in a band, and loss of all rights and privileges, such as the ability to reside on a Reserve.

<sup>27</sup> See also: *Paulette et al v The Queen*, [1977] 2 SCR 628; during the 1970s planning phase of the proposed Mackenzie Valley pipeline, Canada denied that Treaty 8, signed with the Dene of the Weledeh and Akaitcho Region of NWT, had conferred rights on Dene to enable them to protect their territories, but rather took the position that the agreements were no more than land cession agreements. The Supreme Court of Canada agreed with the Crown.

“are an expression of the will of Parliament”,<sup>28</sup> then what legal meaning did any of the treaties have for a Crown that must always act honourably?

This point of intersection between the treaties and statutes is the starting point to resolve the question of legislative intent in Indian policy. It is important, however, to be mindful of the apparent prejudice that has infused both law and policy. For example, the archetype of the ‘poor’ Indian continues to echo through jurisprudence, such as in *Recalma v The Queen*<sup>29</sup>; despite being overturned by subsequent law, the aversion to the ‘wealthy’ Indian continues to influence the opinions of both jurists and the general public. Hence, the “protect, civilize, assimilate”<sup>30</sup> goals of Indian policy continue to linger, resulting in more Aboriginal peoples being marginalized and excluded from traditional territory, and continued losses of family connections, cultural ties, opportunities for economic participation, and ultimately human dignity. The Court’s narrow interpretation of the *Indian Act* tax provisions is but one indicia of where the Court has lost sight of the foundational nature of the treaty relationship.

### **Taxation, the Thin Edge of the Wedge**

It should be understood from the outset that while the *Indian Act* is of primary consideration herein, this is not a defence of past (or present) Indian policy. What is considered is the existing statutory regime governing taxation of Indians, the jurisprudence that has interpreted it, and the *sui generis* Crown-Aboriginal relationship as it pertains to taxation. Thus, this is neither an argument advancing the merits of maintaining the existing legislation, nor is it a defence of the grievous oppression of Aboriginal peoples effected through the *Indian Act*. While the court struggles to fashion a modern, more palatable rationale for the tax exemption, it is

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<sup>28</sup> *Mitchell v Peguis supra* note 24 at 143.

<sup>29</sup> *Infra* note 193.

<sup>30</sup> *See Tobias infra* note 362.

essential to understand that the Crown's relationship with First Nations neither starts nor ends with the *Indian Act*.

In addition, larger questions of Indigenous identity, and how "status" has been defined and controlled by the state through the *Indian Act*, cannot be addressed in any depth within the scope of this work, despite its obvious relevance to the application of *Indian Act* taxation provisions. The transnational nature of Indigenous identity, having been erased or misconstrued in the *Indian Act*, and distorted to fit into a catchall designation of "status Indian", is a perspective offensive to many Aboriginal peoples. Nevertheless, this is the applicable definition to which the tax exemption currently applies. Moreover, non-treaty Aboriginal nations, now realizing some legal recognition of Aboriginal land title,<sup>31</sup> and thus having authority to govern over certain matters of their own affairs, have been dealt with in tandem to treaty nations in the *Indian Act*. Although this muddling of Indigenous identity calls into question the court's ability to accurately situate statutory taxation provisions into a historical perspective, again, it should be left to Parliament and the affected nations to negotiate as treaty partners. However, given the Supreme Court decision in *Daniels* in 2014, which can be read as conflating Métis identity with enfranchised (that is, non-status) 'Indians', historical context again is highly relevant to understanding *whose* tax provision was originally envisioned, if treaties indeed contemplated exemptions.<sup>32</sup>

Finally, this work also will not address larger considerations concerning the lack of relationship of some Aboriginal peoples to their traditional territories, who by law or circumstance may have little or no direct connection to a reserve or their traditional territories. Again, there is an obvious relevance to how the provisions are applied, when considering the circumstances that have removed Indians from their traditional territory. The *Indian Act* has

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<sup>31</sup> See for example: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

<sup>32</sup> *Daniels supra* note 4 at 50, which reads: "The first declaration should, accordingly, be granted as requested. Non-status Indians and Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn."

negatively impacted understandings of Aboriginal identity, and by extension the legal recognition of that identity, thereby disrupting the connection of individuals and Indigenous nations with their territory. Again, despite the fact that Indian ‘status’ has been controlled by the state and has a direct bearing on whom *Indian Act* tax provisions presently apply, addressing this disconnect is beyond the scope of this work.

It is hoped that this examination of the legal and political basis for tax exemption will help embolden the present judiciary to position treaties *vis-à-vis* taxation of Indians, and redirect the Crown’s attention to treaties as foundational to its relationship with Aboriginal peoples. Where omissions and erasures of an accurate record of this treaty relationship have coloured previous jurisprudence, they must be corrected. Apparent in the Crown’s tenacious reluctance to uphold Aboriginal and treaty rights, and moreover its unrelenting response of meeting claims about Aboriginal or treaty rights with legal acrimony, it is disheartening that Parliament has largely left the shaping of its relationship with Aboriginal peoples to the courts. Although a powerful normative socio-economic instrument, taxation of ‘Indians’ has been likewise relegated to the courts to define and determine the applicability of the provisions in today’s modern context.

### **Outline of Chapters**

In the chapters that follow, it will be argued that the elusive legislative objective of sections 87-90 of the *Indian Act*, being those concerning the tax exemption provisions for Indians as defined therein, is evident in the original terms of the Numbered Treaties. Treaty Five is of particular interest, due to its relevance to the *Robertson* decision. Treaty 1, as it relates to Crown breaches of the treaty and the impact to economic development, is also considered. The *Indian Act* is relevant in considering several types of taxes, including taxation of employment

and investment income, excise and sales taxes applied to retail goods sold on Reserve, and finally, property taxes for business situated on Reserves. Chapter 2 will provide an overview of the existing *Indian Act* provisions and early jurisprudence, and their genesis as an expression of the Canadian government Indian policy. Inconsistencies in the Court's current line of interpretation will be discussed. Chapter 3 will discuss the *Williams* "connecting factors" test, and the jurisprudential 'fall-out' created by the introduction of considerations that I argue both exceed Parliamentary intentions and disregard the treaty relationship. Chapter 4 will provide a close reading of the *Benoit*<sup>33</sup> case, and what the court did, and did not, determine regarding a treaty right to tax exemption. The most recent Federal Court of Appeal decisions are also discussed, including *Bastien*, *Dubé*, and *Robertson*. Chapter 5 will examine parts of the historic record of amendments to the *Indian Act*, as they pertain to sections 87-90. As a basis for Indian policy, this history informs the Court's interpretations of the taxation provisions, however misplaced. I will discuss the historical legal and policy context of the *Indian Act* provisions, including the rationale for the *Indian Act*, and government assessments of those policies *vis-à-vis* the Royal Commission on Aboriginal Peoples<sup>34</sup> and the Final Report of the Truth and Reconciliation Commission (TRC).<sup>35</sup> Chapter 6 will discuss ways and means of moving forward. This chapter presents a case study of the "Kapyong" legal saga, which I argue creates fresh injustices by interfering with economic opportunities for Aboriginal prosperity and bolstering public resistance to economic participation by Aboriginal peoples. A discussion of treaty implementation and the Treaty Land Entitlement<sup>36</sup> process in this context will be undertaken. For

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<sup>33</sup> *Infra* note 254.

<sup>34</sup> *Infra* note 196.

<sup>35</sup> *Infra* note 39.

<sup>36</sup> *Infra* note 464.

the purposes of comparison, New Zealand's *Treaty of Waitangi*<sup>37</sup> is also presented as an example of how Māori have overcome similar challenges to economic participation.

The primary goal of this work is to question the assumptions that have historically informed the Court regarding the purpose and application of the tax provisions of the *Indian Act*. Understood contextually, it will be shown that the provisions fall outside of Canada's notional *Income Tax Act*<sup>38</sup> doctrine, and are best situated within Canada's *sui generis* treaty relationship with First Nations peoples. As a nation, Canada is at a crossroads; we can begin to live like we are all "treaty people", or we can choose to perpetrate fresh injustices upon First Nations peoples. The Final Report of the TRC succinctly set out this challenge:

"In 1996, the *Report of the Royal Commission on Aboriginal Peoples* urged Canadians to begin a national process of reconciliation that would have set the country on a bold new path, fundamentally changing the very foundations of Canada's relationship with Aboriginal peoples....In 2015, as the Truth and Reconciliation Commission of Canada wraps up its work, the country has a rare second chance to seize a lost opportunity for reconciliation."<sup>39</sup>

This work illustrates how pervasively colonial norms have frustrated, and continue to frustrate, relations among Aboriginal peoples and non-Aboriginal Canadians, and provides one example to illustrate how treaty implementation might resolve some of this conflict.

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<sup>37</sup> *Infra* note 503.

<sup>38</sup> *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp) [*ITA*].

<sup>39</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) [TRC Final Report] at 7.

## **Chapter 2 – Indian Act Provisions and Early Jurisprudence**

The Supreme Court of Canada decisions of *Nowegijick v R*<sup>40</sup> in 1983, *Williams* in 1992, *Bastien Estate v Canada*<sup>41</sup> and *Dubé v Canada* in 2011,<sup>42</sup> and the Federal Court of Appeal decision of *Robertson* in 2012, inform the current framework for the Canada Revenue Agency (CRA) application of sections 87 of the *Indian Act*. I shall first set out the *Indian Act* provisions, and then discuss the most relevant jurisprudence. This chapter examines the cases leading up to and informing the establishment of the *Williams* “connecting factors” test, which today is foundational to the courts’ means of interpreting the *Indian Act* tax provisions.

Closely related to section 87, are sections 88 through 90, which will also be discussed herein. Other provisions in the *Indian Act* dealing with Indian monies and trade include sections 83 (money by-laws), 84 (recovery of taxes), 91 (trading with Indians), 92 (departmental employees prohibited from trading with Indians), and 93 (removal of materials from reserves), which while relevant as part of the larger consideration of Indian policy development discussed in Chapter 4, are considered only tangentially.

### **Current *Indian Act* Tax Provisions**

It should first be noted that the taxation provisions in the *Indian Act* are implicitly recognized in the Canada *Income Tax Act*,<sup>43</sup> at “Subdivision G: Amounts Not Included in Computing Income”, section 81(1)(a), which recognizes, that as an act of Parliament, the tax provisions of the *Indian Act* supersede the *Income Tax Act* insofar as amounts to be excluded from income:

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<sup>40</sup> [1983] 1 SCR 29 [*Nowegijick*].

<sup>41</sup> 2011 SCC 38, [2011] 2 SCR 710 [*Bastien*].

<sup>42</sup> 2011 SCC 38, [2011] 2 SCR 764 [*Dubé*].

<sup>43</sup> *Income Tax Act supra* note 38.

81(1) There shall not be included in computing the income of a taxpayer for a taxation year,

*a)* an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada.<sup>44</sup>

Notably, section 81 of the *Income Tax Act* also explicitly excludes a hodgepodge of other income sources such as war pensions,<sup>45</sup> Halifax disaster pensions,<sup>46</sup> “payment made by the Federal Republic of Germany...as compensation to a victim of National Socialist persecution”,<sup>47</sup> a variety of public servant payments such as “income from the office of Governor General of Canada”,<sup>48</sup> MLA’s expense allowances and municipal officer’s expenses allowance,<sup>49</sup> and payments for volunteer (emergency) services.<sup>50</sup> Together, these exemptions perhaps reflect a legislative objective to protect specialized government initiatives and obligations that are voluntarily assumed by the Crown. This is the first indication that the *Indian Act* provisions share a *sui generis* basis with other Aboriginal or Treaty rights, and fall outside of normative tax law.

Section 87 of the *Indian Act* legislates tax provisions that circumvent “any other Act of Parliament”, including the Canadian *Income Tax Act*. In doing so, the tax provisions of the *Indian Act* are able to stand outside the interpretive matrix of the tax act as unique provisions. Nevertheless, the court has interpreted section 87 as far as possible to accord with tax law governing various types of taxes relating to sales of goods or services, income derived from employment or investments, and property taxes. The bulk of the jurisprudence has examined at length the meaning of “on reserve” in section 87(1)(b), in recognition that identifying the locus of intangible property (such as employment or interest income) is not necessarily obvious or

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<sup>44</sup> *Ibid* at 81(1)(a).

<sup>45</sup> *Ibid* at s 81 (1)(e).

<sup>46</sup> *Ibid* at s 81 (1)(f).

<sup>47</sup> *Ibid* at s 81 (1)(g).

<sup>48</sup> *Ibid* at s 81 (1)(n).

<sup>49</sup> *Ibid* at s 81 (2) and (3).

<sup>50</sup> *Ibid* at s 81 (4).

simple. The identity of the taxpayer (the “Indian”) has been internally limited at section 2 setting out the definitions in the Act, and defined in section 6, and reflecting an explicit and obvious mandate shaped by Parliament’s drive to enfranchise all Indians, effectively limiting the application of the provisions. These provisions were drafted at a time of deliberate and acceptable racial segregation, which assumed that an Indian would and could only reside on a reserve, or alternatively, be fully enfranchised into the Canadian citizenry, but not both.<sup>51</sup> This limitation alone should be enough to dispense with the idea that the *Indian Act* tax provisions (if not the whole document) could possibly be intended for the “protection” of “Indians and lands reserved for Indians”.<sup>52</sup>

In its current form, section 87 reads:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
  - (b) the personal property of an Indian or a band situated on a reserve.
- (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
- (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

Although not exclusively linked to taxation, section 88, affirms at least notionally, that treaties shield legal rights derived from treaty terms:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general

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<sup>51</sup> By this line of reasoning, if Reserves were intended to be temporary measures, as is evident in policy that anticipated either the extinction or assimilation of all Indians, then the rationale to limit application of the *Indian Act* provisions to “property on a reserve” raises even more questions. These policy rationales are discussed more fully below.

<sup>52</sup> *Constitutional Act, 1982 supra* note 5 at section 91(24).

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 those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Contradictorily, section 88 has typically been used to justify the infringement of treaty and Aboriginal rights, on the basis that provinces may enact ‘laws of general application’, thereby circumventing all but a few rights dealing with traditional hunting, fishing, and other ‘traditional’ modes of economic participation.<sup>53</sup> Anishinaabe legal scholar John Borrows considers this provision “one of the most problematic provisions of the *Indian Act*...[which] largely strips Indigenous communities of the decision-making responsibilities”,<sup>54</sup> thereby interfering with their economic autonomy. As legislation that originated at a time when the Crown was theoretically negotiating treaties in good faith with First Nations, the powers accorded the Crown in section 88 are obviously dissonant with the written terms of the treaties. When compared with the spirit and intent of the Treaties—namely that autonomy and self-determination would be inherently protected for both Crown and First Nations—section 88 is an even greater denial of treaty terms.

Section 89 deals with real and personal property rights, and also outlines that Indian property is protected from other forms of loss or diminution:

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.  
 (1.1) 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

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<sup>53</sup> See for example: *R v Badger*, [1996] 1 SCR 771, which affirmed that s 88 of the *Indian Act* allows provincial laws of general application to apply to Indians to regulate their use of natural resources; *NIL/TU, O Child and Family Services Society v BC Government and Service Employees’ Union*, [2010] 2 SCR 696, which affirmed that provincial labour standards applied, not federal standards; and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], *R v Van der Peet*, and *Simon v The Queen*, [1985] 2 SCR 387 – all of which narrowed the nature and scope of hunting or fishing rights.

<sup>54</sup> John Borrows, *Freedom & Indigenous Constitutionalism*, (Toronto: University of Toronto Press, 2016) at 15 [*Borrows Freedom*].

seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

By this means, both (reserve) land and other property was intentionally placed outside of the reach of creditors, governments, and other entities that under conventional common law would have powers to interfere with the economies of Indians. Section 90 is a deeming provision, defining the kinds of property that are tax-exempt:

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.

Together, sections 87 through 90 form the basis for tax exemptions for some registered Indians, who earn certain types of income, situated “on reserve”—all of which is subject to the interpretation of the Canadian courts.

### **Indians Are Not ‘People’, and Other Interpretive Challenges**

It is an embarrassment that Canada’s earliest jurisprudence concerning section 87 (as it is now enumerated) of the *Indian Act*, struggled to overcome very rudimentary tenets accorded others that set Indians at a complete disadvantage. Like so much of Canadian jurisprudence, while it is the Indian who is most affected by interpretations of the *Indian Act* provisions, First Nations peoples are often not included as parties in the cases that affect them. Not unlike criminal cases, the court hears from the Crown prosecutor and the accused, while the victim’s perspective is sidelined. Ironically, only when the Indian is the accused in a criminal or quasi-criminal matter—as is the arena of so many Aboriginal and Treaty rights determinations—is the

Indian central to the court's deliberations.<sup>55</sup> Add to this the prejudice and racism that infused so much of Canada's colonial project (and many would suggest, still does), a shameful precedential history has been established, one which is slow to change and continues to reinforce residual racist perceptions, even when precedents are overturned.

For example, in 1916 the Québec Supreme Court considered whether David Philippe, being an Indian and member of the Montagnais Band, was prohibited from owning land in fee simple by virtue of his status as an 'Indian'. In 1878, Philippe purchased a small lot from a larger parcel of land 'surrendered' by the Montagnais Indian Band of Lake St. John, Québec. In 1889, under a judgment against Philippe, a sheriff's sale proceeded to sell the land to Pierre Giroux (the defendant). Relying on section 87 of the *Indian Act*, the Crown (as plaintiff), alleged that Philippe "was an Indian...and as such liable neither to taxation nor to execution"<sup>56</sup> in which case, Philippe not only could not lose the land, but could never have purchased it in the first place, effectively rendering title to the Crown.

The Crown argued that "whilst all the other lots into which the reserve had been divided were sold outright to their purchasers, this particular half-lot was not sold to the purchaser David Philippe, but that, being an Indian, he was only "located" on the land in the meaning of that term in the "Indian Act."<sup>57</sup> This argument, though ultimately failing, found traction with one "learned judge of the Court of King's Bench who dissented from the majority...[and] one of whose points [was] taken up in the appellants' factum" in the appeal.<sup>58</sup> The decision quotes verbatim the dissenting judge's rationale: "*On a meme pris le soin de dire que toute "personne" pourrait*

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<sup>55</sup> The quasi-criminal cases discussed herein include: *R v Marshall No 1 & No 2 infra* notes 226 and 227, *R v Sparrow supra* note 13, and *R v Van der Peet supra* note 10.

<sup>56</sup> *The Attorney-General for Canada v Pierre Giroux (Onésime Bouchard/Mis-en-cause)* 1916 CanLII 72 (SCC) at 174-75.

<sup>57</sup> *Ibid* at 175.

<sup>58</sup> *Ibid* at 176.

*devenir acquéreur de ces propriétés mais qu'un sauvage ne pourrait pas être une de ces personnes*".<sup>59</sup> The essence of the Crown's argument was that "person", as defined by the *Indian Act*, excludes "Indian", deeming Philippe ineligible to own surrendered land in any circumstance. Rejecting this perspective, the Court stated: "No reference is given and I know of no such prohibition, positive or otherwise."<sup>60</sup> Sadly, the tax provisions of the *Indian Act* afforded no protection to Philippe, whose land was sold at auction for \$500 (less \$146 outstanding to the Indian Department from his original purchase), but nevertheless prevented the Crown from realizing an unjust gain on a parcel valued in 1913 at \$3200. It is clear in this case that the Crown expected the provisions of the *Indian Act* to protect its own interests, and not those of the Indian. Philippe was not even a party in the case that determined his rights.

Similarly in 1979, the Federal Court of Appeal in *Snow v Canada*<sup>61</sup> quickly dispensed with the question of applicability of section 87 to earned (and otherwise taxable) income. It was held that income was not understood to be property, at least not in the hands of an Indian. The very brief consideration of the *Snow* decision in its entirety reads:

[1] LE DAIN, J: We are all of the view that the appeal must be dismissed on the ground that the tax imposed on the appellant under the *Income Tax Act*, R.S.C. 1952, c. 148 [am. 1970-71-72, c. 63], is not taxation in respect of personal property within the meaning of s. 86 of the *Indian Act*, R.S.C. 1952, c. 149 (now s. 87 of R.S.C. 1970, c. I-6). In our opinion, s. 86 contemplates taxation in respect of specific personal property *qua* property and not taxation in respect of taxable income as defined by the *Income Tax Act*, which, while it may reflect items that are personal property, is not itself personal property but an amount to be determined as a matter of calculation by application of the provisions of the Act.  
[2] Appeal dismissed.

Further interpretive challenges were met in *Brown v British Columbia*.<sup>62</sup> In 1979, the appellant Lillian Brown asserted that she was exempt from paying tax in the amount of \$4.38 on

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<sup>59</sup> *Ibid* at 177.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Snow v Canada*, 1979 CanLII 2669 (FCA).

<sup>62</sup> *Brown v British Columbia* (1979) CanLII 559 (BC CA).

her hydroelectric bill, pursuant to section 87 of the *Indian Act*. The province argued that electricity is not personal property within the meaning of the *Indian Act*, that electricity had no ‘*situs*’ so as to be located on a ‘reserve’, that the tax was on the purchase price (not on the electricity itself) and finally, that the *Indian Act* provision was *ultra vires* Parliament, as it encroached on the province’s power to enact laws of general application. Justice Bull of the British Columbia Court of Appeal rejected these arguments, stating: “Parliament has acted under s. 91(24) of the B.N.A. Act to enact a statute (the Indian Act) which, ... “embodies the accepted view that these aborigines (*sic*) are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation”.”<sup>63</sup> He continued, “such an exemption from taxation should be considered ...and the obvious purpose thereof to provide for the protection, welfare and guidance of Indians, to be almost essential legislation.”<sup>64</sup> Justice Bull concluded “it is abundantly clear that the pith and substance of the Indian Act is the protection of Indians in most phases of their ordinary life, including guidance, welfare and the protection and management of their properties.”<sup>65</sup> The protection thus undertaken by the Crown, and affirmed by the court, was for Indians as mere wards, and the province was prepared to resort to any argument (such as tax is on the ‘purchase price’ and not the electricity) that would nullify the supposed federal protections for ‘Indians and lands reserved for Indians’. Nevertheless, in this case, “property” was given a broad reading in favour of the Indian.

Brown was ultimately successful in her challenge, and a new view of what constituted property (in the hands of an Indian) was introduced. With growing appreciation for the claims of Aboriginal peoples, the Court began to concede that the *Indian Act* might provide some

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<sup>63</sup> *Ibid* at para 26, quoting Rand J in *St. Ann’s Island Shooting & Fishing Club Ltd v R*, [1950] SCR 211 at 219, [1950] 2 DLR 225.

<sup>64</sup> *Ibid* at para 34.

<sup>65</sup> *Ibid* at para 31.

protection, if not benefit, for Indians beyond the wardship state ascribed to them. The eventual broadening of the *Indian Act* tax provisions in the early 1980s aligned with, although not necessarily resulted from, the 1982 constitutional recognition of treaty and Aboriginal rights. Prior to this, according to Oliphant, a “sense of confusion and controversy prevailed in the late 1970s and early 1980s, concerning the semantic distinction between ‘income’ and ‘taxable income’”:<sup>66</sup> For example, Oliphant points out:

The *Indian Act, 1876*, confined the tax exemption to ‘personal property’, thereby signalling a change from the 1850 *Act for the Protection of Indians*, which applied to the Indian ‘person’. Coupled with the fact the federal income taxation was not introduced until 1917, there were simply no previous indicators as to whether the exemption for ‘personal property’ should apply to ‘taxable income’.<sup>67</sup>

The whole notion of personal taxation in Canada had undergone significant revision in the 1960s and 70s, following the Royal Commission on Taxation (the “Carter Commission”),<sup>68</sup> and the reorganization of what would become the Tax Court of Canada. Similarly, Aboriginal and treaty rights were on the political, if not legal, radar in 1982, through their Constitutional entrenchment. Thus in 1983, at a pivotal time for both tax theory and Aboriginal and treaty rights, *Nowegijick*—which dealt directly with *Indian Act* tax provisions, but is often viewed as precedent for only treaty interpretation—sought to clarify the application of section 87 of the *Indian Act*.

### ***Nowegijick* – the Arrival of the Modern Indian**

Gene Nowegijick, was a registered Indian living on the Gull Bay Indian Reserve in Ontario. In 1975, he worked for a logging company, which had its head office on the Gull Bay Reserve. All of the directors, members, and employees, including Mr Nowegijick, were

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<sup>66</sup> *Ibid* at 40.

<sup>67</sup> Oliphant *supra* note 15 at 49.

<sup>68</sup> Canada, “Report of the Royal Commission on Taxation”, (Ottawa: Queen’s Printer, 1966), Keith Carter (Carter Commission Report) [Carter Commission].

registered Indians living on reserve. Sourcing its lumber from a location off-reserve (about 10 miles away), Nowegijick travelled to and from the reserve each day during his employ. By the time this case reached the Supreme Court of Canada in 1983, several interveners became involved, including The Grand Council of Crees of Québec, three Cree organizations, eight other Indian bands and their Chiefs, and the National Indian Brotherhood. This case was clearly recognized as having the potential to set an important precedent for status Indians across Canada. With “little in the cases to assist in the construction of s. 87 of the *Indian Act*”, according to Justice Dickson (as he was then), a unanimous court stubbornly focused its analysis on the question of ‘*situs*’ and relied primarily on Income tax principles to aid in its interpretation.

Surprisingly, the Court having apparently adjusted its consideration of treaty and Aboriginal rights, stated in *Nowegijick*: “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.”<sup>69</sup> The decision came to be known as the *Nowegijick* principle. First, “Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”,<sup>70</sup> and second, “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”.”<sup>71</sup> These two foundational precepts contributed to the canons of interpretation for both treaties and statutes pertaining to Indians and the *Indian Act*.

Accordingly, in an exercise of its discretion, the court found “ambiguity” in the applicability of section 87 to Mr Nowegijick’s income, Justice Dickson stated: “A tax on income

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<sup>69</sup> *Nowegijick supra* note 40 at 36 (emphasis added).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

is in reality a tax on property itself,”<sup>72</sup> and “[a] person exempt from taxation in respect of any of his personal property would have difficulty in understanding why he should pay tax in respect of his wages. And I do not think it is a sufficient answer to say that the conceptualization of the *Income Tax Act* renders it so.”<sup>73</sup> More importantly, the Court also noted: “As I read it, s. 87 creates an exemption for both persons and property...[and] it does not matter then that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property.”<sup>74</sup> The *sui generis* nature of the tax exemptions is evident in the blurring of the line between tax on property and tax on the person, the former being the standard of the *Income Tax Act* and the latter being the terms of the *Indian Act*. The Supreme Court of Canada was quick to point out, however, “that nothing in these reasons should be taken as implying that no Indian shall ever pay tax of any kind.”<sup>75</sup> While appearing to limit the provision, the Court actually set very broad limits to the interpretation of the *Indian Act* tax exemption, stating that there may be some circumstances in which tax will be payable, and conversely, there may be some circumstances where tax is not payable. Notwithstanding that the *Nowegijick* principle has been cited in hundreds of subsequent decisions, and now contributes to the canons of interpretation of treaties, *Nowegijick* appears to have elevated both ‘treaties and statutes relating to Indians’ to this higher level of benevolence.

Technically a ‘win’ for Gene Nowegijick, and indeed all status Indians, and despite the grandiose overtures from the Court “that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”,<sup>76</sup> Justice Dickson completely ignored the relevance of the treaty relationship and its bearing on the purpose of the

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<sup>72</sup> *Ibid* at 38.

<sup>73</sup> *Ibid* at 41.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* at 36.

exemption. It was the opinion of the Court that “We need not speculate upon parliamentary intention, an idle pursuit at best, since the antecedent of s. 87 of the *Indian Act* was enacted long before income tax was introduced as a temporary war-time measure in 1917.”<sup>77</sup> The same could be said of the *Indian Act*: that it was enacted as a temporary measure; speculating on Parliament’s intention of both the Act and the treaties is exactly what is required. Indeed, further speculation may have led the court to a less assimilationist conclusion, as reflected in the reference to, and dismissive treatment of, treaties and the legislative intent behind the *Indian Act* provisions: “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.”<sup>78</sup> Quite simply, the Court asked the wrong question in focusing on the ‘*situs*’ test, and the resultant answer effectively narrowed the provision. If legislation, as the court observes, represents the express intent of Parliament, then a “historic and purposive” reading restricted by the four corners of the *Indian Act* necessarily ignores the treaties, thereby reinforcing the assimilation goals of the Act. However, such a narrow examination can hardly be considered an enlightened “historic and purposive” analysis.

### ***Mitchell v Peguis* – One Step Forward, Two Steps Back**

In 1984, the Supreme Court of Canada began to expound on the Crown’s fiduciary obligations regarding Aboriginal peoples, and the *sui generis* nature of treaty and Aboriginal rights. These legal tenants in *Guerin* were further affirmed in considering section 87 in *Mitchell v Peguis*:<sup>79</sup>

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<sup>77</sup> *Ibid* at 34.

<sup>78</sup> *Ibid* at 36.

<sup>79</sup> *Mitchell v Peguis supra* note 24.

The recent case of *Guerin* took as its fundamental premise the "unique character both of the Indians' interest in land and of their historical relationship with the Crown." (At p. 387, 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.<sup>80</sup>

However, in the weeks prior to releasing the *Mitchell v Peguis* decision, the Supreme Court of Canada released *Sparrow*.<sup>81</sup> Viewed as a 'win' for Aboriginal peoples, this decision emphasized the fiduciary duty of the Crown owed to Aboriginal peoples. It also characterized the relationship between the Crown and Aboriginal peoples as "trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."<sup>82</sup> The Court affirmed in *Sparrow* that legislative objectives: "must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy".<sup>83</sup> The Court even went so far as to acknowledge the historic impotence of the court to uphold treaty and Aboriginal rights:

For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises.... By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.<sup>84</sup>

Despite these lofty declarations, *Sparrow* nevertheless set out a new test, in fact, a means to justify the undermining and narrowing of constitutionally entrenched treaty and Aboriginal

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<sup>80</sup> *Ibid* at 108-09 (with emphasis as it appears in *Mitchell v Peguis* at 387).

<sup>81</sup> *Sparrow supra* note 13.

<sup>82</sup> *Ibid* at 1108.

<sup>83</sup> *Ibid* at 1110.

<sup>84</sup> *Ibid* at 1103.

rights. As Coyle notes, “Ordinarily, a law or government action that violates the Constitution will be held to be invalid. In *Sparrow*, the court decided that a different approach applies to the [treaty and Aboriginal] rights guaranteed by section 35. If a law is found to violate a treaty right, for example, the law can still be saved if the Crown proves that the violation is justified.”<sup>85</sup>

Similarly, Grace Li Xiu Woo suggests this is a reflection of the Crown’s understanding of its ‘fiduciary duty:

...[w]e might thus expect the Crown to promote, protect, and act on behalf of Indigenous points of view. However, even though *Sparrow* is celebrated for the restraint that it imposed on governments by devising a test to justify regulatory infringements on Aboriginal rights, the bottom line is that it permitted infringements rather than protecting Indigenous jurisdictions *per se*.<sup>86</sup>

Creating its own exception to the rule for the protection of treaty and Aboriginal rights is certainly in keeping with the historic relationship between Aboriginal peoples and the Crown, although perhaps not in the way the Court intended it to be understood. Thus, this was the legal and political *zeitgeist* in which *Mitchell v Peguis* was decided.

Donald George Mitchell (of Mitchell Management) sought payment of his 20-percent contingency fee for his role as a “negotiator” in the refund of taxes improperly collected by Manitoba Hydro on electricity purchased by several Indian Bands. The refund amounted to \$953,432, and according to the respondent (Peguis Indian Band) it was to be refunded by Manitoba “on its own initiative and not as a result of the [Mitchell’s] efforts”.<sup>87</sup> As the court noted, in 1983, Manitoba passed an Order-in-Council recognizing that “taxes paid under The Revenue Act 1964 by Indians and Indian Bands were improperly collected since Section 87 of

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<sup>85</sup> Michael Coyle, “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future” in Attorney General of Canada, Hon. Sidney B Linden, Commissioner, *The Ipperwash Inquiry Report*, Research Papers Commissioned by the Inquiry (Ottawa: Government of Canada, 2007), online: <[https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Coyle.pdf](https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Coyle.pdf)> at 25 (emphasis added).

<sup>86</sup> Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous rights at the Supreme Court of Canada*, (Vancouver: UBC Press, 2011) [Woo] at 69.

<sup>87</sup> *Mitchell v Peguis* note 24 at 94.

the Indian Act prohibited provinces from taxing electricity provided to Indians and Indian Bands”<sup>88</sup> on reserves. Recall that this principle was established in *Brown* in 1979. At issue was the ability of Mitchell to garnishee his alleged fee of \$185,175 under the Manitoba *Garnishment Act*,<sup>89</sup> or not, if the reimbursement was protected by virtue of sections 89 and 90 of the *Indian Act*. Mitchell argued that as a ‘law of general application’ (section 88 of the *Indian Act*), the payment is subject to garnishment.

The Manitoba Queen’s Bench found that the alleged debt was not susceptible to garnishment, by deeming the *situs* of the debt to be on reserve, and that “personal property” in section 90 can include intangible property. The Manitoba Court of Appeal upheld this decision, and further elaborated on the meaning of “Her Majesty” to include the provincial Crown: “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.”<sup>90</sup> This principle has been affirmed time and again, including most recently in *Grassy Narrows First Nation v Ontario (Natural Resources)*<sup>91</sup> wherein the Supreme Court of Canada stated:

First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution.<sup>92</sup>

...The view that only Canada can take up or authorize the taking up of lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty.”<sup>93</sup>

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Garnishment Act*, RSM 1970, c G20, CCSM.

<sup>90</sup> *Mitchell v Peguis supra* note 24 at 97-98, quoting Manitoba Court of Appeal Justice O’Sullivan in *Mitchell v Peguis* (1983), 39 Man R (2d) 180.

<sup>91</sup> 2014 SCC 48 [*Grassy Narrows*].

<sup>92</sup> *Ibid* at para 30.

<sup>93</sup> *Ibid* at para 32.

... It only refers to the Government of the Dominion of Canada. The treaty, as discussed, was between the Crown — a concept that includes all government power — and the Ojibway.<sup>94</sup>

While the 2014 *Grassy Narrows* decision allowed Ontario to freely “take-up” Treaty No 3 lands (ruling against Grassy Narrows First Nation), in 1990, the Supreme Court of Canada in *Mitchell v Peguis* conceived the ‘indivisible Crown’ very differently. In this 3:3:1 split decision, and although all of the judges agreed in dismissing Mitchell’s appeal, Chief Justice Dickson was the lone voice in his reliance on *Nowegijick*.<sup>95</sup> Accordingly, he opined that “*Nowegijick* directs the courts to resolve any “doubtful expression” in favour of the Indian [thereby acknowledging ambiguity since] it was found necessary to resort to some further argument beyond the text itself in order to determine the issue”.<sup>96</sup> Thus, for Chief Justice Dickson, the key matter of identifying “Her Majesty” in 1990 was resolved by including the provincial Crown—the very position most recently affirmed in *Grassy Narrows*. He further noted the consistency of his interpretation with 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.”<sup>97</sup> He envisioned the evolution of Canadian federalism as allowing legislative overlap and “as long as Indians are not affected *qua* Indians, a provincial law may affect Indians, and significantly so in terms of everyday life”.<sup>98</sup> In other words, Chief Justice Dickson affirmed the reading of treaty terms and statutes (where they apply to Indians), in accordance with the *Nowegijick*, and recognized the *sui generis* nature of the both statutes and

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<sup>94</sup> *Ibid* at para 39.

<sup>95</sup> In *Mitchell v Peguis*, La Forest, Sopinka, and Gonthier JJ dismissed Mitchell’s appeal, and held that “Her Majesty” referred singularly to the federal Crown. Lamer, Wilson, and L’Heureux-Dubé also dismissed Mitchell’s appeal, but for different reasons. It is interesting to note that of the sitting judges in *Mitchell v Peguis*, only Dickson J (as he was then) and Lamer J were also present in *Nowegijick*.

<sup>96</sup> *Mitchell v Peguis* note 24 at 107.

<sup>97</sup> *Ibid* at 108.

<sup>98</sup> *Ibid* at 109.

treaties. He thereby excluded the “*ejusdem generis* [of the same type] rule of interpretation”<sup>99</sup> for statutes, in favour of an understanding that connected treaty interpretation with the *Indian Act* tax provisions. His intent appears to effectively apply the legal notion of a *sui generis* nature to the *Indian Act* tax provisions.

Largely agreeing with Justice La Forest’s decision (with Justices Sopinka and Gonthier concurring), Justices Lamer, Wilson and L’Heureux-Dubé came to the same result, but instead focused on the provisions of the *Garnishment Act*, and the *situs* of the debt (being with the Crown). Referring to only three cases, and excluding *Nowegijick*, the only issue was the protections afforded an “innocent” third-party (Mitchell) in a garnishment claim against the Crown. Justice Wilson similarly attributed third-party protection as coming through *The Proceeding Against the Crown Act*,<sup>100</sup> making the application of the *Garnishment Act* moot. Justice Wilson wrote: “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 easily it is to understand why the Crown need be, or ought to be, in a position different from the subject.”<sup>101</sup> Nevertheless, the doctrine was applied: “It has long been the position of the common law that the Crown is immune from garnishment proceedings.”<sup>102</sup> This is an interesting position to take (especially in this case) given Justice La Forest’s opposition to *Indian Act* provisions that would unfairly “[ensure] that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens.”<sup>103</sup> Thus, the interests of the Crown and the

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<sup>99</sup> *Ibid* at 113-114. The *ejusdem generis* principle is considered in *Ermineskin Indian Band v Canada* [2009] 1 SCR 222 [*Ermineskin*], and discussed later regarding *Benoit infra* note 254 and treaty interpretation principles.

<sup>100</sup> *The Proceedings Against the Crown Act*, RSM 1987, c P140.

<sup>101</sup> *Ibid* at 119, quoting Dickson J (as he was then) in *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 558.

<sup>102</sup> *Mitchell v Peguis supra* note 24 at 116.

<sup>103</sup> *Ibid* at 131.

“innocent” third party were of utmost concern to the court, and a more nuanced interpretation of the *Indian Act* provisions called for in *Mitchell v Peguis* was dodged.

### **Justice La Forest on the Trees and the Forest**

The La Forest J decision in *Mitchell v Peguis* articulated a restrictive interpretation of sections 87-90 and their purposes, and by failing to incorporate a broader historical context, setting the precedent that continues to reverberate through *Indian Act* tax jurisprudence today. Inherent in his opinion are perspectives that are reminiscent of earlier times. By way of contrast, Chief Justice Dickson seemingly recognized a fiduciary, if not treaty, relationship when he wrote:

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...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....It is the Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretative 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.<sup>104</sup>

For Chief Justice Dickson, the relevance of the *Nowegijick* principles to aid in the interpretation of *Indian Act* tax provisions was obvious and inescapable. In the newly enlightened, post-1982 juridical age, it is possible to infer from the content and the context of his comments that Chief Justice Dickson was attempting to give substance to the constitutional guarantees of sections 25 and 35. He references the “historical and continuing status of aboriginal peoples”, clearly an acknowledgment of the ongoing treaty relationship between the Crown and Aboriginal peoples. The historical “burden” of the “current situation” further speaks of the underlying burden of

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<sup>104</sup> *Ibid* at 98-99 (emphasis added).

treaties on the Crown, and which defines the modern place of treaties in the Canadian Constitution, 1982. These burdens include, but are not limited to, native title rights and a duty to consult, and existing treaty rights, and which I argue include certain tax concessions, given that both *Nowegijick* and *Mitchell v Peguis* shielded Indian-owned assets. “Societal responsibility” again recognizes a relational obligation, one that has not been consistently (or in some cases, appreciably) honoured by the Crown, situating First Nations at significant socio-economic disadvantage.

Justice La Forest, however, conceptualized the Crown-Aboriginal relationship in a very different way, and rejected the interpretation that section 90 of the *Indian Act* should be read to include the provincial Crown. According to Justice La Forest, “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.”<sup>105</sup> For Justice La Forest, the lower court decisions (as well as the opinion of the Chief Justice) gave too much to the Indians. To arrive at his conclusion, Justice La Forest first applied a strictly textual analysis and found that “Her Majesty” can only apply to the federal Crown since, in the absence of explicit language to include the Crown in Right of the Province of Manitoba, the *Indian Act* only defines federal responsibilities.<sup>106</sup>

Next, Justice La Forest considered the historical record of sections 87 and 89 of the *Indian Act*. His “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.”<sup>107</sup> Further comments on Justice La Forest’s analysis on the ‘historical purpose’ of the *Indian Act*

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<sup>105</sup> *Ibid* at 122.

<sup>106</sup> *Ibid* at 123.

<sup>107</sup> *Ibid* at 127.

tax provisions will be discussed in Chapter 5, but suffice it to say here that his opinion is heavily undergirded by anachronistic assumptions about the Crown-Aboriginal relationship. For example, he notes:

As is clear from the comments of the Chief Justice in *Guerin v. The Queen*, [1982] 2 S.C.R. 335, at p. 383, these legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealing between the Indians 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”.<sup>108</sup>

The difficulties with grounding his opinion on this excerpt from *Guerin* are many. First, the “policy” that shaped the Crown-Aboriginal relationship, as he rightly points out, began with the *Royal Proclamation of 1763*,<sup>109</sup> which required the Crown to enter treaties, not issue legislation to take unilateral control of Indians and their lands. Second, there is great doubt concerning the “assumed sovereignty” of the Crown, a notion that not only is hotly contested by Indigenous peoples globally, but that has been tempered by the recognition of native title, in Canada and elsewhere.<sup>110</sup> Further, many, if not most, Indigenous peoples do not share the position that treaties were agreements to cede traditional homelands.<sup>111</sup> As one of the most prolific writers on early Anishinaabe culture in Manitoba, American anthropologist A Irving Hallowell explained:

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<sup>108</sup> *Ibid* at 129-30.

<sup>109</sup> *Royal Proclamation* (1763), RSC 1985, App II, No 1.

<sup>110</sup> The developing legal concept of Native (Aboriginal) title began in Canada with notional recognition in *Calder et al v Attorney-General of British Columbia* [1973] SCR 313 [*Calder*], and then *Guerin*, which then informed the landmark decision of *Mabo* (*infra* note 126) in Australia, and was specifically recognized for the first time in Canada in 2014 in *Tsilhqot'in* (*supra* note 31).

<sup>111</sup> Conceptually, it is apparent that Aboriginal legal concepts, such that the idea of owning or selling land, are conceived differently, and traditional territory is expressed relationally as opposed to ownership of inanimate property. Internationally, a most remarkable, although non-binding, decision was issued in 2014 by the Waitangi Tribunal in New Zealand, in its Wai 1040 Stage 1 Report, wherein it concluded that the Te Paparahi o Te Raki (Northland) claim established that sovereignty over the claimant area was never ceded in the 1840 *Treaty of Waitangi*; online: <<https://waitangitribunal.govt.nz/inquiries/district-inquiries/te-paparahi-o-te-raki-northland/>>. According to John Burrows, many challenges to the legal domestication of Indigenous rights have arisen globally, including in Guatemala, Malaysia, Norway, Sweden, Finland, Columbia, as well as Canada, Australia, and New Zealand. See: John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission”, 46 McGill LJ 615 (2000-2001).

“In the first place, there is nothing in Saulteaux [Anishinaabe] culture that motivates the possession of land for land’s sake. Usufruct, rather than the land itself, is an economic value and land is never rented or sold. The use of the land and its products are a source of wealth rather than land ownership itself.”<sup>112</sup> This usufructuary relationship does not diminish the strength of Aboriginal claims to that land; it is merely a different measure reflecting Aboriginal economic and cultural values. This common view that Aboriginal land was available for the taking has been repeatedly repudiated, yet the essence of the doctrine of discovery persists.<sup>113</sup>

As Commonwealth, common law, nations (or territories formerly colonized by England, as is the case of the United States), there remains a strong jurisprudential link between the United Kingdom, Canada, Australia, New Zealand, and the United States. This is certainly true of the precedents considering Aboriginal rights and territories in all of the aforementioned nations.

Lindsay G Robertson, examining the American “Marshall decisions”<sup>114</sup> on Native Title, argues:

...“no event in the modern era has been more profoundly consequential than the European “discovery” of the Americas....Over a succession of generations, Europeans devised rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere. Of these rules the most fundamental were those governing the ownership of land....Discovery converted the indigenous owners of discovered lands into tenants on those lands.”<sup>115</sup>

Quite simply, the “discovery doctrine survived because it facilitated Indian removal”,<sup>116</sup> and it remains the bedrock of the Crown’s claim to authority over Aboriginal rights, regardless of how spurious or morally repugnant.

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<sup>112</sup> A Irving Hallowell, “Some Psychological Aspects of Measurement among the Saulteaux” in Jennifer SH Brown and Susan Elaine Gray (eds), “Contributions to Ojibwe Studies: Essays, 1934-1972”, (Lincoln: University of Nebraska Press, 2010) at 149.

<sup>113</sup> See also John Borrows, “The Durability of *terra nullius*: *Tsilhqot’in Nation v British Columbia*”, 48 UBC L Rev (2015) 701.

<sup>114</sup> Lindsay G Robertson, *Conquest by Law: How the Discovery of America dispossessed Indigenous Peoples of Their Lands* (New York: Oxford Press, 2005) provides a fulsome discussion of the jurisprudential legacy of the American “Marshall decisions”, to argue that the political and legal consequences are discordant with the original meaning of *Johnson v M’Intosh*, 21 US (8 Wheat) 543, 555 (1823).

<sup>115</sup> *Ibid* at ix-x.

<sup>116</sup> *Ibid* at 143.

Finally, if history is any measure, then clearly the Crown has not lived up to its side of the “agreement” as a treaty partner, or its own Proclamations and recitations of law, to protect 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”.<sup>117</sup> Building on these contested assumptions, Justice La Forest applied a seemingly contradictory slant to his analysis of the provisions when he wrote:

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.<sup>118</sup>

This now widely quoted precedent consequently introduced additional constraints, while reinforcing existing stereotypes. Justice La Forest seemingly provides a tautological rationale for these constraints: since prior decisions confirmed the policy of restricting the tax provisions, the policy confirms the correctness of the Court’s decision. Having rationalized reading down the provisions, he introduced a new criteria, “the commercial mainstream”, on the basis that being ‘Indian’ is counter to living and working in the modern economic world. Instead of affording protections to Indians and their lands, in keeping with a treaty relationship, this decision further reinforced the existing *status quo* of “the economically disadvantaged position of Indians”, the very thing that the tax provisions are not intended to address.

Lastly, Justice La Forest’s analysis also rejected the relevance of *Nowegijick*, a case that explicitly set out interpretive guidelines for tax provisions in the *Indian Act*. He concludes: “I am

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<sup>117</sup> *Mitchell v Peguis supra* note 24 at 131.

<sup>118</sup> *Ibid.*

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”.<sup>119</sup> Giving a mere cursory nod to the *Nowegijick* principles, he stated, “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.”<sup>120</sup> So while claiming to endorse *Nowegijick*, it is, he suggests, for the protection of Indians that the tax provisions be further narrowed.

Most curiously, Justice La Forest makes this extraordinary statement about the interpretation of section 90(1)(b) and the divisibility of the Crown:

If this term [“Her Majesty”] 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.”<sup>121</sup>

Despite the (now) well-settled fact of the indivisible Crown, the *Indian Act* tax provisions continued to be narrowly interpreted, giving preference to Justice La Forest’s opinions. After *Mitchell v Peguis*, the notion of the “commercial mainstream” as being antithetical to owning or earning property as an Indian *qua* Indian gained traction, and despite being repudiated in 2011 in *Bastien*<sup>122</sup> (discussed below), this perspective has persisted. In 2015, the Tax Court of Canada continued to quote Justice La Forest with approval:

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....

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<sup>119</sup> *Ibid* at 126.

<sup>120</sup> *Ibid* at 147 (emphasis added).

<sup>121</sup> *Ibid* at 136.

<sup>122</sup> *Bastien supra* note 41 (and its companion case, *Dubé supra* note 42).

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.<sup>123</sup>

With slight modifications in subsequent jurisprudence, the lasting impact of Justice La Forest's judgment in *Mitchell v Peguis* is two premises, one focused on protecting Indians and their property, and the other on restraining the potential application of the exemptions apparently under the guise of fairness to non-Indians:

Our Court approaches the interpretation of section 87 with a keen eye on its purpose, which was designed to "shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians", but "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."<sup>124</sup>

With these two goals in hand, the Court all but abandoned the application of *Nowegijick* principles to interpret statutes, in favour of a "test" that is flexible enough to fit the modern world of First Nations people, but not so much that any real economic gain or potential could be realized by them. As is so true of much of the common law tradition, the maintenance of the *status quo* is paramount, and change necessarily is introduced only incrementally. As a result, the *Williams* test, to be discussed next, reinforced the already disadvantaged social and economic position of Indians, by putting their culture and experience of colonization at the centre of the courts' assessment. Ironically, to the degree that the *Indian Act* goals of assimilation have succeeded, there forms a line dividing those who benefit from the *Indian Act* tax provisions, from those who do not.

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<sup>123</sup> La Forest J in *Mitchell v Peguis* *supra* note 24 quoted with approval in *Robertson v The Queen*, 2015 TCC 219 at para 133.

<sup>124</sup> *Recalma* *infra* note 193, citing *Mitchell v Peguis*, at page 131.

### Chapter 3 – The *Williams* “Connecting Factors”

By 1992, when the Supreme Court of Canada released its *Williams*<sup>125</sup> decision, the notional recognition of treaty and Aboriginal rights, and in particular native land rights, had come to the forefront of international attention, so much so that the *Calder* and *Guerin* cases in Canada crossed the ocean to Australia to inform the ground-breaking decision of *Mabo*.<sup>126</sup> In terms of Canadian Aboriginal tax law, *Mabo* helped bring into focus the inherent connection of Indigenous peoples and their lands, and challenged the strength of the assumption of sovereignty of the British (and now Canadian and Australian Crown), and the Crown’s unilateral exercise of power over Indigenous peoples. Additionally, the United Nations draft declaration of Indigenous rights was well into development, in large part due to the support of Canadian delegates, and was submitted in 1993 for review. At an international level, evidenced by the international support and formal acceptance of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),<sup>127</sup> there was a growing awareness of the need for reconciliation and restitution in colonized nations.<sup>128</sup> Domestically, the Department of Finance undertook yet another in-depth review of ‘Indian Taxation Policy’, between December 1990 and March 1993, when it released

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<sup>125</sup> *Williams supra* note 14.

<sup>126</sup> *Mabo v Queensland (No 2)* [1992] HCA 23, Australia [*Mabo*]. In Canadian jurisprudence, the Court acknowledged the relevance of the *Mabo* decision regarding Native/Aboriginal title in *Delgamuukw supra* note 53, *R v Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*], and *Van der Peet supra* note 10, for example.

<sup>127</sup> United Nations, GA Res 61/295, UNGAOR, 61<sup>st</sup> Sess, UN Doc A/Res/47/1, (2007), [UNDRIP].

<sup>128</sup> Canada, the United States of America, New Zealand, and Australia were alone in their official, albeit initial, rejection of UNDRIP. Without any fanfare or celebration, in May 2012, Canada quietly accepted UNDRIP, but only as an “aspirational document”. (See: Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, online: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.) In May 2016, before the United Nations Permanent Forum on Indigenous Issues, Canada officially announced that it had lifted its objections to UNDRIP.

its ‘Working Paper on Indian Government Taxation’.<sup>129</sup> The *Williams* decision was released in the midst of these larger dialogues.

The case of Glenn Williams was a relatively simple one. Williams was a member of the Penticton Indian Band, and worked and resided on the reserve. His employer, a logging company, was also situated on a reserve, and workers were paid on the reserve. As part of a Federal job-creation project, a top-up to unemployment benefits for workers was provided, to which Williams was a beneficiary. At issue was whether Williams’ unemployment benefits (arising from contributions collected from both Williams and his employer) and the benefit enhancement payments were taxable in Williams’ hands.

At trial, Justice Cullen (as he was then) found both payments to be situated “on reserve”, and thus tax-exempt by virtue of section 87 of the *Indian Act*. He arrived at this opinion by introducing new language, which he referred to as “connecting factors”, which could be used to determine the location, or *situs*, of intangible property. He opined, “the residence of the debtor [being the Federal Crown] was only one of a number of “connecting factors” which must be examined in order to determine *situs*.”<sup>130</sup> The Federal Court of Appeal split the sources of income, finding the government unemployment benefits to be situated off reserve and therefore taxable, but the top-up contributions administered by the Band, fell within the exemptions afforded by section 90(1)(b) of the *Indian Act*. Justice Stone “rejected the trial judge’s “connecting factors” test and stated that the leading cases had been decided in accordance with the well-established contract principle that, in the absence of an intention in the contract to the contrary, the residence of the debtor determines the *situs* of a simple contract debt.”<sup>131</sup>

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<sup>129</sup> Canada, Department of Finance, “A Working Paper on Indian Government Taxation” (Draft), 1993.

<sup>130</sup> *Williams supra* note 14 at 882. See also *Williams v The Queen* [1989] 2 FC 318.

<sup>131</sup> *Ibid* at 883 (emphasis added).

The Supreme Court of Canada used the *Williams* case to “explore the purposes of the exemption from taxation in s. 87 of the *Indian Act*, the nature of the benefits in question, and the manner in which the incidence of taxation falls upon the benefits to be taxed.”<sup>132</sup> Relying squarely on Justice La Forest’s *Mitchell v Peguis* “historic and purposive” analysis, the Court set out a complex test to determine the *situs* of intangible Indian property. Although *Nowegijick* was referenced, the principle that “Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”<sup>133</sup> was never mentioned. Instead, Justice Gonthier relied on principles in contract law (yet rejected conflict of laws principles as being “entirely out of keeping with the scheme and purposes of the *Indian Act* and *Income Tax Act*”<sup>134</sup>) to resolve interpretive ambiguity. Despite proposing to set out a predictable test to determine *situs*, the Court created a highly contextual non-exhaustive set of potential criteria, to be measured and weighted against the “purpose” of the exemption and the “purposes of the *Indian Act*”:

It is desirable, when construing exemptions from taxation, to develop criteria which are predictable in their application, so that the taxpayers involved may plan their affairs appropriately... Furthermore, it would be dangerous to balance connecting factors in an abstract manner, divorced from the purpose of the exemption under the *Indian Act*. A connection factor is only relevant in so much as it identifies the location of the property in question for the purposes of the *Indian Act*. In particular categories of cases, therefore, one connection factor may have much more weight than another. It would be easy in balancing connecting factors on a case by case basis to lose sight of this.<sup>135</sup>

The *Williams* test for *situs*—the means by which the court would determine if property “held by an Indian” was “situated on reserve”, thereby meeting the definitions in section 87 to 90 of the *Indian Act* was set out as follows:

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<sup>132</sup> *Ibid* at 885.

<sup>133</sup> *Nowegijick supra* note 40 at 36.

<sup>134</sup> *Williams supra* note 14 at 890-91.

<sup>135</sup> *Ibid* at 892 (emphasis added).

The approach which best reflects these concerns is one which analyzes the matter in terms of categories of property and types of taxation. For instance, connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits. The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the *Indian Act*; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve.

This approach preserves the flexibility of the case by case approach, but within a framework which properly identifies the weight which is to be placed on various connecting factors. Of course, the weight to be given various connecting factors cannot be determined precisely. However, this approach has the advantage that it preserves the ability to deal appropriately with future cases which present considerations not previously apparent.<sup>136</sup>

The “connecting factors” test set out in *Williams* resembles the indicia used to determine residency under the *Income Tax Act*, but appears to be interpreted far more stringently.

According to the Canada Revenue Agency, the leading case to determine if taxpayers are “ordinarily resident” in Canada, and therefore deeming income taxable by Canada, is the 1946 case, *Thomson v Minister of National Revenue*.<sup>137</sup> This case is interpreted by CRA to aid in the identification of “residential ties of an individual that will almost always be significant residential ties for the purpose of determining residence status”.<sup>138</sup> These indicia include the taxpayer’s dwelling place (or places), the location of a spouse or common-law partner, and where dependants reside. Secondary indicia may include the location of personal property (like furniture), professional, recreational or religious memberships, any ties to a Canadian employer, medical insurance from a province or territory, and possession of a Canadian passport.<sup>139</sup> There

<sup>136</sup> *Williams supra* note 14 at 892.

<sup>137</sup> [1946] SCT 209, 1946 CANLII 1 (SCC).

<sup>138</sup> Canada Revenue Agency, “Income Tax Folio – S5-F1-C1, Determining an Individual’s Residence Status”, (2016), online: <<http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s5/f1/s5-f1-c1-eng.html>>, at 1.11.

<sup>139</sup> *Ibid* at 1.14.

is also a numerical threshold of 183 days, for those who are “sojourners”, by which they may be deemed resident in Canada. While the *Williams* “connecting factors” test attempts to make similar connections (between intangible property and a reserve in Canada, as opposed to connecting a person to Canada), the factors are not nearly as well defined, predictable, or cogent.

### “Connecting Factors” Test Fallout

What the court in *Williams* set out to provide was clarification on the purpose of the exemption, a way to categorize intangible property, and a means to determine *situs*. However, as the jurisprudence that followed *Williams* indicated,<sup>140</sup> the “connecting factors” test was anything but helpful, and failed to articulate a meaningful historic and purposive analysis of the *Indian Act* provisions. Contrary to Justice Gonthier’s explicit avoidance of conflict of laws theory, as Leslie Pinder pointed out, “the source of this test also is to be found in conflict of laws.”<sup>141</sup> Similarly, Martha O’Brien noted, “the situs-of-the-debtor test was rejected on the basis of the broad historical and policy arguments in favour of protecting Indian entitlements”,<sup>142</sup> yet in real-life application, the test introduced criteria that appear nowhere in the history of this legislation. In addition to the rather spurious rationale for this new test, the sought-after flexibility reaches towards vagueness, and the predictability is more akin to restriction. According to Pinder:

...treating each case as if it were unique, without enabling the development of principles to be applied in future cases, leads to abuse. If each CCRA official is able to assess the factors according to his or her fancy—with the prejudice weighing in against applying the exemption—the system is discredited, and natives have to resort to the extraordinary costs of litigation, only to find that a successful outcome provides no relief for others.<sup>143</sup>

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<sup>140</sup> See for example: *Workers’ Compensation Board (Alta) v Enoch Band*, 1993 CanLII 3421 (AB CA), *Union of NB Indians (Min Finance)*, [1998] 1 SCR 1161 *Recalma v Canada*, [1998] 3 CNLR 279, and *Shilling v MNR*, [1999] 4 FCR 178, as discussed in O’Brien and Pinder, *infra* note 141.

<sup>141</sup> Leslie J Pinder, “The Indian Act Taxation Exemption – Beguiling Simplicity: *Shilling v. The Queen*”, 48:5 Can Tax J (2000) 1496 [Pinder] at 1497.

<sup>142</sup> *Ibid* at 189-90.

<sup>143</sup> *Ibid* at 1502. Note: CCRA, formerly Canada Customs and Revenue Agency, is now called the Canada Revenue Agency [CRA].

O'Brien taking a similar position stated: "the "connecting factors" test in *Williams* has been applied and, frequently, misapplied and distorted."<sup>144</sup> The test "provides no indication of how much weight should be ascribed, and in what circumstances, to the place of residence of the owner of the income. Most significantly, *Williams* did not require any relationship between the intangible property and traditional First Nations culture, and it does not require that the income, either in the way it is earned or in the way it is spent by the owner, be integral to or provide a benefit to the reserve community."<sup>145</sup> It is apparent that the *Williams* test opened wide the door to such an application through its 'historic and purposive' analysis, and the concern that taxation must not "amount to the erosion of the entitlements of an Indian qua Indian on a reserve",<sup>146</sup> further confounded the application of the provisions.

This phrase, "Indian *qua* Indian", meaning literally an 'Indian in the capacity of an Indian', first appeared in *Mitchell v Peguis*, and then was used repeatedly in Justice Gonthier's *Williams* judgment,<sup>147</sup> but in both instances, was bereft of explanation or connection to the tax provisions these cases examined. It is O'Brien's observation that "the courts have shown a marked tendency to apply the exemption restrictively and to require that the source of income have a demonstrably "Indian" character."<sup>148</sup> Thus, *Williams* significantly narrowed the interpretation of section 87 provisions by introducing a two-step test to consider variable criteria that examine the character of (otherwise taxable) property and types of taxation against the potential of taxation of that property to "erode the entitlement of an Indian *qua* Indian to personal property on the

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<sup>144</sup> Martha O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track", (2002) 50:5 Can Tax J at 1572 [O'Brien].

<sup>145</sup> *Ibid* at 1574.

<sup>146</sup> *Williams supra* note 14 at 891 (emphasis added).

<sup>147</sup> See: *Williams supra* note 14 at 886 (quoting *Mitchell v Peguis*), at 886 in summary on the 'Nature and Purpose' of the exemption – referencing the Crown's obligations under the *Royal Proclamation of 1763*, at 891 regarding 'resident of debtor test', at 891 concerning 'The Proper Test', and at 896 regarding the test for *situs* of Unemployment Benefits, and at 900 in Gonthier J's conclusion.

<sup>148</sup> O'Brien *supra* note 144 at 1571.

reserve”.<sup>149</sup> The corollary to this rationale is what the court might then consider how an Indian might not act in the capacity of an Indian, except perhaps to renounce his or her heritage and be fully assimilated into the Canadian body politic.<sup>150</sup> Finally, to add insult to injury, Justice Gonthier presented a version of history that is difficult to reconcile with Canada’s colonial policy. He stated:

Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian 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. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.<sup>151</sup>

To use the language of ‘choice’, and ‘protection’ to characterize the impact of the *Indian Act* on the lives of Indians and their traditional territory, indicates just how far jurisprudence removed itself from the historic realities of those who are subject to the *Indian Act*. Adherence to the principles of simplicity, neutrality, and equity—the cardinal rules of tax policy—becomes very difficult to identify in this rhetoric. These tax principles date back to at least 1776, and were articulated in Adam Smith’s *The Wealth of Nations* as “equity, certainty, convenience and economy”.<sup>152</sup> In Canada’s ambitious overhaul of the Canadian Tax system in 1966, the Carter Commission echoed these principles stating:

We believe that four fundamental objectives on which the Canadian people agree are:  
1. To maximize the current and future output of goods and services desired by Canadians.

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<sup>149</sup> *Williams supra* note 14 at 900.

<sup>150</sup> To borrow the words of Duncan Campbell Scott, Head of the Department of Indian Affairs, 1920: “Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department”. Mark Abley contests the attribution of this phrase, but it is commonly accepted that it represents the sentiment of the day. See Abley (*infra* note 365) at 36-37.

<sup>151</sup> *Williams supra* note 14 at 887 (emphasis added).

<sup>152</sup> Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (selected ed, 1993) at 450, as quoted in Clinton Alley & Duncan Bently, “A remodeling of Adam Smith’s tax design principles”, (2005), Bond University ePublications@bond, online: <[http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1044&context=law\\_pubs](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1044&context=law_pubs)>, 579 at 586.

2. To ensure that this flow of goods and services is distributed equitably among individuals or groups.
3. To protect the liberties and rights of individuals through the preservation of representative, responsible government and maintenance of the rule of law.
4. To maintain and strengthen the Canadian federation.<sup>153</sup>

When considering the *Williams* “connecting factors” test, one must ask, does this test facilitate a fair, predictable, and economic or efficient system of revenue? Interestingly, the Carter Commission also commented on the inappropriateness of alternative means of revenue collection, including the commandeering of resources:

The government can commandeer resources from private individuals and put them to its own use. While this method may have its place in times of national emergency, under normal conditions it is either hopelessly inefficient if it is done fairly, or much more likely, it has completely capricious results. It places the whole cost of government's services on those who are unlucky enough to be within easy reach.<sup>154</sup>

Given the Crown’s capricious nature in dealing with Indians and land reserved for Indians, the method of revenue collection by commandeering resources, more closely resembles *Indian Act* policy, than it does the tax policy principles of simplicity, neutrality, and equity. All told, the Commission heard from companies, organizations, and individuals, comprising over 700 witnesses, in 99 days of public hearings, in 12 Canadian cities, and received 300 briefs.<sup>155</sup> For a report that is focused on equity as its primary concern, and claimed: “We are confident that we have heard all points of view as to what would constitute a desirable Canadian tax system”<sup>156</sup>, this seems to be a significant oversight. Carter wrote:

We assign a higher priority to the objective of equity than to all the others. As pointed out above, our task requires us to make recommendations that would lead to an equitable distribution of the burden of taxation. We are convinced that unless this objective is achieved to a high degree all other achievements are of little account. Thus the need for an

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<sup>153</sup> Carter Commission *supra* note 68, Vol 2 at 7.

<sup>154</sup> *Ibid* at 2.

<sup>155</sup> *Ibid* Vol 1 at xiii.

<sup>156</sup> *Ibid*.

equitable tax system has been our major concern and has guided us in all our deliberations.<sup>157</sup>

The final principle identified by Carter, to “maintain and strengthen the Canadian federation” serves to reinforce the idea that Aboriginal peoples were entirely outside the Commission’s consideration. Notably absent from the six-volume, comprehensive Carter Commission inquiry of the Canadian income tax system, is consideration of taxation of Indians or the *Indian Act* taxation provisions. The ‘two founding nations’ myth of federation simply ignores the *sui generis* place of Aboriginal peoples, and the Carter Commission renders them invisible.

### **Certainty in Ordering Affairs – Native Leasing Service**

Among the cardinal rules of tax policy is the principle of predictability, that is, the reduction of uncertainty in ordering one’s financial affairs. Following the *Williams* decision and the development of the “connecting factors” test, the application of section 87 became unpredictable. Williams’ income, being from the Federal government, was deemed to be off-reserve, but the income was nevertheless considered to be tax exempt. As a result of the decision, Revenue Canada (as it was called then) introduced new guidelines regarding employment income, which took effect on January 1, 1995. These changes created great uncertainty in tax planning for Indians, with perhaps the hardest hit group of employees being the approximately 3,900 employees of Native Leasing Services (NLS).<sup>158</sup>

The O.I. Group, which includes NLS, is “a nationally focused PEO – Professional Employer Organization that has been providing services to organizations for over 28

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<sup>157</sup> *Ibid* at 17.

<sup>158</sup> Joanna Smith, Toronto Star, “Canada revenue Agency seeks back taxes from aboriginal employees”, (2015), online: <<https://www.thestar.com/news/canada/2015/12/14/canada-revenue-agency-seeks-back-taxes-from-aboriginal-employees.html>> [Joanna Smith].

years...[and] the largest Employee Leasing/Outsourcing Organization in Canada.”<sup>159</sup> Owner and president Roger Obansawin, and his partner Ljuba Irwin, set up the employment firm in 1987. They are both status Indians, and the head office for NLS is situated on the Six Nations of the Grand River Reserve in Ontario. By their own description, Native Leasing Services became the intermediary between employees and employers:

“The leasing concept can be a little confusing and we feel that it is important to define how it works. Leasing develops a special relationship between a Placement Organization (which is the actual worksite where the work is being performed); the Employer (The OI Group or Native Leasing Services) and Leased individual (the Employee). How it works is that a company or an organization, rather than hiring people to work for them directly will instead contact a leasing agency and ask the leasing company to hire people and send them to the company or organization. It becomes a “win-win” situation.”<sup>160</sup>

As Native Leasing Services was operating under the interpretation of section 87 at the time, which they understood as providing a tax exemption for their employees, an audit was performed by Revenue Canada, “confirming [O.I. Group and NLS] for leased staff and that the company “runs a clean operation””<sup>161</sup> However, following *Williams*, there is evidence, including direct communication between Revenue Canada and Native Leasing Services that NLS was singled out by Revenue Canada, and were informed that the “connecting factors” test did not in fact provide a tax exemption for Native Leasing Services employees.<sup>162</sup> This announcement triggered political protests in response to the proposed guidelines, with “Obonsawin and other indigenous activists occupying [the] fifth floor of a Revenue Canada building in downtown Toronto in December 1994”.<sup>163</sup>

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<sup>159</sup> O.I. Group of Companies, “Employee Leasing/Outsourcing—Who We Are”, 2009, online: <[http://www.oigroup.ca/employee\\_leasing.php](http://www.oigroup.ca/employee_leasing.php)>.

<sup>160</sup> *Ibid*, “Employee Leasing/Outsourcing—Technical Information for Placement Organizations and Employees”, (2002), online: <[http://www.oigroup.ca/employee\\_leasing-how\\_it\\_works.php](http://www.oigroup.ca/employee_leasing-how_it_works.php)>.

<sup>161</sup> Turtle Island Native Network, News: Spotlight on Aboriginal Rights, Taxation and Related Issues”, (2002), online: <<http://www.turtleisland.org/news/news-taxation-shilling.htm>> [Turtle Island News].

<sup>162</sup> See *Hester v The Queen*, 2010 TCC 647 at para 4, which sets out the CRA announcement and a pre-emptive request made to all NLS employees to agree to be bound by the *Shilling* decision (*infra* note 168).

<sup>163</sup> Joanna Smith, *supra* note 158.

Rather than adding certainty, the new guidelines seemingly contradicted the *ratio* of *Williams*. Guideline 4, in particular, appears to be most relevant to the NLS series of cases that demonstrates the difficulty in tax planning post-*Williams*:

#### Guideline 4

When:

- the employer is resident on a reserve; and
- the employer is:
  - an Indian Band which has a reserve, or a tribal council representing one or more Indian Bands which have reserves, or
  - an Indian organization controlled by one or more such bands or tribal councils, if the organization is dedicated exclusively to the social, cultural, educational, or economic development of Indians who for the most part live on reserves; and
- the duties of the employment are in connection with the employer's non-commercial activities carried on exclusively for the benefit of Indians who for the most part live on reserves:

All of the Income of an Indian from an employment will usually be exempt from Income Tax.<sup>164</sup>

Guideline 4 does not appear to resemble the “connecting factors” test, in that it explicitly confines potential employers to being “on a reserve” in order for its employees to qualify for the exemption, and requires several factors in combination to locate property on a reserve. Further, rather than being one factor to consider, to be weighed on a case-by-case basis, commercial enterprises are automatically excluded. This is even more apparent in examples provided on the Canada Revenue Agency webpage to indicate employment situations that are “not exempt”:

Mr. S works for a commercial building supplies company that is owned by a tribal council and is resident on a reserve. He performs his duties off reserve and lives off reserve. Mr. S is taxable on his employment income because, although there is one factor, the residence of the employer, connecting the income to a reserve, this factor by itself is not sufficient to confer the exemption when the employer and the employee are active in the commercial mainstream of society.

Ms. T works for an Indian organization dedicated to organizing social programs for off-reserve Indians. The organization is located off reserve. Ms. T is taxable on her

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<sup>164</sup> Canada Revenue Agency, “Indian Act Exemption for Employment Income Guidelines”, (2013), online: <<http://www.cra-arc.gc.ca/brgnls/gdlns-eng.html#emp>> (emphasis added).

employment income because there are no factors connecting that income to a location on a reserve.<sup>165</sup>

The new guidelines, which remain current as of 2017, effectively exclude the employment income of all NLS employees from section 87 exemptions, on the basis that their work is performed off-reserve.<sup>166</sup> In response to the protests and occupation of the Revenue Canada office, the Deputy Minister of Revenue Canada, Pierre Gravel, wrote to Irwin (of Native Leasing Services) promising to: ““take all available steps to expedite consideration by the courts of any challenge of the guidelines or their application in particular circumstances” in exchange for vacating the fifth-floor of its office building. This led to Native Leasing Services and Revenue Canada selecting four “test cases” to clarify the law and establish legal precedent”,<sup>167</sup> of which *Shilling v MNR*<sup>168</sup> became the leading case.

In 1997, Rachel Shilling filed a statement of claim requesting a declaration regarding the applicability of section 87 of the *Indian Act* on her 1995 and 1996 income. Justice Sharlow (as she was then), answering the preliminary question of applicability of section 87, ruled in favour of Shilling.<sup>169</sup> This decision was appealed by the Canada Revenue Agency, and in 2001, Appeal Court Justices Rothstein, Evans and Malone, held that “the respondent both worked and resided in Toronto. The location and nature of her employment are the important factors locating her employment income off-reserve.”<sup>170</sup> The factors selected gave no recognition to the fact that

"In 1984, having discovered that her son was part of a bicycle group that was getting into trouble, Ms. Shilling decided that it would be better if they moved from the reserve. Consequently, she applied for a job as the Executive Director of the Ahkinomagai Kemik Education Council and worked at the First Nations School of Toronto. After commuting

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<sup>165</sup> *Ibid.*

<sup>166</sup> Turtle Island News *supra* note 161.

<sup>167</sup> Joanna Smith, *supra* note 158.

<sup>168</sup> *Shilling v MNR*, [2001] FCA 178 (CanLII) [*Shilling*].

<sup>169</sup> *Shilling v MNR*, [1999] 4 FCR 178, 1999 CanLII 8289 (FC).

<sup>170</sup> *Supra* note 168 at para 58.

from her home on the Rama reserve for one year, she moved to Toronto in 1985 and has resided there at all material times since then.”<sup>171</sup>

As a result, Shilling—as the test case for NLS employees—was found to not meet the “connecting factors” test and was therefore ineligible to claim section 87 exemptions. In 2002, the Supreme Court of Canada denied leave to appeal, ending a seven-year dispute between Canada Revenue Agency and Native Leasing Services over the application of section 87.

Given the gravity of the implications for employees of Native Leasing Services, Roger Obonsawin and Joe Hester sought to launch an “Abuse of Power” class action in 2000 against federal ministers and senior bureaucrats of the Canadian Revenue Agency. “Mounting evidence throughout the pre-trial procedures suggests that the government has not been forthright or fair in litigating the Shilling case. OI and NLS are forced to deal with an unequal political and bureaucratic environment. While the courts are always an option to challenge government policy and direction, it is a long and expensive undertaking.”<sup>172</sup> It was estimated in 2002 that “O.I. and its employees have committed in excess of \$1.5 million. The struggle is not over. There may be many years ahead before there is a final resolution to this matter.”<sup>173</sup> In many ways, even after *Shilling*, Indians are no further ahead in knowing how best to order their financial affairs, and the retroactive collection of taxes from NLS employees continues. According to Smith of the *Toronto Star*, writing in 2015, the Canada Revenue Agency has been “aggressively collecting back taxes from a group of mostly low-income aboriginal women who lost a long-running legal battle to be exempt from paying personal income taxes”.<sup>174</sup> The average income, according to lawyer Jim Fyshe who worked on a pro-bono basis for NLS, was \$27,000, and they “live at or

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<sup>171</sup> *Ibid* at para 4-5.

<sup>172</sup> Turtle Island News *supra* note 161.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid*.

near the poverty line.”<sup>175</sup> For many of these people, the assessed taxes, interest, and fines amount to an insurmountable debt. This is the legacy of policy decisions flowing from the *Williams* case.

At least 1000 appeals involving employees of Native Leasing Services or O.I. Employment Leasing have come before the court.<sup>176</sup> The Crown now relies on *Shilling*, which stands for the principle that “the interposition of NLS as the employer does not significantly connect the employment income to a reserve in a manner relevant to section 87 of the IA.”<sup>177</sup> It would be difficult to find an exception among Native Leasing Services employees, to indicate that they did not have at least one, if not many, connections to a reserve. In the cases examined, all were status Indians, many were directly involved with cultural activities, or providing health or education services to status Indians, and many either lived on or visited immediate family on reserves on a regular basis. Nevertheless, the Tax Court and appellate courts are consistently ruling in favour of the Minister of National Revenue to find that section 87 does not apply to the employees of Native Leasing Services. A sample of cases involving Native Leasing Services employees are worth mentioning. In *Stacey-Diabo v The Queen*,<sup>178</sup> five employees were found to have no tax exemption, including Stacy-Diabo, who:

...was working as a policy analyst with the federal Department of Indian Affairs and Northern Development ("DIAND") in the Self-government Policy Directorate. In that capacity, she provided advice on a wide variety of issues in relation to self-government negotiations between the Government of Canada and the First Nations reserves. Her duties were to represent DIAND with respect to self-government and land claims negotiations. She testified that the purpose of her position was to provide social, political, economic and cultural benefits to First Nations reserves across Canada, including her own community of Kahnawake, but not to any specific reserve. She also occasionally provided advice for the benefit of off-reserve members.... DIAND refused her request to be allowed to perform her work on the reserve.<sup>179</sup>

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<sup>175</sup> Joanna Smith *supra* note 158.

<sup>176</sup> *Baptiste v The Queen*, 2011 TCC 295 [Baptiste] at para 3. This figure is also cited in *Nahwegahbow v The Queen*, 2011 TCC 296 at para 3, and in both instances, it is an assertion of the Crown.

<sup>177</sup> *Ibid.*

<sup>178</sup> 2002 CanLII 1088 (TCC) [*Stacey-Diabo*].

<sup>179</sup> *Ibid* at para 5-6.

In *Googoo v The Queen*,<sup>180</sup> eight separate appellants, including “Ms. Delores Joyce Maguire [who] was born and raised on the Glooscap First Nation Reserve. At the age of 19 she married into another culture and lost her Indian status under the *Indian Act*. Since her marriage, Ms. Maguire has not lived on a reserve but she ultimately regained her Indian status. Ms. Maguire became an addictions counselor in and about the Native community.”<sup>181</sup> Also in *Googoo*, Mr Knockwood, worked “as a language and cultural instructor performing his duties at the Child Development Centre and Friendship Centre in Halifax”.<sup>182</sup> Ms Googoo worked with the Aboriginal Peoples Television Network, and Ms Mashing worked as a Research Technical Assistant with the Canadian Aboriginal AIDS Network. All of their appeals were denied.

Thirteen employees were reassessed for several tax years in *Robinson v The Queen*,<sup>183</sup> which proceeded together on the basis of common evidence. The appellants provided an Aboriginal Crisis Program and Second Stage housing for Aboriginal victims of domestic violence. They argued for consideration of their circumstances that potentially weakened their connection to a reserve:

“In the course of their arguments, both counsel for the Appellants submitted the evidence demonstrated that as employees of NLS they were exercising their treaty rights and chose to connect with their home community as much as circumstances permitted. In some instances, travel to a reserve was onerous both in terms of time and cost. Often, an Appellant had chosen to leave her reserve to pursue education or employment opportunities or to join family living elsewhere. Sometimes, as an infant or young child, an Appellant had been removed involuntarily from her reserve whether through intervention of the child welfare authorities or relocation by a parent.”<sup>184</sup>

Deputy Judge DW Rowe dismissed or quashed all thirteen appeals, allowing the Canada Revenue Agency to reassess as many as eight taxation years, as was the case for June Robinson.

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<sup>180</sup> 2008 TCC 589 [*Googoo*].

<sup>181</sup> *Ibid* at para 17-18.

<sup>182</sup> *Ibid* at para 65.

<sup>183</sup> 2010 TCC 649 [*Robinson*].

<sup>184</sup> *Ibid* at para 47.

In *Baptiste v The Queen*, the employee was reassessed for nine taxation years, in which she raised a “necessity argument [that] in effect says that the employer [a bank], employee and place of employment would be on a reserve if that were possible and therefore the employment income should be treated as if it were located on a reserve....The respondent [CRA] is of the view that Ms. Baptiste’s work was more beneficial to the bank than to the Aboriginal community.”<sup>185</sup> Ms Baptiste’s income was not tax exempt. Similarly, in *Montour v The Queen*, Montour was a support worker at a women’s shelter, which was necessarily located off-reserve for the safety of its clients.<sup>186</sup> Her appeal was dismissed.

*Marcinyshyn v The Queen* involved three appellants, including “Mawakeesic and Marcinyshyn [who] both worked for AMI [Anishnawbe Mushkiki Inc.]. Mawakeesic worked as a Counsellor in the FASD program which included instruction in parenting skills and nutrition.”<sup>187</sup> The inclusion of Marcinyshy’s employment income was used to reduce her eligibility for Child Tax Benefit payments. Five appellants were heard in *Baldwin v The Queen*; one employee worked with Aboriginal housing tenants, another as a Healthy Babies healthy Children’s Program worker.<sup>188</sup> All of their appeals were dismissed.

By 2011, when *Bastien* was decided, the Canada Revenue Agency had successfully challenged the tax-exempt premise upon which NLS had based its business practices. Although Native Leasing Services is not explicitly referenced in *Bastien*, or the many cases that relied on the *Shilling* ruling, *Bastien*, and more recently *Robertson*, appears to characterize the business arrangements of Native Leasing Services as “abuse”:

Of course, in determining the location of income for the purposes of the tax exemption, the court should look to the substance as well as to the form of the transaction giving rise to

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<sup>185</sup> *Baptiste supra* note 176 at para 23-24.

<sup>186</sup> *Montour v The Queen*, 2013 TCC 178 at para 7.

<sup>187</sup> *Marcinyshyn v The Queen*, 2011 TCC 516 at para 8.

<sup>188</sup> *Baldwin v The Queen*, 2014 TCC 284.

the income. The question is whether the income is sufficiently strongly connected to the reserve that it may be said to be situated there. Connections that are artificial or abusive should not be given weight in the analysis....Cases of improper manipulation by Indian taxpayers to avoid income tax may be addressed as they are in the case of non-Indian taxpayers.<sup>189</sup>

Similarly, *Robertson* states:

The Crown has not suggested that the Appellants have attempted an artificial manipulation of the connecting factors in order to bring their fishing income within the exemption from tax provided by section 87. The various connections between the Reserve and the Appellants' income from fishing are indisputably *bona fide* and not motivated by tax avoidance considerations....

However, in order to avoid potentially abusive or artificial manipulation of the connecting factors in other cases, a degree of flexibility must be maintained in the selection and weighing of the connecting factors, and in the emphasis given to those that provide a substantive basis for situating property on a reserve.<sup>190</sup>

In *Bell v The Queen*, it was made clear that *Shilling* equated setting up business on a reserve to adhere to section 87 requirements with illegal tax avoidance practices, and not prudent tax planning: "Finally, the Appellant submits that issues of impropriety and artificial connections have no bearing on a case such as this. They are only relevant if the Crown alleges there is a sham or that the general anti-avoidance rule applies: *Shilling v. The Queen*, 2001 FCA 178."<sup>191</sup>

For the convenience of Indians looking to clarify the *Indian Act* provisions, the Canada Revenue Agency now provides a handy form to help determine if their employment income is taxable. The "Determination of Exemption of an Indian's Employment Income" form, asks questions regarding the date of registration under the *Indian Act* (as gender restrictions only partially addressed in 1985 and 2011 impact eligibility), if the Indian lives on or off reserve, and information regarding other potential connecting factors:

All of the employee's employment income is exempt from income tax if any one of the following situations applies. Check the appropriate box.

<sup>189</sup> *Bastien supra* note 41 at para 62 (emphasis added).

<sup>190</sup> *Robertson supra* note 8 at para 41-42 (emphasis added).

<sup>191</sup> 2016 TCC 175 at para 39.

...

the employee's employment duties are connected to the employer's non-commercial activities carried on exclusively for the benefit of Indians who, for the most part, reside on reserves and the employer resides on a reserve; **and** the employer is:

- an Indian band that has a reserve or a tribal council representing one or more Indian bands that have reserves; **or**
- an Indian organization controlled by one or more such bands or tribal councils and is dedicated exclusively to the social, cultural, educational, or economic development of Indians who, for the most part, reside on reserves (guideline 4).<sup>192</sup>

Again, the “connecting factors” test bears little resemblance to the guidance provided by the Canada Revenue Agency.

### **Indian *qua* Indian – Acting in the Capacity of an Indian**

In the late 1980s and 90s, as Canadian courts were giving meaning to section 35 of the Constitution, recognizing ‘existing treaty and Aboriginal rights’, *Indian Act* tax law took a strange turn. While jurisprudence has insisted that taxation provisions of the *Indian Act* are not a protected right (to be discussed more fully later), the court in *Recalma*<sup>193</sup> drew from thin air what appears to be a “distinctive culture test”: “Although the Tax Court of Canada and the Federal Court of Appeal have continued to list connecting factors and assign them weight, an additional factor, not found in *Williams*, is often given overriding weight: whether the source of the income was integral to the life of the reserve, or tended to preserve the traditional native way of life.”<sup>194</sup> This connection between concepts about Indigenous culture in the 1996 *Van der Peet*<sup>195</sup> decision being introduced into *Recalma* is inexplicable. While on one hand the court refuses to recognize

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<sup>192</sup> Canada Revenue Agency, “TD1-IN Determination of Exemption of an Indian's Employment Income”, (nd), online: <<http://www.cra-arc.gc.ca/E/pbg/tf/td1-in/td1in-16e.pdf>> (emphasis in original).

<sup>193</sup> *Recalma v Canada*, 1998 CanLII 7621 (FCA) [*Recalma*].

<sup>194</sup> O'Brien note 144 at 1576. The application of the ‘integral culture test’ to section 87 *situs* analysis first appeared in *Folster v The Queen* (1997), 97 DTC 5315 (FCA) *infra* note 329.

<sup>195</sup> *Van der Peet supra* note 10.

the *sui generis* origins of taxation provisions accorded Indians (and only Indians), it imported a culture test into its interpretation of the *Indian Act* tax provisions.

In addition to the *Van der Peet* decision, it is also worth noting at this point that the Royal Commission on Aboriginal Peoples (RCAP), commissioned in 1991, released its 4000-page report in 1996, which painstakingly detailed the historically fractured relationship between the Crown and Aboriginal peoples. The Crown's use of the *Indian Act* to deliberately debilitate Aboriginal individuals and their communities, including economic sanctions, is glaringly apparent. Among other grievous and harmful policies, RCAP also considered the government's program of involuntary enfranchisement,<sup>196</sup> which had the effect of severing an Indian's connection to any reserve. For the Court to work from a premise that the purposes of the taxation provisions of the *Indian Act* are historically upheld by a protection rationale is simplistic and disingenuous.

The *Van der Peet* decision dealt with Aboriginal fishing rights, in an area never ceded by treaty, but within the jurisdiction assumed by the Crown, thus controlled by the *Indian Act* and provincial resource management legislation. Dorothy Van der Peet was charged under British Columbia fishing regulations for selling 10 salmon, which the Crown considered a "commercial" enterprise. While she held an "Indian food fish license", the regulations prohibited the sale, barter, or offer to sell or barter any fish.<sup>197</sup> Van der Peet was found guilty of violating the regulations, and unable to meet the newly devised "distinctive culture test", one that did not exist until after her trial. The majority of the court affirmed that the Stó:lō right to fish was limited to fishing for sustenance and ceremony purposes only, and excluded 'commercial' fishing. The *Van*

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<sup>196</sup> Canada, Royal Commission on Aboriginal People, "Gathering Strength: Canada's Aboriginal Action Plan", (Ottawa: Minister of Indian Affairs and Northern Development, 1997) [RCAP]. Regarding involuntary enfranchisement see: Vol 4, "Perspectives and Realities", at 22ff.

<sup>197</sup> *British Columbia Fishery (General) Regulations*, SOR/84-248, s 527(5).

*der Peet* test for Aboriginal rights was grounded in the concept of identifying rights “integral to a distinctive culture”:

As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.... In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.<sup>198</sup>

According to Woo, this case “crystallized the Supreme Court’s use of history for the purpose of determining Aboriginal rights.... [but as] L’Heureux-Dubé pointed out in her dissent, [Chief Justice] Lamer in his majority opinion did not actually follow the principle [of taking into consideration the perspective of Aboriginal peoples] that he set out.”<sup>199</sup> Alarming, the court maintained that any rights recognized in this case must be “cognizable to the Canadian legal and constitutional structure”<sup>200</sup> thereby privileging the interests and perspective of the state. In Woo’s in-depth analysis of this decision, she states:

The Court’s understanding of the common law restricted it to what was common in England or, more specifically, to Canadian colonial experience that deferred to a distant motherland and ignored Indigenous sovereignty and jurisdiction....By requiring conformity to this interpretation of “the Canadian legal and constitutional structure,” these formulations implicitly demanded acceptance of colonization as a precondition for establishing Aboriginal rights.... The bottom line, however, is that the Court did not reject colonialism as one might have expected it to given the wording of s.35(1), the simultaneous assertion of egalitarian principles in the *Charter of Rights and Freedoms*, and the recognition that “the rules of the game” had changed. It did not even acknowledge that British assertions of sovereignty were of questionable legal validity from both Indigenous and modern international perspectives.<sup>201</sup>

The impact of *Van der Peet*, being a case on fishing rights, on Aboriginal tax law then cannot be understated. Not only was the court in *Williams* doggedly fixated on fitting the *Indian Act* tax

<sup>198</sup> *Van der Peet supra* note 10 at 562.

<sup>199</sup> Woo *supra* note 86 at 184.

<sup>200</sup> *Van der Peet supra* note 10 at 49 (quoting *Sparrow supra* note 13) at 1112.

<sup>201</sup> Woo *supra* note 86 at 184-85 (notes removed).

provisions into normative tax law, any concessions to Indians would now also have to meet a *Van der Peet*-style culture test of the taxable (income generating) activities. The normative power of taxation is equally compelling; the Carter Commission noted in its objectives that: “Unless the allocation of the burden [of taxation] is generally accepted as fair, the social and political fabric of a country is weakened and can be destroyed.”<sup>202</sup> It is a very short step to see that the *Williams* criterion of “Indian *qua* Indian” was given shape through the *Van der Peet* “distinctive culture” test, once again normalizing assimilationist Canadian Indian policy.

Woo’s meticulous analysis of 62 Supreme Court of Canada Indigenous rights cases, spanning the years of 1983 to 2006, and including *Nowegijick*, *Mitchell v Peguis*, and *Van der Peet*, supported her conclusion that, “Despite its expressly democratic intentions, the Court upheld colonial legality. It was not in any sense a defender of Indigenous normativity.”<sup>203</sup>

Further, Woo states:

None of the cases that [she] examined was initiated by the Crown on behalf of an Indigenous interest or to defend an Indigenous right. On the contrary, though the federal Crown acted as an intervener in twenty-two cases and provincial Crowns intervened in thirty-seven cases, there is no evidence in the cases studied that any of them supported an Indigenous point of view. In effect, as might be expected given the historical genesis of the Crown’s presence and its current institutional structure, it typically represented settler society in opposition to Indigenous people.”<sup>204</sup>

The difficulty for the Courts in assessing treaty and Aboriginal rights is that the judiciary are trying to make sense of the law from within an entrenched colonial framework. Moreover, their misplaced efforts have been significantly supported by academia. Arthur Ray, having acted as an expert witness in several treaty and Aboriginal rights cases, noted, “up until the land title suit of the Nisga’a of British Columbia in *Calder v Regina* (1973), both the legal system and academic scholarship concerning Aboriginal people largely supported their dispossession and economic

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<sup>202</sup> Carter Commission, *supra* note 68, Vol 1 at 4.

<sup>203</sup> Woo *supra* note 86 at 139.

<sup>204</sup> *Ibid* at 170.

marginalization.”<sup>205</sup> As already noted in some of the cases discussed herein, the Supreme Court of Canada in particular has struggled to ‘reconcile’ the assumed sovereignty of the British, now Canadian, state with the pre-existence of Indigenous ‘settlement’ with their own political and legal systems:

The denial of Indigenous political rights was consistent with Canada’s constitutional history. Despite eighteenth-century reliance on Indigenous allies, despite continuing use of treaties to found British claims to sovereignty, and despite the provisions in the *British North America Act* that granted separate provincial administration to the settler colonies, no Indigenous nation took part in the negotiations that led to Confederation in 1867.<sup>206</sup>

In attempting to articulate the purpose of the *Indian Act* exemptions, building on the protection rationale set out by Justice La Forest in *Mitchell v Peguis*, courts have continued to add to the deepening confusion. Since *Williams*, there has been a growing judicial emphasis on examining the types of work performed (as opposed to the types or sources of income), and the quality of attachment of the Indian to a reserve through that source of income, thus eclipsing the interpretive model set out in *Nowegijick*. Thus by 1997, again, only one year after RCAP called on the Crown to address its difficult relationship with Aboriginal peoples, the courts’ purposive and historic interpretation of section 87 began to interpret tax provisions against its skewed view of what it means to be an ‘Indian *qua* Indian’.

The facts of the *Recalma* case may have suggested a more predictable outcome, particularly under the new *Williams* “connecting factors” test, where the boxes should have been easier to identify and check off. The appellants, three members of the Recalma family, were a “community-oriented Native family, members of the Qualicum Band, living on the Qualicum Indian Reserve on Vancouver Island. The two male appellants have been elected chief of their band at different times. They, along with the female appellant, operate a fishing business through

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<sup>205</sup> Arthur Ray, *Telling it to the Judge: Taking Native History to Court*, (Montreal: McGill-Queen’s University Press, 2011) [Ray] at 154.

<sup>206</sup> Woo *supra* note 86 at 18-19.

various corporations”.<sup>207</sup> The factors connecting the income to the reserve were obvious and many, and included employment income generated on reserve, which was the source of the interest bearing investments, the Recalmas themselves lived on the reserve, the fact that the activity concerned was fishing in traditional waters—as their ancestors had done for millennia—and that the bank where income was deposited was physically located on the reserve. Nevertheless, both the Tax Court of Canada (TCC)<sup>208</sup> and the Federal Court of Appeal found the *situs* of the Recalma’s income to be off-reserve and therefore unprotected by section 87. The Supreme Court of Canada subsequently denied leave to appeal.

In order to be deemed as “property on reserve”, the source, or more literally, the location of the income must be determined. Although being central to the Court’s analysis of determining the *situs* of Indian (intangible) property, O’Brien argues that the connecting factors test is “too subjective and vague” to be useful as precedent. In purporting to apply the connecting factors test, Justice Linden stated that a court must decide “where it makes the most sense” to locate the personal property in issue in order to avoid the erosion of property held by Indians qua Indians and to protect the traditional native way of life.<sup>209</sup> Thus the connecting factors test is to apply various factors, each being accorded different weight on a case-by-case basis, and determining which factors were most critical and the weight they should be accorded, is left judges to simply rely on what “makes the most sense”.<sup>210</sup> The court differentiated investment income in this case not by where the work was performed that generated the original income (as in with unemployment benefits—the focus of the *Williams* case), nor where the business income originated. Rather, “where investment income is at issue, it must be viewed in relation to its

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<sup>207</sup> *Recalma supra* note 193 at para 2.

<sup>208</sup> *Recalma v Canada*, [1997] 4 CNLR 272 (TCC).

<sup>209</sup> O’Brien *supra* note 144 at 1577.

<sup>210</sup> *Recalma supra* note 193 para 9.

connection to the Reserve, its benefit to the traditional Native way of life, the potential danger to the erosion of Native property and the extent to which it may be considered as being derived from economic mainstream activity.”<sup>211</sup> O’Brien further suggested that the court misconceived the connecting factors test, and the “idea that the purpose of section 87 is to exempt income derived from activities that are integral to the life of the reserve, or to preserve the traditional Indian way of life”,<sup>212</sup> led to serious distortions.

By drawing from Justice La Forest’s obiter in *Mitchell v Peguis*, the notion of the “commercial mainstream”<sup>213</sup> crept into the connecting factors test. Even though the *Recalma* Court admitted that the “commercial mainstream” criterion was never set out to be a “test” in *Williams*, Justice Linden relied heavily on it, and gave the greatest weight to this factor. According to O’Brien, “determination of whether the income was earned in “the commercial mainstream,” [was] an inadequately defined concept that seems to refer to activities or sources connected or analogous to activities or sources in the off-reserve economy. If the income is earned in the commercial mainstream, it is ipso facto not situated on the reserve.”<sup>214</sup> While *Recalma* never directly referenced *Van der Peet*, the language used to describe the ‘commercial mainstream’ criterion in *Recalma* was surprisingly similar to the *Van der Peet* “integral to culture test”. *Recalma* explained:

In evaluating the various factors the Court must decide where it "makes the most sense" to locate the personal property in issue in order to avoid the "erosion of property held by Indians qua Indians" so as to protect the traditional Native way of life. It is also important in assessing the different factors to consider whether the activity generating the income was "intimately connected to" the Reserve, that is, an "integral part" of Reserve life, or

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<sup>211</sup> *Ibid* at para 11.

<sup>212</sup> O’Brien *supra* note 144 at 1576 (writing in 2002, prior to changes to the ‘commercial mainstream’ criteria).

<sup>213</sup> Despite being frequently applied, prior to 2012 the phrase ‘commercial mainstream test’ was never judicially considered (see Pinder *supra* note 141 at 1500, her footnote 15).

<sup>214</sup> O’Brien *supra* note 144 at 1576.

whether it was more appropriate to consider it a part of "commercial mainstream" activity.<sup>215</sup>

...

So too, where investment income is at issue, it must be viewed in relation to its connection to the Reserve, its benefit to the traditional Native way of life, the potential danger to the erosion of Native property and the extent to which it may be considered as being derived from economic mainstream activity.<sup>216</sup>

In *Van der Peet*, where the central question concerned whether “commercial” fishing was integral to the Stó:lō peoples, the test (in part) is described thusly:

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.<sup>217</sup>

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The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).<sup>218</sup>

After *Recalma* the “commercial mainstream” (not-a-test) test became the primary criterion to determine the *situs* of intangible property, and remained so until 2011, the effect of which conceivably impacted the economic potential of on-reserve work and business activity in the intervening years. As Pinder commented on *Shilling v The Queen*, one case of many that followed the *Recalma* precedent:

To attempt to establish participation in the commercial mainstream as one of the connecting factors in that determination is to upset the purposes behind section 87. Some of the earlier judgments have become ensnared on this point. In effect, judges have sought to find “disconnecting” factors. This is not the task of the courts, or of those administering

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<sup>215</sup> *Recalma supra* note 193 at para 9 (emphasis added).

<sup>216</sup> *Ibid* at para 11 (emphasis added).

<sup>217</sup> *Van der Peet supra* note 10 at para 55 (emphasis in the original).

<sup>218</sup> *Ibid* at para 56.

section 87....To search for “disconnecting” factors is to lose the way and to end up with an approach to the provision that seeks to minimize and impair a right, rather than to find a liberal and purposive interpretation.<sup>219</sup>

Additionally, the *Recalma* court resorted to originalism, to justify its incorporation of this cultural appropriate-verses-commercial mainstream consideration: “We cannot imagine that such a result [of interest income being tax exempt] was meant to be achieved by the drafters of section 87.”<sup>220</sup> By this same reasoning, the drafters could not have intended taxation on Indian’s employment income, given that the tax provisions of the 1876 *Indian Act* existed prior to the introduction of general income tax in Canada in 1917. Resorting to originalism would make the exemption nonsensical, yet it exists. In attempting to reconcile these two positions, the court sought to find “disconnecting” factors, rather than connecting ones.

This trend to minimize the provisions also took a subtler form; in rejecting the utility of section 87 to provide an economic advantage to Indians (and recall that the court simply said such an advantage was to be ruled out as the “purpose” of the exemption, not that an advantage could not be realized), the court in *Recalma* perpetuated the normalization of the ‘poor Indian’ stereotype. The language and tone of this judgment, and others that would followed, suggest a judicial (if not public) acrimony towards Indigenous claims of any kind, and in particular, an acute aversion to Indians who realize economic success.

For example, it could be assumed that Justice Linden was simply setting out the material facts, when he noted that the *Recalma*’s were “successful”, and listed their “accumulated wealth, at over \$4,000,000.”<sup>221</sup> The investment income in question was deposited at a bank on the reserve that was “both to support Native economic advancement as well as to obtain certain tax

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<sup>219</sup> Pinder *supra* note 141 at 1502.

<sup>220</sup> *Recalma supra* note 193 at para 14.

<sup>221</sup> *Ibid* at para 3.

advantages.”<sup>222</sup> While the bank could presumably provide some employment opportunities for Indians, the court decided that acting as a tax shelter was outside of the purpose of the *Indian Act* provisions, notwithstanding the fact that “there is nothing wrong with Canadians arranging their affairs in order to minimize their tax burden.”<sup>223</sup> Accordingly, the Federal Court of Appeal found that the investments made by all three of the Recalmas failed to fit within the provisions of the *Indian Act* as ‘property of an Indian...situated on a reserve’. After finding income interest was inconsistent with the “traditional Native way of life”,<sup>224</sup> the court reasoned:

To hold otherwise would open the door to wealthy Natives living on reserves across Canada to place their holdings into banks or other financial institutions situated on reserves and through these agencies invest in stocks, bonds and mortgages across Canada and the world without attracting any income tax on their profits. We cannot imagine that such a result was meant to be achieved by the drafters of section 87. The result may, of course, be otherwise in factual circumstances where funds invested directly or through banks on reserves are used exclusively or mainly for loans to Natives on reserves. When Natives, however worthy and committed to their traditions, choose to invest their funds in the general mainstream of the economy, they cannot shield themselves from tax merely by using a financial institution situated on a reserve to do so.<sup>225</sup>

Given that *Mitchell v Peguis* explicitly stated that the *Indian Act* tax provisions are not intended to confer a general economic benefit—in other words, whether an economic benefit results is irrelevant to determining the purpose of the provisions—on what basis does the ‘wealthy’ status of the Indians even warrant notice? By connecting this concern over “wealthy Natives on reserves” and contrasting it with those who are “worthy and committed to their traditions”, the Court implies that the two groups are mutually exclusive. Again, this interpretation points to economic assimilation, rather than a mutually beneficial treaty relationship.

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<sup>222</sup> *Ibid* at para 4.

<sup>223</sup> *Ibid* at para 5. This principle of tax planning and aggressive tax planning as opposed to tax evasion is a well-established and accepted mechanism of sound financial planning, with only the latter being prohibited. See: Canada Revenue Agency, “Tax Avoidance”, (2013), online: <<http://www.cra-arc.gc.ca/gncy/lrt/vvw-eng.html>>.

<sup>224</sup> *Ibid* at para 11.

<sup>225</sup> *Ibid* at para 14.

***R v Marshall* on Indian “necessaries” and “moderate livelihood”**

This constrictive view of the economic potential of Aboriginal peoples (that is, an Indian *qua* Indian) was articulated as earning a “moderate living” in the *R v Marshall No 1*<sup>226</sup> and *R v Marshall No 2*<sup>227</sup> decisions. In an unprecedented response, the Supreme Court of Canada issued two parallel opinions on essentially the same matter, in a case regarding fishing rights. After delivering its decision on 17 September 1999, in November of the same year, it released a second opinion in response to an intervener application by the West Nova Fishermen’s Coalition. Although the application for a rehearing and stay of judgement was dismissed, the Court proceeded to issue a second opinion on the matter. Whereas *Marshall No 1* recognized the Mi’kmaq treaty rights, *Marshall No 2* encouraged the regulatory restriction of those rights, a point that the Crown never even argued. Following *Marshall No 1*, the Coalition decried the decision, claiming it would be an “injustice” to its members if the appellant [was] not put through a new trial on the issue of justification [using the *Sparrow/Badger* infringement test]”.<sup>228</sup> *Marshall No 2*, as the court stated, was to clarify “a series of misconceptions about what the September 17, 1999 majority judgment decided and what it did not decide.”<sup>229</sup>

Donald Marshall Jr, a Mi’kmaq Indian, who had already survived 11 years of incarceration for a wrongful conviction for murder, was charged for fishing and selling \$787.10 of eels, in contravention of federal fishing regulations. In an agreed statement of facts, it was clear that Marshall “was engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse”.<sup>230</sup> Marshall argued that the Mi’kmaq Treaties of 1760-61 provided

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<sup>226</sup> *R v Marshall* [1999] 3 SCR 456, [*Marshall No 1*], dated 17 September 1999.

<sup>227</sup> *R v Marshall* [1999] 3 SCR 533 [*Marshall No 2*], dated 17 November 1999.

<sup>228</sup> *Ibid* at para 7. See *Sparrow supra* note 13, and *R v Badger*, [1996] 1 SCR 771, which extended the *Sparrow* infringement test to treaty rights.

<sup>229</sup> *Ibid* at para 2.

<sup>230</sup> *Marshall No 1 supra* note 226, as quoted by the court from the Statement of Facts at para 8.

a ‘trade clause’ that exempted him from compliance with the fishing regulations. Both the trial court and Nova Scotia Court of Appeal upheld all charges. The Supreme Court of Canada, however, handed down a 5:2 split decision to uphold Marshall’s treaty rights to fish, stating “because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaq people”.<sup>231</sup> To deny the treaty right, as the lower courts held, in the opinion of the majority, “left the Mi’kmaq with an empty shell of a treaty promise.”<sup>232</sup> Although the Court acknowledged the validity of the treaty and Marshall’s claim, the *Nowegijick* principle of a ‘large and liberal’ interpretation is absent, owing to the fact that application is only required where the court exercises its discretion to identify ambiguity in potential interpretations.

In *Marshall No 1*, the Supreme Court of Canada looked closely at the “necessaries” clause in the treaty, and determined that “the accused’s treaty rights are limited to securing “necessaries, and do not extend to the open-ended accumulation of wealth.”<sup>233</sup> Writing for the majority, Justice Binnie opined, “In my view, the 1760 treaty does affirm the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed “necessaries”. This right was always subject to regulation.”<sup>234</sup> As quickly as the right was acknowledged, it was constrained:

What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessities.... The concept of “necessaries” is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), ...described as a “moderate livelihood”. Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities”, but not the accumulation of wealth...It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.<sup>235</sup>

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<sup>231</sup> *Ibid* at para 4.

<sup>232</sup> *Ibid* at para 52.

<sup>233</sup> *Ibid* at para 7 (emphasis added).

<sup>234</sup> *Ibid* at para 4 (emphasis added).

<sup>235</sup> *Ibid* at para 58-59.

The small scale of Marshall's fishing operation, being of little economic consequence but to him, was an important consideration in the recognition of this treaty right. Nevertheless, in its argument, the Crown expressed concern that the alleged treaty rights "would open the floodgates to uncontrollable and excessive exploitation of the natural resources.... The ultimate fear [was] that the appellant...could lever the treaty right into a factory trawler".<sup>236</sup> As noted in *Marshall No 2*, even with expert evidence that went uncontested by the (non-Aboriginal) West Nova Fishermen's Coalition that "the recent Aboriginal commercial fisheries appear to be minuscule in comparison",<sup>237</sup> the Coalition called for the court to suspend the recognition of the Mi'kmaq fishing rights. It is not surprising that this ideological difference sparked a two-year period of civil unrest and violent protest by non-Aboriginal fishermen, who saw a treaty right to fish (eels in this case) to be a direct threat to the lucrative lobster stocks upon which they depended.

Confining treaty and Aboriginal rights to a bare minimum is a theme that resonates throughout Canadian jurisprudence. In this case, the Supreme Court of Canada recognized a "treaty right [that] permits the Mi'kmaq community to work for a living through continuing access to fish and wildlife to trade for "necessaries", which a majority of the Court interpreted as "food, clothing and housing, supplemented by a few amenities".<sup>238</sup> While on one hand, the court suggests that "bare subsistence" is an inappropriate standard of life for anyone; it nevertheless adopted the 1760 standard of "necessaries" to define Marshall's treaty right. Even with this minimal recognition of treaty rights, this decision again revealed the position the Crown finds itself; an outright denial of the treaty right to fish would have brought to the forefront the Crown's failure to uphold its treaty promises with the Mi'kmaq.<sup>239</sup> Conversely, by recognizing

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<sup>236</sup> *Ibid* at para 57.

<sup>237</sup> *Marshall No 2 supra* note 227 at para 42.

<sup>238</sup> *Marshall No 1 supra* note 226 at para 59.

<sup>239</sup> "This appeal put to the test the principle, emphasized by this Court on several occasions, that the honour of the

Mi'kmaq rights, non-Aboriginal fishermen felt betrayed by their government by not prioritizing their perceived right to maintain their standard of living. The Supreme Court of Canada was able to balance these conflicting positions by deflecting responsibility to the provincial and federal departments mandated to regulate fisheries. The façade of the Honour of the Crown was thus preserved, and at the same time, governments were able to maintain control over the economic potential of Indians. Writing on what became known as the “Burnt Church crisis”, Sarah King commented on what she termed the ‘Canadian nationalist myth’:

For the people of the Burnt Church First Nation and their sympathizers, the actions of the Canadian government through the DFO and the RCMP were a terrible injustice, which, if recognized by the Canadian public, would have destabilized the government’s position in the dispute. Addressing the concerns of the sovereigntists would have required the Canadian government to address its own complex and difficult colonial history, in which questions about the legitimacy of Canada’s displacement of Aboriginal people are reasonable and important. Instead, throughout the dispute and its aftermath, the government’s agencies argued for their own views of the dispute, grounding those views in nationalist language and myth in order to invoke the propriety of their position.<sup>240</sup>

For Woo: “The court ignored the sovereignty inherent to the early use of treaty processes, and its judgments merely tinkered with the modern Canadian understanding of a constitutional paradigm that had been carried across the Atlantic Ocean and evolved during the imperial age.”<sup>241</sup>

As a result, the focus of *Marshall No 2* was largely to affirm the Crown’s power to regulate the newly recognized Mi’kmaq treaty right, which shifted the focus to the federal and provincial regulatory bodies. In answering the motion to retry the matter, which it denied, the Supreme Court of Canada was explicit as to what rights could be exercised by the Mi’kmaq, and the limitations of its first decision:

Equally, it will be open to an accused in future cases to try to show that the treaty right was intended in 1760 by *both* sides to include access to resources other than fish, wildlife and traditionally gathered things such as fruits and berries. The word “gathering” in the

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Crown is always at stake in its dealings with aboriginal peoples”, *Marshall No 1 supra* note 213 at para 49.

<sup>240</sup> Sarah King, *Fishing in Contested Waters: Place and Community in Burnt Church/Esgenoôpetitj*, at 153.

<sup>241</sup> Woo *supra* note 86 at 129.

September 17, 1999 majority judgment was used in connection with the types of the resources traditionally “gathered” in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties.... The Union of New Brunswick Indians also suggested on this motion a need to “negotiate an integrated approach dealing with all resources coming within the purview of fishing, hunting and gathering which includes harvesting from the sea, the forests and the land”. This extended interpretation of “gathering” is not dealt with in the September 17, 1999 majority judgment, and negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go beyond the subject matter of this appeal.

The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right “to gather” anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower....<sup>242</sup>

Thus, the economic implications for even a “successful” defense of treaty rights appear to be limited by colonial policies for Indians, which reinforce the stereotypical perception of subsistence living, a value that transferred easily to the interpretation of statutes, and in particular cases focused on the “purpose” of the *Indian Act* tax provisions. The assumption of Crown sovereignty, which is always presumed but never explained, is at the heart of this conflict.<sup>243</sup>

### **Taxation and Sovereignty**

*Mitchell v MNR*<sup>244</sup> was just the case to test this presumption. Again, the “integral to a distinctive culture” test was invoked, this time regarding excise taxes. The *Indian Act* provisions are not in question here, however, as a taxation case, it is important to note the direct connection between the courts’ interpretation of the Crown’s right to impose tax, and its reticence to acknowledge historic or traditional Aboriginal practices that may challenge the assumption of sovereignty. The Minister of National Revenue challenged the findings of the lower courts that

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<sup>242</sup> *Marshall No 2 supra* note 227 at para 19-20.

<sup>243</sup> In contrast to the “assumed sovereignty of the Crown” in *Sparrow*, see *Pamajewon supra* note 126 for an unenlightening discussion of the application of the *Van der Peet* test to Aboriginal self-government.

<sup>244</sup> *Mitchell v MNR*, 2001 SCC 33 [*Mitchell v MNR*].

determined Mitchell held an Aboriginal right to be exempted from the Canadian *Customs Act*.<sup>245</sup> Although the Supreme Court of Canada rendered a split decision, differing only in its reasons, the Crown successfully used its claim of assumed sovereignty as a blanket defense, “because such a right would be fundamentally contrary to Canadian sovereignty”.<sup>246</sup>

In 1998, Michael Mitchell, a Mohawk of Akwesasne and resident in Canada,<sup>247</sup> challenged the validity of the *Customs Act*. The Mohawk community of Akwesasne predates both Canadian confederation and the creation of the Canadian-American border, and formed part of the Iroquois Confederacy, in existence long before European contact. Today, the community straddles both provincial and international borders. In the course of crossing these modern borders, Mitchell claimed he had an existing Aboriginal right to cross the Canada-United States border, including the right to bring goods from United States into Canada for personal and community use, without having to pay customs duties on those goods. The trial judge found, among other things, that the Aboriginal right claimed did include the right to bring goods for personal and community use from the United States into Canada for non-commercial scale trade with other First Nations.<sup>248</sup> Although the Federal Court of Appeal affirmed Mitchell’s right to bring goods into Canada duty-free, it narrowed the right to the area of Mohawk traditional trade.<sup>249</sup> The Supreme Court of Canada ruled in favour of the Minister of National Revenue, finding that no such right was made out. The decision affirmed that the Crown’s assertion of sovereignty had “eclipsed” any

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<sup>245</sup> *Customs Act*, RSC 1985, c 1 (2d Supp.).

<sup>246</sup> *Mitchell v MNR supra* note 244 at para 1.

<sup>247</sup> Michael Mitchell identified himself as a Mohawk of Akwesasne; the court however, “telescoped” his identity (to focus on his role as Grand Chief), his reasons for bringing goods across the international boarder (for trade, not just gifts), and the legal question to be considered (not simply of taxation, but also of mobility rights). For further discussion, see for example: Peter W Hutchins, “Promises to Keep: The Implications of *Mitchell v MNR*”, materials prepared for a conference held in Vancouver, British Columbia, 2001, online: <<http://www.hutchinslegal.ca/DATA/TEXTEDOC/Promises-To-Keep-The-Implications-of-Mitchell-v-M-N-R-.pdf>>.

<sup>248</sup> *Mitchell v MNR*, [1997] 4 CNLR 103.

<sup>249</sup> *Mitchell v MNR*, 1998 CanLII 9104 (FCA).

international trading or mobility right claimed, and second, that the international practice of trade was “neither a defining feature of [Mohawk] culture nor vital to their collective identity.”<sup>250</sup>

Given that the common law is conservative and incremental, and even with the Constitutional assurances of sections 25 and 35, it is no wonder then that the “purpose” of *Indian Act* tax provisions has eluded judicial understanding. By allowing the Crown’s assertion of sovereignty over Indigenous peoples and their lands to go untested, the prejudices that propagated Canada’s colonial history continue.<sup>251</sup> It is this common law tradition of exacerbating error upon error, which has truncated the courts’ ability to adjudicate over claims of Aboriginal and treaty rights. As historic prejudices have been exposed to greater (and more just) scrutiny, it was only a matter of time until the question of a treaty right to tax exemptions would force its way into the courts. Building on the momentum of this decision, the case of *Benoit v Canada*<sup>252</sup> sought to advance the treaty right to tax exemption argument even further.

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<sup>250</sup> *Mitchell v MNR supra* note 244 at headnotes.

<sup>251</sup> The legal doctrines of *terra nullius* and the Doctrine of Discovery devised by the Christian/Catholic church and promoted by More, Hobbes, Locke, and others ascribed a less-than-human status to Indigenous peoples globally, ultimately circumventing the moral implications of colonization, and permitting the taking of Indigenous lands for the purposes of Empire building.

<sup>252</sup> *Infra* note 254.

## Chapter 4 – Taxation as a Treaty Right

In 2002, the Federal Court issued its *Benoit v Canada*<sup>253</sup> opinion in a whopping 100-page (369-paragraph) decision, affirming an existing Treaty 8 right to tax exemption for the descendants of the Cree and Dene signatories. Predictably, the Crown appealed the decision. The Federal Court of Appeal hearing resulted in Federal Court of Appeal Justice Nadon overturning the decision of Justice Campbell of the Trial Division of the Federal Court. It is noteworthy that Justice Nadon and Justice Campbell have taken dramatically opposite positions on at least one other occasion, an example of which is the subject of discussion in Chapter 6. In *Benoit*, leave to appeal was dismissed by the Supreme Court of Canada. As a result, the *Benoit*<sup>254</sup> decision is reported by the Canada Revenue Agency (CRA) as standing for the proposition that there is no treaty right to tax exemption: “On June 11, 2003, the Federal Court of Appeal ruled that Treaty 8 does not provide a general tax exemption,”<sup>255</sup> a statement that is not entirely accurate.

At the trial level, for Justice Campbell, the critical question in this case concerned: “The honour of the Federal Crown [which] has been placed in issue respecting its treaty making dealings at the end of the nineteenth century with the Aboriginal People”.<sup>256</sup> Cree and Dene peoples in parts of Northern British Columbia, Alberta, Saskatchewan, and Southern Northwest Territories, collectively considered the Peace-Athabasca country, signed Treaty 8, in 1899. Justice Campbell considered, among other things, established principles of treaty interpretation, including the fact that treaty terms may not necessarily be recorded in the written documents, and that at all times, the Honour of the Crown is at stake. In this sense, the Federal Court ruling was

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<sup>253</sup> *Benoit v Canada*, 2002 FCT 243.

<sup>254</sup> *Canada v Benoit*, 2003 FCA 236 [*Benoit*].

<sup>255</sup> Canada, CRA, “Information for Indians”, *Benoit* legal decision, online: <<http://www.cra-arc.gc.ca/brgnls/stts-eng.html#hdng1>>.

<sup>256</sup> *Benoit v Canada* *supra* note 253 at para 1.

not ground-breaking or novel, when Justice Campbell wrote: “In my opinion, Canada has not extinguished this treaty right, and there is no justification proved for its infringement.

Accordingly, as a matter of constitutional law, I find that Federal taxation provisions are of no force and effect with respect to beneficiaries of Treaty 8.”<sup>257</sup> This opinion was based on extensive examination of Treaty 8 historic records, oral history testimony, and expert evidence. The Federal Court rejected the opinions of two key Crown experts: Thomas Flanagan and Alexander von Gernet. The Crown’s reliance on these two “experts” is well known and well documented, and in particular their bias against the recognition of Aboriginal or treaty rights.<sup>258</sup>

### **Justice Nadon *versus* Justice Campbell (on Oral History)**

The Federal Court of Appeal in *Benoit*, however, focused on the oral history evidence, and conversely not only accepted, but also relied heavily upon von Gernet’s testimony. Extensive excerpts of von Gernet’s report were referenced in the appellate judgment, which dismissed the veracity of the oral history testimony regarding the treaty negotiations and terms of Treaty 8. In contrast, the Federal Court in *Daniels v Canada*<sup>259</sup> clearly called this reliance into question:

...[von Gernet] has been accepted in court as an expert in 25 cases in provincial, state and superior courts as well as in this Court always on behalf of the Crown. He was accepted as an expert qualified to give opinion evidence as an anthropologist and ethnohistorian specializing in the use of archaeological evidence, written documentation and oral traditions to reconstruct past cultures of Aboriginal people, as well as the history of contact between Aboriginal peoples and newcomers throughout Canada, and parts of the United States, which history includes the relationship between government policies and Aboriginal peoples.

...

Von Gernet came at his task of making his report in an unusual way. He would brook no instructions nor work with counsel; he was there to express his opinions. Regrettably, this

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<sup>257</sup> *Ibid* at para 9.

<sup>258</sup> See *Daniels v Canada*, 2013 FC 6 [*Daniels FC*] at para 176.

<sup>259</sup> The SCC in *Daniels supra* note 4, also discounted von Gernet’s testimony.

was evident in that he exhibited little understanding of the case or the issues for the Court; thus he could not be as helpful as one would have hoped.

Von Gernet's evidence suffered from a number of other problems. He relied on a database of documents provided by the Defendants which was not current or updated. He relied extensively on secondary sources which became clear when he did not understand the context in which much of that material arose. His conclusions were often based on faulty understanding; for example, the frailties of the 1871 Census as a reliable indicator of "Indian/half-breed" population.

In general, von Gernet's research and conclusions were unoriginal often reflecting virtually regurgitating other people's work such as that of Thomas Flanagan's article "The Case Against Métis Aboriginal Rights" (1983) 9(3) Canadian Public Policy 314.

Unfortunately, von Gernet exhibited a shallow understanding of many of the documents he relied upon or was unexplainably selective in his use of evidence. Thus, his evidence stood in sharp contrast to many of the other witnesses on both sides in terms of knowledge, reliability and credibility.

While the Court does not discount all of von Gernet's evidence, it places considerably less weight on it where it contradicts other experts. His Report did not stand up well to the glaring light of cross-examination and provided the Court with much less illumination into the issues in this case.<sup>260</sup>

While the Crown's reliance on Flanagan and von Gernet had been commonplace, some of their academic peers are also less enthusiastic about their contributions. Arthur Ray, who was involved in *Buffalo v Regina*,<sup>261</sup> a Treaty 6 case, (which proceeded to the Supreme Court of Canada as *Ermineskin*<sup>262</sup>) was also a regular expert witness in court proceedings, commented:

After my fellow experts and I had submitted our reports [on the economic history of Treaty 6], the Crown's two experts, political scientist Thomas Flanagan and archaeologist Alexander von Gernet, wrote lengthy replies. The Crown had retained them as rebuttal witnesses, but did not commission them to do any original historical research, in the belief that such evidence was not essential for the case.<sup>263</sup>

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<sup>260</sup> *Daniels* FC *supra* note 158, at paras 176, 178-182.

<sup>261</sup> *Buffalo v Regina*, 2005 FC 1622; Arthur Ray characterizes this case as "the granddaddy of treaty claims in Canada", as a case that surpassed the length and scope of *Delgamuukw* (see Arthur Ray *supra* note 205 at 66).

<sup>262</sup> The class action suit was appealed to the SCC as *Ermineskin Indian Band v Canada* [2009] 1 SCR 222 [*Ermineskin*], and included Ermineskin and Samson Indian Band and Nation, *et al.*

<sup>263</sup> Ray *supra* note 205 at 71.

According to Ray, the Flanagan and von Gernet submissions in *Buffalo* sought to discredit the validity of oral history. Even before *Benoit*, the Supreme Court of Canada had some misgivings about von Gernet's ability to enlighten the court with his 'expertise'. In *Mitchell v MNR*:

The trial judge preferred the evidence of Dr. Venables and Chief Mitchell where it conflicted with that of Dr. von Gernet. He [the trial judge] properly admitted the testimony of Chief Mitchell relaying the oral history of his people, correctly stating, in accordance with *Van der Peet*, that the weight he accorded "to oral history and to documentary evidence does not depend on the form in which the evidence was presented to the court" (p. 25).<sup>264</sup>

...

This is a significant fact, given the reliance by the trial judge on this evidence in concluding the aboriginal right was established, and in rejecting the testimony of the appellant's expert witness, Dr. von Gernet, to the effect that he had "yet to find a single archeological site anywhere in Ontario dating to the prehistoric, the protohistoric or the early historical period which has in any way ever been associated with the Mohawks" (p. 30).<sup>265</sup>

The Crown's go-to experts, who appear more akin to advocates than educators,<sup>266</sup> were not alone in their vehement objection to recognizing a treaty right to tax exemptions. The Canadian Taxpayers Federation (CTF), represented by Michael Gray, participated as interveners in the Federal Court hearing in *Benoit*. This organization promotes itself as a "citizens advocacy group dedicated to lower taxes, less waste and accountable government".<sup>267</sup> It openly opposes any recognition of treaty rights, and presently has an online petition regarding Federal Aboriginal policy, claiming, among other things:

"Despite billions of dollars in spending, the outcomes have been terrible for both people living on reserves and taxpayers off reserve; who pay most of the bills.... We the undersigned call on you to reject requests for additional funding, to enforce greater oversight, audits and accountability and to look at fundamental changes to the current system (including allowing home ownership, sending money to the people rather than the band council, and abolishing the Indian Act) to ensure the next generation of aboriginal Canadians do not grow up in poverty."<sup>268</sup>

<sup>264</sup> *Mitchell v MNR supra* note 244 at para 48.

<sup>265</sup> *Ibid* at para 46.

<sup>266</sup> See Arthur Ray *supra* note 205, 155ff.

<sup>267</sup> Canadian Taxpayers Federation, "Home", online: <<http://www.taxpayer.com/en/>>.

<sup>268</sup> Petition by the Canadian Taxpayers Federation regarding Federal Aboriginal policy reform, online petition:

It is unclear whose opinions the organization represents, thus the basis of its policy critique was called into question by a journalist, who claimed the organization has only five members, provides no information on its funders, and “pays no taxes on the \$4.7 million in donations it received in 2014-15.”<sup>269</sup> Even so, this apparent lack of credibility has not thwarted the CTF from its rigorous opposition to First Nations’ aspirations to negotiate, or litigate if they must, a fairer taxation regime. In a separate motion, the Federal Court of Appeal rejected the CTF’s application to intervene, but noted its ‘floodgates argument’ in the decision: “In his affidavit, Mr. Gray expresses concern about the “possible impact on government taxation at every level within the territories covered by Treaty 8 and, by “copy-cat” application, the rest of Canada, and its possible adverse effects on the democratic rights and freedoms.”<sup>270</sup> The legally binding nature of the treaties and their constitutional recognition apparently does not form part of the CTF’s vision for a democratic nation.

While the Federal Court adjudicated on the terms of Treaty 8 in *Benoit*, the Federal Court of Appeal saw its task as an adjudicator of facts. It is a basic principle for appellate courts to rely heavily upon the adjudication of evidence by the trial courts yet in *Benoit*, Justice Nadon took issue with, among other things, how the trial judge assessed oral history testimony: “the Trial Judge ought to have had in mind the hearsay nature of the evidence on which he was relying for his conclusion and, specifically, whether that evidence met the reliability test enunciated by the

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<<https://www.taxpayer.com/resource-centre/petitions/petition?tpContentId=2>>, nd.

<sup>269</sup> Dougald Lamont, CBC News, “Opinion: Canadian Taxpayers Federation has 5 members—why should we care what they think?”, 2016, online: <http://www.cbc.ca/news/canada/manitoba/canadian-taxpayer-federation-opinion-lamont-1.3802441>.

<sup>270</sup> *Benoit v Canada*, 2000, CanLII 15857 (FC) [*Benoit v Canada* FC 2000] at para 11.

Supreme Court of Canada in *Mitchell*.<sup>271</sup> In his conclusion, Justice Nadon completely overturned the lower court's findings on its assessment of the evidence, stating:

In my view, the approach suggested by Dr. von Gernet to oral history evidence is undeniably a proper approach ....

I agree with Dr. von Gernet that oral history evidence cannot be accepted, *per se*, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archeologists, social scientists, apply to the various types of evidence which they have to deal with.

...

Since there is nothing in the record which can reasonably support the conclusion reached by the Trial Judge, I am compelled to find that he made a palpable and overriding error. The Trial Judge appears to have failed to consider a sizeable portion of the evidence and to have misapprehended material evidence. Had he not made these errors, he could only have come to the conclusion that the evidence adduced by the respondents was not sufficient to allow him to reach the conclusion that he did.<sup>272</sup>

In the end, Justice Nadon, writing for a unanimous court stated: "Consequently, I conclude that the respondents did not establish that the Aboriginal signatories of Treaty 8 understood that the Treaty Commissioners had made a promise exempting them from taxation at any time for any reason."<sup>273</sup> It is important to note, however, that contrary to the Canada Revenue Agency guidelines, Justice Nadon did not conclude that there was no treaty promise; rather, he concluded that there was "insufficient evidence to support the view that the Aboriginal signatories understood that they would be exempted from taxation at any time and for any reason."<sup>274</sup>

Interestingly, the similarities between *Benoit* and *Ermineskin* (aside from the reliance on certain 'expert' witnesses) included the consideration of the relationship between statute (both considering the *Indian Act*) and the interpretation of a Numbered Treaty. Recall that in *Mitchell v Peguis*, only Chief Justice Dickson's minority opinion rejected the principle of *ejusdem generis*

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<sup>271</sup> *Benoit supra* note 254 at para 100, citing *Mitchell v MNR*.

<sup>272</sup> *Ibid* at paras 112-113, 177.

<sup>273</sup> *Ibid* at para 118.

<sup>274</sup> *Ibid* at para 116.

[of the same type] interpretation of statutes, in favour of applying the *Nowegijick* principles.<sup>275</sup>

The *Ermineskin* decision also considered this rule of interpretation: “As I have indicated, s. 64(1) says that the Minister may direct and authorize the “expenditure” of capital moneys for a number of purposes. Under the rule of *ejusdem generis*, the type of expenditures permitted under s. 64(1)(k) take on meaning from the prior enumerated expenditures in s. 64(1).”<sup>276</sup> In *Benoit*, despite the *Nowegijick* principles being applied at the Federal Court level, they are nowhere to be found in Justice Nadon’s decision, which relied on “general evidentiary principles”.<sup>277</sup>

The large sums of money<sup>278</sup> involved in the *Ermineskin* case—which set the interpretation of the *Indian Act* against the Constitutionally entrenched fiduciary duty of the Crown, again highlighted that the court’s (in)ability to adjudicate over the Crown’s intent and its actions.

Writing on *Ermineskin*, journalist Gordon Laird shares the words of an Elder involved in providing oral history evidence:

Around us hangs a collection of modern First Nations art, something the Samson elder points out with pride. Look, he says with a wave of his hand, this is why Indians mean business—we never stopped being aboriginal, despite everything else. “The Indian Act never expected that Indians would have a huge amount of money,” he jokes. “They didn’t expect us Indians to get into business.”<sup>279</sup>

...

[Laird:] After more than 150 years of assorted Indian Act legislation, nobody actually knows the answers to those questions. The relationship between aboriginals and Canada is still alarmingly fuzzy. Among other things, the Buffalo case will address the complicated legacy of the Act—and today’s increasingly antagonistic relationship between government and Indians. History is being put on trial.<sup>280</sup>

<sup>275</sup> See *Mitchell v Peguis supra* note 24.

<sup>276</sup> *Ermineskin supra* note 87 at para 262.

<sup>277</sup> *Benoit supra* note 254 at paras 108, 112, and 114 (citing *Mitchell v Peguis supra* note 24).

<sup>278</sup> *Ermineskin supra* note 262 at para 19 reads: The amounts of money involved in this case are very large. The bands presented evidence at trial estimating the additional amounts which they argued might have been earned had their royalties been invested rather than earning interest under the Indian moneys formula. Using approximate numbers, these estimates ranged from \$239 million to \$1.53 billion for Samson, and from \$156 million to \$217 million for Ermineskin.

<sup>279</sup> Gordon Laird, “This Land is Whose Land?”, *THIS: Progressive politics, ideas & culture*, 2000, online: <<https://this.org/2000/12/01/this-land-is-whose-land/>> commenting on *Victor Buffalo v The Queen*.

<sup>280</sup> *Ibid.*

What is becoming increasingly obvious in these cases is that the remnants of Aboriginal history, memory, and culture, after 500 years of colonization, are set up against the full force of the Crown, public opinion, and a court that is incapable of operating outside of a system designed to support a colonial legacy.

In his conclusion, Justice Nadon claims that not only is Treaty 8 “silent with respect to a promise exempting the Aboriginal signatories from taxation”,<sup>281</sup> but remarkably reaches even further, claiming: “The previous numbered treaties did not contain any promise of a tax exemption.”<sup>282</sup> Clearly this latter point was not under consideration in *Benoit*, no evidence was presented on the “previous numbered treaties” and the *obiter* should not have formed part of the Federal Court of Appeal decision. Nevertheless, since the *Benoit* decision in 2003, the Canada Revenue Agency took the position that the court has adjudicated on the issue of treaty rights to a tax exemption for Indians. Further, this is clearly incorrect and an affront to the Crown’s honour to uphold the *Nowegijick* principles in treaty and statute interpretation. The question of the relevance of the promises of the Numbered Treaties, both written and unwritten, to understanding of section 87 is still very much a live issue to be settled.

### **The “Commercial Mainstream” (*Brigadoon*<sup>283</sup>) Test**

Before proceeding to the *Tuccaro*<sup>284</sup> decision, which has returned to the question of Treaty 8 tax immunity, several other important cases require discussion. First, the *Bastien* and *Dubé* cases in 2011, contested the premises of the “commercial mainstream” test, introduced by Justice

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<sup>281</sup> *Benoit supra* note 254 at para 116.

<sup>282</sup> *Ibid.*

<sup>283</sup> Like the town of Brigadoon (from the Alan Jay Lerner & Frederick Loewe 1947 musical of the same name) that vanishes, then re-emerges on a predictable schedule out of the fog-adorned hills of Scotland, the notion of the “commercial mainstream” continues to re-appear out of thin air.

<sup>284</sup> *Infra* note 344.

La Forest in *Mitchell v Peguis*, and applied since *Recalma*. The Supreme Court of Canada released *Bastien* and *Dubé* concurrently. Both cases involved interest income on term deposits at a *Caisse populaire* located on-reserve, and both decisions resulted in a 5:2 split, with Justice Cromwell writing for the majority, and Justices Deschamps and Rothstein dissenting. The significance of *Bastien* and *Dubé* is at least three-fold. First, *Bastien* cited *Recalma* with disapproval, specifically on the use of the “commercial mainstream” factor. While this could be interpreted as overturning *Recalma*, in fact the court never completely excluded it as a factor, instead it “effectively changed the weight and importance of one of the traditionally considered factors”.<sup>285</sup> Moreover, *Bastien* never fully repudiated the idea that business involvement in a commercial sense is mutually exclusive to the notion of an Indian *qua* Indian—only that such a focus can go “too far”:

The reference to rights of an “Indian *qua* Indian” in *Mitchell*, which was repeated in *Williams*, and the linking of the tax exemption to the traditional way of life have been criticized....However, I do not read either judgment as departing from a focus on the location of the property in question when applying the tax exemption.... A purposive interpretation goes too far if it substitutes for the inquiry into the location of the property mandated by the statute an assessment of what does or does not constitute an “Indian” way of life on a reserve. I do not read *Mitchell* or *Williams* as mandating that approach.<sup>286</sup>

...

In my respectful view, the *Recalma* line of cases has sometimes wrongly elevated the “commercial mainstream” consideration to one of determinant weight. More precisely, several decisions have looked to whether the debtor’s economic activity was in the

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<sup>285</sup> See for example *Dickie v The Queen*, 2012 TCC 327, wherein it states at para 11: “With respect to the Respondent, the appeal was one of the first aboriginal business income cases to be heard following the decisions of *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710, and *Dubé v. Canada*, 2011 SCC 39, [2011] 2 S.C.R. 764, which effectively changed the weight and importance of one of the traditionally considered factors to be considered in the “connecting factors” test; namely, the commerciality of the business thus creating a new dynamic in the application of the connecting factors test. In fact, a strong case can be made to argue that the only other post *Bastien Estate* and *Dubé* cases brought before the Courts dealt with fishing and small scale logging activities. The nature of the Appellant’s business in this case involved a larger business that clearly competed with non- aboriginal businesses in what has been traditionally considered in the commercial mainstream; a case of head to head competition between an aboriginal business and non–aboriginal competitors. In my view, the case has a significant impact on the interpretation of the *Bastien Estate* and *Dubé* decisions of the Supreme Court of Canada. While the name of the applicable “connecting factors” test did not change, the weight and importance of the commercial mainstream factor was significantly reduced and in fact almost obliterated in determining the issue of residence on the reserve.”

<sup>286</sup> *Bastien supra* note 41 at paras 27.

commercial mainstream even though the investment income payable to the Indian taxpayer was not. This consideration must be applied with care lest it significantly undermine the exemption.<sup>287</sup>

Second, *Bastien* (and *Dubé*) demonstrate the fickle nature of identifying and weighing the factors that are considered relevant by the court. The majority opinion in both *Bastien* and *Dubé*, provided by Justice Cromwell, noted the clear connecting factors. In *Bastien*, the late Rolland Bastien was a status Indian who was born and died on reserve, his wife and children (who presumably inherited his estate) also resided on reserve. Until the time he sold his on-reserve business to his children, Bastien manufactured moccasins. Bastien invested some of the proceeds of his business (and sale of the business) in term deposits at the *Caisse populaire* located on-reserve. Applying the *Williams* connecting factors test, which Justice Cromwell suggested, “are potentially relevant here”,<sup>288</sup> the location of the debtor (the *Caisse populaire*) is on-reserve, and for various reasons, this factor is deemed to have the most significant weight. Other potential factors served to reinforce situating the income on reserve, including location of Bastien’s residence, and the source of the capital, being the moccasin manufacturing business founded by his great-grandfather. Nevertheless, both the Tax Court of Canada and the Federal Court of Appeal upheld the Canada Revenue Agency assessment, which denied the applicability of section 87 on Bastien’s (and Dubé’s) interest income.

The facts in *Dubé* are very similar, except that Dubé resided on a reserve only part time, and according to the Tax Court of Canada, the source of the capital could not be identified definitively as having originated on-reserve. Justice Cromwell (in *Dubé*) also notes a third difference: “the trial judge found that Mr. Dubé had not spent his interest income on a

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<sup>287</sup> *Ibid* para 52 (emphasis added).

<sup>288</sup> *Ibid* at para 43.

reserve.”<sup>289</sup> Drawing attention to where Dubé spent his income is alarming, first because of its sheer irrelevance, and second, because this factor seems to appear out of nowhere. (Justice Cromwell discounted this factor in *Dubé*). Perhaps the court is suggesting that all of the income of an Indian *qua* Indian should—although reality precludes the possibility—be spent on-reserve.

The dissenting opinion in both *Bastien* and *Dubé* came from Justice Deschamps, with Justice Rothstein concurring. Although Justice Deschamps would have upheld the Canada Revenue Agency assessment and the decisions of the lower courts (that the interest income was not tax exempt under section 87), the dissent raises several interesting points. In what appears to be an attempt to provide a historical and purposive analysis, an incomprehensible—and highly biased—opinion is provided. For example, Justice Deschamps points out that the tax provision predates Confederation, but characterizes it as provided by means of a “Crown promise”. Britain, having no authority to tax another nation would not need to make such a concession, since neither British nor international law would have permitted taxation, particularly in its present forms. Citing expert witness Dr Kenneth Norrie, the Federal Court in *Benoit* noted:

[106] Dr. Norrie provided information as to which taxes were in existence in Canada in 1899. He concludes that [t]axation was still in an early stage of development in Canada at the end of the 19th century ... Provinces and municipalities were becoming more active tax collectors at this time, as citizens turned to them for public sector services. The number and mix of taxes varied, however, as provincial and municipal governments experimented with ways to meet their burgeoning revenue needs (Norrie, 6).

Provincial and municipal taxes only accounted for 2.7% of total taxes paid in 1896 and 5.6% in 1913 (Norrie, 3) but these taxes included licences, succession duties, real property taxes, business taxes, and poll taxes (Norrie, 4-6). Personal income taxes were not generally in place at this time (Norrie, 5), although municipalities in Saskatchewan and Alberta were permitted to rely on them as of 1883 (Norrie, 6).<sup>290</sup>

[108] In the *Indian Act*, the first tax exemption for Aboriginal People appeared in the 1850 legislation (Transcript, 11 July 2001, 3168). At the time of treaty negotiations, a tax exemption was in place as a result of the 1876 *Indian Act*. According to Dr. Beaulieu's

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<sup>289</sup> *Dubé supra* note 42 at para 7.

<sup>290</sup> *Benoit v Canada* FC 2000 *supra* note 270 at para 106.

testimony, "The provisions in the 1876 *Indian Act* applied to all of Indians in Canada ... tax exemption applied to Indians living on the reserves" (Transcript, 11 July 2001, 3183). Furthermore, the law did not distinguish between status, treaty, and non-status Indians: "The law is meant to apply to all Indians in Canada" (Transcript, 11 July 2001, 3184). However, "one constant conclusion is that there was a link between tax exemptions and reservations" (Transcript, 11 July 2001, 3194).<sup>291</sup>

Justice Deschamps states: "Before Confederation, the Crown promised not to tax lands and personal property of Indians situated on reserves."<sup>292</sup> In 1867, as is the case today, Indians do not hold land in fee simple and are not subject to property taxes by that reason, not due to a Crown concession. Second, personal income taxes were not introduced until 1917. The "purpose" of the present *Indian Act* exemption is therefore not to be found in such a reading of history, however, the notion of a Crown "promise" is highly suggestive of a treaty relationship.

Next, Justice Deschamps focused her criticism on the application of the *Williams* connecting factors test. *Bastien* and *Dubé* both concern interest income, and being intangible property, Justice Deschamps claims that to attribute a location to the interest income "is a pure legal fiction".<sup>293</sup> She also wrongly credits the statute as requiring this complex determination of *situs*, as it is the court alone that created and now applies this test. She is correct in claiming, nevertheless, that the difficulty in developing a test to fit all circumstances is great. However, her view was that *Bastien* and *Dubé* "involve facts that are so different that they highlight how risky it would be to adopt a test that focuses on formal factors and under which the circumstances of the liability for tax or the eligibility for the exemption are not taken into account,"<sup>294</sup> and calls the application of the connecting factors test "artificial" and out of context.<sup>295</sup> The cases were, in fact, heard together because of their similarities. The majority decision appeared to simplify the

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<sup>291</sup> *Ibid* at para 108.

<sup>292</sup> *Bastien supra* note 41 at para 66.

<sup>293</sup> *Ibid* at para 67.

<sup>294</sup> *Ibid* at para 67.

<sup>295</sup> *Ibid* at para 67.

test, to which Justice Deschamps was in agreement, but she rejected how it was simplified: “In sum, I cannot agree with Cromwell J.’s analysis for several reasons....In short, the factors he chooses to apply are in reality but one, the debtor’s place of residence, and his analysis is inconsistent with the historical purpose of the exemption.”<sup>296</sup> I will turn to this “purpose” argument momentarily.

Despite the harsh criticism for the *Williams* connecting factor test, Justice Deschamps offers no constructive alternative, except to call for the development of a test “to identify concrete and discernable connections with the reserve. In the appeal of Mr. Bastien’s estate, all the connecting factors favour granting the exemption. In Mr. Dubé’s appeal, on the other hand, the connection results from a legal fiction that has no basis in solid evidence.”<sup>297</sup> Similarly in *Dubé*, Justice Deschamps repeats her call for a test that would require “concrete connections”,<sup>298</sup> but then states that the “creditor’s place of residence might be of some relevance, but it cannot be determinative, since this factor ceased to be a condition of eligibility for the exemption more than a century ago.”<sup>299</sup> The bricks and mortar location of the *Caisse populaire* (which in both cases was located on reserve) was clearly not what Justice Deschamps was suggesting by “concrete connections”, but it is not clear how she would define such factors.

Justice Deschamps then points to the *Income Tax Act*, to suggest its treatment of interest income be incorporated into the *Williams* test: “Under the provision governing the tax treatment of interest income, the taxpayer must include any accrued interest in his or her income, even if it has not been paid.... For this reason, the place of payment should be given little weight.”<sup>300</sup>

Finally, if only to further confound the connecting factors test, Justice Deschamps notes that

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<sup>296</sup> *Ibid* at para 109.

<sup>297</sup> *Ibid* at para 110.

<sup>298</sup> *Dubé supra* note 42 at para 35.

<sup>299</sup> *Ibid* at para 37.

<sup>300</sup> *Ibid* referencing: *Income Tax Act* at s 12(4).

“any significance of the place of payment is further reduced by the fact that the taxpayer can have access to his or her money without going to the reserve.”<sup>301</sup> Given that more than 50 percent of status-Indians live off reserve,<sup>302</sup> and that many reserves are remote and difficult to access, and further that travel may be expensive or dangerous in certain seasons, this comment is both very alarming and seriously out of touch with the modern Indian.

The language chosen by Justice Deschamps is also curiously lax, and begs the question as to how the court is attempting to give meaning to the “purpose” of the *Indian Act* provisions. In paragraph 69 of *Bastien*, she refers to the “scope of protection from taxation afforded to Aboriginal people”.<sup>303</sup> As discussed above, legislation that predated the *Indian Act* did not differentiate between treaty, status, and non-status Indians, but it certainly did not apply to all Aboriginal people. She points to the fact that the protection from taxation “varied over time...[and] was altered by the *Indian Act, 1876*, ... which provided that the exemption would from then on apply to personal and real property belonging to Indians, but it no longer required that the Indians themselves reside on a reserve. This important aspect was provided for once again in 1951”,<sup>304</sup> when major revisions were made. (There is also a hint here that the court recognizes that reserves were expected to be temporary measures.) She stated this “exceptional protection from taxation was linked to the Crown’s fiduciary duty to protect the lands of Aboriginal peoples after the latter had renounced the use of force against non-Aboriginal people.” Again using the term “Aboriginal”, she perhaps was mindful that this was a time when Indian Residential Schools were ravaging yet another generation of Indian, Inuit, and Métis

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<sup>301</sup> *Ibid* at para 35.

<sup>302</sup> Statistics Canada, “Aboriginal Peoples in Canada: First Nations People, Métis and Inuit”, (2016), online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>>, at 11. Based on the National Household Survey, 2011, Statistics Canada reported: “Of the 637,660 First Nations people who reported being Registered Indians, nearly one-half (49.3%) lived on an Indian reserve or Indian settlement.” An additional 213,900 First Nations peoples are “not Registered Indians” (at 4).

<sup>303</sup> *Bastien supra* note 41 at para 69.

<sup>304</sup> *Ibid*.

children. Moreover, the livelihoods of those who survived were soon lost to trauma, and the daily activities of those who retained a traditional way of life were severely restricted, particularly due to the Pass System. The government responded, Justice Deschamps suggested, with a tax concession in exchange for the cessation of Indian aggression. Can this perspective seriously support a claim that the changes in the *Indian Act* since its implementation in 1876, and the actions of the government that followed, was an exercise of the Crown acting in the capacity of a fiduciary? In the end, Justice Deschamps resigns herself, perhaps with hands flung high into the air, to proclaim:

In light of the findings of fact of the Tax Court of Canada judge, it is impossible to identify a sufficient concrete connection with the reserve in this appeal. . . . No reason was given for entering into the contract [that is, a justification for Mr Dubé’s choice to deposit his funds at the financial institution that would maximize his returns] on the reserve that would enable the Court to hold that this fact furthers the purpose of the exemption.<sup>305</sup>

To grant the exemption in such circumstances would be tantamount to turning the reserve into a tax haven for Indians engaged in unspecified for-profit activities off the reserve.<sup>306</sup>

Despite the fact that the very purpose of the tax exemption is to shield Indians—not Aboriginal peoples, from taxation, Justice Deschamps decries it as a “tax haven” for off-reserve activities.

### **Treaty to Reserve to Tax Exemption...Short Steps**

This final comment by Justice Deschamps, leads to my third point of interest in the *Bastien* and *Dubé* decisions, namely how the court has explained, or more accurately has failed to articulate, a coherent rationale for the “purpose” of section 87 (and ss88-90). Since *Mitchell v Peguis* the court has relied almost exclusively on Justice La Forest’s analysis, and *Bastien* and *Dubé* was no exception. Justice Cromwell, writing for the majority (with no dissent on this point), cites with approval Justice La Forest, who:

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<sup>305</sup> *Dubé supra* note 42 at para 39 (emphasis added).

<sup>306</sup> *Ibid* at para 40 (emphasis added).

...summed up his discussion of the purpose of the provisions by noting that since the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, “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”. He added an important qualification: the purpose of the exemptions is to preserve property reserved for their use, “not to remedy the *economically* disadvantaged position of Indians by ensuring that [they could] acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens”: p. 131. As La Forest J. put it:

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. [Emphasis added; p. 133.]<sup>307</sup>

The court’s focus on situating intangible property on physical parcels of land, that is reserves, where the provisions are said to apply exclusively, cannot be divorced from reserves having a direct connection to the Numbered Treaties. Justice Cromwell deliberately emphasised that Justice La Forest drew particular attention to the necessity of “the protections of ss. 87 and 89 will always [only] apply to property situated on a reserve.”<sup>308</sup> The modern experience of life on a reserve is a stark contrast to what they were originally intended for, simply the preservation of a “reserved” space for Indians, wherein Euro-Canadian settlers could not encroach. Consistent with this purpose, the current *Indian Act* retains the power to punish trespass, with a fine or up to one month in prison, demonstrating this exclusivity.<sup>309</sup> Until amendments were made in 2014, these same provisions, at sections 32 and 33, also prohibited all on-reserve financial transactions with a non-band member, without the express permission of The Minister.<sup>310</sup> In light of the government’s use of the *Indian Act* to restrict movement of Indians wanting to leave reserves to

<sup>307</sup> *Bastien supra* note 41 at para 21.

<sup>308</sup> *Ibid* at para 22 (emphasis added by Cromwell, J).

<sup>309</sup> *Indian Act* ss 30-31 *supra* note 3.

<sup>310</sup> *Ibid* ss 32 was in force until 15 December, 2014, and read: Sale or barter of produce:

“(1) A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing. Exemption (2) The Minister may at any time by order exempt a band and the members thereof or any member thereof from the operation of this section, and may revoke any such order.”

hunt, fish and particularly to engage in economic activity, the connection between the taxation provisions and the physical reserve land bears further comment.

Justice Deschamps, citing Richard Bartlett, noted the circumstances surrounding the negotiations of Treaty 8, which were undertaken after the enactment of the *Indian Act*:

...“it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds”....This undertaking by the Crown was also repeated in certain treaties under which Aboriginal peoples surrendered lands: “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”.<sup>311</sup>

In making reference to the *Royal Proclamation of 1763*<sup>312</sup> and “certain treaties”, the court admits, but fails to acknowledge, that it is the sacred treaty agreements, which are *sui generis* in nature, that set Indians apart. The reserves that resulted from the Numbered Treaties as specific *per capita* land allotments (and thereafter as a recognition of the unique place of Indians in the Canadian federation) represent a term in each treaty that set aside land for the exclusive use and enjoyment of Indians. The fact that the Crown has repeatedly failed to honour this and other terms in most, if not all, of its treaties, does not detract from the fact that reserve land does not set Indians apart, treaties do. Justice Cromwell similarly commented: “The exemption was rooted in the promises made to Indians that they would not be interfered with in their mode of life”.<sup>313</sup> These “promises” are those contained in the Treaties, not the *Indian Act*, and point to a much greater “purpose” than mere “protection” of assets. The fastidious focus of the court on locating property (intangible or otherwise) on reserves, while relating directly to the language in the

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<sup>311</sup> *Ibid* at para 70, from: *Treaty No. 8* (1899), as quoted in RH Bartlett, “The Indian Act of Canada” (1977-1978), 27 *Buff L Rev* 581, at 613.

<sup>312</sup> *Royal Proclamation* (1763), *supra* note 109.

<sup>313</sup> *Bastien supra* note 41 at para 28, citing RH Bartlett, “The Indian Act of Canada” (1977-1978), 27 *Buff L Rev* 581, at 612-13.

*Indian Act*, also serves to connect the taxation provision to treaty terms. Citing Justice La Forest in *Mitchell*, Justice Deschamps states:

...“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” ....

The purpose of the s. 87 exemption was to “preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize”. It “was not to confer a general economic benefit upon the Indians”.<sup>314</sup>

The treaty relationship, as the public is often reminded in the “We are All Treaty People”<sup>315</sup> slogans, is not one confined to reserves or the Indians who live or work on reserves. Indian (and indeed Aboriginal) identity extends much further than the boundaries of Indian reserves.

Sadly, the courts may still be a very long way from recognizing that an Indian can continue to be an “Indian *qua* Indian”, without a direct physical connection to any reserve. The court has failed to appreciate that it is the treaties, not the *Indian Act*, that define the relationship between the Crown and the respective Aboriginal nations. This failure has led to a contrived “ambiguity” that has proven very difficult to resolve, particularly in a modern economy:

“As Professor Sullivan has wisely observed, even when the broad purposes of legislation are clear, “it does not follow that the unqualified pursuit of those purposes will give effect to the legislature’s intention”...A purposive analysis must inform the court’s approach to weighing the connecting factors. But it must be acknowledged that there may not always be a complete correspondence between the meaning of the text and its broad, underlying purpose”.<sup>316</sup>

In other words, there remains a great deal of *prima facie* ambiguity in identifying and weighing potential connecting factors that goes unacknowledged by the court, thus, the application of the provisions amounts to guesswork. The virtual exclusion of the *Nowegijick* principles in ascertaining the “purpose” of obviously “ambiguous” statutes, further impedes the court’s ability

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<sup>314</sup> *Ibid* at para 71.

<sup>315</sup> See for example, Treaty Relations Commission of Manitoba, “We Are All Treaty People”, 2017, online: <<http://www.trem.ca/public-education/workshops/we-are-all-treaty-people/>>.

<sup>316</sup> *Bastien supra* note 41 at para 25, citing R Sullivan, *Sullivan on the Construction of Statutes* (5th ed 2008), at 297.

to articulate a clear application of the tax provisions. Having muddied the waters in *Mitchell v Peguis* through the importation of a new criterion, that is that eligible income is only that which is earned (and possibly spent) by an “Indian *qua* Indian”, the connecting factors test was not clarified; in fact, the Indian *qua* Indian criterion only served to add an additional layer of confusion. As the result of *Bastien* and *Dubé*, the “commercial mainstream” factor is significantly diminished. However, the criterion of a distinctive to culture test remains:

However, a purposive interpretation of the exemption does not require that the evolution of that way of life should be impeded. Rather, the comments in both *Mitchell* and *Williams* in relation to the protection of property which Indians hold *qua* Indians should be read in relation to the need to establish a connection between the property and the reserve such that it may be said that the property is situated there for the purposes of the *Indian Act*.<sup>317</sup>

Given the anticipated longevity of the Numbered Treaties,<sup>318</sup> and that the Crown finally constitutionally recognized treaties in 1982, one might expect the court to accord greater importance and more solemnity to the treaties. Instead, the connecting factors test, however flawed, is revered as having greater utility, but according to Justice Deschamps, “regarding the application of the connecting factors proposed in *Williams*, I do not agree that 20 years of experience drawn from decisions of Canadian courts should be swept aside.”<sup>319</sup> Justice Deschamps makes no direct reference to the treaty relationship between the Crown and Indians, which would go a long way to allay the confusion over the “purpose of section 87”.

### **From Omission to Admission - *Robertson***

The court has continued to struggle to articulate this elusive “purpose” of the tax provisions of sections 87 through 90, and recently, has been quite forthright about its

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<sup>317</sup> *Ibid* at para 28.

<sup>318</sup> From the perspective of Aboriginal peoples and their understandings of treaties, the relationship formed in treating endures “for as long as the sun shines, the grass grows, and rivers flow”, an expression of longevity.

<sup>319</sup> *Bastien supra* note 41 at para 105.

conundrum. Adding to what appears to be a more enlightened judicial environment, the Federal Court of Appeal released its *Robertson* (and its companion case *Ballantyne v The Queen*<sup>320</sup>) decision in 2012. In addressing the “purpose of section 87”, the Federal Court of Appeal in *Robertson* stated: “It is easier to say what the purpose of section 87 is not, than to state positively what it is. Thus, it is well settled that its purpose is not to “confer a general economic benefit upon the Indians”....Nor is it limited to “the preservation of the traditional Indian way of life”.”<sup>321</sup> In 2012, 136 years after the enactment of *Indian Act* tax provisions (and as Justice Deschamps in *Bastien* pointed out, the provisions are essentially the same now as in 1876), the court was still unable to articulate the “purpose” of the provisions. Although *Robertson* and *Ballantyne* presented seemingly recognizable connecting factors, Canada Revenue Agency assessed income tax owing on their self-employment income, making *Robertson* the first Federal Court of Appeal case considering section 87, since *Bastien* and *Dubé*.

The material facts of *Ballantyne* were very similar to those in *Robertson*, thus the two decisions were released together. *Robertson* involved the fishing revenue of Ronald Robertson and Roger Saunders, both members of Norway House Cree First Nation, and as noted in the decision, from a community “which in 1875 became signatory to Treaty No. 5.”<sup>322</sup> While Robertson lived on the reserve all his life, Saunders lived off-reserve. Both men were self-employed and members of a fish marketing co-op. The decision further detailed the lakes in which they fished, their day-to-day activities while working, locations of packing stations, where they stored their fishing equipment, locations of business records, information about the management of the co-op, and the role of the co-op in the community, among other things. Justice Hershfield of the Tax Court of Canada upheld the appeal of both Robertson and

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<sup>320</sup> 2012 FCA 95 [*Ballantyne*].

<sup>321</sup> *Robertson supra* note 8 at para 45, in-text references to *Bastien* and *Williams* removed (emphasis added).

<sup>322</sup> *Ibid* at para 7.

Saunders, and relied on *Nowegijick* to resolve the ambiguity in weighing the connecting factors.<sup>323</sup>

Ron Ballantyne resided on the Grand Rapids Reserve in Manitoba, also in Treaty 5 territory. He was also assessed by the Canada Revenue Agency for taxes owed on his fishing income, however in his case, Justice Webb of the Tax Court of Canada upheld the assessment.<sup>324</sup> Except for five “seemingly small”<sup>325</sup> differences, the Federal Court of Appeal found that the facts in *Ballantyne* were very similar to both Robertson and Saunders’ situations. That these factually similar cases even came to the Federal Court of Appeal, the Tax Court having dismissed one appeal but not the other, attests to the court’s confusion in applying the connecting factors test. In fairness, *Bastien* had not been decided before these cases came before the Tax Court of Canada; nevertheless Justice Evans notes: “I would note two aspects of his analysis that, in light of *Bastien* and this Court’s decision in *Robertson*, appear, with respect, to have led [the TCC judge] astray.”<sup>326</sup>

Importantly, Justice Evans was careful to point out that the decision of the lower court in *Robertson* “may be inconsistent with this jurisprudence in one or two respects, particularly in the weight he attached to the fact that commercial fishing had long been integral to the life of the Reserve”.<sup>327</sup> However, he noted that the lower court correctly “rejected (at para. 119) the stark dichotomy between income that arises from an activity in the “commercial mainstream” (and is therefore not situated on a reserve), and income from an activity that is integral to life on a reserve and is held by the Indian *qua* Indian (and is therefore situated on a reserve).”<sup>328</sup> It is

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<sup>323</sup> *Robertson v The Queen*, 2010 TCC 552 at 163 [*Robertson* TCC].

<sup>324</sup> *Ballantyne v The Queen*, 2009 TCC 325.

<sup>325</sup> *Ibid* at para 18.

<sup>326</sup> *Ballantyne supra* note 320 at para 10.

<sup>327</sup> *Robertson supra* note 8 at para 4.

<sup>328</sup> *Ibid* at para 29.

nonetheless worth looking at the lower courts' decisions, and noting the continued importance of the cultural factors. The Tax Court of Canada in *Robertson*, without reference to the “commercial mainstream”, cited the Federal Court of Appeal decision in *Clarke*<sup>329</sup>:

...a situs test under section 87 is rendered arbitrary without sufficient and meaningful consideration of the traditional way of life as it pertains to the entitlements of Indian qua Indian. At paragraph 12 Justice Linden stated:

12 ... Unless the purpose of the legislative provision which imposes the situs requirement drives the selection of the criteria used to determine the situs of the property, there is simply no principled basis for selecting one criterion over another. The analysis must therefore begin by examining Parliament's intention in enacting section 87 of the Indian Act.

Justice Pelletier, who concurred in *Robertson*, picked up on this perspective, but for different reasons:

In my view, there is a much more direct route to the same conclusion and it is this. While the objective of s. 87 of the Indian Act R.S.C. 1985 c. I-5 is far from clear, one can say that it must have been intended to protect or enhance Indians' economic interest in their reserve....

In my view, the connection to the reserve required by s. 87 and the jurisprudence which it has spawned is supplied by the relationship between the business activity and the location and attributes of the reserve. In this case, the appellants are engaged in a business activity that is indigenous to their remote northern reserve. The application of s.87 should not be divorced from the reality of Indian reserve life. The inquiry required by s. 87 should focus on the business opportunities available to these appellants, living where they live, exercising the skills they have. If s. 87 is intended to protect, in some undefined way, the economic patrimony of Indians in relation to their reserves, I can think of no circumstances in which its application would be more appropriate than it is in this case.<sup>330</sup>

The connection between employment that is “indigenous”—that is performed by an Indian *qua* Indian—and the *Indian Act* provisions appears to be inescapable. This resulted in part because *Robertson* appealed the Canada Revenue Agency assessment by virtue of section 87, “and or the provisions of Treaty Number 5”,<sup>331</sup> and as a constitutionally protected Aboriginal right. The

<sup>329</sup> *Clarke v The Minister of National Revenue*, (1997), 148 DLR (4th) 314, (sub nom Canada v. Folster), [1997] 3 CTC 157 (FCA).

<sup>330</sup> *Robertson supra* note 8 at paras 91-92 (emphasis added).

<sup>331</sup> *Robertson TCC supra* note 323 at para 3.

impact of the Manitoba Natural Resource Transfer Agreement (NRTA)<sup>332</sup> on potential rights further complicated Robertson's case. Although extensive expert evidence was provided to support Robertson's Treaty and/or Aboriginal rights argument, and the Tax Court "noted the importance of the historical evidence in [his] analysis of the application of the section 87 exemption",<sup>333</sup> it made no specific ruling, except on the application of section 87. Justice Hershfield, added in obiter:

I am sympathetic to the argument urged on me by the Appellants. The authorities, however, are less sympathetic. Further, even if I were to accept that there is room in these Appeals to conclude that there was sufficient evidence to allow a finding that the activity in question was part of a tradition that was integral to the distinctive pre-contract culture of the Norway House Cree, there is the issue of continuity. Also, precious little has been said as to why I should accept taxation as constituting an unjustified infringement of such protected right if it existed [*sic*]. In any event, it is not necessary for me make a finding as to the application of section 35.<sup>334</sup>

The complex legal intersection of *The Indian Act*, the Treaties, the NRTAs, and the constitutional protection of treaty and Aboriginal rights, as seen in *Robertson*, is vast.

One final observation from *Robertson* is relevant to the question of determining *situs* of property. One connecting factor considered by the Federal Court of Appeal related not to the type of intangible property (income) in question, but rather to the type of reserve land that was involved. While Treaty 5 made certain assurances to the Cree and Ojibwe of Manitoba, and notwithstanding that the Crown has flagrantly breached many of its treaties with First Nations, prior to 1982, the Crown also reserved for itself the right to unilaterally alter treaty terms. After losing significant portions of their reserve land to hydroelectric development and deliberate

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<sup>332</sup> *Natural Resource Transfer Agreement* (being Schedule 1 to the *Constitution Act* 1930, (UK) 20-21 Geo V, c 26, reprinted in RSC 1985, App II, No 26. For a discussion of the impact of the NRTAs on Aboriginal rights, see also D'Arcy Vermette, "Colonialism and the suppression of Aboriginal Voice", 40:2 *Ottawa L Rev* 225 at 247ff.

<sup>333</sup> *Ibid* at para 155.

<sup>334</sup> *Ibid* at para 154.

flooding, a settlement was reached in 1977 to compensate Norway House First Nation for its loss.

Areas designated as TLE [Treaty Land Entitlement] Lands totaled 106,434 acres and were...areas considered to be within the communities' traditional territory...[and] uncontradicted testimony was to the effect that the land selections were made with the purpose of fulfilling economic, social and community development needs and were selected on the basis that they were lands of historical significance to the Norway House Cree Nation, including lands traditionally used for fishing.<sup>335</sup>

The Federal Court of Appeal additionally noted, “the First Nation sought and received compensation, and pressed for the settlement of land claims. As a result, new reserve lands were promised and the Norway House Resource Management Area (RMA) was recognized.”<sup>336</sup> The court determined that the *situs* of certain connecting factors was the RMA, and not technically on the reserve: “The First Nation has had a long association with the land in the RMA. The Reserve itself is within the boundaries of the RMA, but the rest of the RMA land is not, and has never been, part of the Reserve. The Judge found that while the Appellants’ fishing activities occurred within the RMA, they were not on the Reserve.”<sup>337</sup> Nor are bodies of water, regardless of the proximity to reserves, considered part of reserves. The Tax Court of Canada commented: “Keeping in mind, as well, that the use of the boats and nets is off-reserve only because that is the only place they could be used, being where the fish were”,<sup>338</sup> and the Federal Court of Appeal concurred: “On the other hand, they catch their fish in lakes that are not part of the Reserve.”<sup>339</sup> Given that fishing is one of the very few economic activities currently recognized by the court as a protected Aboriginal right, relegating its practice to a *situs* that can never be located on a reserve certainly has the potential to limit the application of section 87. It would

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<sup>335</sup> *Ibid* at para 46 (footnote removed).

<sup>336</sup> *Robertson supra* note 8 at para 24, emphasis added. The designation of ‘reserve’ lands involves a different process than the TLE, and is a discretionary Crown power.

<sup>337</sup> *Ibid* at para 25.

<sup>338</sup> *Robertson TCC supra* note 323 at para 152.

<sup>339</sup> *Robertson supra* note 8 at para 66.

seem that after so much consideration of income tax law, property law, corporate or business law, the “private law of agency”,<sup>340</sup> and contract law, all of which were considered in *Robertson* at least tangentially,<sup>341</sup> that the “more direct route”, as Justice Pelletier suggested, to articulating the “purpose” of section 87 and related provisions, is to simply acknowledge the connection to treaty promises. To repeat, it is the treaties that have set Indians apart from other Aboriginal peoples, and which reflected their unique—indeed *sui generis*—relationship with their land, with the Crown, and with one another.<sup>342</sup> The very existence of treaties between the Crown and certain First Nations peoples is what now sets signatory nations apart from other First Nations peoples. While modern treaties have created new legal relationships, for example between the Crown and the Nisga’a, or the creation of Nunavut as a modern (treaty) agreement, the legal relationship formed through historic treaties is unique-*sui generis*. Those nations with historic treaties are not differentiated on the basis of culture, but rather having a unique constitutional status recognized by the Crown in Canada.<sup>343</sup>

### ***Tuccaro – Return to Treaty Rights***

This brings me back to *Tuccaro v Canada*,<sup>344</sup> which to date is the most recent assertion of a treaty right to tax immunity. Beginning in December 2012, David Tuccaro filed a Notice of Appeal with the Tax Court of Canada, claiming a treaty right to tax exemption. The Crown responded with a motion to strike out certain portions of Tuccaro’s pleadings, including

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<sup>340</sup> *Ibid* at para 75.

<sup>341</sup> See *Robertson supra* note 8 at paras 36, 67, 75, and 79.

<sup>342</sup> While Treaty 11, was revised through a modern (comprehensive) land claim in 1976, to now include Métis of the NWT, none of the Numbered Treaties explicitly included Métis as signatories. References to “Half-breeds” in the Treaties do not recognize the distinct identity of the Métis, although the court in *Daniels* 2016 SCC 12 (at para 46) appears to now conflate the terms “Métis” and “non-status Indians”.

<sup>343</sup> To repeat, although the question of who is an “Indian” is an important one, and it clearly impacts to whom the *Indian Act* provisions are applied, a more fulsome discussion is outside of the scope of this paper.

<sup>344</sup> 2016 FCA 259 [*Tuccaro*].

paragraphs that specifically related to Treaty 8, and “the background, negotiations, history, conclusion and effect of Treaty 8 and subsequent interpretation and actions regarding same”.<sup>345</sup> It was the Crown’s position that the matter was *res judicata*, citing *Benoit and Dumont*<sup>346</sup> as having settled the matter. In a hearing in September 2013, the Tax Court agreed with the Crown, striking large sections of Tuccaro’s draft Appeal: “Given the unambiguous finding of the Federal Court of Appeal regarding Treaty 8, it is plain and obvious there is presently no chance of success on that basis for a legal claim of exemption from tax.”<sup>347</sup> (The court is implicitly justifying its rejection of a “large and liberal” interpretation in this comment, as the *Nowegijick* principles are only invoked where the court can identify interpretive ambiguities.) The Crown further objected to paragraphs that connected the Canada Revenue Agency guidelines with the Honour of the Crown, regarding which the Tax Court held:

In reply to the motion to strike these provisions, the Appellant stated this matter is not a standard case. The Appellant stated that while the Guidelines do not legally bind the Minister to the assessment, they are nonetheless a relevant consideration buttressed by the Honour of the Crown arguments because factually the Crown publishes these Guidelines and related forms exclusively for use by native taxpayers applying for exemption. It was argued by the Appellant [Tuccaro] that recent case law suggests that the Honour of the Crown argument has a higher and possibly more notable meaning by virtue of the historical trust role played by the federal Crown in native matters.<sup>348</sup>

Both parties appealed the order, and in July 2014, the Federal Court of Appeal issued its decision, to allow the appeal of Tuccaro, and dismiss the Crown’s cross-appeal. In its reasons, the court provided a highly technical explanation of *res judicata*, and differentiated it from the

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<sup>345</sup> *Tuccaro v The Queen*, 2013 TCC 300 (CanLII) at para 17 [*Tuccaro* TCC 2013]. The impugned paragraphs included 14 through 32, inclusive.

<sup>346</sup> *Dumont v The Queen*, 2005 TCC 790; *Dumont v The Queen*, 2008 FCA 32 [*Dumont*].

<sup>347</sup> *Tuccaro* TCC 2013 *supra* note 345 (emphasis added).

<sup>348</sup> *Ibid* at para 12, citing *Manitoba Métis Federation Inc. v Canada*, 2013 SCC 14, [2013] SCJ No. 14 (QL), at paragraph 90 and *Mohawks of the Bay of Quinte v Canada*, 2013 FC 669, [2013] FCJ No. 741 (QL), at para 48.

principles of *per rem judicatam*—“issue estoppel” and the doctrine of *stare decisis*.<sup>349</sup> To further clarify, the Federal Court of Appeal held:

It was an error of law for the Tax Court Judge to rely on the “established law regarding the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories” in striking the paragraphs of Mr. Tuccaro’s Notice of Appeal related to Treaty 8. There is no law decided in the *Benoit* case - only the question of fact of whether the Aboriginal signatories to this treaty had understood that a promise of tax exemption had been made by the commissioners who negotiated the Treaty on behalf of the Crown. The failure to identify and address all of the required elements of issue estoppel – which is a species of *res judicata* that was initially identified as the basis for the motion to strike the paragraphs related to Treaty 8 – was also an error of law.<sup>350</sup>

This decision also noted a secondary issue that remains outstanding from the *Benoit* decision, being “the factual finding of whether “the Aboriginal signatories understood that they would be exempted from taxation at any time for any reason” and, after a detailed review of the record, concluded that there was “insufficient evidence to support” this view (paragraph 116).<sup>351</sup> The question of *non est factum*—literally “not my deed”, suggests that the written treaty contains terms that are fundamentally different in character than what was contemplated by at least one party, the answer to which could have paradigm shifting potential for treaty rights litigation, including taxation.

The matter returned to the Tax Court of Canada, before Justice Hershfield (who incidentally also heard the *Robertson* case), with the parties disagreeing on the contents of the (Amended) Notice of Motion on technical grounds. The Judge dismissed the motions of both parties, noting that the Crown’s primary objection was made “on the basis that the Appellant’s

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<sup>349</sup> See *Tuccaro v Canada*, 2014 FCA 184 (CanLII) [*Tuccaro* FCA 2014], at paras 12 through 29, inclusive.

<sup>350</sup> *Tuccaro supra* note 344 at para 22 (emphasis added).

<sup>351</sup> *Ibid* at para 21.

raising Treaty 8 as a ground for appeal was an abuse of process.”<sup>352</sup> Justice Hershfield further commented:

Sometimes I am encouraged to say that in many cases the honour of the bar demands that interlocutory motions on the propriety of pleadings be avoided. This is one of those cases. While it does not address a party’s means, it is one of those cases given that the public purse in this case is attacked on three fronts when such challenges are repeatedly made. There is a similar waste of scarce judicial resources when successive actions, using motions or otherwise, are made at different times.<sup>353</sup>

Justice Hershfield expressed no similar concern for Indians who may be seeking to have their treaty rights upheld.

*Tuccaro*<sup>354</sup> returned to the Federal Court of Appeal before a new panel of judges, once again for a contest of procedural and technical terms, and whether the matters contested were correctly before the court. The short, but complex, judgment concluded: “For all of the above reasons, I believe that the TCC did not err in dismissing this motion because it is not plain and obvious that the Crown is estopped from relying on issue estoppel as a defence. In sum, while I do not endorse all the reasons given by the TCC, I believe that it reached the correct result.”<sup>355</sup> In essence, where this leaves the question of a treaty right to tax exemption is in the hands of the trial judge, who will adjudicate on the issue, if the Crown chooses to raise it—and it will, of estoppel. Perhaps it is time to remind the Crown of the general guiding principle set down in the 1990 Supreme Court of Canada *Sparrow* decision: “The relationship between the Government and aboriginals [sic] is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”<sup>356</sup>

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<sup>352</sup> *Tuccaro* 2015 TCC 290 (CanLII) [*Tuccaro* TCC 2015].

<sup>353</sup> *Ibid* at para 54, footnoted with “I highlight the culture shift advocated by the Supreme Court in *Hryniak* [*v* *Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87,] towards litigation promoting proportionality, timeliness and affordability.”

<sup>354</sup> *Tuccaro* *supra* note 344.

<sup>355</sup> *Ibid* at para 37.

<sup>356</sup> *Sparrow* *supra* note 13 at 1108.

## Chapter 5 – The Problematic Record of Canada’s Indian Policy

The taxation provisions in the *Indian Act*, along with those sections governing membership and registration (commonly understood to differentiate status and non-status Indians, and rooted in the enfranchisement goals of the Crown), are perhaps the most controversial and misunderstood provisions of the entire statute. Not surprisingly, these seemingly anachronistic provisions are reviled by some, but tenaciously defended by others, and the division is not necessarily along racial lines. From its earliest drafting, to its present form, the *Indian Act* remains the primary statute governing all matters pertaining to status Indians, notwithstanding Aboriginal nations now governed by modern treaties.

Before 1850, Indian legislation had been incomplete, enacted piecemeal and virtually unenforceable. After 1850, two objectives emerged: 1) protection of Indians from destructive elements of “white” society until Christianity and education raised them to an acceptable level and 2) protection of Indian lands until Indian people were able to occupy and protect them in the same way as other citizens.<sup>357</sup>

Concurring with this pithy summary, John Tobias and Richard Bartlett (to be discussed herein), among others, have written extensively on the development of Indian policy, and the use and misuse of legislative authority expressed through the *Indian Act*. Despite having undergone numerous amendments, and contrary to the expanding legal rights of Aboriginal peoples in general, the basic premises of the *Indian Act* nevertheless have remained steadfast.

From the outset of Canada’s Indian policy, Aboriginal and treaty rights were (and arguably continue to be—such that *Sparrow* reinforced this position) subordinated to “white” interests. In 1910, reflecting the sentiment of the day, the (then) Minister of the Interior,<sup>358</sup> Superintendent-

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<sup>357</sup> John Leslie, Ron Maguire, Robert G Moore, *The Historical Development of the Indian Act* (Ottawa: Treaties and Historical Research Centre, Research Branch Corporate Policy, Indian and Northern Affairs Canada, 1978) [Historical Development of the Indian Act], at 2.

<sup>358</sup> Note: In 1897, the Department of Indian Affairs was reorganized, placing Aboriginal peoples, including Indians

General Frank Oliver commented, “that Government should never allow Indian rights “to become a wrong to the white man”.<sup>359</sup> Bartlett, whose work was cited by the Supreme Court of Canada in *Mitchell v Peguis*, wrote in 1980: “The most singular feature of Canadian legislation concerning Indians is that the governmental policy established therein, that of “civilizing the Indians,” has shown almost no variation since the early 19th century when the government assumed responsibility for the society and welfare of the Indian population.”<sup>360</sup> The second related goal of the *Indian Act* was enfranchisement, much of which was accomplished forcibly. Again, Bartlett pointed to this: “The form of the modern Indian Act can be traced to the Department of Secretary of State Act and the amending statute passed the following year, the Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs.”<sup>361</sup> Tobias adds a third goal of Canada’s Indian policy: protection.<sup>362</sup> With these three goals, the civilizing and forced enfranchisement of Indians was designed to eventually assimilate all Indians into the general population, and provide “[p]rotection of the Indians and their land from abuse and imposition was afforded until such time that protection was superfluous.”<sup>363</sup> The complete failure of Canada’s Indian policy, such that Indians neither became extinct nor fully assimilated, is self-evident. Wendy Moss and Elaine Gardner-O’Toole note: “It is generally accepted that the often conflicting goals of “civilization,” assimilation, and protection of Indian

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and lands reserved for Indians, under the auspices of the Deputy Minister of the Interior. In 1909, another reorganization expanded the Department, where (the now infamous) Duncan Campbell Scott moved up through the ranks to assume the position of Deputy Superintendent of Indian Affairs in 1913. In 1913, the Department of Indian Affairs was moved into the Department of Mines and Resources.

<sup>359</sup> Historical Development of the Indian Act *supra* note 357 at 110, quoting House of Commons Debates, 1910-11, Vol IV, col 7826: Indian Act Amendment Bill, 26 Apr 1911.

<sup>360</sup> Richard H Bartlett, “Indian Act of Canada: An Unyielding Barrier”, 1980, *Amer Indian J* at 11, [Bartlett] referencing Report of Department of Interior, (1876) Sessional Paper No. 9; Report of the Deputy Superintendent-General of Indian Affairs, Report of Department of Interior, (1879) Sessional Paper No. 7; and Report of the Deputy Superintendent General, (1921) Sessional Paper, No. 27.

<sup>361</sup> *Ibid.*, citing Can Stat c 6 (1869).

<sup>362</sup> John L Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy”, in JR Miller, ed, *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) [Tobias].

<sup>363</sup> Bartlett *supra* note 360 at 12.

peoples that have been pursued throughout the history of federal Indian legislation...[and that] governments vacillated between two policies [of extreme isolation or immediate assimilation].”<sup>364</sup> Whether it was by isolation, as with the rigid use of the Pass System to contain Indians on reserves, or through education, economic, or other means of assimilation, the ultimate goals of the Canadian government were and are unequivocal and unwavering: colonization. In 2009, (now former) Prime Minister Harper declared that Canada has no history of colonialism, and unlike the candour of former Prime Minister Paul Martin who three years later stated: “We have never admitted to ourselves that we were, and still are, a colonial power”,<sup>365</sup> history has proven exactly what the *Indian Act* was intended to accomplish. Chief Justice McLachlin was less forthcoming:

In a world overcome by ethnic and racial violence, Canada bears a special responsibility to uphold its distinctive experience of pluralism, tolerance and respect, as an example that the encounter of difference need not be brutal or violent. The story of the peaceful, democratic co-existence of our different communities can be made meaningful to others. Canada has no colonial past, and global strategic plan, and is not a threat to anyone. For this reason, it can be a model.<sup>366</sup>

In every version, Canada’s *Indian Act* has been about violence and intolerance. Enacted in 1876, but incorporating earlier legislation, the *Indian Act* underwent a series of revisions to reflect Canadian Indian policy, but never deviated far from the themes of “protection, civilization, and assimilation, [which according to Tobias] have always been the goals.”<sup>367</sup> Grounded in the political and legal theory of Imperial expansionism and social Darwinianism, legislation sought to deal with the ‘Indian problem’ by ‘legal means’, in order to provide land,

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<sup>364</sup> Wendy Moss & Elaine Gardner-O’Toole, “Aboriginal People: History of Discriminatory Laws”, 1987, rev 1991, Government of Canada, Supply and Services, Publication BP-175E, online: <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm>>, [Moss & Gardner-O’Toole] (np).

<sup>365</sup> Mark Abley, *Conversations with a Dead Man: The Legacy of Duncan Campbell Scott*, Madeira Park, BC: Douglas & McIntyre, 2013) [Abley] at 135.

<sup>366</sup> Beverley McLachlin CJ, Supreme Court of Canada, “Globalization, Identity and Citizenship”, speech given to ADM Forum, Ottawa, October 26, 2004, online: <<http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2004-10-26-eng.aspx>> (emphasis added).

<sup>367</sup> Tobias *supra* note 362 at 127.

resources, and livelihoods to European immigrants. “Most of the changes in the Indian Act during the Post-Confederation period derived from a belief that Indians could be integrated with the majority community. Legislative changes reflected the prime interest of “white” society, rather than those of Indian people.”<sup>368</sup> Enfranchisement became the magic legal equivalent of ‘having one’s cake and eating it too’; by making assurances to First Nations through treaties, the Crown satisfied (at least on paper) the legal requirements of the *Royal Proclamation of 1763*, to treat and compensate. However, the *Indian Act*, and the Crown’s enfranchisement powers in particular, “meant the end of its special legal obligations and the successful absorption of a minority culture. . . . The necessity of strictly defining “Indian” and, accordingly, restricting access to many Indian rights, including treaty rights, was claimed to be justified as a protective measure.”<sup>369</sup> This policy was especially harmful to women and children, yet Parliament insisted it was “necessary to prevent the domination and exploitation of reserve communities by white men.”<sup>370</sup> What it was also designed to prevent was the “large financial burden on the treasury, [which] . . . resulted in the compulsory enfranchisement legislation of 1920 and 1923.”<sup>371</sup> It is this theme of “protection”, which the court has consistently fallen upon as the only rationale for the tax provisions. Yet, as Bartlett points out: “Insofar as statistics can reveal a style of life, they indicate that these people are by far the most economically impoverished and socially disadvantaged group in Canada.”<sup>372</sup> This reality makes it very difficult to extrapolate the relationship between the *Indian Act* and its apparent “protection” rationale.

Both jurisprudence and academic commentary considering *Indian Act* tax provisions have largely focused on the “protection” element of the *Act*. (Not that the ‘civilization’ and

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<sup>368</sup> Historical Development of the Indian Act *supra* note 357 at 51.

<sup>369</sup> Moss & Gardner-O’Toole *supra* note 364 (np).

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> Bartlett *supra* note 360 at 11.

‘assimilation’ goals are not directly connected to the ‘protection’ role of the legislation, they are simply more difficult to justify.) Thus, to search for a historical “legislative object” in any of the *Indian Act* provisions, necessitates at the very least, an acknowledgment of the ignoble basis and intent of the original Act. There can be no doubt that the origins of the *Indian Act* were based more on a desire to exploit resources, than to provide ‘protection’ for the First peoples already occupying what became Canada.

It is estimated that more than a million immigrants came to settle in western Canada from 1900 to 1912.<sup>373</sup> The scope of the influx of people and the demands to rapidly modernize infrastructure brought with it “massive construction of railway lines and roads, emergence of cities and towns, and an insatiable demand for agricultural lands. Many Indian reserves were substantially reduced in size during this time, yet Indian people did not appear to realize any social or economic benefit.”<sup>374</sup> If protection of Indian interests was indeed the intention of not only taxation provisions, but also the *Act* in its entirety, then it failed miserably. To rationalize that the taxation provisions are grounded in the Crown’s expression of its fiduciary relationship to First Nations, in the light of its own Indian law and policy, the fiduciary argument is incoherent and a complete *non sequitur*.

### **Hard (*Indian Act*) History Lessons**

There are abundant examples of inconsistencies, between how the court (and perhaps much of settler society) recalls history, and legislative records of what actually happened. For example, “in the 1906 Revised Statute...no less than forty-six clauses dealt directly with

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<sup>373</sup> Historical Development of the Indian Act *supra* note 357 at 105.

<sup>374</sup> *Ibid* at 105.

management of Indian lands and timber resources”.<sup>375</sup> *Indian Act* amendments in 1911, “significantly changed clause forty-six respecting expropriation of reserve land for public purposes...[and] allowed all companies, municipalities and authorities with necessary statutory power to expropriate as much reserve land as necessary for public works”.<sup>376</sup> Also introduced at this time was section 49A, giving expanded powers of expropriation of reserve lands located near towns or cities, and allowed “having regard to the interest of the public and of the Indians of the bands for whose use the reserve is held, that the Indians should be removed from the reserve or any part of it”.<sup>377</sup> The expropriation of land that was explicitly set aside for Indians, in order to prevent “frauds and abuses” (as *per The Royal Proclamation of 1763*), were anything but protection for Indians. Similarly, other legislation imperilled the wellbeing of Indians, such as “The Migratory Birds Convention Act of 1917 conditionally prohibited Indians in Canada from hunting all game-birds at any time of the year. This became a national issue for Indians who felt it abrogated treaty hunting rights.”<sup>378</sup> Most notably, and as extensively documented by the Truth and Reconciliation Commission, the Indian Residential Schools (IRS) policy was especially heinous, in terms of its detrimental effects on whole generations of Aboriginal<sup>379</sup> children. The IRS policy was facilitated by amendments made in 1920, which were lauded as changes that would “give the department control and remove from the Indian parent the responsibility for the care and education of his child, and the best interest of Indians are protected and fully promoted”.<sup>380</sup> It is doubtful that any of these changes resulted in social or economic gains for Indians.

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<sup>375</sup> *Ibid* at 104 (emphasis in original removed).

<sup>376</sup> *Ibid* at 108 (emphasis in original).

<sup>377</sup> *Ibid* at 109, citing section 49A.

<sup>378</sup> *Ibid* at 112 (notes removed, emphasis in original).

<sup>379</sup> IRS policy was not restricted to Indians, but included Métis and Inuit children.

<sup>380</sup> Abley *supra* note 365 at 151.

The 1936 amendments to the *Indian Act* situated First Nations *peoples* within the domain of the Department of Mines and Resources. Indians having the misfortune to live on coveted lands and resources were mere impediments to a settler-state bent on exploitation of those resources. In fact, the legal ‘responsibility’ over Indians, and later ‘Eskimos’ (Inuit) peoples, was repeatedly transferred or reallocated between a variety of departments, including the Department of Mines and Resources, to the Department of Citizenship and Immigration (in 1949). In 1945, “Indian Health Services was transferred from the Department of Mines and Resources to the Department of National Health and Welfare....At this time Eskimo Health Services was also transferred from the responsibility of the North-west Territories Division of Lands, Parks, and Forests Branch.”<sup>381</sup> None of these changes to the *Indian Act* reflected policies consistent with the Crown’s fiduciary responsibility. To suggest that the Constitutional and legislative organization of government oversight of Aboriginal peoples was to facilitate the protection of the latter is intellectually dishonest. What was protected was the Crown’s ability to purloin the vast natural resources upon which First Nations depended and the land they (inconveniently) occupied. What is evident in the historical development of Indian policy is that the tax exemption preserved in the *Indian Act* is indicative of a relationship far outside of the typical state-citizen dynamic, and behaviour that is even more incongruous for a self-proclaimed fiduciary.

None of this evaded the attention of Parliament. According to Bartlett:

The 1946-48 Joint Committee of the Senate and House of Commons reported on the lack of success of the government policy of assimilation. The committee found many anachronisms and contradictions in the Indian Act and recommended that nearly all sections of the Act be repealed or amended. The recommended "amendment or repeal" took place in 1951, although the provisions of the Indian Act of 1951 were dramatically similar to those adopted in 1868.<sup>382</sup>

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<sup>381</sup> Historical Development of the Indian Act *supra* note 357, at ix.

<sup>382</sup> Bartlett *supra* note 360 at 13-14, citing Special Joint Committee of Senate and House Commons on Indian Act, Minutes of Proceedings Fourth Report (1948).

Even after these major amendments in 1951, as pointed out in *Bastien*,<sup>383</sup> the taxation provisions were left largely intact. Also of significance is the addition of section 88 (regarding laws of general application) in the 1951 amendments, which Bartlett connected to a larger Federal agenda: “Federal government policy has always looked forward to the day when Indian lands would become municipalities under the jurisdiction of the provinces. To this end the federal government has continually sought to transfer jurisdiction over Indians to the provinces”,<sup>384</sup> which has proven to be “a massive intrusion of provincial jurisdiction into the powers of government...[and that] amendment of section 88 is essential to any revision of the Indian Act that purports to confer significant powers of self-government upon Indian bands.”<sup>385</sup> So while changes at this time could potentially provide a means toward self-government (however this was intended to fit into the government’s larger agenda), taxation provisions are, quite literally in the *Indian Act*, set beside section 88.

This legislative juxtaposition of these provisions perhaps sheds some light on why sections 87, 89, and 90 are seemingly out of place; Bartlett considers this “the one instance where the Indian Act looks beyond the written text of the treaties”,<sup>386</sup> which hints at their true purpose. To contextualize this comment, Bartlett argues that the introduction of section 88 significantly interfered with explicit treaty promises—the very thing the clause promises to protect. Section 88 begins: “Subject to the terms of any treaty and any other Act of Parliament...”. Having had the benefit of decades of jurisprudence after Bartlett wrote his analysis, John Borrows’ comment bears repeating: “The application of provincial legislative power through section 88 of the *Indian Act* and other means is one of the most problematic provisions of the *Indian Act*...[and] largely

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<sup>383</sup> See *Bastien supra* note 41 para 69ff.

<sup>384</sup> Bartlett *supra* note 360 at 21.

<sup>385</sup> *Ibid* at 22-23.

<sup>386</sup> *Ibid* at p 25.

strips Indigenous communities of the decision-making responsibilities”.<sup>387</sup> Writing shortly after the *Benoit* decision, Johnson suggests that the ‘protection’ rationale for the exemption is problematic, in that while Indian land is claimed to be the focus of protection, the tax provision is in fact directed at the individual Indian. Thus, he concedes that the ‘protection’ rationale “is essentially paternalistic in that it assumes that Indians need protection in the management of their property”.<sup>388</sup> So the question must be asked: how did we get here?

In Canadian jurisprudence, the persistent perception of Aboriginal peoples as incompetent and passive benefactors of the Crown’s goodwill is exemplified by a 1929 decision, a proposition that stood as *good law* until 1985. In *R v Syliboy*,<sup>389</sup> Justice Patterson dispensed with the notion of competency of Aboriginal peoples, stating:

“Treaties are unconstrained Acts of independent powers.” But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain [*sic*] not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual—an agreement that, as we have seen, was very shortly after broken.<sup>390</sup>

It was not until 1985 in *R v Simon*,<sup>391</sup> that the Supreme Court of Canada confronted the Crown’s reliance on this degrading characterization of Aboriginal peoples, and definitively redefined the

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<sup>387</sup> Borrows *Freedom supra* note 54 at 15.

<sup>388</sup> Johnson *supra* note 17 at 27.

<sup>389</sup> *R v Syliboy*, [1929] 1 DLR 307 (Co Ct).

<sup>390</sup> *R v Simon*, [1985] 2 SCR 387 [*Simon*], quoting *R v Syliboy* at para 20.

<sup>391</sup> *Ibid.*

“historical legal context” of the treaties. As eloquently put, albeit considerably understated, by Chief Justice Dickson in *R v Simon*:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.<sup>392</sup>

Moreover, prior to 1982, treaty rights were vulnerable to the unilateral exercise of state power, regardless of the moral, if not legal, implications.<sup>393</sup> There can be no question that a great deal of misunderstanding and ignorance about the Indians and treaties have coloured jurisprudence over the last century.

### **Treaty Relationship or Chronic Contest?**

Even as Canadian law now recognizes those very same treaties (and the rights inherent in those agreements) as constitutionally protected, settlement agreements for Crown breaches continue to be vigorously contested by the Crown. If the Crown really meant what it promised, both in the written and oral records, as well in the Crown’s insistence that ‘reconciliation’ with Aboriginal peoples is necessary—and constitutionally mandated by section 35—then it must be prepared to honour its agreements. However, reconciliation, as D’Arcy Vermette argues:

...is undoubtedly a nice, attractive word, [but] no reconciliation is actually taking place or being built as a result of or in relation to Canada's laws concerning the rights of Aboriginal peoples. On the contrary, in recent years Canada's courts have created and interpreted a principle of reconciliation which embodies (some) nice language but offers little reconciling substance. Canadian courts are confused (or dishonest) because "[i]n 'truth'...

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<sup>392</sup> *Ibid* at 20-21.

<sup>393</sup> See *R v Moosehunter*, [1981] 1 SCR 282 at 293: “The Government of Canada can alter the rights of Indians granted under treaties (*Sikyea v. The Queen*) [(1964), 2 CCC 129]. Provinces cannot. Through the Natural Resources Agreement, the federal government attempted to fulfil their treaty obligations to the Indians. The Province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands or lands to which they had a right of access. Any changes which would be required in the future could be negotiated and alterations made through the provisions for amendment contained in the Agreement.”

there never was any 'conciliation' to 're'".<sup>394</sup>

Similarly, Carwyn Jones, writing on cross-cultural reconciliation, suggests concepts of justice and reconciliation as a means to address the social disruption, and framed by a Christian conception of those terms, is highly problematic, particularly “while injustices continue”.<sup>395</sup> Reconciliation must surely be mutually dependent.

This vision of reconciliation as being mutually dependent is at the heart of treaty implementation, such that all Aboriginal peoples will have opportunity to participate fully, according to the terms outlined by treaty, as competent agents of their own destiny. Undoubtedly, the *Indian Act*, as a product of ‘another era’, was likewise drafted and implemented in a manner inconsistent and insensitive to ‘native rights’, and moreover incongruent with the Honour of the Crown. Thus, the rationale for the exemption from taxation for treaty nations is found within the domain of the treaty relationship, and not simply as a statutory concession under the guise of providing fiduciary protection.

Treaty nations hold a unique place in confederation. Although it may be fearful of recognizing treaties as foundational, the Crown nevertheless must come to terms with this reality, if treaties are to be fully recognized and implemented in accordance with the *Constitution Act, 1982*. Likewise, after having sustained hundreds of years of colonization, Aboriginal peoples and their nations must themselves reimagine their place in Canada, and envision a future of socio-economic prosperity. As treaty nations, prosperity is not simply a matter of conducting business for the purpose of wealth accumulation, but rather concerns the continuance (or some cases, revival) of national identities and Indigenous ways of being, albeit within the settler state.

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<sup>394</sup> D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the dispossession of Aboriginal Peoples”, (2011) 29 Windsor YB Access Just 55 at 56 (notes removed) [Vermette].

<sup>395</sup> Carwyn Jones, “New Treaty, New Tradition: Reconciling New Zealand and Māori Law”, (Vancouver: UBC Press, 2016) at 57-58 [Jones].

Treaties, including the unwritten promises made to First Nations by the Crown, set out terms of this *sui generis* relationship; the tax exemption provisions of the *Indian Act* merely reify facets of those agreements and understandings.

However, calls to renew the treaty relationship are frequently thwarted by a legal system unable to adapt. The Crown contests even the most basic principles. While the Numbered Treaties have significant parallels, particularly in what the Crown claims was ceded by Indians, the Federal Court of Appeal recently ruled that the unique context of each of the Numbered Treaties make it difficult to generalize. In *Horseman*,<sup>396</sup> the Federal Court of Appeal dismissed an appeal challenging decisions of the lower courts that declined to certify a proposed class action regarding annuity payments, on the basis that the Numbered Treaties are too different from one another. As a result, the appellate court ruled that the “claims of the class members did not raise a common question of law or fact”.<sup>397</sup> It further reasoned:

This is not only because of the two-step approach that must be adopted when one construes a Treaty, but because the proposed question necessarily involves, among other things, a highly factual determination of the mutual intention of the parties, the purposes for which they each entered into their individual Treaty and issues relating to the historical, cultural and economic context surrounding each Treaty....Overall, the Federal Court found that the differences among the Treaties were such that the broad common issue proposed in an attempt to connect them all would be inappropriate for certification. I substantially agree with the analysis of the Federal Court.<sup>398</sup>

This decision certainly works in the favour of a Crown that has repeatedly and intentionally breached its promises to treaty Nations, and instead relied on the *Indian Act* to set the terms of its relationship with First Nations. The Crown’s shift of focus from the *Indian Act* to the treaty relationship, by virtue of constitutional recognition, sadly has not reset the relationship. According to Borrows, “the constitutional rooting of Aboriginal and treaty rights in Canada’s

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<sup>396</sup> *Horseman v Canada*, 2016 FCA 238.

<sup>397</sup> *Ibid* at 1.

<sup>398</sup> *Ibid* at 8, citing *Marshall No 1*.

constitution has not led to any significant legislative recognition and affirmation of those rights... [and] has been another colonial disaster.”<sup>399</sup>

In its five-year study, the Royal Commission on Aboriginal Peoples (RCAP)<sup>400</sup> focused on several key areas, including health, education, economic development, justice, and self-government. Four policy areas were of particular interest to Aboriginal peoples, who identified them as “the most unjust policies imposed on them and that those injustices, while rooted in history, have effects that continue to this day,”<sup>401</sup> namely the *Indian Act*, Indian Residential Schools, government community relocations, and veterans affairs. To this list, I would add a fifth issue, being policy directed at Indian women, which has exacerbated the impacts of loss of personal and economic security. Even a cursory read of its 4000-page report reveals the interconnection of these issues. In addition to collecting accounts of significant human rights abuses, RCAP examined policies that advanced Aboriginal dispossession of territory, involuntary enfranchisement (through cultural, legal, and economic means), and the denial of the foundational treaty relationship between the Crown (and settlers) and Indigenous peoples. As a result of the wide-spread and systemic problems underlying the Crown-Aboriginal relationship, RCAP put forward 440 ‘Recommendations’ to effect sweeping changes; in 1998, the Canadian Government responded with a policy framework: *Gathering Strength: Canada’s Aboriginal Action Plan*.<sup>402</sup> Opinions are divided as to the commitment and results of government efforts; nevertheless, both government and Indigenous peoples agree that the solutions to many, if not most, of the socio-economic problems faced by the latter can be found in resetting the relationship. Although RCAP is arguably Canada’s most comprehensive inquiry of its kind, it

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<sup>399</sup> Borrows *Freedom supra* note 54 at 179 (note removed).

<sup>400</sup> RCAP *supra* note 196.

<sup>401</sup> *Ibid* Vol 1, at 247.

<sup>402</sup> *Ibid*.

was neither the first nor the last report to examine structural discrimination<sup>403</sup> against Aboriginal peoples.

Among the mountain of evidence supporting this position are, for example, the 1907 PH Bryce Report on health, and the McKenna-McBride Royal Commission of 1913, which “resulted in the establishment of new or confirmation of old Indian reserves in the Nass [BC] area....Frank Calder, one of the appellants, says that this was done over Indian objections. Nevertheless, the federal authority did act under its powers under s. 91(24) of the [*British North America*] Act.”<sup>404</sup> It was only in the dissent opinion in *Calder* that this misplaced (if not illegal) legislative authority was called into question: “The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong.”<sup>405</sup> In 1988, the Aboriginal Justice Inquiry began, with the Aboriginal Justice Implementation Commission (AJIC) mandated to implement the findings of the Inquiry. On that basis, the Commission recommended, among other things: “The Interpretation Act of Manitoba be amended to provide that all legislation be interpreted subject to Aboriginal and treaty rights...[and] in the area of statutes in conflict with Aboriginal and treaty rights...the Commission is continuing to review those recommendations.”<sup>406</sup>

Most recently, the final report of the TRC has again reminded the Crown, and indeed Canadians as a whole, that its fundamental relationship with Indigenous peoples must change. Not surprisingly, similar issues continue to be identified; even with the specific focus on

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<sup>403</sup> I adopt the definition provided by Moss & Gardner O’Toole *supra* note 364: ““discrimination” will be used in the sense of legal distinctions singling out aboriginal people for special treatment and operating to the detriment of their fundamental human rights.”

<sup>404</sup> *Calder supra* note 110 at 336.

<sup>405</sup> *Ibid* at 315.

<sup>406</sup> Government of Manitoba, “Aboriginal Justice Implementation Commission, November 1999”, First Quarterly Report, March 31, 2000 <online: <http://www.ajic.mb.ca/reports/firstquarter.html#6.%20Recommendations>>.

residential schools, the TRC *Calls to Action* overlap with at least 40 RCAP recommendations.<sup>407</sup>

Specifically, the TRC summarized its *Calls* this way:

The time has come, according to the Commission, to start afresh, to put the relationship on a more secure foundation, based on the following four principles:

1. mutual recognition (three facets of which are equality, co-existence and self-government);
2. mutual respect;
3. sharing (based on the long overdue recognition that Canada's past and present prosperity rests on a relationship of sharing extended by Aboriginal peoples); and
4. mutual responsibility (involving the transformation of a colonial relationship into a partnership with joint responsibility for the land).<sup>408</sup>

The fact that every report, study, inquiry, and most importantly First Nations peoples themselves, have called for a renewed relationship through treaty implementation, would seem to require that if any valid legislative intent is to be found to interpret the tax provisions, the place to focus a “historic and purposive” analysis is in the broader context of the treaties, not solely the *Indian Act*. According to Woo:

“As [Sir William] Johnson<sup>409</sup> attempted to explain, “no Nation of Indians have any word which can express, or convey the Idea of Subjection.” Nor do most of us today. Canada’s constitutional premises have, as we shall see, undergone a massive yet rarely articulated reorientation. Failure to acknowledge paradigmatic mismatch, both between the indigenous and colonizing cultures and within colonial culture over time, has muddied most attempts either to resolve conflicts with Indigenous peoples or to defend their rights in terms that will be recognized by modern Canadian law.”<sup>410</sup>

This ‘paradigmatic mismatch’—of ascribing a “protection” rationale to the “purpose” of section 87, is precisely why the court has yet to reconcile an obvious economic benefit to Indians with

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<sup>407</sup> Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, speech delivered at National Forum on Reconciliation: Marking the 20<sup>th</sup> Anniversary of the Royal Commission on Aboriginal Peoples”, 2 November 2016, (Winnipeg), also available online: <<https://www.canada.ca/en/indigenous-northern-affairs/news/2016/11/national-forum-reconciliation-marking-20th-anniversary-royal-commission-aboriginal-peoples.html?=&wbdisable=true>>.

<sup>408</sup> Institute on Governance, “Summary of the Final Report of The Royal Commission on Aboriginal Peoples” (April 1997) at 3, online: <[http://iog.ca/wp-content/uploads/2012/12/1997\\_April\\_rcapsum.pdf](http://iog.ca/wp-content/uploads/2012/12/1997_April_rcapsum.pdf)>.

<sup>409</sup> Sir W Johnson acted as a British negotiator during the years following the Seven Years’ War, and Superintendent of Indian Affairs from 1746 to 1751. (The Canadian Encyclopedia, online: <<http://www.thecanadianencyclopedia.ca/en/article/sir-william-johnson/>>.

<sup>410</sup> Woo *supra* note 86 at 6.

legislation that has been anything but protective.

Similarly, and notwithstanding being a ‘statute’, the view that the *Indian Act* tax exemption provisions are merely statutory, is highly problematic, and neglects the realities of their historic development. Likewise, the claim that “the underlying purpose of the tax exemption is to preserve Indian land entitlements”,<sup>411</sup> cannot be supported, when so much has been done to dispossess Aboriginal peoples from their traditional territories, culture, and livelihoods. For the same reasons, the conclusion that the “purpose of s. 87 is grounded in the federal Crown’s fiduciary obligation to Indians”,<sup>412</sup> imperils the Honour of the Crown. Judicial consideration of much of Canada’s Indian policy, from a more enlightened position, must test the legislative objective for the origins of the tax-exemption provisions, *vis-à-vis* the Constitutional objectives of sections 25 and 35, which necessarily invokes the *sui generis* Crown-Aboriginal relationship. This is the only appropriate place to begin a “historic and purposive” analysis of section 87.

Much of the litigation regarding Aboriginal and treaty rights has focused on section 35, being the constitutional affirmation of existing rights. The courts have taken over 30 years to work out tests and interpretive parameters of section 35, with far less attention given to section 25. In order to alter the courts’ focus on the (albeit confusing) legislative provisions of the *Indian Act*, it may be time to begin to better define the shield provided by section 25 to treaty rights. The non-abrogation, non-derogation protections of communal rights promised in treaties have not yet been well defined by the courts. As opposed to relying on the flawed colonial premises of the *Indian Act*, constitutional recognition of the *sui generis* treaty relationship may require being tested and defined through a new area of law, dealing specifically with section 25 communal treaty rights. Thus, this recognition is not the end of the question on the purpose of the *Indian Act*

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<sup>411</sup> Oliphant *supra* note 15 at 43.

<sup>412</sup> Johnson *supra* note 17 at 2.

tax provisions, but the beginning of that exploration. The mere elevation of Canada's treaties should (although it is difficult to appreciate in today's courts) reduce legal conflict, and encourage negotiation and reconciliation, but of course, that remains to be seen. Given that federal legislation has been much to blame for the marginalization and destruction of Aboriginal peoples and their communities, a legislative solution is far more desirable.

### **From Dominion to Dialogue**

One final NLS case not discussed above, but which bears mentioning here for its example of the dismissive way courts can, and do, deal with treaty and Aboriginal claims, is *Sackaney v The Queen*.<sup>413</sup> Judy Sackaney and Mary Ann Shoefly-Devries were employed for several years off-reserve by Native Leasing Services, and were reassessed by the Canada Revenue Agency for those years. In contesting the CRA assessment, the appellants raised several issues in what could be considered a "shot gun" defense. While the case was ineffectively argued as a whole, they nevertheless raised several important arguments that have never been adequately addressed by the Canadian Supreme Court or Parliament. In the order considered in the 2013 decision, their claims included, first, a general tax immunity, which was a challenge to the Crown's imposition of tax on Aboriginal peoples, who "never agreed to pay tax and have not been consulted on the issue".<sup>414</sup> The court answered this claim stating, "The appellants' position amounts to a denial of the sovereignty of the Crown over aboriginal people in relation to taxation."<sup>415</sup> At least from the perspective of many Aboriginal people, this is exactly the question that begs an answer: How did the Crown obtain sovereignty over all Indigenous peoples? As Asch argues, since Aboriginal people were here before European settlement, it is the Crown that should have to defend the

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<sup>413</sup> 2013 TCC 303 (CanLII) [*Sackaney*].

<sup>414</sup> *Ibid* at para 10.

<sup>415</sup> *Ibid* at para 12.

basis of its assumed sovereignty: “Chief Justice Lamer [in *Delgamuukw*] summarized this proposition when he asserted that to be ‘here to stay’ requires reconciling ‘the pre-existence of aboriginal societies with the sovereignty of the Crown,’ rather than the other way around.”<sup>416</sup> The court dismissed this assertion, stating tax immunity is “incompatible with the Crown’s sovereignty over Canadian territory.”<sup>417</sup>

The second defence argued that the lack of constitutional consultation, as guaranteed in s35.1 of the *Constitution Act, 1982*, and in the constitutional talks that followed in the 1980s, never considered the impact of taxation on Aboriginal peoples. The court replied: “Neither the enactment [of the *Indian Act*] nor the application of paragraph 87(1)(b) relate to land or treaty claims that are under negotiation, or to any discretionary control exercised by the Crown.”<sup>418</sup> In other words, since the Crown had not contemplated any changes to the tax provisions, no duty to consult was owed.<sup>419</sup> Sackaney also relied on Article 40 of UNDRIP, which supports Indigenous rights to “just and fair procedures...[and] due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”<sup>420</sup> If *Sankaney* was heard today, would the court be more receptive of the relevance of UNDRIP and International law, rather than claiming “it is not legally binding under international law and, although endorsed by Canada in 2010, it has not been ratified by Parliament. It does not give rise to any substantive rights in Canada”?<sup>421</sup> This is yet another unknown that adds even further

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<sup>416</sup> Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*, (Toronto: University of Toronto Press, 2014) [Asch] at 5.

<sup>417</sup> *Ibid* at para 14.

<sup>418</sup> *Ibid* at 33, relying on *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 36-38.

<sup>419</sup> See also *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43, wherein a new Energy Purchase Agreement extending to 2034, was granted to Rio Tinto Alcan for its hydroelectric dam and considered a continuation of the former EPA issued in the 1950s, thereby never triggering a duty to consult with the affected First Nations. No consultation whatsoever over the building of the dam and subsequent flooding that displaced First Nations off their ancestral lands of the Nechako Valley has ever taken place.

<sup>420</sup> *Ibid* at para 34, citing UNDRIP *supra* note 127.

<sup>421</sup> *Ibid* at para 35.

uncertainty to how the court will interpret *Indian Act* tax provisions.

Mobility rights were also asserted, as guaranteed by section 6 of the *Charter of Rights and Freedoms*.<sup>422</sup> Given that more than 50 percent of status Indians live off-reserve,<sup>423</sup> it makes sense that rights will reflect a modern and highly mobile Indian population. The “choice” an Indian makes (to use the language of Justice Gonthier in *Williams*<sup>424</sup>) to live off reserve in order to pursue education or gainful employment, or as a result of factors outside of their control,<sup>425</sup> effectively repudiates, at least in part, one’s Aboriginal identity; alternatively, making the “choice” to move to, or remain on, a Reserve with little or no opportunity for economic participation, is an extreme constraint on geographic location unique to Indians who want to remain “Indian”. The court glibly responds by claiming that the “right to move freely and work anywhere in Canada ... [that are] guaranteed by subsection 6(2) are subject to any laws of general application in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence”,<sup>426</sup> and then references the *Income Tax Act* as being such a law. This is completely discordant with even the very narrow reading of section 87 of the *Indian Act*, which explicitly states: “Notwithstanding any other Act of Parliament of any Act of the legislature of a province...property is exempt...”.<sup>427</sup>

Concerning the claim of a mobility right, section 25 of the *Constitution Act, 1982* shields treaty and Aboriginal rights, which at the very least should necessitate some analysis. Similarly, Sackaney raised a section 15 (equality) question, which is also dismissed by the court. The judge in *Sackaney* concludes: “property located on a reserve and property located elsewhere ... was not

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<sup>422</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

<sup>423</sup> Statistics Canada *supra* note 302.

<sup>424</sup> *Williams* “choice” *supra* note 151.

<sup>425</sup> These circumstances (some of which are discussed above) include Indian Residential School, adoption, a variety of forms of forced enfranchisement and loss of band membership.

<sup>426</sup> *Sackaney* *supra* note 413 at para 40.

<sup>427</sup> *Indian Act* *supra* note 3 at 87(1).

an enumerated or analogous ground for the purpose of section 15(1)”.<sup>428</sup> Despite the fact that the *Indian Act* applies only to Indians, and it is their property located on Reserves, and Reserves being areas uniquely set aside for Indians, it seems rather pedantic to suggest that there is no enumerated ground (being race) on which to make an equality claim worth at least some judicial consideration.<sup>429</sup> Sackaney’s *Charter* claim is dismissed thusly: “There is nothing immutable like race, religion or a characteristic which can only be changed at an unacceptable cost to personal liberty, involved in the distinctions as to situs of property. The distinction as to the situs of personal property on a reserve is not therefore an analogous ground.”<sup>430</sup>

Finally, *Sackaney* questioned the Tax Court’s jurisdiction to address inherent Aboriginal rights, among “other submissions” including hardship, prosecutorial discrimination, their lack of proper legal representation, a potential Constitutional Question, and the impact on them of Indian Residential School, all of which the court curtly dismisses. All of these claims contribute to a context that the court is slow to recognize, even as it espouses reconciliation. There is little to no recognition of the historic marginalization of communities and individual from economic opportunities, entrenched racism and bias in the court, the residual effects on existing jurisprudence resulting from both prejudicial and legislative prohibitions of Indians pursuing legal claims, the impact of residential schools on individual and their communities, just to name a few. The court defies even its own best judgement (from *Calder*<sup>431</sup>), and perhaps more disappointingly the concept of the Honour of the Crown by stating: “Even if the appellant had

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<sup>428</sup> *Sackaney supra* note 413 at para 47.

<sup>429</sup> See also: *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, wherein the court found that discrimination on the basis of pregnancy is indeed discrimination on the basis of sex (an enumerated grounds prohibited by section 15 of the *Charter*). *Brooks* overturned the decision in *Bliss v Attorney General of Canada*, [1979] 1 SCR 183, which found that seeming inequalities in the (then) unemployment act benefits were not discriminatory in denying benefits to pregnant women. The court found (at p 184): “Any inequality between the sexes in this area is not created by legislation but by nature.”

<sup>430</sup> *Sackaney supra* note 413 at para 47, citing *Horn v Canada* [2007] FCJ No 1356.

<sup>431</sup> *Calder supra* note 110; according to *Calder*, “clear and plain” legislative intent is required to extinguish rights; mere legislative regulation is insufficient to extinguish existing rights.

pled facts to show that tax immunity for aboriginals existed at some point prior to 1982, it is apparent that those rights would have been extinguished when income tax was imposed in 1917 on “every person residing or ordinarily resident in Canada”.<sup>432</sup> The commentary below on *Sackaney* is replete with the frustration and difficulty in bringing treaty and Aboriginal claims to Canada’s courts:

Ms. Sackaney and Ms. Shoefly claim that the process in its entirety has been stacked against them from the beginning. Both women are Aboriginal and single parents that claim that Canada’s bid to tax an already impoverished Nation is a direct violation of Treaty and Constitutional Rights, Rights that are protected within the Canadian Constitution. These actions by Canada’s Tax Court prompts questions about the morality and ability of Canada’s actions (both domestically & internationally) to change land so much that the original inhabitants cannot practice their traditional culture (hunting, gathering, exercise their mobility to travel in freedom and other traditional lifestyle practices, but are forced (coerced) to redefine themselves to avoid complete extinction. However, at no point have we stepped forward as one voice and stated what we want to stop being Anishnabek and become Canadian citizens that would open the door to taxation.<sup>433</sup>

The *Sackaney* case, despite being dismissed entirely without hearing arguments, on the grounds that it is “plain and obvious that the arguments they are raising have no chance of success”<sup>434</sup> is a reflection of the hostility that persists in the Crown-Indian relationship. What is plain and obvious is that Parliament continues to rely heavily on the adversarial process of litigation, trusting that the Court, as the judicial branch obligated to uphold the state’s sovereignty over Aboriginal people. As a result, the Crown has yet to demonstrate that reconciliation can go beyond the suppression of Aboriginal resistance to state assertions of sovereignty.

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<sup>432</sup> *Sackaney supra* note 413 at 21, citing *Income War Tax Act, 1917*, SC 1917, c 28, subsection 4(1).

<sup>433</sup> NationTalk, Press Release, “MShoefly/Sackaney Vs. Taxation”, 13 November 2011, online: <<http://nationtalk.ca/story/mshoeflysackaney-vs-taxation>>.

<sup>434</sup> *Supra Sackaney* note 413 at 56.

## **Chapter 6 – Implementing the Spirit and Intent of Our Treaties:**

### **Case Study on Kapyong (Winnipeg) & Te Awa—The Base (Hamilton, NZ)**<sup>435</sup>

If a perfect storm could develop anywhere, perhaps Winnipeg with its legendary weather would be the location of choice, and indeed, it is. However, this storm is one with legal and social implications, not meteorological. This storm is the jurisprudential challenge to articulate the “purpose” of section 87 (as was recently admitted in *Robertson*), compounded with the Crown’s history of unresolved Treaty 1 breaches, added to Winnipeg’s reputation as a city with serious issues with racism,<sup>436</sup> all of which came to bear in the battle over “Kapyong”. This chapter is a case study of how the court’s “historic and purposive” analysis of section 87 intersects with the impact of its Treaty breaches, in a culture with competing notions of fairness.

Among the myriad of Canada’s conflicts with First Nations peoples is the legal battle over Kapyong, an abandoned military base in the City of Winnipeg. The dispute over Kapyong is a reminder of the importance of treaty implementation, which in this case, could facilitate an urban reserve as a means of economic development and participation for First Nations people, and potential that is frustrated by red herring objections concerning tax fairness. The Kapyong dispute has been fuelled by misconceptions of treaty promises, and biases concerning the rightful place of Indians, both constitutionally and socially. Looking beyond Winnipeg, I also present the story of “Te Awa—The Base” from New Zealand. With a settler history similar to Canada’s, and

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<sup>435</sup> Portions of this chapter were presented in part at *Unsettling Conversations, Unmasking Racisms*, October 18, 2014, Edmonton, Alberta, and at the International Studies Association Annual Convention on February 18, 2015 in New Orleans, Louisiana.

<sup>436</sup> Maclean’s magazine reported in 2015 that Winnipeg is Canada’s most racist city, a distinction it rejected. A follow up story was published a year later, reporting positive steps that were being taken by the City of Winnipeg to address these issues. See: Nancy Macdonald, Maclean’s, “Welcome to Winnipeg: Where Canada’s racism problem is at its worst”, (2015), online: <<http://www.macleans.ca/news/canada/welcome-to-winnipeg-where-canadas-racism-problem-is-at-its-worst/>>, and Nancy Macdonald, Maclean’s, “Winnipeg a leader in fixing Canada’s racism problem”, (2016), online: <<http://www.macleans.ca/news/canada/winnipeg-shows-us-how-to-fix-canadas-racism-problem/>>.

the *Treaty of Waitangi*, being contemporaneous with Canada's Numbered Treaties, Te Awa was met with similar challenges, yet sets an example of a better way forward.

### **Kapyong: Winnipeg's "Area 51"<sup>437</sup>**

In the heart of the nation sits the City of Winnipeg, Manitoba, which the Treaty Relations Commission of Manitoba identifies as one of the "communities sharing the obligations and benefits of"<sup>438</sup> Treaty Number 1. As Canada's first "Numbered Treaty", it brought promise of a new direction—a new kind of relationship—between Her Majesty the Queen (Victoria) and Her government, and the "Chippewa and Swampy Cree Indians of Manitoba" (more correctly, the Anishinaabe and Nehiyaw peoples). The Numbered treaties reached further than the 'peace and friendship' treaties of earlier years, and defined a means to peacefully share land and resources with the anticipated arrival of droves of European settlers. While the Crown continues to describe these treaties as 'simple land cession treaties', even the most cursory reading of the text of Treaty 1 reveals a vision for an enduring and mutually beneficial relationship.

The benefits for new settlers were obvious: vast tracts of arable land, abundant supplies of lumber, water, and wild game and fish, and a new life without threat of conflict. In return, Treaty 1 Nations agreed to continue in their traditional ways—including their legal, political, and cultural practices—and, they also expected to participate in a new and rapidly changing economy. The Crown promised (at the very least) to ensure access to traditional hunting and fishing grounds, farming implements and livestock for each community with a view to promote

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<sup>437</sup> Urban legends abound about the American military base "Area 51", including whether it really exists, what government secrets it may house, and the abundance of conspiracy theories that have evolved to cover up what is held in Area 51. While the fate of Kapyong has been litigated publically and extensively, there is no way to predict what decisions, if any, will be made concerning this area, since the Federal Government has not been forthcoming with its plans.

<sup>438</sup> Treaty Relations Commission of Manitoba, "Treaty No. 1", (2017) online: [www.trcm.ca/treaties/treaties-in-manitoba/treaty-no-1/](http://www.trcm.ca/treaties/treaties-in-manitoba/treaty-no-1/).

agriculture, and annuities that, at the time of signing, far exceeded the mere *symbolic* 5-dollar payments of today. The 1871 Treaty 1 land allotment, a process controlled by the Crown's Indian Agent, set out the amount of land to be "reserved" for the exclusive and perpetual use by Treaty 1 Nation, an amount that in 2017, has yet to be fulfilled by the Crown. Kapyong presents an opportunity and the means for the Crown to fulfil, at least in part, its outstanding debt to Treaty 1 Nations, and importantly, an opportunity for Treaty 1 Nations to participate as a community in the modern economy in their traditional territory.

In 2009, Treaty 1 Nations resorted to litigation to hold the Crown accountable for decisions pertaining to Kapyong, but the Crown was already aware of its failures, likely since the signing of Treaty 1. Treaty implementation has been problematic (at least for the Crown) since the ink dried on the documents that recorded the solemn agreements. In the simplest terms, requiring little or no interpretation, this Treaty required that the Crown set aside 160 acres per family of five (or in that proportion) for the exclusive use of each "band", as the Crown called them. The fact that Treaty 1 First Nations were short changed has been admitted many times by the Crown, courts, and Parliament alike. Yet, the debt remains outstanding, the effects of which continue to withhold justice from First Nations peoples. Sadly, Treaty 1 Nations are not unique in this position, but successive governments have nevertheless continued to adhere to the veneer of honour, while continually deferring meaningful action meet their obligations. What follows is a discussion of the history and jurisprudence concerning Kapyong, along with the submissions from the court of public opinion.

### Meeting Treaty Obligations

Having placed the bulk of Crown land in the hands of provincial governments at the time of confederation, the Federal Crown complicated the means by which it would meet its outstanding Treaty obligations. However, in 1930, the Crown added Section 11 to the Constitution, in order to enable Canada to fulfil its obligations under the treaties. Although jurisdictional barriers were eliminated from the apparent conflict of provincial ownership of lands and resources, the Crown never prioritized fulfilling its outstanding treaty obligations. In 1947, a Special Joint Committee of the Senate and House of Commons recommended the creation of an Indian specific claims commission (the ISCC, as it would become much later), to assess Crown breaches of the Treaties and settle proven claims. The call for an independent claims commission also came from John Diefenbaker<sup>439</sup> (as PC Member for Lake Centre, as he was then) in 1950, and in 1961, a Joint Committee of the Senate and House called for the establishment of a formal commission. However, in 1965, legislation introduced to establish a commission died on the order paper. It was not until 1973 that a specific claims policy was established, but the process attracted heavy criticism in 1979 in an “unpublished report prepared for Canada [citing] “conflicting duties” in the federal government’s involvement in claims settlement and [recommended the establishment of] an impartial, independent body”<sup>440</sup>.

The failure of the federal Crown to honour its debts to Treaty nations dragged on, and the

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<sup>439</sup> In 2011, the (then) Conservative Government named an award in Diefenbaker’s honour, as a defender of human rights. According to the Backgrounder released at the time, “Prime Minister Diefenbaker, who held office from June 1957 to April 1963, was a leader in the area of human rights at home and abroad. His tenacity in defending rights for all led to the passage of the Canadian Bill of Rights in 1960. He succeeded in correcting a historic injustice by extending to First Nations people the right to vote in federal elections without giving up their treaty status. Prime Minister Diefenbaker’s appointments of the first woman to Cabinet and the first Aboriginal member of the Senate heralded a new era of inclusiveness in Canadian political life.” See Government of Canada, “Minister Cannon Announces Creation of John Diefenbaker Defender of Human Rights And Freedom Award”, 2011, online: <<https://www.canada.ca/en/news/archive/2011/02/minister-cannon-announces-creation-john-diefenbaker-defender-human-rights-freedom-award.html>>.

<sup>440</sup> Minister of Public Works and government Services Canada, Minister of Indian Affairs and Northern Development, 2007, “Specific Claims: Justice at Last”, at 6.

issue of outstanding land claims was again addressed in the “Penner Report”<sup>441</sup> of 1983, as well as the House of Commons Standing Committee on Aboriginal Affairs in 1990, both calling for the creation of an independent quasi-judicial tribunal to assess Crown breaches of the Treaties. Finally, in 1991, more than a century late, “Canada took concrete steps to remedy its breach of Treaty No. 1”<sup>442</sup> and the Indian Specific Claims Commission (ISCC) was established. The ISCC was rife with shortcomings, which were pointed out by the Royal Commission on Aboriginal Peoples (RCAP), a task force on the specific claims process, and by virtue of the introduction of the *Specific Claims Resolution Act (SCRA)*. Although the *SCRA* received Royal Assent and became law in 2003, First Nations overwhelmingly rejected it, objecting to among other things, the government’s arbitrary cap of 7 million dollars on all settlements. The *Act* was accordingly repealed in 2008.

Prior to the 1982 constitutional changes to protect the legality of Treaties, and despite the fact that the Crown accorded itself the power to make unilateral changes to treaty terms up to the time of these constitutional amendments, Crown breaches of Treaty agreements were never in question. In what could only be considered an act of cowardice—for if the Crown truly believed it had a defensible position as the Sovereign, it would have withstood any legal challenge—in 1927, the Crown amended the *Indian Act*,<sup>443</sup> to effectively bar all legal action by Aboriginal people, thereby removing any opportunity for First Nations to demand redress.<sup>444</sup> In other words, an Indian had no access to the courts, except as an accused in criminal proceedings, or as a

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<sup>441</sup> Canada, The Special Committee on Indian Self-government, “Indian Self-government in Canada”, (1983), Keith Penner *et al*, at 147 [“Penner Report”].

<sup>442</sup> *Canada v Long Plain First Nation* 2015 FCA 177, [*Long Plain* 2015 FCA 177] at para 15.

<sup>443</sup> *Indian Act*, RSC 1927, c 98, s 141.

<sup>444</sup> As early as 1882, the Crown was limiting Indians’ access to justice. The Historical Development of the Indian Act states: “Amendments in 1882 “revised the seventy-eighth clause of the 1880 Act which permitted Indians to sue for debts or to compel performance of obligations contracted with them... to curtail “Indian fondness for petty litigation”” *supra* note 357 at 80-81. Moss & Gardner-O’Toole *supra* note 364 state: “The persistence of the Nishga in pursuing recognition of their land rights eventually led to a criminal law prohibition in 1927 against the collection of funds for claims suits without the written consent of the Superintendent-General.”

defendant in a civil trial. This legislation remained in place until 1951. Unsurprisingly, the Crown's take it-or leave approach to settlement during this time was less than successful. Now, post-1982, the Numbered Treaties (and others, stemming from the authority of the *Royal Proclamation of 1763*) together with Canada's modern treaties form the only legitimate basis for Canada's existence as a nation, and unless the Crown acts honourably and adheres to those agreements, Canada lacks credibility as a free nation.

In 2006, the Government of Manitoba supported the Federal Government's initiative to create legal mechanisms to deal with *per capita* land debts arising from Crown breaches of the Numbered Treaties, through a Treaty Land Entitlement (TLE) review process. This process led 29 Manitoba First Nations, including Treaty 1 Nations, who collectively were owed 1.423 million acres,<sup>445</sup> to have their claims validated by the Federal Crown. In 2007, a Government of Manitoba news release recognized the TLE settlement process as a priority, and committed to "expediting the provincial work on the long-standing Treaty Land Entitlement Framework (TLE) Agreement including completing the transfer to Canada of 1.2 million acres originally identified as TLE land within the next four years."<sup>446</sup> This mandate was also highlighted in the 2007 Manitoba Speech from the Throne, wherein the Government declared that settlement was as an "economic necessity for First Nations" [...pointing to the need to...] support a long-overdue major acceleration of TLE claims through a more decisive settlement process."<sup>447</sup>

Similarly, Indian and Northern Affairs Canada (INAC) had published their policy directive in 2007, "Specific Claims: Justice at Last", wherein the Minister outlined a comprehensive action plan:

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<sup>445</sup> Province of Manitoba, 2011, "Province makes Good Progress on Meeting Treaty Land Entitlement Obligations: Robinson", online: <[news.gov.mb.ca/news/?item=11913](http://news.gov.mb.ca/news/?item=11913)>.

<sup>446</sup> Province of Manitoba, 2007, "Province Targets Four-Year Completion Time Frame for First Nations land Settlements", online: , <[news.gov.mb.ca/news/index.html?item=1871&posted=2007-06-28](http://news.gov.mb.ca/news/index.html?item=1871&posted=2007-06-28)>.

<sup>447</sup> Manitoba: Speech from the Throne, 1<sup>st</sup> Sess, 39<sup>th</sup> Leg Ass, June 6, 2007 (John Harvard).

“Canada’s New Government plans ... to accelerate the resolution of specific claims in order to provide justice for First Nation claimants and certainty for government, industry and all Canadians. After years of debate, we are taking a new, decisive approach to restore confidence in the integrity and effectiveness of the process to resolve specific claims.

...

The Government of Canada has a policy in place to resolve these claims through negotiations rather than through the courts. To honour its obligations and right these past wrongs, Canada negotiates settlements that provide justice to First Nation claimants as well as fairness and certainty for all Canadians. Negotiation is always better than confrontation in securing peaceful settlements that respect the interests of all parties.”<sup>448</sup>

By 2011, the Province claimed to be making “substantial progress in meeting its obligations under treaty land entitlements”,<sup>449</sup> which it deemed “to be a provincial priority and can be an important component in the future economic development plans of First Nations”.<sup>450</sup> However, neither legal force nor moral imperative appears to have generated any sense of urgency for the Crown to resolve remaining claims through good faith bargaining. INAC estimated in February 2015, that Treaty 1 First Nations were still owed over 236,000 hectares (583,000 acres) of land.<sup>451</sup> Worse, “In the last two years [2014 and 2015], only a 0.046-hectare plot has been converted to reserve land”.<sup>452</sup> Continuing this trend, a mere 4.21 acres of urban land (necessary for the establishment of urban reserves) was added in all of 2016,<sup>453</sup> drawing into question the Crown’s commitment to Treaty implementation as a means to economic development.

After nearly a century and a half of Euro-Canadian immigration, facilitated by Canadian property law to “crystalize” private ownership, the means to rectify the Crown’s debt has

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<sup>448</sup> Minister of Public Works and Government Services Canada, Minister of Indian Affairs and Northern Development, 2007, “Specific Claims: Justice at Last”, at 1 (emphasis added).

<sup>449</sup> Province of Manitoba, 2011, “Province makes Good Progress on Meeting Treaty Land Entitlement Obligations: Robinson”, online: <[news.gov.mb.ca/news/?item=11913](http://news.gov.mb.ca/news/?item=11913)>.

<sup>450</sup> *Ibid.*

<sup>451</sup> Crown debt to Manitoba First Nations, exceeds 1.14 million hectares (2.8 million acres). First Nations in other provinces have made similar successful claims for Crown breaches of their corresponding Treaties. See: Indigenous and Northern Affairs Canada, “Treaty Land Entitlement”, online: <[www.aadnc-aandc.gc.ca/eng/1100100034822/1100100034823](http://www.aadnc-aandc.gc.ca/eng/1100100034822/1100100034823)>.

<sup>452</sup> Mary Agnes Welch, “After Supreme Court ruling: a clash of claims between Métis, First Nations”, Winnipeg Free Press, 14 February 2015, online: <[www.winnipegfreepress.com/local/clash-of-claims-on-metis-first-nations-291943961.html](http://www.winnipegfreepress.com/local/clash-of-claims-on-metis-first-nations-291943961.html)>.

<sup>453</sup> Indigenous and Northern Affairs Canada, 2017, “Approved Additions to Reserve Proposals”, online: <[www.aadnc-aandc.gc.ca/eng/1466532960405/1466533062058](http://www.aadnc-aandc.gc.ca/eng/1466532960405/1466533062058)>.

become increasingly complex. It would seem to have been better for all concerned if the Crown had made genuine efforts to honour its treaty obligations from the outset. Through the TLE process, however, all doubt as to what was owned, to whom, and now most importantly, how land would be transferred to First Nations ownership, was resolved. The basic structure of these agreements was for the Crown to set aside funds—that is, financial compensation for its breaches of the Treaty terms, which could be used by the respective aggrieved First Nations, for future purchases of “surplus” Crown land.<sup>454</sup> Canada agreed, “that it would “in good faith, use [its] best efforts to fulfil the terms” of the agreement and to act on a timely basis”.<sup>455</sup> Having met the burden of proof to support their claims before the Indian Specific Claims Commission, First Nations’ negotiated TLE agreements, thereby creating legal mechanisms by which the Crown is to fulfill its Treaty obligations.

### **Changing the Rules**

Treaty 1 First Nations have waited 146 years—so far—for the Crown to follow through on its obligations. Nevertheless, in continued defiance of the terms of Treaty 1, as well as the explicit terms of the Treaty Land Entitlement agreements, when the Kapyong land became available, the Crown moved to divest itself of the “surplus” land, without consideration of, or consultation with, Treaty 1 First Nations. The transfer of the resident Canadian Forces troops from Kapyong to a new permanent home was announced in April 2001, which according to Treasury Board guidelines, resulted in the land being designated “surplus” Crown land. Just weeks after the Kapyong announcement, in July 2001, the Treasury Board created new rules, and

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<sup>454</sup> The Government of Canada defines surplus real property as: “Real property that is no longer required in support of a department's programs.” (Source: Government of Canada, (nd), “Policy on Management of Real Property”, online: [tbs-sct.gc.ca/pol/doc-eng.aspx?id=12042#appA](http://tbs-sct.gc.ca/pol/doc-eng.aspx?id=12042#appA).) It should be noted that land purchases also include the potential to purchase “other land”, being real property held in fee simple (private land), if there is a willing seller.

<sup>455</sup> *Long Plain* 2015 FCA 177 *supra* note 442 at para 26.

“divided surplus property disposal into two categories: routine and strategic. All property falls into the first category unless it has an especially high market value or is “sensitive”—in which case it becomes “strategic”.”<sup>456</sup> This effectively removed the land from consideration in any TLE agreement.

Since the highest law of the land constitutionally protects Treaty rights, Treaty 1 Nations claimed that the Crown’s unilateral decision to remove the “surplus” land, without considering the legal interests of Treaty 1 Nations, was unlawful. The TLE agreements in essence created a first-right-of-refusal for recipient First Nations to consider the purchase of “surplus”—but not “strategic”—Crown land, in order to satisfy their original entitlements under Treaty 1.<sup>457</sup> The “surplus” Kapyong land was exactly the type of opportunity that would, and indeed did, attract the interest of Treaty 1 Nations. The Crown ignored their explicit expression of interest, and rather than uphold the terms of the TLEs, the intent of which was to implement the terms of the 1871 Treaty, and with disregard for its constitutional duty to consult First Nations on Crown actions that may negatively impact Treaty rights, the Crown made plans that excluded possibility of First Nations acquiring the land through the TLE process.

As a result, the affected First Nations<sup>458</sup> initiated court action, seeking a declaration that the Crown was required to consult with them, before excluding the parcel from consideration *vis-à-vis* their TLE settlements. In the words of Federal Court Justice Campbell, “if the standard for

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<sup>456</sup> *Canada v Brokenhead First Nation* 2011 FCA 148 [*Brokenhead* 2011 FCA 148], para 13. These changes were made pursuant to the Treasury Board’s pursuant to Treasury Board’s *Policy on the Disposal of Surplus Real Property* as amended by the *Directive on the Sale or Transfer of Surplus Real Property*, 2015, online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12043>>.

<sup>457</sup> The TLE Framework Agreement is not unique to Manitoba, and can be exercised by First Nations (Treaty Nations) across Canada, where claimants have successfully proven that the Crown breached its obligations in any of the Numbered Treaties.

<sup>458</sup> Canada has recognized only five claimants in this suit, all of which have validated TLE claims: Long Plain FN, Swan Lake FN, Roseau River Anishinabe FN, Brokenhead Ojibway Nation, and under a separate agreement, Peguis FN. On October 7, 2011, Brokenhead FN filed a notice of discontinuance, removing itself as a party to the joint Application.

meaningful consultation...is not met...the chain of legal dispute will not be broken, and disruption to the aspirations of Canada and the Applicant First Nations will continue”.<sup>459</sup> Since first filing an application for judicial review in January 2008, this legal contest has involved seven related hearings, all concerning the Kapyong land.<sup>460</sup> Two of these hearings came before the Federal Court of Appeal, having been heard twice at the Federal court level. At every stage, the Crown continued to oppose and litigate, even as it failed to make the case that it had the power to act unilaterally, effectively ignoring its duty to consult with Treaty 1 Nations and fulfil its treaty obligations to them.

In his 2009 decision, Justice Campbell affirmed that “Canada’s decision to act on the Treasury Board Directive [to remove Kapyong from the ‘surplus’ listing] is unlawful and a failure to maintain the honour of the Crown”.<sup>461</sup> He noted that the record “establishes that from the beginning to the end of the decision-making with respect to the lands, it is clear that Canada had no intention to grant the First Nations any meaningful consultation”.<sup>462</sup> Highlighted in this decision was also the importance of Treaty implementation as a means to reconciliation:

The Treaty Commissioner for Saskatchewan sees Treaty implementation as part of a process of reconciliation. The Commissioner’s following comment, cited by the Applicant First Nations, is a helpful observation in understanding the importance of a non-litigious engagement between Aboriginal People and government when making decisions which directly affect Aboriginal Treaty rights:

In law, as both the Haida and Mikisew cases emphasize, reconciliation is a “process,” and that process does not end with the making of a treaty. The process carries on through the implementation of that treaty and is guided by a duty of honourable dealing. The very nature of the treaties is to establish mutual rights and obligations.<sup>463</sup>

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<sup>459</sup> *Brokenhead First Nation v Canada*, 2009 FC 982 [*Brokenhead* 2009 FC 982] at para 38.

<sup>460</sup> The cases include; *Brokenhead First Nations v Canada* 2009 FC 982; *Canada v Brokenhead First Nation* 2011 FCA 148; *Long Plain First Nation v Canada* 2012 FC 1474; *Long Plain First Nation v Canada* 2013 FC 86; *Peguis First Nation v Canada (Attorney General)* 2013 FC 276; *Peguis First Nation v Canada (Attorney General)* 2014 FCA 7; *Canada v Long Plain First Nation* 2015 FCA 177.

<sup>461</sup> *Brokenhead* 2009 FC 982 *supra* note 459 at para 37.

<sup>462</sup> *Ibid* at para 28.

<sup>463</sup> *Ibid* at para 12.

In what has become the Crown's standard for dealing with Aboriginal peoples, and despite the clear duty upon the Crown to consult, the Government responded by filing an appeal. This response flies in the face of the government's own rhetoric promising Aboriginal peoples that their constitutionally entrenched rights will be respected, the Crown's preference for negotiation over litigation, and the Crown's stated goals to correct its century-old breaches of the Treaties through the TLE processes, as outlined in the TLE Framework agreement and other similar agreements.<sup>464</sup>

### **Justice Nadon *versus* Justice Campbell (on Reasonable Reasons)**

Thus, the matter proceeded to the Federal Court of Appeal, where Appeal Court Justice Marc Nadon, writing for a unanimous court, deemed the reasons for the original order "rife with uncertainty and contradiction [and] inadequate. They do not grapple with and attempt to resolve the difficult legal issues and the confusing evidentiary record that were before him."<sup>465</sup> Justice Nadon found, among other things, that the decision left Canada "in the position of being ordered to consult, but being unsure with whom it must consult"<sup>466</sup> He found that Justice Campbell "failed to adequately distinguish between the different circumstances of the respondents",<sup>467</sup> and "it was an error on the Judge's part to fail to seriously consider Canada's alternative argument that its duty to consult had been fulfilled".<sup>468</sup> Finding "the Judge failed to seize the substance of the critical issues before him",<sup>469</sup> Justice Nadon ordered that the matter be referred back to the Federal Court, shooting the messenger by explicitly excluding Justice Campbell as a potential

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<sup>464</sup> *Treaty Land Entitlement Framework Agreement*, 29 May 1997, online: <[http://tlec.ca/wp-content/uploads/2012/01/TLE-Framework-Agreement-1997\\_\\_7.pdf](http://tlec.ca/wp-content/uploads/2012/01/TLE-Framework-Agreement-1997__7.pdf)>.

<sup>465</sup> *Brokenhead* 2011 FCA 148 *supra* note 456, at paras 34 and 50.

<sup>466</sup> *Ibid* at para 38.

<sup>467</sup> *Ibid* at para 40.

<sup>468</sup> *Ibid* at para 48.

<sup>469</sup> *Ibid* at para 51.

adjudicator. Despite his many criticisms aimed almost exclusively at the trial judge, he awarded costs to the Crown. Before sending the matter back to the Federal Court for retrial, Justice Nadon also implicated Brokenhead First Nation as an author of its own misfortune, for failing to exercise the alternative dispute resolution mechanism in its TLE agreement, instead of pursuing their interests in the Court.<sup>470</sup>

Meticulously addressing the concerns raised by Justice Nadon, in December 2012, Federal Court Justice Roger T Hughes released his 47-page, comprehensive “Amended Reasons for Judgment and Judgment” concerning the Crown’s duty to consult the affected First Nations. In his reasons, Justice Hughes adopted verbatim nearly half of the Justice Campbell (Federal Court) decision, and added substantial detail to affirm the original finding that “Canada has failed to fulfil the scope of its duty to consult with the Applicants”.<sup>471</sup> On this point, Justice Hughes was unequivocal: Canada, despite conceding it has a duty to consult,<sup>472</sup> “[e]ven at a minimal level...did not fulfil its obligations”.<sup>473</sup> Further, the “matter is more egregious in the 2006 to 2007 period. Canada simply ignored correspondence written by and on behalf of the Applicants”,<sup>474</sup> wrote Justice Hughes.

The legal challenge to the Crown’s decisions regarding this land indeed “has an unhappy history”,<sup>475</sup> as Justice Hughes termed it. To make his point, his order contained a request for submissions on costs, which was a signal to the Crown that the Court was displeased with the course of litigation. In 2013, a separate hearing was held as to costs, wherein Justice Hughes

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<sup>470</sup> *Ibid* at para 45. These sentiments were echoed in the Federal Court of Appeal Decision, *Long Plain* 2015 FCA 177 *supra* note 442, see for example, paragraph 139: “As is often the case when relationships become dysfunctional, fault can be found on both sides.” Also see paragraphs 158 and 159 of this same decision, wherein the Court opines on the “reciprocal duty on aboriginal peoples”.

<sup>471</sup> *Long Plain First Nation v Canada*, 2012 FC 1474 [*Long Plain* 2012 FC 1474] at para 80.

<sup>472</sup> *Ibid* at para 66.

<sup>473</sup> *Ibid* at para 78.

<sup>474</sup> *Ibid* at para 69.

<sup>475</sup> *Ibid* at para 4.

determined appropriate costs, based largely on the belligerent behaviour of the Crown: “Had that concession [regarding the *prima facie* duty of the Crown to consult] been made earlier, substantial effort and evidence could have been saved. The respondents failed to make full and candid disclosure of the documents relating to the decision at issue. This made the argument and decision difficult.”<sup>476</sup> Clearly, the warning issued by Justice Hughes in the trial decision, went unheeded at the 2013 Federal Court hearing. Quoting the Crown’s oral argument at length, Justice Hughes noted this belligerence, wherein Crown counsel boasted,

“if we can’t reach an agreement [through consultation] or we can’t reach accommodation, well, we’ll then just proceed to sell the property to the Canada Lands Company. We’ll do whatever it is that we had to do. If my learned friends have an objection at that point to our transferring the property because the consultation in their opinion was not thorough enough or satisfactory, it’s open to them to bring the matter back to the Court for review”<sup>477</sup>.

This ‘unhappy history’ of Crown-Aboriginal relations is not unique, and sadly demonstrates the Canadian government’s vacuous interpretation of what it means to act in accordance with the ‘Honour of the Crown’. Despite being defined by the Court and constitutionally entrenched, it would seem that the Crown’s duty to consult with Aboriginal peoples is only meaningful where persistence and very deep pockets support the legal challenges necessary for First Nations to force the Crown to submit to its own law. When called to account for the lack of substantive action to address breaching the treaty relationship, the Crown continues to act in a manner that is both insolent and dishonourable. Unsurprisingly, the Crown again appealed the new Federal Court decision.

The long awaited (second) Federal Court of Appeal decision on Kapyong was released in August 2015, seventeen months after hearing it for the second time in early 2014, and more than 14 years after the initial announcement that the Kapyong base was to be vacated. In adjudicating

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<sup>476</sup> *Long Plain First Nation v Canada*, 2013 FC 86, at para 7.

<sup>477</sup> *Brokenhead* 2009 FC 982 *supra* note 459, at para 38 (highlighting added by Justice Campbell removed).

the Kapyong question, the Federal Court of Appeal put it this way: “For over a century, Canada had broken a treaty promise to provide certain Aboriginal bands with lands. And to remedy the broken promise, Canada entered into certain agreements with some of the bands, including four of the respondent bands, to facilitate their acquisition of lands.”<sup>478</sup>

The remedy sought in the Kapyong cases had always been a petition to the court to issue a declaration that the Crown owed a duty to consult with Treaty 1 Nations before selling the Kapyong land to other buyers, and second, an order to restrain the Crown from selling the land through the Canada Lands Company, which would make any future negotiations on the land irrelevant. At every level, the court agreed that the Crown had, and continues to have, a duty to consult Treaty 1 Nations on the Kapyong land sale. The Crown eventually conceded on the first point, although it argued that it had met that duty. The Federal Court of Appeal disagreed with the Crown, and defining sixteen specific points on which the Crown failed to consult,<sup>479</sup> the Court was nevertheless gentle and generous in its reproach:

In my view, the treaty land entitlement agreements, seen in their proper historical context, reveal a genuine, *bona fide* desire, intention and commitment on the part of Canada—consistent with its obligations of honourable conduct, reconciliation and fair dealing with Aboriginal peoples—to engage in a process to rectify Canada’s broken promise in Treaty No. 1 over time. ...

...

In doing this, we must ensure that we are not applying too exacting a standard. ... Even in healthy relationships where there is mutual trust and ample communication over simple issues, there can be isolated innocent omissions, misunderstandings, accidents and mistakes.

...

Examining the record myself, I see no particular *animus* on the part of Canada. Instead, fairly read, the record shows a repeated lack of understanding on the part of Canada about the nature and scope of the duty to consult in the particularly unusual circumstances of this case. ... As these reasons suggest, it should have altered its course. But that sort of inertia is not enough to warrant the use of the term “egregious.”<sup>480</sup>

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<sup>478</sup> *Long Plain* 2015 FCA 177 *supra* note 442, at para 9.

<sup>479</sup> See in particular paragraph 134 of *Long Plain* 2015 FCA 177 *supra* note 442.

<sup>480</sup> *Long Plain* 2015 FCA 177 *supra* note 442, at paras 117, 133, and 137.

Despite over a hundred years of legal inertia, if not outright aggression towards First Nations, the court credits the Crown with being honourable, finding that any mistakes were simply that, innocent mistakes. This is not merely incidental to the wellbeing of Aboriginal peoples, but absolutely central. The fact that Treaty implementation and economic development are so closely tied, and there exists a desperate and chronic need for economic opportunities for First Nations, recognized as a “priority” by government after government, one has to wonder if the Crown can ever do wrong? To add to the injustice, bearing in mind that this decision was a “win” for Treaty 1 First Nations, the court concluded:

Although we must show deference to remedial choices made by the Federal Court, in my view there was no basis in principle or on the facts of this case for the Federal Court to make the restraining order and the supervision order. Thus, I would set aside paragraph 4 of the judgment of the Federal Court.

First, the restraining order. In my view, on this evidentiary record, it cannot be sustained. One cannot say that Canada will not obey the letter and spirit of this Court’s decision. For many years leading up to the judgment of the Federal Court, Canada was free to transfer the Barracks property to the Canada Lands Company but did not. There is no reason to think that Canada will now act unfairly or unilaterally concerning the Barracks property. Further, as a result of these reasons, Canada is now well-aware of its obligations, and there is no evidence to suggest that it will not govern itself accordingly.<sup>481</sup>

The Court thus quashed the orders issued by the trial judge, and asserted that the Crown could be trusted to do the right thing. After 146 years of failing to act in keeping with its Treaty obligations, should have given the court reason to question the trustworthiness of the Crown. Having faced legal contest after legal contest, and forcing First Nations to invest scarce resources in what appears to be a vain attempt to hold the Crown accountable, Treaty 1 First Nations are no closer to receiving what they are due. The Federal Court of Appeal put it very simply: “The Aboriginal bands fulfilled their side of the bargain under Treaty No. 1. But Canada did not. It

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<sup>481</sup> *Ibid* at paras 147 and 148 (emphasis added).

never fulfilled the per capita provision. It broke the solemn promise it had made.”<sup>482</sup>

Nevertheless, it refused to hold the Crown to its word and facilitate reconciliation. The obvious repercussions of such an impotent decision is that without land, economic opportunities will continue to be scarce for First Nations peoples. Treaty implementation, and indeed a renewed relationship with First Nations, requires that the Crown begin to speak with truth and honour.

### **From Pavement to Prosperity – Kapyong as an Urban Reserve**

The Crown’s belligerent reticence to fully implement the 1871 Treaty 1 *per capita* land allocation is apparent in the Kapyong court decisions, the result of which is clearly adverse to the economic interests of those First Nations. According to Alan Pratt: “Breaches of government duties have had the effect of depriving First Nations of access to land and resources that they desperately need to sustain themselves and struggle toward prosperity and have been among the principal causes of poverty and lack of opportunity in First Nations communities.”<sup>483</sup> Whether by design or by accident, or perhaps owing to the economic potential of the Kapyong land, the Federal Government chose to restrict how the land would be disposed through its designation as “strategic”. Despite the fact that this parcel of land appears to fit the criteria that would enable the Crown to make some progress on meeting its Treaty obligations, as detailed in TLE agreements, and now affirmed by the Federal Court of Appeal, the barracks remain vacant and decaying.

The rationale offered by the Crown for the decision to change the designation of the Kapyong land, from “surplus” to “strategic”, was to “optimize the financial and community value of strategic government surplus properties through effective planning, including rezoning

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<sup>482</sup> *Ibid* at para 13.

<sup>483</sup> Alan Pratt, Alan Pratt Professional Corporation, 2004, “Validating Claims Under the *Specific Claims Resolution Act* (And Beyond!)”, online: <<http://www.prattlaw.ca/articles/ValidatingSpecificClaimsJune2004.pdf>>, p 4.

and site servicing for property development, so as to achieve the highest and best use of the land”.<sup>484</sup> This designation has since been successfully applied to convert other abandoned military urban sites, into premier “legacy” neighbourhoods in Edmonton, Calgary, and Chilliwack. Clearly, the Government of Canada envisioned this ‘highest’ and ‘best’ use of the land should necessarily exclude ownership and development by First Nations. Despite the rhetoric about the importance of economic development for First Nations, the Crown appears to be determined to prevent an urban reserve in Winnipeg on the former Kapyong Barracks land.

Urban reserves are considered by many to be one of the most promising avenues to prosperity for First Nations peoples, and are at least notionally promoted by government. For example, in 2008, Aboriginal Affairs and Northern Development Canada (as it was called at the time) released a “Backgrounder” policy statement on urban reserves. This statement set out the challenges to First Nations’ economic participation as being something far removed from the historic reality of Canada’s Indian policy that created many of these conditions. By avoiding taking responsibility for much of the current socio-economic conditions experienced by Indians, urban reserves are promoted as innovative opportunities for First Nations to overcome their unfortunate happenstance of history: “Many First Nations in Canada are located in rural areas, far from the cities and towns where most wealth and jobs are created. This geographic remoteness can sometimes pose challenges for First Nations trying to increase their economic self-sufficiency. Urban reserves are one of the most successful ways to address this problem.”<sup>485</sup> In this way, the government is poised to absolve itself of blameworthiness, if Indians fail to capitalize on such opportunities (even in the face of government opposition).

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<sup>484</sup> Michael C Ircha and Robert Young, eds, *Federal Property Policy in Canadian Municipalities*, (Montreal: McGill-Queen’s University Press, 2013) at 19.

<sup>485</sup> Aboriginal Affairs and Northern Development Canada (2008), “Backgrounder – Urban reserves: A Quiet Success Story”, online: <[www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332](http://www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332)>.

Kapyong could have, and perhaps may yet be, the crown jewel of Treaty 1 First Nations economic enterprises.<sup>486</sup> At this point, however, it is difficult to imagine how this can come about. Even if they are able to purchase the land, they must also seek the approval of the Federal government to convert the land to “reserve” status. This involves a long and complex process. “Of 1,275 ATR [Additions To Reserves] projects started between 2005 and 2012, 88.9% were for legal obligations; 10.9% were for community additions; and 0.2% were for new reserves/other (Standing Senate Committee on Aboriginal Peoples, 2012). Therefore, only small numbers of applications have fallen in the category for ‘new’ urban reserves.”<sup>487</sup>

Reserve creation often stems from Canada's legal obligation to settle and implement outstanding land claims. The majority of urban reserves are created as a result of specific claim and Treaty Land Entitlement settlements, which provide First Nations with cash payments that may be used to purchase land. As with any private individual or corporation, First Nations have the right to buy land from a willing seller. Once acquired, they also have the option of asking the federal government to transfer their land to reserve status, whether the property is located in an urban or rural setting.

Approval of reserve status is not automatic. In order to get land designated as a reserve, federal policies require that a step-by-step approach be taken to address the concerns of everyone involved, including municipalities and environmental authorities. The Department's Additions to Reserves/New Reserves Policy requires environmental site assessments prior to any land acquisition by the federal government. This serves to protect both Canada and First Nations from adverse impacts.<sup>488</sup>

Adding to this already complex problem is the impact of widespread public opposition to an urban reserve in this area. In September 2014, Probe Research asked Winnipeggers to respond to this question: “The division between aboriginal and non-aboriginal citizens is a serious issue in our city?”, and reported “that most [in fact, over 75 percent of] *Winnipeggers* believe there is a

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<sup>486</sup> The economic potential of the barracks land remains considerable, given that it is situated in the City of Winnipeg, proximal to two affluent neighbourhoods, and is already zoned for commercial development. This may be among the reasons why the Federal Government chose to restrict how the land would be disposed. Despite the fact that this parcel of land appears to fit the criteria that would enable the Crown to make some progress on meeting its Treaty obligations, as detailed in TLE agreements and now affirmed by the Federal Court of Appeal (discussed above), the barracks remain a vacant lot.

<sup>487</sup> Holli Poholka, (2006), “First Nation Successes: Developing Urban Reserves in Canada” p 17.

<sup>488</sup> Aboriginal Affairs and Northern Development Canada (2008), “Backgrounder – Urban reserves: A Quiet Success Story”, online: <[www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332](http://www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332)>.

deep racial gulf between Aboriginal and non-Aboriginal citizens – and this is indeed a serious problem for the city”.<sup>489</sup>

For whatever reasons, many citizens have voiced their objection to the possibility of an urban reserve at Kapyong, with some assuming it is yet again, a demand for a handout made by Aboriginal people. Nothing could be further from the truth. Clearly, by the Crown’s own admission, and again most recently, the Court’s confirmation, it is the Crown that is dining out on a “free lunch”, to use the language of the Canadian Tax Payers Foundation.<sup>490</sup> While Aboriginal people continue to experience poverty and disadvantage like no other group in Canada, the Crown has resisted at every turn to allow Treaty 1 nations opportunity to purchase, at fair market value, the Kapyong parcel for development as an economic centre. Public comments from individuals identifying themselves as residents of the nearby Tuxedo and River Heights neighbourhoods, range from overtly racist to mildly sympathetic, but not enthusiastic by any measure.<sup>491</sup>

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<sup>489</sup> Probe Research Inc, (2014), “Winnipeg is a Divided City, Citizens Say”, online: [www.probe-research.com/documents/141003%20Aboriginal%20Relations%20Release.pdf](http://www.probe-research.com/documents/141003%20Aboriginal%20Relations%20Release.pdf).

<sup>490</sup> Tanis Fiss & Adrienne Batra, Canadian Taxpayers Federation, (2005), “Urban Reserve – Coming to a City Near You”, online: <[www.caledoniawakeupcall.com/CTF/050916ctf.html](http://www.caledoniawakeupcall.com/CTF/050916ctf.html)>.

<sup>491</sup> See for example: Dan Lett, Winnipeg Free Press, 15 Dec 2012, “Barracks boondoggle a waste of time, money: No reason for wrangling”, comment by reader “karlitos10”: “I’d rather see the Feds pump a million per year into this land to maintain it then let first nations build an urban reserve their and waste that land on something that would be a waste of real estate..if first nations want an urban reserve they should buy up a strip of boarded up shacks in the north end and build it there..it might actually do some long term good if it was built their” [*sic*].

Larry Kusch, Winnipeg Free Press, 7 Oct 2012, “First Nations overjoyed with Kapyong land decision”, comment by reader “SMITT3700\_” 12:36AM on 12/15/2012: “Wonder how the people living in Tuxedo are going to enjoy having an “urban reserve” as a neighbour?” and reply: “Endora Stevens” 12:18PM on 12/15/2012: “Enjoy? They for the most part might compare it to having a tumor or severe infection I am guessing?” [*sic*].

Alexandra Paul, Winnipeg Free Press, 7 Oct 2012, “First Nation close to deal on Kapyong Barracks”, comment by reader “Devchev” 5:58 on 11/29/2012: “@Michael Kannon can you show me the link where 1/3 of Canadian workers weren’t taxed. And furthermore the reason they are “impoverished” is because they choose to be. Why should I pay extra tax to give them a leg up. Any business I’ve started I’ve done on my own without tax breaks”; comment by reader: “Michael Kannon” 11:48AM on 11/28/2012: “@Sarabrook, You missed many of the deleted comments. One was comparing FN people to dogs plus the same ole assortment of blanket bigotry. And you call us backwards!”

Stories and comments online: <[www.winnipegfreepress.com/](http://www.winnipegfreepress.com/)>. The most offensive comments are removed or blocked by the Free Press, but those that remain sufficiently demonstrate the ill informed and racist sentiments of many readers [Free Press Comments].

### Grounding Taxation in the Treaty Relationship

Courts continue to uphold this underlying claim of indisputable, indivisible Crown sovereignty, propped up by its own legal fiction. This ‘historically validated arrangement’, as Paul McHugh terms it, has infused the Courts’ understanding of treaties, such that “the sovereignty of the Crown-in-Parliament was put beyond any historical explanation”.<sup>492</sup> This perspective has hobbled the Crown’s ability to consider the true spirit and intent of historical treaties with Indigenous peoples. As Michael Asch points out, for Canadians, “Treaties, then, and not the constitution, are our charter of rights”.<sup>493</sup> The inability of the courts, and indeed Parliament, to recognize the sovereign basis of treaty agreements, relegates them to an inferior rendition of their original intent, forcing courts to becoming increasingly creative in justifying the lack of implementation and honour accorded them. What is missed in this perspective is that Treaties create a perpetual relationship between equals. Asch states “while these [treaty] commitments were laid out, they were merely a tangible expression of a larger commitment to ensure that [First Nations] would benefit, not suffer, economically as a consequence of settlement”.<sup>494</sup> While the courts are determining “who is in charge” in jurisdictional squabbles between the provincial and federal Crowns, First Nations peoples are looking to Treaties as a means to partnership with the Crown.

Asch urges the Canadian state to step up to the challenge to apply its own constitutional interpretive framework to treaties. By doing so, he argues, treaties can assume their proper legal importance:

“If we take the view that [the Crown] lied, the treaties become worthless pieces of paper and we are back to square one. But if we take the view that we meant what we said, they

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<sup>492</sup> Paul McHugh, “Sovereignty this Century – Maori and the Common law Constitution” [2000] Victoria University of Wellington Law Review 16; 31:1 [McHugh] (np). Russell terms this arrangement “legal magic” *infra* note 562.

<sup>493</sup> Asch *supra* note 416 at 99.

<sup>494</sup> *Ibid* at 994.

become transformative, for through them, we become permanent partners sharing the land, not thieves stealing it, people who are here to stay not because we had the power to impose our will but because we forged a permanent, unbreakable partnership with those who were already here when we came.”<sup>495</sup>

This transformative potential, accepting that settlers meant what they said, then has great implications for the future prosperity of Indigenous nations. It is clear that self-determination and economic prosperity are inseparably linked. Given the resistance that Indigenous communities face when attempting to take hold of the prosperity envisioned in the treaties, it is incumbent upon the Crown to act honourably.

It is important to understand that Treaties are not simply about hunting and fishing rights. Although economic opportunities in remote areas have always existed—the billions of dollars extracted or generated from Aboriginal lands and waters testifies to this fact—Treaty Indians in particular have been historically shut out of sharing in that prosperity. Now, with a growing urban Aboriginal population, treaty implementation also affects at least 50 percent of status Indians who reside in urban centres like Winnipeg. The challenges for First Nations peoples to finding meaningful employment in urban centres are many: prejudice and stereotypes held by potential employers, general racism (which is alive and well), and poor educational outcomes are obvious barriers.<sup>496</sup> According to Wilson & Macdonald: “Not only has the legacy of colonialism left Aboriginal peoples disproportionately ranked among the poorest of Canadians, this study reveals disturbing levels of income inequality persist as well. In 2006, the median income for Aboriginal peoples was \$18,962 — 30% lower than the \$27,097 median income for the rest of

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<sup>495</sup> *Ibid* at 99.

<sup>496</sup> See: Richard J Klyne, “Employment Barriers and Aboriginal Working Life: Towards A Representative Workplace in Saskatchewan” (MA thesis, University of Regina, 2002 [unpublished]); Centre for Social Justice, “Aboriginal Issues”(nd), online: <<http://www.socialjustice.org/index.php?page=aboriginal-issues>>; Patti Doyle-Bedwell, ““With the Appropriate Qualifications”: Aboriginal People and Employment Equity”, 26:3,4 *Canadian Woman Studies*, (Winter-Spring 2008) 77.

Canadians.”<sup>497</sup> Even where individual Indians are successful, as many are, it is on an individual basis only. When considering Treaty implementation as a means to economic development vis-à-vis urban reserves, opportunities for First Nation bands/communities become possible. The bottom line here is simple: urban reserves have the potential to create the economic activity necessary to employ whole communities. Ironically, it is often those who oppose the development of urban reserves who are quick to demand that Indians get jobs and become contributing members of society. Perhaps this enthusiasm would be better directed at the Crown to uphold its treaty obligations, so Indians can get on with business...literally.

### **Public Opinion: “It’s Not Fair!”**

Public opposition to urban reserves frequently coalesces around the fact that the *Indian Act* contains certain tax provisions for status Indians on reserves. Amid blatantly racist commentary from Winnipeggers and other “concerned” parties who opposed the acquisition of the Kapyong land by Treaty 1 Nations, are objections to the special tax status that registered Indians can claim in some circumstances. The most contentious of these provisions include the potential for tax-free employment earnings, sales tax exemptions on retail purchases, and businesses that are exempt from paying property taxes. It is this seemingly “unfair” tax treatment within an urban reserve (also termed an “economic zone”) that so often draws the scorn and protest of non-Indigenous peoples. Understanding the true issues, both historic and legal, in a dispute like Kapyong goes a long way towards reconciliation. Holding steadfastly to racist, erroneous information, perhaps even with the intent to misinform Canadians about urban reserves, is divisive and destructive. In many ways, Kapyong serves to highlight how Aboriginal peoples in

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<sup>497</sup> Daniel Wilson & David Macdonald, Canadian Centre for Policy Alternatives, “The Income Gap Between Aboriginal Peoples and the Rest of Canada”, (Apr 2010), online: <<http://www.ccpanews.ca/sites/default/files/uploads/publications/reports/docs/Aboriginal%20Income%20Gap.pdf>> at 3.

what is now Canada have lived in a post-truth era since 1867.

The key issue to consider here, however, is the larger picture of fairness. Viewed simply through a lens of taxation, horizontal and vertical fairness being a fundamental principle, the real issue is one of treaty implementation. It is the Crown that continues to proclaim its own honour—and nowhere more than in its dealing with Aboriginal peoples, while it champions the Rule of Law, and extolls the virtues of peace, order, and good governance. Except, it seems, when it comes to its foundational relationship with the first peoples of Turtle Island. At issue, then is this question: Is it fair to renege on treaties, systematically dispossess and demoralize its First Nations peoples, and then feign concern for their economic and social wellbeing? Are the perceived “advantages” of the section 87 of the *Indian Act* provisions that are “given” to First Nations peoples really about taxation? In the face of legislation (namely the *Indian Act*), Crown agreements (such as the TLEs), Constitutional amendments (entrenching Aboriginal and treaty rights in sections 25 and 35), and court decisions (especially those dealing specifically with Kapyong), the so-called ‘unfair’ taxation provisions is no basis for the Crown to continue to impede the resolution of the Kapyong matter. It is this larger context to which Canadians must pay attention.

Nevertheless, it is also apparent that the archetype of the ‘poor’ Indian continues to echo through jurisprudence, such as is found in *Recalma*; despite being modified by subsequent law, the aversion to the ‘wealthy’ Indian continues to influence both jurists and the general public. Even the slightest hint that Indians (and indeed all Aboriginal peoples) might rise up and manage their own affairs in their own way, and achieve economic success, makes many Canadians nervous. Hence, the ‘protect, civilize, assimilate’ goals of Indian policy continue to linger, resulting in more Aboriginal peoples being marginalized, excluded from traditional territory,

family connections, cultural ties, opportunities for economic participation, and ultimately human dignity. The courts' narrow interpretation of the *Indian Act* tax provisions is but one indicia of where they have lost sight of the foundational nature of the treaty relationship.

This 'special' legal status is now understood to have formed the foundation of Canadian Indian law and policy, albeit one that has been marred by prejudice and ruthless colonial ambition, but nevertheless is a relationship that began with treaties. Jurisprudence since 1982 indicates that the court have raised expectations for its own consideration of the treaties, giving recognition to the fact that Aboriginal peoples have their own perspectives, and which the courts suggests are equally legitimate and requiring accommodation. This proposition, one that has consistently been held by Aboriginal peoples since the time of treaty making, gained traction in 1984 with the *Guerin*<sup>498</sup> decision, and continues to resonate in subsequent jurisprudence.<sup>499</sup> While the importance of having due regard for the 'Aboriginal' perspective remains to be fully explored by the courts, Indigenous scholarship and Aboriginal perspectives of the treaties and the rights protected by those special agreements, have much to contribute to understanding the historic basis for the *Indian Act* tax provision. The intrinsic connection between Aboriginal peoples and their traditional territories, and the rights that flow from that relationship, is slowly becoming apparent to jurists and legislators alike. Legal scholar John Borrows put it this way:

Even in parts of the country where treaties were signed, Indigenous peoples experience broad denials of their freedom and autonomy to land, governance, and other vital resources....Canada has not only done a poor job in reflecting Indigenous peoples within its constitutional order, it has greatly harmed their social, economic, and spiritual relations and practices throughout most of its history. As Chief Justice McLachlin observed, Canada committed cultural genocide in relation to Aboriginal peoples. Colonialism is not only a historic fact of Canadian life – it is a present distressing reality.<sup>500</sup>

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<sup>498</sup> *Guerin supra* note 11.

<sup>499</sup> The Supreme Court continues to retreat from this position. In considering excise taxes, the Court denied the possibility that the 'aboriginal perspective' could ever "alter the basic structure of Sovereign-Indian relations [nor are] aboriginal peoples ...outside the sovereignty of the Crown"; see *Mitchell v Peguis supra* note 24, at 109.

<sup>500</sup> Borrows *Freedom supra* note 54 at 107 (notes removed).

The last words on the Kapyong matter from the 2015 Federal Court of Appeal were thus:

Finally, it is to be hoped that whatever rancour, bitterness and mistrust among the parties may have existed in the past, the parties will now proceed to engage in constructive, respectful consultations concerning the Barracks property for the benefit of all.<sup>501</sup>

Recall, however, that the Federal Court of Appeal refused to issue any order or directive for the Crown, and justified this position by assuming the Crown's sense of honour is to be relied upon:

“There is no reason to think that Canada will now act unfairly or unilaterally concerning the Barracks property. Further, as a result of these reasons, Canada is now well-aware of its obligations, and there is no evidence to suggest that it will not govern itself accordingly.”<sup>502</sup>

### **New Zealand – Treaty Implementation**

The *Treaty of Waitangi*, New Zealand's foundational document, was signed in 1840, between Britain and “Chiefs of the Confederation of the United Tribes of New Zealand”.<sup>503</sup> By this time, Britain had already recognized the sovereignty of Aotearoa (or New Zealand as they called it), as established through a Declaration of Independence and the use of a flag, and reflected in statements of the British Colonial office.<sup>504</sup> For Lieutenant-Governor Hobson, the Treaty ushered in “British sovereignty over all of New Zealand: over the North Island on the basis of cession...and over the southern island by right of discovery”.<sup>505</sup> This proclamation defied the fact that Māori Chiefs from the South Island had also signed the Treaty, and moreover, that the Māori text of the treaty ceded neither sovereignty nor territory. The Treaty appeared to have little meaning for British plans for colonization, which were carried out through

<sup>501</sup> *Long Plain* 2015 FCA 177 *supra* note 442 at para 163.

<sup>502</sup> *Ibid* at para 148.

<sup>503</sup> *Treaty of Waitangi Act 1975, Schedule 1 – The Treaty of Waitangi*, English Text [Treaty of Waitangi].

<sup>504</sup> See for example, Great Britain, House of Commons Parliamentary Papers, “Report From the Select Committee on New Zealand together with the Minutes of Evidence”, 1840, at 55-60.

<sup>505</sup> Minister for Culture and Heritage, “Political and constitutional timeline”, 13 November 2013, New Zealand History online, online: <<http://www.nzhistory.net/nz>>.

unprovoked military actions and ‘legal’ land seizures of Māori land.

Only a few short decades after the signing of the *Treaty of Waitangi*, its legal importance was forgotten by all but the Māori, who depended on its promises and protection. By 1877, in an Māori land case, Supreme Court Chief Justice Prendergast declared the “alleged treaty...if it ever existed, was a legal nullity”,<sup>506</sup> rationalizing his position with the myth that “the aborigines were found without any kind of civil government, or any settled system of law...[thus] incapable of performing the duties, and therefore of assuming the rights, of a civilised community”.<sup>507</sup> This landmark precedent would guide the Crown-Māori relationship for the next century, resulting in the systematic and unjust dispossession and oppression of Māori peoples. According to Prendergast, Canadian jurisprudence supported his determination; while the French (Canadians) enjoyed recognition of their own civil code, “in the case of primitive barbarians, the supreme executive government must acquit itself, as best it may, of its obligation to respect native property rights, and of necessity must be the sole arbiter of its own justice.”<sup>508</sup> The Crown monologue on Māori, and indeed all Aboriginal, rights quickly dispensed with any notion of a treaty relationship.

Despite this typical experience of British colonization and the Crown’s historic disregard for the *Treaty of Waitangi*, New Zealanders engaged in a paradigm shift. In 1975, recognizing their legal, if not moral, obligation of Treaty implementation, the government of New Zealand took a different, and markedly bolder, approach to renewing and rebuilding the Treaty Crown-Māori relationship. A number of factors contributed to this shift, not the least of which was the relentless belief of Māori in the importance of the Treaty. The turning point in modern Treaty interpretation came through the *Treaty of Waitangi Act 1975*, and the recognition of the latter in

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<sup>506</sup> *Wi Parata v Bishop of Wellington* [1877] 3NZ Jur (NS) 72 (SC) at 2 [“Prendergast decision”].

<sup>507</sup> *Ibid* at 5.

<sup>508</sup> *Ibid* at 7.

subsequent legislation, restoring the *Treaty* from “a simple nullity”,<sup>509</sup> to a status nearing a constitutional authority.

The 1975 Act further established the Waitangi Tribunal, a permanent commission of inquiry, whose main function is to inquire and make recommendations concerning “claims that Maoris are prejudicially affected by legislation, policy or acts or omissions of the Crown inconsistent with the Principles of the Treaty of Waitangi”.<sup>510</sup> The 1985 amendment expanded these provisions to include inquiry into historic breaches, such as the illegal confiscations of Māori land by the Crown. Although Tribunal Report recommendations are (generally)<sup>511</sup> non-binding on Courts, the Act itself is binding on the Crown,<sup>512</sup> and the Tribunal holds “exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them”.<sup>513</sup> Opportunity for legal reparation, including the potential return of land and resources, held new hope for Māori revitalization.

The ‘Principles’ of the Treaty, which are of central interpretive value, came into focus in 1987, as the result of the challenge by the New Zealand Māori Council to the enactment of the *State-Owned Enterprises Act 1986*.<sup>514</sup> Facing severe national economic challenges, New Zealand introduced legislation requiring all State enterprises to become fiscally accountable; the “concept underlying the 1986 Act [was] that the directors operate the companies to make profits and without day-to-day Government interference”.<sup>515</sup> The legislation provoked swift response from the Maori Council, with Mr Graham Latimer representing “all persons entitled to the protection

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<sup>509</sup> *Ibid* at 8.

<sup>510</sup> *New Zealand Māori Council v Attorney-General* [1989] NZCA 43, Judgment of Cooke at 6 [“Lands Case”]. While the Court of Appeal reached a unanimous decision, each member set out individual reasons.

<sup>511</sup> The *Education Amendment Act 1990* and the *NZ Railways Corporation Restructuring Act 1990* are examples of exceptions, whereby the Tribunal is empowered to make binding recommendations regarding the return to Māori of certain education lands in the first instance, and railway lands in the second instance.

<sup>512</sup> Treaty of Waitangi *supra* note 503 at s 3.

<sup>513</sup> *Ibid* at s 5(2).

<sup>514</sup> State-Owned Enterprises Act 1986 (NZ), 1986/124.

<sup>515</sup> Lands Case *supra* note 510 at 4 (Judgment of Cooke).

of Article II of the Treaty of Waitangi<sup>516</sup>; Māori applicants expressed concern that the Act allowed for alienation and sale of millions of hectares of Crown land and other natural resources, thus removing them from being available for settlement purposes. The High Court noted the concern, which was also reflected in an interim report of the Tribunal, and the matter, despite the Solicitor-General's opposition, was expedited to the Court of Appeal.<sup>517</sup>

In his submission to the Court of Appeal, the Solicitor General “stressed the inconvenient practical consequences that would flow from an interpretation in favour of added Māori protection”.<sup>518</sup> The court dismissed this assertion stating, “it has now become obligatory on the Crown to evolve a system for exercising the powers under the [*State Owned Enterprises*] Act”,<sup>519</sup> requiring state exercise of power to be consistent with principles inherent in the Treaty.

This renewed commitment to honouring both Māori and Pākehā (non-Māori) perspectives is bolstered by the fact that the *Treaty of Waitangi* is a bilingual text. As opined by Justice Cooke:

The difference between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Māori tradition and culture. It is necessary also because the relatively sophisticated society...could not possibly have been foreseen by those who participated in the making of the 1840 Treaty.... The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.”<sup>520</sup>

Consequently, interpretation has moved away from a strict textual reading of Treaty terms.

Jurisprudence, Waitangi Tribunal reports, and government initiatives continue to contribute to the development of treaty ‘principles’ that more fully express the ‘spirit’ of the Treaty.

The principles inherent in the Treaty, as articulated by the Court of Appeal, “were the

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<sup>516</sup> *Ibid*. The *style of cause* in this matter also names Graham Stanley Latimer, “suing on behalf of himself and all persons entitled to the protection of Article II of the Treaty of Waitangi”. Also see discussion of applicant at 2.

<sup>517</sup> *New Zealand Māori Council & Latimer v Attorney-General* [1987] NZHC 78 at 14 [Latimer].

<sup>518</sup> *Lands Case supra* note 510, Judgment of Cooke, at 18.

<sup>519</sup> *Ibid* at 39.

<sup>520</sup> *Ibid* at 34-35.

foundation for the future relationship between the Crown and the Maori race”,<sup>521</sup> and the need for clarification of those principles was “perhaps as important for the future of our country as any [case] that has come before a New Zealand Court.”<sup>522</sup> Ultimately, Justice Cooke reached two major conclusions: first, that the “principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act...[and second] that those principles require the Pākehā and Māori Treaty partners to act towards each other reasonably and with the utmost good faith”.<sup>523</sup> The principles, although dynamic and developing, provide “an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted”.<sup>524</sup> The dynamic articulation of the Principles underlines the intent that the Treaty was a forward-looking document, intended to adapt and accommodate the needs and aspirations of both parties.

Notwithstanding the cumulative effects of legal, cultural, social, and economic oppression experienced by the Māori peoples, Treaty implementation has assisted in addressing some of the historic effects of systematic dispossession and discrimination, and opened new opportunities for a mutually respectful and beneficial relationship between Māori and Pākehā. In his closing remarks, Justice Cooke credits the legislature for enabling the Court to reach its conclusion, thus pointing to political will as the cornerstone of effective treaty implementation.

### ***Treaty of Waitangi and the Waikato-Tainui Settlement***

The 1995 Waikato-Tainui settlement agreement was the first (and largest) of its kind in New Zealand. The Waikato-Tainui iwi (tribe) came to Aotearoa (New Zealand) about 700 years

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<sup>521</sup> *Ibid*, Judgment of Bisson at 19.

<sup>522</sup> *Ibid*, Judgment of Cooke at 3.

<sup>523</sup> *Ibid* at 44.

<sup>524</sup> *Ibid* at 47.

ago; today, they comprise more than 64,500 members.<sup>525</sup> Guided by recent jurisprudence, and encouraged by the Minister in Charge of Treaty of Waitangi Negotiations, Waikato-Tainui began direct negotiations with the Crown in 1989, as an alternative to the Tribunal process. The Waikato-Tainui claim included, among other things, compensation for the illegal confiscation (“Raupatu”<sup>526</sup>) of approximately 1.2 million acres (480,000 ha) of Tainui land by the Crown in the 1860s. As a goodwill gesture, in 1992 the Crown returned two parcels of land, as an advance payment of the final settlement: Hopuhopu land, a 50.475-hectare (125 ac) parcel, formerly used as a military camp, and Te Rapa land, a 29.171 hectare (72 ac) parcel, a former Air Force base, on the edge of the City of Hamilton. This transfer was later affirmed in the final settlement agreement.

The *Waikato Raupatu Claims Settlement Act 1995*,<sup>527</sup> gave effect to the terms of settlement addressing the illegal seizures of Waikato-Tainui land. The settlement acknowledged extensive historical research received by the Tribunal,<sup>528</sup> corroborating the longstanding Māori claims of the illegality of land confiscations, and the disparate compensation previously given for their losses. The Settlement Act further noted the Court of Appeal’s disapproval of the 1926 Royal Commission Inquiry on Māori land confiscations (“Sim Report”), which:

...failed to convey “an expressed sense of the crippling impact of Raupatu on the welfare, economy and potential development of Tainui”, and that the subsequent annual monetary

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<sup>525</sup> Waikato Tainui, “About Us”, online: <<http://www.waikatotainui.com/about-us/>>.

<sup>526</sup> The term “Raupatu” refers in a general sense to the dispossession of land experienced by Indigenous peoples, but specifically to a period of unprovoked attacks on Māori peoples by Pākehā (non-Māori people), following a relative prosperous time of trade and peace, but prior to the Land Wars of 1863. Literally, the terms suggests the death of ‘one hundred’ (“*rau*”) people by ‘violent attack’ (“*patu*”). Land was either taken by force, in defiance of the *Treaty of Waitangi*, or was taken from Māori, who successfully repelled attacks, but then were deemed to be disloyal to the Crown by virtue of fighting against the British attackers. Due to the illegal nature of the Crown acquisitions, the Raupatu settlements were undertaken by the New Zealand government as part of its commitment to fully implement the *Treaty of Waitangi*. Refer to Dean Patariki Smeatham Mahuta, “Raupatu: A Waikato Perspective”, (2008) 1:1 *Te Kaharoa* (e-Journal on Indigenous Pacific Issues) 174.

<sup>527</sup> *Waikato Raupatu Claims Settlement Act 1995*, [NZ] 1995 No 58 (RS) [Waikato Settlement Act 1995].

<sup>528</sup> See also: Waitangi Tribunal, Department of Justice, “Report of the Waitangi Tribunal on the Manukau Claim (Wai-8) [NZ]”, (July 1985), online: <[https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_68495207/WAI008.PDF](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68495207/WAI008.PDF)>.

payments made by the government were trivial “in present day money values”, and concluded that “Some form of more real and constructive compensation is obviously called for if the Treaty is to be honoured.”<sup>529</sup>

The primary shortcomings of the Sim Report were its narrow mandate to “examine whether the confiscations were *excessive* (rather than wrong)”,<sup>530</sup> and a refusal to consider the return of land to respective iwis (tribes). The 1995 settlement, instead sought to bring substantial correction to the “injustice of the Raupatu”<sup>531</sup> and the “grave injustice”<sup>532</sup> served on Waikato-Tainui through previous law and policy. The terms included provisions for both the return of specific parcels of land, as well as financial compensation.

Accordingly, a 200-plus page ‘Deed of Settlement’ provided, among other things (notably, an extensive apology from the Crown), for the immediate and future transfers of Crown lands to the Waikato Land Holding Trustee, along with annual cash payments, for a total value of \$170 million dollars. This combination of land and monetary compensation was integral to a negotiated settlement:

The Crown appreciates that this sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognised, has given rise to Waikato’s two principles ‘i riro whenua atu, me hoki whenua mai’ (as land was taken, land should be returned) and ‘ko to moni hei utu mo te hara’ (the money is the acknowledgement by the Crown of their crime). In order to provide redress the Crown has agreed to return as much land as is possible that the Crown has in its possession to Waikato.<sup>533</sup>

The settlement formally acknowledged Waikato’s claim that raupatu land contributed at least 12 billion dollars to development in New Zealand, “whilst the Waikato tribe has been alienated

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<sup>529</sup> *Ibid* at Preamble section N (English text), quoting NZ Court of Appeal decision: *R T Mahuta and Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.

<sup>530</sup> Richard S Hill, *State Authority, Indigenous Autonomy Crown-Maori Relations in New Zealand/Aotearoa 1900-1950* (Wellington: Victoria University Press, 2004) at 136 (emphasis in the original).

<sup>531</sup> Waikato Settlement Act 1995 *supra* note 527 at Preamble (M).

<sup>532</sup> *Ibid* at Preamble (R).

<sup>533</sup> Her Majesty the Queen in right of New Zealand and Waikato – Deed of Settlement, 22 May 1995 [NZ] [Waikato Settlement] at s 3.4.

from its lands and deprived of the benefit of its lands”.<sup>534</sup> This admission stood in direct contrast to the recommendations of the Sim Report, which gave no admission of wrong doing, provided limited compensation of approximately \$275,000 through annual payments, and returned no Waikato land whatsoever. The central importance of land-for-land compensation is exemplified in section 16 of the settlement, which provides power to the Crown to “compulsorily acquire [Crown] property for purpose of settlement...as if the property were land required for both Government work and a public work”,<sup>535</sup> clearly prioritizing the return of Waikato land over general public purposes.

### **Waikato-Tainui: From Injustice to Economic Development**

The 1995 Waikato-Tainui Raupatu settlement was intended “to begin the process of healing and to enter a new age of co-operation”.<sup>536</sup> Beginning in 1995 with \$170 million in assets, by 2014, the Waikato Raupatu Lands Trust, acting as Tainui Group Holdings (TGH), surpassed \$1 billion in assets. After some difficult years of financial mismanagement, TGH developed a number of business projects that have yielded significant benefits to their membership. Since 2004, “53 percent of all dividends – the equivalent of \$55 million – has been distributed back to [Waikato] people to support education, health, sports [and other cultural] events and programmes”.<sup>537</sup> The TGH investment portfolio quickly expanded to include industrial and agricultural land, forest and fishery interests, and the hotel and service industry. The “jewel of the settlement crown for Tainui”,<sup>538</sup> however, is Te Awa – ‘The Base’ shopping

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<sup>534</sup> *Ibid* at s 3.5.

<sup>535</sup> *Ibid* at s 16(1)(b).

<sup>536</sup> *Ibid* at s 3.6.

<sup>537</sup> Waikato-Tainui Annual Report 2014, online: <<http://versite.co.nz/~2014/17393/files/assets/basic-html/index.html#16>>.

<sup>538</sup> Latimer *supra* note 517 at 88.

complex on the outskirts of the City of Hamilton.

‘The Base’ takes its name from the ‘Te Rapa’ land parcel, a former Air Force Base, vested to Waikato Tainui as part of its 1995 settlement. By 1998, TGH plans were underway to redevelop the abandoned facilities into a major retail-shopping complex. Between 2004 and 2007, the multi-stage, multi-million dollar project was undertaken in partnership with a major retail chain, and “in accordance with four resource consents issued by the [City of Hamilton] Council”.<sup>539</sup> Moreover, development had proceeded in full compliance with the *Hamilton City Proposed District Plan* (HCPDP),<sup>540</sup> albeit not without resistance from Hamilton City Council and complaints from business owners of the central business district (CBD). Council abruptly introduced ‘Variation 21’ as a means to halt, or at least slow, the draw of retail consumers away from the CBD businesses, the vast majority of which would have been established long before any Treaty Settlements were contemplated.

It was the view of Hamilton City Council that the “liberal HCPDP rules (and particularly those directly affecting The Base) were undermining the sustainable and efficient operation of the Hamilton CBD.”<sup>541</sup> However, expert evidence put before the Environment Court in 2002 revealed, “there had already been substantial decline in retail in the CBD between 1997 and 2002 before retail activities at The Base commenced”.<sup>542</sup> Although expert witnesses for the Council suggested that ‘The Base’ had the effect of drawing customers “away from the CBD and other suburban business centres”,<sup>543</sup> Council’s solution to declining consumer interest in Hamilton’s

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<sup>539</sup> *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* CIV 2009-419-1712 (3 June 2010) [*Waikato-Tainui* 2009] at 8.

<sup>540</sup> The *Resource Management Act 1991* (NZ) 1991/69 [RMA/NZ] requires all city councils to oversee development in accordance with a District Plan, pursuant to section 73 of the RMA.

<sup>541</sup> *Waikato-Tainui* 2009 *supra* note 539 at 14.

<sup>542</sup> Statement of Evidence of Harold Francis Bhana, submission by Tainui Group Holding Ltd on the Proposed Waikato Regional Policy Statement 2010, online: <<http://www.waikatoregion.govt.nz/PageFiles/21512/11%20May/May%2011%20Item%2014.pdf>> at 9.2.

<sup>543</sup> *Waikato-Tainui* 2009 *supra* note 539 at 14.

non-iwi owned businesses was to strengthen the HCPDP rules. Believing there was a “rapidly growing problem”,<sup>544</sup> Council introduced ‘Variation 21’, creating new assessment criteria designed to “maintain the CBD as the principle retail and commercial hub of the city”,<sup>545</sup> and impose “greater restrictions on retail and office activity...[and] significantly greater discretion in respect of the future development of The Base”.<sup>546</sup> Council expressed its concern over:

...the possible loss of public confidence in the existing CBD...safeguarding and maximising long standing and recent significant public investment...[and that] the benefits of that liberalisation (market-led change) have ‘run its course’ and a more ‘managed’ strategy needs to be incorporated in to Plan policy to promote an integrated and sustainable future urban environment for Hamilton”.<sup>547</sup>

Moreover, Council intentionally excluded Waikato-Tainui (and TGH) from consultations, despite the fact that the proposed changes were almost exclusively targeted at preventing financial growth and future development of ‘The Base’. Council’s view was that notice “would be likely to result in the plaintiff making applications for protective resource consents...[and] would have allowed the plaintiff to secure its position under the pre-Variation 21 HCPDP rules in a manner which would largely defeat the purpose of Variation 21”.<sup>548</sup> Council’s intent was to pre-emptively eliminate the opportunity for Tainui to complete its development plans. The legislation would impact Tainui’s ability to move forward as an iwi, but more disturbing, it revealed Council regarded Waikato Tainui iwi as a competitor, rather than an integral part of the Hamilton community.

In response, Waikato Tainui challenged the legality of ‘Variation 21’, claiming Council breached *Treaty of Waitangi* Principles entrenched in the *Resource Management Act*. The Principles require, among other things, the Crown and its agents to consult with Māori

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<sup>544</sup> *Ibid* at 16.

<sup>545</sup> *Ibid*.

<sup>546</sup> *Ibid* at 17-18.

<sup>547</sup> *Ibid* at 23.

<sup>548</sup> *Ibid* at 25.

authorities, when the latter may be affected by changes in policy.<sup>549</sup> As the High Court saw it, the “crux of the issue is whether the Council should be able to prevent a party from preserving its rights and opportunities”<sup>550</sup> thereby subordinating Tainui’s rights “to what Council regards as the greater public good”.<sup>551</sup> In weighing the impact of the Council’s decision on Tainui, the High Court noted the importance of The Base and “its importance as an asset that is able to further the goals and policies of Tainui by providing a future income stream for the tribe”.<sup>552</sup> The fact that ‘The Base’ was “not formerly land of exceptional significance to Tainui”<sup>553</sup> was irrelevant, since it was the aspirations of Tainui that were jeopardized. The ‘new age of cooperation’ envisioned in the settlement clearly required Hamilton City Council to consult, and at the earliest possible opportunity, in order to avoid “serious adverse effects”.<sup>554</sup> The High Court declared ‘Variation 21’ “unlawful, invalid and of no effect”,<sup>555</sup> thereby reinforcing the Principles of the *Treaty*. The court resoundingly reaffirmed that it was not the Treaty that was invalid, but instead declared the Crown’s wilful disregard for it to be unlawful and of no effect.

### **Treaties, Economic Development, and Taxation**

Initially defined by treaty, the Crown’s relationship with the Indigenous peoples of Canada, and the Māori peoples of New Zealand, today is instead shaped by legal and political contest. The similarities in their struggles to overcome socio-economic disadvantages are stark, most notably in the Crown and public responses to their desire to participate in a modern economy. In Canada, Treaty 1 First Nations were successful in bringing a claim for ‘land debt

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<sup>549</sup> See RMA/NZ *supra* note 540, Schedule 1 s 3.

<sup>550</sup> *Waikato-Tainui 2009 supra* note 539 at 71.

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid* at 88.

<sup>553</sup> *Ibid* at 90.

<sup>554</sup> *Ibid* at 95.

<sup>555</sup> *Ibid* at 103.

owed to First Nations', still outstanding from 1871. In 2004, Crown land in the City of Winnipeg became available that, according to the terms of the settlement, should have been offered for purchase to Treaty 1 Nations. Instead, the federal government blocked the purchase of Kapyong by Treaty 1 Nations by creating a new "strategic" land category.<sup>556</sup> Likewise, in New Zealand, the Waikato-Tainui claim arose from historical Crown breaches of the 1840 *Treaty of Waitangi*. In 1995, a settlement was reached to address the unjust Crown confiscation of Tainui lands. Land that was returned to Tainui in the City of Hamilton was already being developed into a shopping complex, when the municipal government attempted to halt the project through legal challenges. In both countries, legally binding settlement agreements were intended to facilitate the return of traditional territory, compensate for Crown breaches of historic treaties, and indirectly provide opportunity for economic development and participation for the respective Indigenous communities. However, in each instance, completion of the settlement was met with legal and political challenges initiated by the Crown or other government players.

Why has the Federal Government of Canada chosen to sabotage the economic future of Treaty 1 First Nations at Kapyong? Likewise, why did Hamilton work to undermine Waikato-Tainui's plans to develop 'The Base'? As has been demonstrated time and again, urban development can and does facilitate the aspirations of Indigenous nations for economic prosperity, while simultaneously contributing to the mainstream economy. For example, in a report prepared for the First Nations Tax Commission, it was concluded that the "potential for municipalities to lose property tax revenues when a First Nation acquires land within a municipality and converts it to reserve status is either zero or small and where it is small it is more than offset by other fiscal benefits."<sup>557</sup> Even if the motives of the settler-state in promoting

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<sup>556</sup> *Supra* note 442 regarding "strategic" land.

<sup>557</sup> Fiscal Realities Economists, "Additions to Reserve Municipal Tax Concerns: Potential Municipal Property Tax

economic self-sufficiency may be disingenuous, as Robyn Green argues,<sup>558</sup> the overall benefit of improving Indigenous economic activity is obvious. In light of this fact, how can this resistance be explained? For some, the answer is extremely simple.

The justification myth goes something like this: “What were once Indigenous-lands are now settler-lands, and it is the ‘inclusive’ multi-cultural settler nation that must benefit from this resource.” Moreover, “Indigenous peoples were not making appropriate use of the land prior to the arrival of Europeans, so treaties were the means to ‘legally’ remove the land from them, and them from the land.” “Those who were dispossessed but survived are now assumed to be part of the larger nation, thus no special benefits should flow their way.” “Non-Indigenous interests, both business and personal, should not be disadvantaged today, particularly as the result of archaic promises dating back to the 1800s. The treaties document this agreement as fair, full, and final compensation for their lands.” This is certainly the position taken by Canada:

Under these treaties, the First Nations who occupied these territories gave up large areas of land to the Crown. In exchange, the treaties provided for such things as reserve lands and other benefits like farm equipment and animals, annual payments, ammunition, clothing and certain rights to hunt and fish. The Crown also made some promises such as maintaining schools on reserves or providing teachers or educational help to the First Nation named in the treaties.<sup>559</sup>

Surprisingly, such explanations are often held tenaciously by the general public, and exposed in responses to media coverage of unilateral exercises of government power, such as has been seen with Kapyong.<sup>560</sup> Mark Anderson and Carmen Robertson conclude in their study of Canadian

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Losses from First Nation ATRs”, (2015), online: <[http://sp.fng.ca/fntc/fntcweb/ATR\\_tax\\_loss\\_2015\\_final.pdf](http://sp.fng.ca/fntc/fntcweb/ATR_tax_loss_2015_final.pdf)> at 1.

<sup>558</sup> Like ‘reconciliation’, which holds different meanings for Indigenous peoples and their colonizers, ‘prosperity’ is similarly juxtaposed. Robyn Green argues “that the settler state deploys investment logic to determine specific reconciliatory exchanges that ensure the containment of Indigenous claims to restitution and the creation of mutual economic beneficiaries. These demands may retrench the social debt owed to Indigenous peoples by the settler state and undercut the spirit of restitution and justice.” See Robyn Green, “The economics of reconciliation: tracing investment in Indigenous-settler relations”, (2015) 17:4 J or Genocide Research, 473 at 474.

<sup>559</sup> Indigenous and Northern Affairs Canada, “Aboriginal people in Canada”, (2010), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>>.

<sup>560</sup> See Free Press Comments *supra* note 477, and Bruce Owen, The Brandon Sun, 23 Feb 2011, “First Nations, feds

media reporting on Aboriginal people: “Canada’s mainstream newspapers have aided and abetted the marginalization of Aboriginals in Canada.... Yet clearly the printed press has, since the sale of Rupert’s Land, operated as a principal voice of and for Canadian-style colonialism.”<sup>561</sup> Sadly and more alarmingly, such opinions also ground the legal arguments made before the courts by settler governments.

Courts continue to uphold this underlying claim of indisputable, indivisible Crown sovereignty, propped up by a historical justification myth. Peter Russell explains this myth as ‘legal magic’ stemming from “a belief in the inherent inferiority of the Aboriginal peoples as peoples...[and] the bed-rock presumption of imperial rule.”<sup>562</sup> This ‘historically validated arrangement’, as Paul McHugh terms it, has infused the courts’ understanding of treaties, such that “the sovereignty of the Crown-in-Parliament was put beyond any historical explanation”.<sup>563</sup> This perspective has hobbled the Crown’s ability to consider the true spirit and intent of historical treaties with Indigenous peoples. Harold Cardinal suggested to the “Indians of Canada,

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tussle over Kapyong Land: Former barracks site vacant since 2004”: Comment by reader “big\_dog” Feb 23, 2011 at 7:59AM: “Canada has a lot more to do to meet our tresaty rights”...give me a break. Canada has been paying through the nose for years, every year it seems to mount higher and higher. When are the first nations going to stand up and say “Hey, we are a proud nation, we want to stand on our own two feet”. As for the land, the chief is quick with the excuses, but not wuick with an answer or an offer. Step up Cheif Hudson. Although you may figure it may be cheaper to drag it through the courts.” [sic].

Comment by reader “pentax99” Feb 23, 2011 at 7:51 AM: “The land belongs to ALL citizens of Canada. The property should be sold, subject to city zoning bylaws, by public auction or transparent bid. The highest bidder gets the land. If the First Nation bid is the highest only then the property is theirs”.

Comment by reader “OrneryPegger” 23 Feb 2011 at 9:16AM: “That piece of land needs to be split 50/50 between the feds and the Indians. Can't people share anymore? This would be a great site for a new youth prison (buildings are already there) which should include a trade and academically-focused school to get them prepped for real life. There should also be a building where aboriginal kids would go to learn their heritage and become proud Indians once again. A rehab building should also sit on that site complete with short and long-term rehab housing. Make the people better and the city will become better. The rest of the land can be developed into retail (as if we need more retail) and housing” [sic].

Story and comments online: <<http://www.brandonsun.com/breaking-news/first-nations-feds-tussle-over-kapyong-land-116719484.html?path=/breaking-news&id=116719484&sortBy=oldest&viewAllComments=y>>.

<sup>561</sup> Mark Cronlund Anderson & Carmen L Robertson, *Seeing Red: A History of Natives in Canadian Newspapers*, (Winnipeg: University of Manitoba Press, 2011) at 274.

<sup>562</sup> Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*, (Toronto: University of Toronto Press, 2005) at 31.

<sup>563</sup> McHugh *supra* note 492 (np).

the treaties represent an Indian Magna Carta”,<sup>564</sup> and as Michael Asch points out, for Canadians, “Treaties, then, and not the constitution, are our charter of rights”.<sup>565</sup> The inability of the courts, and indeed Parliament, to recognize the sovereign basis of treaty agreements, relegates them to an inferior rendition of their original intent, forcing courts to becoming increasingly creative in justifying the lack of implementation and honour accorded them.

In New Zealand, reacting to the Te Paparahi o Te Raki (Wai 1040) Report, wherein the Tribunal has stated that the *Treaty of Waitangi* could not have effected the relinquishment of sovereignty of certain iwis, Prime Minister John Key was emphatic. Suggestions of Māori separatism provoked Key’s response: “It’s a very slippery slope, because you will get lots of people who will argue, when its convenient for them, that gives them unilateral decision-making rights in certain areas. I can’t see why New Zealanders would support that. I can’t see how it would help what is a vibrant, growing, multicultural New Zealand to succeed.”<sup>566</sup> Despite the fact that the state takes this privilege for granted, for Key, the mere suggestion that Māori could, or should, exercise self-determination according to their Treaty rights, was preposterous.

What is missed in this perspective is that Treaties form a relationship between equals. Asch states “while these [treaty] commitments were laid out, they were merely a tangible expression of a larger commitment to ensure that [First Nations] would benefit, not suffer, economically as a consequence of settlement”.<sup>567</sup> Similarly, in New Zealand, the “Preamble of the Māori language version of Te Tiriti o Waitangi 1840 has within it a key principle of economic development and business futures. This principle is the Māori philosophical idea of a ‘good life’.”<sup>568</sup> This concept

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<sup>564</sup> Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: MG Hurtig, 1969) at 28.

<sup>565</sup> Asch *supra* note 416 at 99.

<sup>566</sup> Audrey Young, The New Zealand Herald, “Key: Little’s Waitangi comments push ‘separatism’, audio online: <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11399086](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11399086); 9 February 2015>.

<sup>567</sup> Asch *supra* note 416 at 94.

<sup>568</sup> Manuka Henare, “Lasting Peace and the Good Life: Economic Development and the ‘Āta noho’ Principle of Te Tiriti o Waitangi”, in Veronica MH Tawhai & Katarina Gray-Sharp, eds, *‘Always Speaking’: The Treaty of*

of an on going, dynamic relationship, where continuous discussion and negotiation are essential, is not novel in Canadian or New Zealand jurisprudence.

### **Moving Forward by Returning to Treaties**

Treaties, like constitutional documents, can and should be understood as having the capacity to develop and adapt through interpretation. Canada and New Zealand share a common constitutional lineage – one that dates back to the fields of Runnymede and the Magna Carta. While often viewed as the origin of the British Constitution, it is but one of many documents that have grown in meaning through ongoing constitutional interpretation. As Lord Sankey explained in his 1929 decision of the ‘Persons Case’, the Canadian constitution represents a “living tree capable of growth and expansion”.<sup>569</sup> This is the primary constitutional interpretive doctrine in Canada, which coincides with Indigenous understandings of the spirit and the intent of the relationship established through treaty. While Canada has yet to move beyond its self-serving understanding of both treaties and its Constitution, New Zealand has embraced the concept. In the ‘Lands Case’, the court found that the Treaty “should be interpreted widely and effectively as a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with principles of the Treaty.”<sup>570</sup> Justice Cooke stated that the “Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas”.<sup>571</sup> In New Zealand, this constitutional embryo seeded a tree that, although still green and young, with nurturing will flourish. In contrast, Canada’s constitutional tree lacks integrity, as a rootless body of law that

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Waitangi and Public Policy” (Wellington, NZ: Huia Publishers, 2011) at 261.

<sup>569</sup> *Edwards v Canada (Attorney General)* [1930] AC 123, 1 DLR 98 (PC).

<sup>570</sup> *Land’s Case* *supra* note 510, Judgment of Cooke at 14-15.

<sup>571</sup> *Ibid* at 35.

has denied the necessity to connect through the treaties to the land it occupies.

For treaties to develop into a flourishing constitutional tree requires a paradigm shift. The green shoots of this shift are already apparent in New Zealand. In Canada, it is the “lingering strength of this presumption of cultural superiority remains the major barrier in moving towards a truly post-colonial position for Indigenous peoples”<sup>572</sup> Failing this acknowledgement, ‘treaty rights’ will continue to be interpreted by courts as benefits granted or disregarded at the pleasure of the Crown. Indigenous people globally have suffered at the hand of the Crown operating under a guise of legal superiority, and meaningful political and economic reconciliation requires more than simple apologies and state-sponsored record gathering.

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<sup>572</sup> Russell *supra* at note 562 at 31.

## Chapter 7 - Conclusions and Recommendations

The Federal Court of Appeal in *Robertson* opened the door to a deeper consideration of the “purpose” of section 87 of the *Indian Act*, through its struggle to interpret the tax provisions therein, admitting: “It is easier to say what the purpose of section 87 is not, than to state positively what it is.”<sup>573</sup> I have set out only a small fraction of the jurisprudence concerning the interpretation of sections 87 through 90, and argued that the primary reason for the court’s interpretive difficulty is that it has not gone back far enough in its own history and jurisprudence to properly situate its “historic and purposive” interpretation. Understanding that the *Indian Act* cannot possibly reflect the Parliamentary intentions of a Honourable Crown, the court must reach further back and look to the Crown’s original relationship with First Nations, which is when the tax exemptions first appeared in legislation.

Courts and academic commentaries alike have attempted to interpret the tax provisions through the application of a variety of tests and legal theory, and if nothing else has been made clear herein, it should be apparent that the *Indian Act* provisions are not conventional tax law. The exemption provisions of the *Indian Act* predate the introduction of most of the types of taxes ordinarily paid by Canadians today—including excise tax, property tax, and most importantly, personal income tax—and the existing exemptions have continued from before 1876, uninterrupted in legislation to the present. The *Indian Act* exemptions were never intended to be part of a state-regulated means of income redistribution, or a way to provide an income supplement for ‘poor Indians’. Indeed, it is easier, or at least more convenient, for a colonial nation to determine what the provisions are not, than to look for the “purpose” of the tax provisions within the treaty relationship.

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<sup>573</sup> *Robertson supra* note 8 at paras 45 & 51 (emphasis added).

The key decisions consistently point to this conclusion: *Nowegijick* stands for the proposition that “treaties and statutes [namely the *Indian Act*] relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”<sup>574</sup> In *Mitchell v Peguis*, and despite the courts’ continued reliance on the opinion of Justice La Forest, Chief Justice Dickson would have applied the *Nowegijick* principle to uphold the application of the exemptions. In this Supreme Court of Canada 3:3:1 decision, I am reminded of the maxim that “hard cases make bad law”.

The *Williams* decision significantly narrowed the provisions with the “connecting factors” test, but worse, also added an element of great unpredictability. As discussed above, the long line of tax cases stemming from the Native Leasing Services (NLS) business, which could not be examined in detail in this work, certainly illustrate how damaging this uncertainty has been for Jane or Joe-the-Indian taxpayer. The NLS cases continue to be tenaciously litigated by the Crown, leaving many First Nations people in financial ruin.<sup>575</sup> After *Williams*, the court implicitly introduced a culture test, which was expressed in *Recalma* as the “commercial mainstream test”, thereby setting economic success as antithetical to being an “Indian *qua* Indian”. Very much like the court’s inability to articulate a “purpose” of the tax exemptions, it has provided only a few examples of what an “Indian *qua* Indian” is not, but has never provided a test to affirmatively identify an “Indian *qua* Indian”; in other words, the court cannot say what circumstances could nullify the identity of an Indian, and in this age of reconciliation, is the denial of the exemption on this basis not simply economic assimilation?

The *Marshall* decisions—a jurisprudential anomaly in themselves—similarly demonstrated the court’s propensity to restrict economic participation of Indians. Although *Marshall* was found

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<sup>574</sup> *Nowegijick supra* note 40 at 36.

<sup>575</sup> See for example, Wayne K Spear, “Mitchell vs Canada: the dangerous quicksand of First Nations rights”, (2016), online: <<https://waynespear.com/2016/05/03/cra/>>.

to have an Aboriginal right to fish, the court made it abundantly clear that this right is to be limited by regulations, so as to accommodate and protect the economic interests of non-Aboriginal commercial fishing. Also in a stand-alone category is the case of *Mitchell v MNR*, which was in some respects another “hard case”. Predating Canadian Confederation and American independence by at least several centuries, the authority of the Iroquois Confederacy (which included the Mohawk Nation of Akwesasne where Mitchell lived) was nevertheless deemed to be subsumed by Canadian sovereignty, which led the Supreme Court of Canada to find no treaty or Aboriginal right, or even *Indian Act* excise tax exemption applied to Mitchell.

The positive outcomes (for the Indians) in *Bastien*, *Dubé*, and most recently in 2012, *Robertson* and *Ballantyne*, may indicate that the Supreme Court of Canada is increasingly willing to expand the *Indian Act* taxation provisions. *Benoit*, and later *Tuccaro*, have argued for a treaty right to tax exemption, with the former case reaching no definitive *ratio* regarding that question, and the latter, having yet to proceed to the Supreme Court of Canada, where the assertion of a treaty right to tax immunity will inevitably be decided. It is this tension between recognizing a mere statutory provision and the potential to ground tax immunity in a truly *sui generis* treaty relationship that the court has historically dismissed without due consideration.

As this jurisprudential history demonstrates, attempts to articulate the Parliamentary intent in the *Indian Act* tax provisions is slowly edging toward recognition of a treaty right to tax immunity. Not in our wildest dreams should that suggest that the Crown will desist in taxing Indians. Rather, it may be an indication that the political commitment of many successive governments, as well as the call of every major report, inquiry, and commission—not the least of which includes RCAP and the Final Report of the TRC—for the Crown to renew its treaty relationship with Indians, will be acted upon with honour and integrity. Tax immunity accorded

Indians is but a small potential facet of that renewed relationship. Movement in this direction is consistent with what the courts have stated to be the purpose of the tax exemption—namely protection—but it is also consistent with the Honour of the Crown and its treaty obligations, international law, and Canada’s recent commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>576</sup> Most importantly, while having been excluded from most of Canada’s jurisprudence considering the rights of Aboriginal peoples and the Crown’s responsibility to them, a *sui generis* tax regime, based on a nation-to-nation relationship, is consistent with the “Aboriginal” perspective of treaties and mutual responsibility.

The case study discussing Kapyong, in Winnipeg and Te Awa—The Base, in New Zealand is both a comparison and a contrast. The historic and legal circumstances of the land claims in both countries, along with the political and public responses to Indigenous peoples’ economic aspirations, are astonishingly similar. The contrast, however, is that Waikato-Tainui was able to move forward to realize phenomenal economic (and cultural) successes. Having started from a settlement package of 170 million dollars in 1995, and experiencing significant economic setbacks along the way, in July 2014, Waikato-Tainui assets surpassed one billion dollars.<sup>577</sup> This economic trend continues for the iwi, with a sod-turning ceremony in March 2017 to commence the building of its biggest venture to date: an inland green-field port.<sup>578</sup> Treaty 1 Nations, however, remain in limbo, with no immediate resolution to their outstanding land claims or the future of the Kapyong land, and no immanent prospects for expanding their economic participation in the larger Canadian economy.

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<sup>576</sup> UNDRIP *supra* note 127.

<sup>577</sup> Anne Gibson, New Zealand Herald, “Waikato-Tainui tops \$1b in assets”, 2 Jul 2014, online: <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11285705](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11285705)>.

<sup>578</sup> Mānia Clarke, Māori Television, “Waikato Tainui begins build on Ruakura hub”, 28 March 2018 [*sic*], online: <<http://www.maoritelevision.com/news/regional/waikato-tainui-begins-build-on-ruakura-hub>>.

The mutually cooperative—treaty—relationship with Aboriginal peoples that Canada can and must aspire to live out will find inspiration in New Zealand’s example. Implementation of the *Treaty of Waitangi* did not come quickly or easily. The initial efforts at implementation in 1975 began as proactive claims to prevent further injustices. This was quickly followed with an amendment in 1985, to include retroactive claims, including the first settlement with Waikato-Tainui, as discussed above. In his discussion of the *Treaty of Waitangi* Principles, Carwyn Jones notes that the High Court tends to apply the *Treaty*, even in cases where no explicit reference is made, “Because the treaty was so fundamental to New Zealand society, the court found that treaty principles ought to shape the interpretation of legislation that impacts upon treaty interests.”<sup>579</sup> Jones further explains that this is consistent with the Indigenous (Māori) perspective:

“Utu is about restoring balance—not only by reciprocating the presentation of “good” gifts (food stuffs, items of clothing, tools, luxury items) but also by responding to “bad” gifts (insults, thefts, other offences). . . . [Hirini] Mead suggests a number of questions that may be relevant to ask in order to determine an appropriate form of utu when a breach has occurred, including: Who is implicated in the breach? What was the reason for the breach? Was harm intended? Or was the intention to benefit people? Did those responsible for the breach assess the likely effects on others before taking action?”<sup>580</sup>

These are the questions Canadians, Parliamentarians, and Canadian Courts should be asking, as opposed to devising a legal justification to infringe on treaty and Aboriginal rights.<sup>581</sup> The court should be asking: Are the best interests of First Nations peoples considered in allowing Treaty right infringement, or is seeking minimal impairment sufficient? Would any relationship, treaty or otherwise, survive if doing the minimum was the standard?

What has become clear is that Canada needs a new story, one that begins long before 1876 and the enactment of the *Indian Act*, and moreover, one that responds to the voice of Aboriginal

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<sup>579</sup> Jones *supra* note 395 at 19.

<sup>580</sup> *Ibid* at 76.

<sup>581</sup> As per the *Sparrow* test, *supra* note 13.

peoples themselves. As Richard Delgado points out regarding legal storytelling: “The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it.”<sup>582</sup> The Treaties provide a place to start, and in true Indigenous story-telling fashion, have many facets and many lessons, which without them “diminishes the conversation through which we create reality, [and] construct our communal lives.”<sup>583</sup> These counter-narratives are not cultural relics, but they hold the means by which colonized nations might “avoid intellectual apartheid.”<sup>584</sup> Delgado waxes poetic in his call to pay attention to the stories of the “outgroup”: “Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together.”<sup>585</sup> This is a far more inspiring goal for the Canadian state than to “facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty”.<sup>586</sup> The latter simply appears to be the continued policy of forced assimilation. The constrictive interpretation of *Indian Act* taxation provisions discussed herein is a thin, but powerful wedge that advances this goal in the economic realm. According to D’Arcy Vermette:

Try as Aboriginal scholars and commentators might to encourage Canadian courts to approach their relationship with Aboriginal peoples in a different, non-colonialist light, it appears that very little listening is taking place. Instead, courts adopt language and propose concepts that appear enlightened on their face but that actually are limited to formalizing the process of colonization.<sup>587</sup>

Even a court that is listening typically relies on incremental change, thereby ensuring that the

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<sup>582</sup> Richard Delgado, “A Plea for Narrative”, (1989) 87 Mich L Rev 2411 at 2438 (footnotes removed).

<sup>583</sup> *Ibid* at 2439.

<sup>584</sup> *Ibid* at 2440.

<sup>585</sup> *Ibid* at 2441.

<sup>586</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, at para 42.

<sup>587</sup> Vermette *supra* note 402 at 56.

*status quo* is retained for as long as possible. For First Nations, this means continuing dispossession of their traditional lands, economic exclusion, and the erosion of culture and identity. The generational impact of years of prejudice is accumulating into a long, slow death of First Nation identity and vitality, which further privileges the colonizer, his laws, and his worldviews. It is a tried and true strategy, but not a very honourable one.

Treaty implementation, on the other hand, is not for the faint of heart; it requires great vision, immense courage, and a little creativity. With the legal and moral necessity of situating Aboriginal perspectives on at least the same level as discourses promoting assimilation, the potential of the space created by the court's invocation of *sui generis*, is great. Thus, to extend this term to taxation provisions is not unreasonable. Instead of loathing the Crown's creative uses of *sui generis* to limit treaty and Aboriginal rights, perhaps Aboriginal people should be filling this space with their own *sui generis* understandings of their place in the treaty relationship, including ascribing their *sui generis* interpretation of the "purpose" to the (present) *Indian Act* tax provisions. By advancing a more fulsome argument, one which is aided by adequate resources to research historic contexts of treaties, and is received by the court willing to apply the *Nowegijick* principles, the considerations raised in *Sackaney* questions that must be heard by the court and by this nation. Understanding the treaty relationship is where reconciliation begins.

In conclusion, I turn once again to *Robertson* and *Ballantyne*. As discussed, the appellants in these cases were all engaged in fishing in the traditional territory of Treaty 5. I take a particular interest in this fact, as an urban, yet status Indian, whose great-great grandfather, Chief Jacob Berens, signed Treaty 5 in 1875. A properly contextualized inquiry into the "historic and purposive" interpretation of my treaty rights *vis-à-vis* taxation, requires a through study of the abundance and prosperity experienced by my ancestors at the time of signing our Treaty. As

Maureen Matthews points out: “It has been argued that when [Treaty 5 Nations] learned to exploit the richest of these fisheries about 800 BC, the population of the ancestors of the Anishinaabeg mushroomed and that their technical achievement in doing so was second to none in aboriginal North America.”<sup>588</sup> This is the abundance that was envisioned to be ours in this new Treaty relationship with the European settlers. Clearly, this is an area that requires greater attention and fully informed cultural contextualization.

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<sup>588</sup> Maureen Matthews & Roger Roulette, “Giigoowag zhigwa Noojigiigoo’iweg: Fish and Fisheries in the Pimachiowin Aki Region”, (2011), Discussion paper for the Pimachiowin Aki UNESCO World Heritage Site Bid, on file with author, at 2 (notes removed).

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*Authenticity Level:* Copy made in 1825 from the 1760 original held by the Richebuctou chiefs; taken by the Aboriginal signatories for presentation in London, England.

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