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INDIANS AND TAXATION IN CANADA

Richard H. Bartlett*

A History

Canadian Indian Legislation and Policy

Canadian Indian policy as contained in the Indian Act of Canada, has been described as possessing two components: (1) “‘civilizing’ the Indian population and achieving assimilation and integration as soon as possible,” and (2) “protection of the Indians and their land from abuse and imposition until such time, as being ‘civilized,’ such protection was superfluous.”¹ Such a protection from “abuse and imposition” was considered to require an exemption from taxation of Indians and their lands. In 1850 the Province of Canada passed “An Act for the protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury.” Section 4 provided:

That no taxes shall be levied or assessed upon any Indian or any person inter-married with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person inter-married with any Indian so long as he, she or they shall reside on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians.²

The 1857 “Act to Encourage the Gradual Civilization of Indian Tribes”³ afforded an explicit statement of the policy of assimilation in providing for the enfranchisement of Indians of a “sufficiently advanced” education or “sufficiently intelligent to be capable of managing their own affairs.” Enfranchisement

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Editor's Note. Because of a lack of access to the Canadian resources cited herein, the editors and staff of the *American Indian Law Review* have relied upon the author's expertise in assuming the accuracy in form and content of the footnotes to this article. Professor Bartlett is currently on sabbatical in Australia.

1. Bartlett, *Indian Act of Canada*, 27 BUFFALO L. REV. 581, 583 (1978).

2. Prov. Can. Stat. c. 74 (1850).

3. Prov. Can. Stat. c. 26 (1857).

removed the disabilities and distinctions imposed upon the Indian people for their protection. In particular, Section 14 provided:

Lands allotted under this Act to an Indian enfranchised under it shall be liable to taxes and all other obligations and duties under the municipal and school laws of the section of the Province in which such land is situated, as he shall also be in respect of them and of his other property.

The exemption from taxation declared in the 1850 statute remained unchanged until the first consolidation of Canadian Indian legislation provided in the Indian Act of 1876.⁴ It appears that until that time the exemption from taxation outside Upper Canada was assumed, rather than declared, to apply. The need for a consolidation of Indian legislation became apparent with the settlement of the Northwest Territories and the establishment of treaty relations with Indians inhabiting the area.⁵ The 1876 Act did not contain substantial changes from previously established legislative policy, but the ambit of the exemption from taxation was altered. Sections 64 and 65 provided:

64. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situated.

65. All land vested in the Crown, or in any person or body corporate, in trust for or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians or non-treaty Indians shall be exempt from taxation.

Section 88 declared that upon enfranchisement "the provisions of this Act and of any Act or law making any distinction between the legal rights, privileges, disabilities and liabilities of Indians and those of Her Majesty's other subjects shall cease to apply." The exemption from taxation contained in the Indian Act of 1876 is significantly different from that of the legislation of 1850. The 1850 statute ruled out taxation upon Indian lands *and* Indians resident thereon. The 1876 statute confined the exemption to real or personal property of an Indian situated on a reserve and did

4. S.C. 1876 c. 18.

5. Annual Report of Department of Interior, 1876, Sessional Paper No. 9.

not extend to the person. The exemption remained almost unaltered until 1951.⁶ The only two changes in that entire period consisted of an amendment in 1884 that sought to continue the exemption on lands allotted to enfranchised Indians until declared taxable by proclamation,⁷ and an amendment in 1888 that clarified the liability to taxation of surrendered lands.⁸

In 1951 the exemption was rewritten⁹ in the following form, now embodied in Section 87 of the Indian Act:

87. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve or surrendered lands, and

(b) the personal property of an Indian or band situated on a reserve,

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property 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 on or in respect of other property passing to an Indian.

(2) Subsection (1) does not apply to or in respect of the personal property of an Indian who has executed a waiver under the provisions of paragraph (e) of subsection (2) of section 14 of the Canada Elections Act, 1951.

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

6. See S. 75, 76, 101, S.C. 1880 c. 28; s. 77 S.C. 1886 c. 43; s. 99-101 S.C. 1906 c. 81; s. 102-104 S.C. 1927 c. 98.

7. S. 11 S.C. 1884 c. 27.

8. S. 3 S.C. 1888 c. 22.

9. S.C. 1951 c. 29; 9a R.S.C. c. 1-6 s. 87.

between a band and Her Majesty, shall be deemed always to be situated on a reserve.

Subsection 87(2) was repealed in 1960.¹⁰

Indian Tradition and the Treaties

Jenness, in his tome entitled *The Indians of Canada*,¹¹ comments that the "socialistic character of Indian life" was the principal check on material ambitions. Such an approach to the distribution of food and material goods also explains the absence of modern forms of taxation in traditional Indian life. Moreover, in the majority of tribes in Canada land was not a proper subject for private ownership. If a major object of modern taxation consists in equalizing the distribution of wealth, the communal aspects of ownership of property in traditional Indian life accomplished such a goal. The forced distribution of the goods of the wealthy among the Inuit¹² of northern Canada or the "potlatch"¹³ of the West Coast tribes appear in such context as forms of taxation. The financing of public institutions, which accounts for so much of modern taxation, was generally achieved by voluntary participation and contribution.¹⁴ Excise duties and real property taxes were the principal forms of taxation at the time of contact between the Indian tribes and European settlers.

Contact between the two groups was structured in accordance with treaties signed between the Indian tribes and the responsible government. In Eastern Canada:

[T]hese treaties were little more than territorial cessions in return for once-for-all grants, usually in goods, although there is contemporary evidence that some of the Indians involved considered that the government was assuming broader trusteeship responsibilities as part of the bargain. Annuities, or annual payments for the land rights ceded, appeared in a treaty in 1818, after which they became usual. At this stage, the provision of land for Indian reserves only occasionally formed part of the surrender terms. Similarly, the right to continue hunting and fishing over ceded territories was very rarely men-

10. S. 1 S.C. 1960 c. 8.

11. D. JENNESS, *THE INDIANS OF CANADA* (6th ed. 1963).

12. HOEBEL, *LAW OF PRIMITIVE MAN* 81 (Atheneum ed. 1968).

13. G. MANUEL, *THE FOURTH WORLD, AN INDIAN REALITY* 77 (1974).

14. E. BENNETT, *CUSTOMARY LAW OF THE CREE* (Unpublished paper, 1978, College of Law, University of Saskatchewan).

tioned in the written terms of surrender. Not until 1850, when cessions of land rights were taken by William Robinson along the northern shores of Lakes Huron and Superior, were treaties made that granted to the Indians all four items: once-for-all expenditures, annuities, reserves and guarantees concerning hunting and fishing. It was for this reason that Alexander Morris, most widely known of the government's negotiators, wrote of them as constituting the "forerunners of the future treaties" to be made by the recently created Dominion.¹⁵

The "numbered" treaties (numbered 1 to 11) were signed between 1871 and 1921 and entailed the surrender of the entire prairie region of Canada and the western half of what is now the Northwest Territories. With respect to mainland British Columbia and other areas in northern Canada, treaties were not signed and are only now being negotiated. No references to taxation are found in the written terms of the treaties. Oral assurances and promises are recorded that intimated that the Indians were to be prepared to adopt changes in their way of life and yet suggested that no compulsion to do so would be exerted. Thus in 1876 the Treaty Commissioner for Treaty No. 6 observed:

I accordingly shaped my address, so as to give them confidence in the intentions of the government, and to quiet their apprehensions. I impressed strongly on them the necessity of changing their present mode of life, and commencing to make homes and gardens for themselves, so as to be prepared for the diminution of the buffalo and other large animals which is going on so rapidly.

I then fully explained to them the proposals I had to make—that we did not wish to interfere with their present mode of living and that we would assign them reserves and assist them as was being done elsewhere, in commencing to farm, . . .

What was offered was a gift as they still had their old mode of living.¹⁶

The only specific reference to taxation in the oral assurances recorded at the time of the treaties is contained in the report of the Treaty Commissioner in respect of Treaty No. 8 in 1899:

15. INDIANS CLAIMS COMMISSION, *INDIAN CLAIMS IN CANADA* 9 (1975).

16. MORRIS, *TREATIES OF CANADA WITH THE INDIANS, 1880, 183-86 COLES CANADIANA* (1971).

There was expressed at every point the fear that the making of the Treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the Treaty would lead to taxation and enforced military service.

We assured them that the Treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.¹⁷

Indian Powers of Taxation After Treaty

The Federation of Saskatchewan Indians observed in 1977:

INHERENT POWERS OF INDIAN GOVERNMENTS

Indian governments traditionally exercised the powers of sovereign nations and the most fundamental right of a sovereign nation is the right to govern its people and territory under its own laws and customs:

Inherent means that the right of self-government was not granted by Parliament or any other branch of any foreign government. Indians have always had that right and the Treaties re-enforce this position.

Indian tribes and subsequently Indian Bands are qualified to exercise powers of self-government because they are independent political groups. Among the inherent powers of Indian government are the power to:

- a) determine the form of government;
- b) define conditions for membership in the nation;
- c) regulate the domestic relations of its members;
- d) levy and collect taxes.¹⁸

Federal legislation has acknowledged only the most limited power to levy taxes in Indian governments and has never contemplated inherent powers approaching that described above. In 1884 the Indian Advancement Act, which sought to replace government by chiefs in council with government by council, provided that bands considered "fit" might assess and tax "lands of Indians enfranchised, or in possession of lands by location ticket in the reserve subject to the approval and confirmation of the

17. Treaty No. 8 (1899), Queens Printer, Ottawa.

18. Federation of Saskatchewan Indians, "Indian Government," 1977, Prince Albert, Saskatchewan.

Superintendent General.”¹⁹ The assessment was subject to “correction” by the Indian agent and the annual tax was restricted to one half of one percent of the assessed value of the land. The revenue might only be expended on matter with respect to which the council might pass bylaws. The provision remained unchanged²⁰ until 1951. No Indian band in western Canada was considered “fit” to exercise the power first conferred in 1884. In 1951 the modern form of the provision was adopted. It is now Section 83 of the Indian Act:

83. (1) Without prejudice to the powers conferred by section 81, where the Governor in Council declares that a band has reached an advanced stage of development, the council of the band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely

(a) the raising of money by

- (i) the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof, and
- (ii) the licensing of businesses, callings, trades and occupations;

(b) the appropriation and expenditure of moneys of the band to defray band expenses;

(c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);

(d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);

(e) the imposition of a penalty for non-payment of taxes imposed pursuant to this section, recoverable on summary conviction, not exceeding the amount of the tax or the amount remaining unpaid;

(f) the raising of money from band members to support band projects; and

(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) No expenditure shall be made out of moneys raised pursuant to paragraph (1)(a) except under the authority of a by-law of the council of the band.²¹

19. S.C. 1884 c. 28 s. 10(11).

20. S.C. 1886 c. 44 s. 10(k); S.C. 1906 c. 81 s. 194(j).

21. R.S.C. 1970 c. 1-6 s. 83.

Subparagraph 83(1)(f) was added in 1956.²²

The Franchise and Taxation

The principal forms of revenue of the founding colonies of Confederation in 1867 were customs and excise.²³ It was accordingly determined that as the federal government was to assume the more burdensome expenditures it should be accorded unlimited powers of taxation, including the tariff. Provincial powers were restricted to direct taxation and thereby provided for municipal real property taxation. It has been observed:

Taxation in direct form was so detested in almost all provinces but Ontario [where municipal property and income taxes were well developed at Confederation] that it can be assumed that there was no serious expectation that the provinces would use these powers. Indeed it is evident from speeches of the day that the founding fathers counted on the very unpopularity of direct taxation to prevent its extensive use. Nonetheless, the power had to be given the provinces so that it could in turn be conferred upon the municipalities to enable them to continue to collect property taxes.²⁴

Necessity, however, required that the provinces utilize their powers of taxation and accordingly British Columbia, in 1876, and Prince Edward Island, in 1894, levied personal income taxes. The expenses of World War I caused the imposition of a federal income tax in 1917, and shortly thereafter a federal sales tax was introduced. Heavy capital expenditures after the war compelled the provinces to devise new methods of taxation; gasoline taxes and liquor control "were to build many a road and school." Provincial sales taxes were not introduced until the Depression. By 1940 there were provincial retail taxes in Saskatchewan and Quebec and municipal sales taxes in Montreal and Quebec City. Today the only province in which no sales tax is levied is Alberta.

The early reliance of provincial governments upon real property taxation effectively disenfranchised Indians resident upon reserves. The Indian interest in reserve lands was not entered upon the assessment list upon which the right to vote depended.²⁵

22. S.C. 1956, c. 40 s. 21.

23. See 1 PERRY, TAXES, TARIFFS AND SUBSIDIES (1955).

24. Moore & Perry, Financing of Canadian Federation, Canadian Tax Paper No. 43 (1966) Canada Tax Foundation, at 1.

25. See Bartlett, CITIZENS MINUS: INDIANS AND THE RIGHT TO VOTE, SASK. L. REV. (1980).

Thus Section 4 of the Election Act of the Province of Ontario passed in 1876 provided:

4. To remove doubts, it is hereby declared that all Indians, or persons with part Indian blood, who have been duly enfranchised, and all Indians or persons with part Indian blood, who do not reside among Indians, though they participate in the annuities, interest moneys and rents of a tribe, band or body of Indians, shall be entitled to vote, subject to the same qualifications in other respects, and to the same provisions and restrictions, as other persons in the electoral district.²⁶

The section recognized the right to vote of enfranchised Indians who had been allotted sufficiently valuable land or those Indians, albeit not enfranchised, who had left the reserve and managed to acquire sufficient real property so as to be eligible to vote.

Until 1885 federal elections were governed by existing provincial statutes.²⁷ In 1885 the Conservative government of Sir John A. Macdonald passed the Electoral Franchise Act²⁸ to provide for federal elections. The franchise was extended to Indians in the east possessed of real property on a reserve valued in excess of \$150 and not otherwise qualified.²⁹ The Six Nations Indians expressed concern as to the implications of the extension of the franchise. Chief Jones wrote to Macdonald:

Many of the Indians on the Grand River Reservation have been told, that in case they received the right to vote, then Treaty Rights with the Government would not be able to compel the Government to observe and carry out the treaties.

They have also been told that the granting of the Franchise to them, was a scheme of the Government with the object of imposing direct *taxation* upon them.

These two subjects are being used successfully in many cases to induce the Indians to either vote against your government or not to vote at all—Kindly give us your opinion upon these two subjects immediately and oblige.³⁰

Macdonald wrote to Chief Johnson of Desoronto as follows:

26. S.C. 1875-76 c. 10.

27. S. 41 British North America Act 1867.

28. S.C. 1885 c. 40.

29. S. 11 (c) S.C. 1885 c. 40.

30. PAC MG 26A, vol. 428 ¶ 209783, Aug. 8, 1886.

I am informed that you are under the impression that if an Indian on a reserve should exercise the franchise under the late act it would render him liable to pay additional taxes. This is altogether a mistake. The Grits who did all they could to deprive the Indians of the right of voting are spreading that falsehood in order to prevent the original proprietors of the soil of this country from standing on a footing of equality with the white men who have come into it. I can assure you that an Indian will not increase his liability, his burdens, or his duties as a subject or citizen by voting at the election. He will stand exactly in the same position in all respects the hour after he may vote as he stood the hours before he voted.³¹

The Grits (Liberals) were returned to power in 1896 and the Franchise Act³² of 1898 eliminated the separate federal franchise. In 1920 the federal franchise was reestablished but excluded "Indians ordinarily resident on an Indian reservation, provided, however, that any Indian who has served in the naval, military or air forces of Canada in the war declared by Her Majesty on August 4th, 1914, against the Empire of Germany and subsequently against other powers shall be qualified to vote."³³ In 1944 the franchise was extended to the Indians who fought in World War II, and in 1948 the spouses of those who had served in the two World Wars.³⁴ The anxiety of the Six Nations, expressed sixty-five years before, proved well founded when in 1950 the franchise was extended to those Indians who "[e]xecuted a waiver, in a form prescribed by the Minister of Citizenship and Immigration, of exemptions under the Indian Act from taxation on and in respect of personal property, and subsequent to the execution of such waiver a writ has issued ordering an election in any electoral district."³⁵

The Minister of Citizenship and Immigration, who moved second reading of the amendment in the House of Commons, observed:

The exemption from taxation of real and personal property held by Indians on reserves has been modified so that it will

31. Macdonald Paper, MG 26A vol. 436 ¶ 215104-6, July 7, 1887.

32. S.C. 1898 c. 14.

33. S.C. 1920 c. 46 s. 29(1) Dominion Elections Act; R.S.C. 1927 c. 53 s. 29(1); S.C. 1938 c. 46 s. 14.

34. S.C. 1948 c. 46.

35. S.C. 1950 c. 35 s. 1.

not apply to the personal property of Indians ordinarily resident on reserves, other than veterans of the first and second great wars and their wives, who execute a waiver under an amendment to the Dominion Elections Act, 1938; otherwise the exemption from taxation stands as it has stood since this provision was enacted in 1876. . . .

It is proposed to apply this only to personal property; the real property on the reserve is held in trust by the crown and does not belong to the individual Indian, but is held for the use and benefit of the band or community as a whole, and it is felt that such property should not be taxed, as the individual Indian has only an occupational interest in the land.

It may be of interest to note that the Indian Act of 1869 was entitled "An Act for The Gradual Enfranchisement of Indians." At this time it was apparently thought that Indians would become readily absorbed into the general community, and provision was made for any qualified Indian to attain full citizenship by applying for enfranchisement. Since then the way has been open for Indians who have sufficiently demonstrated their ability to maintain themselves off reserves to attain all the rights and privileges enjoyed by other citizens of the country. The procedure is by order in council. Since yearly records were established in 1918, more than 5,000 Indians have sought and received enfranchisement.³⁶

A member of the House of Commons responded:

And yet at least in my opinion, we ask the Indian to barter his right to the exemption for the privilege of voting in a federal election. That is something which I feel is fundamentally and basically wrong.

We inquire why this is done, and the minister says he does not want to set up a special category of Indians. It seems to me there are about one hundred Indians in reserves in Canada—and I give that figure only as a rough guess—who are earning taxable incomes, or incomes that would be exempt under our present legislation. I would be very pleased to have the minister correct me if I am wrong. In other words we are disfranchising about 125,000 people, or at least making it difficult for them, and asking them to waive some of their rights, in order that the Department of National Revenue here in Ot-

36. June 21, 1950 H.C. Debates, vol. 4.

tawa may collect some revenue from about one hundred Indians.³⁷

The franchise granted to the Eskimos in that year was not subject to any conditions. The Minister of Citizenship and Immigration explained that "the Eskimo, not being exempt from taxation, may vote."³⁸ In 1951 the franchise was extended to those Indians and their spouses who served in the Korean War.³⁹ It was not until 1960 that the federal franchise was finally extended to Indians under the same conditions as other citizens of Canada. The restriction on the franchise requiring a waiver of the taxation exemption was repealed.⁴⁰ The Minister of Citizenship and Immigration expressed a dramatically different view from that of nine years previously and reiterated the remarks of Sir John A. Macdonald nearly a century before:

The proposal now before the house is that the restriction which applies to the Indians living on reserves be abolished so that all Indians will have the right to vote on the same basis as other citizens. Many reasons can be forwarded in support of this proposal. Foremost is the fact that it is not in keeping with our democratic principles that there should be citizens—and all Indians are citizens—who are restricted in the exercise of one of the fundamental rights of a democracy, the right to participate in the election of the representatives in parliament.

Second, however well-intentioned, the present legislation has fallen far short of the objective recommended by the special joint committee of the Senate and the House of Commons.

Third, the present legislation has been quite unacceptable to the majority of the Indians resident on reserves, as is evidenced by the fact which I mentioned previously this afternoon, that since 1950 only 122 Indians out of an estimated 60,000 adult Indians residing on reserves have waived their exemption to taxation.

Fourth, in recent years more and more Indians and Indian groups have been pressing for the franchise free from the existing restriction.

Finally, there is the reason mentioned by the Prime Minister [Mr. Diefenbaker] in his speech to this house on January 18,

37. May 15, 1951 H.C. Debates, vol. 4, per Gibson M.P.

38. June 1950, H.C. Debates, p. 3812, per Harris M.P.

39. S.C. 1951 c. 3 s. 6.

40. S.C. 1960 c. 7 s. 1.

namely that it will remove in the eyes of the world any suggestion that in Canada colour or race places any citizen in an inferior category to other citizens of the country.

My comment that many Indians and Indian organizations have been pressing for the vote free from the existing restrictions was not intended to create the impression that all Indians are in favour of having the vote. There are some who are opposed and their objection is apparently based on the fear that it will mean the loss of aboriginal or treaty rights. I am not aware of any legal basis for this fear and I would like to repeat again the assurance given to the Indians by the Prime Minister in this house on January 18, that existing rights and treaties, traditionally or otherwise, possessed by the Indians, will not in any way be abrogated or diminished in consequence of their having the right to vote.⁴¹

From 1867 until 1885 and from 1898 until 1920 the federal franchise was determined by the provisions of the provincial Election Acts. Such legislation also determined eligibility to vote in provincial elections. The western provinces of Alberta, British Columbia, Manitoba, and Saskatchewan disqualified "Indians" from voting, with exceptions in the case of the latter three provinces for those who served in the armed forces. The franchise was granted in Alberta in 1965, in British Columbia in 1949, in Manitoba in 1952, and in Saskatchewan in 1960.⁴² The eastern provinces of Ontario, New Brunswick, Prince Edward Island, and Quebec disqualified "Indians resident on a reserve" from voting, with the exception in the case of the first three provinces

41. Mar. 9, 1960 c. 7, s. 1.

42.

Alberta Election Act, S.A. 1909 c. 3 s. 10(4).		Manitoba	S.M. 1886 c. 29 s. 12 R.S.M. 1891 c. 49 s. 14(b) R.S.M. 1902 c. 52 s. 19(b)
R.S.A. 1922 c. 4 s. 10(d)			R.S.M. 1931 c. 10 s. 16(b)
R.S.A. 1942 c. 5 s. 16(d)		amended	R.S.M. 1940 c. 57 s. 15(b)
R.S.A. 1955 c. 97 s. 16(1)(d)			S.M. 1952 c. 18
repealed		repealed	
S.A. 1965 c. 23			
British Columbia	S.D.C. 1875 c. 2 s. 1	Saskatchewan	
R.S.B.C. 1897 c. 67 s. 8		Elections Act	S.S. 1908 c. 2 s. 11
R.S.B.C. 1911 c. 72 s. 8			R.S.S. 1909 c. 3 s. 11
R.S.B.C. 1924 c. 76 s. 5(a)			R.S.S. 1920 c. 3 s. 12(3)
S.B.C. 1931 c. 21			R.S.S. 1930 c. 4 s. 12(3)
R.S.B.C. 1936 c. 84			R.S.S. 1940 c. 4 s. 12(3)
amended	S.B.C. 1947 c. 28— for war service	amended	S.S. 1951 c. 3 s. 29(b)— for war service
repealed	S.B.C. 1949 c. 9	repealed	S.S. 1960 c. 45 s. 1.

of those who had served in the armed forces. The franchise was granted in Ontario in 1954, in New Brunswick and Prince Edward Island in 1963, and in Quebec in 1969.⁴³

Jurisdiction Over Indians and Taxation

Section 91(3) of the British North America Act⁴⁴ confers exclusive legislative authority upon the Canadian Parliament in respect of "the raising of money by any mode or system of taxation." Section 92(2) confers exclusive legislative authority upon the legislature of each province in relation to "direct taxation within the Province in order to the raising of revenue for provincial purposes." The meaning of "direct taxation" was declared in *Atlantic Smoke Shops v. Conlon*⁴⁵ where the Lord Chancellor on behalf of the Privy Council adopted "[t]he definition of a direct tax which was used by Lord Hobhouse in *Bank of Toronto v. Lambe* and which is derived from John Stuart Mill's 'Principles of Political Economy' (bk. V. c.3) as (one which is demanded from the very persons who it is intended or desired should pay it)."⁴⁶ In *Atlantic Smoke Shops* a sales tax upon tobacco was held to be within provincial jurisdiction because it was imposed "immediately on the consumer." "It is a tax which is to be paid by the last purchaser of the article, and, since there is no question

43.

Ontario	S.O. 1875-76 c. 10	amended	S.N.B. 1944 c. 8 s. 34
	R.S.O. 1877 c. 10 s. 7		R.S.N.B. 1952 c. 70 s. 34
	R.S.O. 1887 c. 9 s. 7		S.N.B. 1963 c. 7 s. 34
	R.S.O. 1897 c. 9 s. 12-14	Prince Edward Island	
	R.S.O. 1914 c. 8 s. 22		S.P.E.I. 1913
amended	S.O. 1926 c. 4 s. 22— for service in World War II		S.P.E.I. 1922 c. 5 s. 32
	R.S.O. 1937 c. 8 s. 22	repealed	S.P.E.I. 1931 c. 5 s. 3
	R.S.O. 1939 c. 11 s. 22— for service in World War II	Quebec Elections Act	R.S.P.E.I. 1951 c. 48 s. 9
amended	R.S.O. 1950 c. 11 s. 22		S.P.E.I. 1963 c. 11 s. 22
repealed	S.O. 1954 c. 25		R.S.Q. 1888 Art. 172
New Brunswick Elections Act	S.N.B. 1889 c. 3 s. 24— disqualified "Indians"	repealed	R.S.Q. 1909 Art. 180
	R.S.N.B. 1908 c. 3 s. 26		S.Q. 1915 c. 17 s. 5
	R.S.N.B. 1927 c. 4 s. 6		R.S.Q. 1941 c. 5 s. 13(2)
			R.S.Q. 1964 c. 7 s. 48(c)
			S.Q. 1969 c. 13

44. R.S.C. 1970 App. 5.

45. [1943] A.C. 550, 562-63, per Viscount Simon, L.C.

46. *Id.*, citing *Bank of Toronto v. Lambe*, 12 App. Cas. 575, 582.

of further re-sale, the tax cannot be passed on to any other person by subsequent dealing.”⁴⁷ Direct taxation has been held to embrace income tax, land tax, and sales tax upon gasoline, liquor, and other goods. A sales tax imposed upon building materials, subsequently incorporated into houses, was held to constitute a direct tax as “there was no passing on the tax on the materials in their original form.” The builder was the “ultimate user of the materials.”⁴⁸ Estate taxes are considered to be exclusively within federal jurisdiction because the tax falls primarily on the executor who passes the burden along to the persons who ultimately pay. Succession duty is regarded as a direct tax falling on the successor and is accordingly within provincial jurisdiction.⁴⁹

Exclusive jurisdiction over “Indians and Lands reserved for Indians” resides in the Canadian Parliament.⁵⁰ Chief Justice Laskin declared in *Cardinal v. Attorney General of Alberta*⁵¹:

Where land in a Province is, as in the present case, an admitted Indian reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada. This is seen in the Indian Act, with which I will deal later in these reasons.⁵²

Justice Martland, writing for the majority, rejected the enclave approach:

A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the British North America Act, 1867, was to create enclaves within a Province within the boundaries of which provincial legislation could have no application.⁵³

47. [1943] A.C. 550, 563, per Viscount Simon, L.C.

48. Cairns Constr. v. Government of Saskatchewan [1959] 27 W.W.R. 297 (Sask. C.A.).

49. Provincial Treasurer of Alberta v. Kerr [1933] A.C. 710 (P.C.).

50. Section 91 (24) British North America Act R.S.C. 1970 App. 5.

51. [1973] 40 D.L.R.3d 553 (Can. S. Ct.)

52. *Id.* at 568. The Chief Justice affirmed such an approach in *Natural Parents v. Superintendent of Child Welfare* [1976] 1 W.W.R. 699 (Can. S. Ct.).

53. [1973] 40 D.L.R.3d 553 at 559-60 (S. Ct. Can.).

Prior to 1951 the application of provincial legislation was, of course, subject to occupation of the field by federal legislation such as the Indian Act, and at least one authority declared that the taxation provisions of that statute precluded the imposition of provincial taxation upon Indians.

Under ss. 102, 103 and 104 of the Indian Act, the Dominion Parliament has legislated in respect to the subject of taxation as it may affect "Indians and Lands Reserved for the Indians," a subject assigned exclusively to that legislative body, and having done so, I do not see under what principle provincial legislation can be made to supplement, change or restrict such federal enactment.

True the federal enactment makes no reference to poll or income tax, but its failure to do so does not in my opinion, give a provincial Legislature power to add that which the federal enactment may have omitted.

It is my view that ss. 102, 103 and 104 of the Indian Act are exhaustive on the subject of Indian taxation so as to exclude provincial legislation, and therefore the provisions of the City Charter providing for the payment of a poll tax, has no application to an unenfranchised Indian whether residing on or off the Reserve.⁵⁴

In 1951 the present Section 88 of the Indian Act was introduced,⁵⁵ apparently with the aim of restating or codifying the application of traditional constitutional law principles to Indians.

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Section 88 specifically provides for a narrow notion of occupation of field and thus renders academic much of the debate as to the applicability of the enclave approach or a broad notion of occupation of the field on a reserve. "Subject to the terms of the treaty, provincial laws, of general application" will apply except

54. *Re Kane* [1940] 1 D.L.R. 390, 395-96 (N.S. Co. Ct.).

55. R.S.C. 1970 c. 1-6.

to the extent that they are inconsistent with the Indian Act and its regulations. Section 88 does not, however, provide for non-Indians and it is therefore necessary to examine the preexisting case law in that regard. The section represents a significant intrusion of provincial jurisdiction into the powers of self-government to which bands and band councils aspire. The section provides for the imposition of provincial taxation upon Indians subject only to "the terms of any treaty" and the provisions of the Indian Act. The provisions of the Indian Act will be examined after considering the limits imposed upon provincial taxation by treaty.

The Treaties: Subject to the Terms of Any Treaty

The application of provincial laws of general application to Indians is expressed by Section 88 of the Indian Act to be "subject to the terms of any treaty." Federal legislation is not so restricted.⁵⁶ The precise ambit of arrangements which might deny the operation of provincial taxing statutes is not settled. It has been held, however, to extend to arrangements between the Hudson's Bay Company and the Indians of Vancouver Island,⁵⁷ and to exclude international treaties between states. In *Francis v. Queen*,⁵⁸ an Indian resident on a reserve invoked the terms of the

56. *R. v. George* [1966] 55 D.L.R.2d 386, 397 (S. Ct. Can.).

57. [1964] 52 W.W.R. (N.S.) 193 (B.C.C.A.) *aff'd* 52 D.L.R.2d 481 (S. Ct. Can.). Davey, J.A., declared: "In considering whether Ex. 8 is a treaty within the meaning of sec. [88] regard ought to be paid to the history of our country; its original occupation and settlement; the fact that the Hudson's Bay Company was the proprietor and, to use a feudal term contained in its charters, the lord of the lands in the Northwest Territories and Vancouver Island; and the part that company played in the settlement and development of this country. In the Charter granting Vancouver Island to the Hudson's Bay Company, it was charged with the settlement and colonization of that island. That was clearly part of the Imperial policy to head off American settlement of and claims to the territory. In that sense the Hudson's Bay Company was an instrument of Imperial policy. It was also the long-standing policy of the Imperial government and of the Hudson's Bay Company that the crown or the company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard Ex. 8 as a mere agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety of these facts, I entertain no doubt that parliament intended the word 'treaty' in sec. [88] to include all such agreements, and to except their provisions from the operative part of the section."

58. [1956] S.C.R. 618.

Jay Treaty of November 19, 1794, between His Britannic Majesty and the United States of America to resist the imposition of federal customs and sales tax. The claim was denied, *inter alia*, because, as declared by Justice Kellock: "I think it is quite clear that 'treaty' in this section does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute. [Indian Act]."⁵⁹ As Justice Davey declared in *R. v. White and Bob*⁶⁰:

[I]t can be safely said that it does not mean an "executive act establishing relationships between what are recognized as two or more independent states and in sovereign capacities; . . ." per Rand, J. in *Francis v. Reg.*

It is also clear, in my opinion, that the word is not used in its widest sense as including agreements between individuals dealing with their private and personal affairs. Its meaning lies between those extremes.⁶¹

It is to be observed that, in contrast to the position in the United States, subjects of a contracting party to an international treaty cannot rely upon its terms in the absence of implementing legislation. Thus Francis's claim to rely upon the Jay Treaty was entirely unsuccessful. As Chief Justice Kevin observed: "The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation."⁶²

With respect to treaties that are contemplated by the language of Section 88, two possible arguments might be made to deny the imposition of provincial taxation: First, that the tax sought to be imposed is directed to the raising of revenue for items that were promised the treating Indians; second, that the tax sought to be imposed is in violation of the promises made that no such tax would be levied. The first argument was presented in *Regina v. Johnston*.⁶³ Prior to 1973, Saskatchewan imposed a hospitalization tax upon its residents, as the remaining provinces of Canada still do. The revenue so raised was applied toward the financing

59. *Id.* at 631.

60. [1964] 52 W.W.R. (N.S.) 193 (B.C.C.A.).

61. *Id.* at 197.

62. [1956] S.C.R. 618.

63. [1966] 56 W.W.R. 565 (Sask. C.A.).

of hospitals in the province. Walter Johnston, a member of the tribe of Indians with which Treaty No. 6 was signed, argued that the following clauses of the treaty exempted him from liability to pay:

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

Chief Justice Culliton readily concluded that the treaty was of a type contemplated by Section 88:

It was agreed and so found by the trial judge that the respondent was an Indian as defined in the Indian Act and that he was a descendant of the Indians on behalf of whom treaty 6 was made. Treaty 6 is, in my opinion, a treaty of the type referred to in sec. [88] of the Indian Act. He is, therefore, in my opinion, entitled to any rights or immunities under the said treaty that may have been contemplated by parliament in enacting sec. [88] of the Indian Act.⁶⁴

The Chief Justice adopted the "ordinary meaning" approach to the interpretation of the terms of the treaty and relied upon the record compiled by Treaty Commissioner Morris⁶⁵ and concluded:

The [pestilence] clause, it means no more than it plainly states: The obligation of the Crown in the event of pestilence or general famine, to provide such assistance as the chief superintendent of Indians should deem necessary and sufficient to meet the calamity. With every deference to the contrary opinion of the learned judge of the magistrate's court, I do not think this clause of the treaty has any relevancy in the determination of the question with which he was faced.

64. *Id.*

65. MORRIS, *supra* note 16.

Again, on the plain reading of the "medicine chest" clause, it means no more than the words clearly convey: An undertaking by the crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians at *the direction of the agent*.⁶⁶

Walter Johnston was required to pay the hospitalization tax.

Four years later in *Regina v. Swimmer*,⁶⁷ the Saskatchewan Court of Appeal reaffirmed the position adopted in *Johnston* and rejected the argument that a member of the tribe of Indians which was a party to Treaty No. 6 was not subject to the payment of the Saskatchewan Medical Care Insurance premium. Chief Justice Culliton declared: "[T]he terms of Treaty #6 do not impose upon the Government of Canada the obligation of providing, without cost, medical and hospital services to all Indians."⁶⁸

It has yet to be argued in court that the oral assurances offered by the Treaty No. 8 Commissioner that "it did not lead the way to the imposition of any tax"⁶⁹ operate to deny the application of provincial tax. Such argument appears unlikely to succeed. The courts have been reluctant to look beyond the written terms of the treaties to ascertain the promises made by the Crown to the Indians, and the only specific reference to taxation that was recorded was in the oral discussion preceding Treaty No. 8. Arguments based upon the retention by treaty of the sovereignty of Indian bands in respect to taxation appear very difficult to reconcile with the "plain reading" analysis employed by the Saskatchewan Court of Appeal in *Johnston* and *Swimmer*.

Who is Exempt? The Provisions of the Indian Act

Section 87 of the Indian Act exempts from taxation prescribed property of an "Indian or band." Entitlement to be registered as an "Indian" under the Indian Act is confined to members of bands historically reputed to consist of Indians, descendants in the male line, and wives of those persons. Two groups are

66. [1966] 56 W.W.R. 565 (Sask. C.A.) (emphasis added). Cf. *Dreaver v. Regina* (Unreported Ex. Ct.) where Angers, J., gave, in the words of Culliton, C.J., an "extended interpretation" to the "medicine chest" clause relying upon oral assurances at the time of the treaty such that the clause was held to contemplate "free medicines, drugs and medical supplies."

67. [1971] 1 W.W.R. 756 (Sask. C.A.).

68. *Id.* at 760.

69. Treaty No. 8 (1899), Queens Printer, Ottawa.

specifically disentitled—the half bloods, or *métis*, and those who are enfranchised. The latter group includes Indian-born wives who marry non-Indians. “Band” is defined in Section 2(1) of the Act to refer to a body of Indians for whose use and benefit lands have been set apart as reserves or monies held on their behalf, or have been declared to be such by order in council.⁷⁰

It appears uncontested that the ambit of the terms “Indian” and “band” in Section 87 are governed by the meanings thereof provided elsewhere in the Act. Thus it does not appear open to argument that the *métis* or nonstatus Indians may benefit from the exemption by reference to some broader definition. The only contentious issue that has arisen is in regard to “Indian corporations.” In *Kinnookimaw Beach Assoc. v. The Queen in Right of Saskatchewan*,⁷¹ the application of taxation to a nonprofit corporation formed by seven Indian bands as equal shareholders for the development of reserve lands as a golf, tennis, and beach resort was considered. The Saskatchewan Board of Revenue Commissioner “with regret” held that the corporation was liable to pay a provincial sales tax (termed “education and hospitalization tax”) upon capital purchases. The Board acknowledged that if the seven bands had joined together in an organization other than a corporate body, they would have enjoyed the benefit of the exemption under Section 87. This observation is to be considered in the light of the Department of Indian Affairs’ policy of insisting that Indian band economic development take place through corporations. Upon appeal to the Saskatchewan Queen’s Bench Court, it was argued “that this was an appropriate case for the corporate veil to be lifted.”⁷² Upon an examination of the inconclusive jurisprudence in this area, Chief Justice Johnson declared:

It seems that if the corporate veil can be lifted to prevent taxpayers from avoiding the payment of taxes, it may also be lifted to give taxpayers the benefit of tax exemptions in a case such as this where such exemption is specially granted to a particular group or class of people for whose care and assistance the legislation is designed as is the Indian Act. This would lead to “the just and equitable enforcement of a tax law” in the words of Culliton C.J.S. This Act is designed to ensure that

70. See also Bartlett, *The Indian Act of Canada*, 27 BUFFALO L. REV. 581 (1978).

71. Unreported as yet, Sask. C.A., June 28, 1979.

72. [1978] 6 W.W.R. 749, 751 (Sask. Q.B.).

the Indian people are specially cared and provided for by the government of Canada. It is notorious that dozens of projects by the federal government [are] to enable the Indian people to help themselves as a step in their upward development and growth, and I can take judicial notice that the project of the appellant falls within the class of these works. It would be completely incongruous and anomalous for public funds to be expended by one government to assist Indian peoples if another government were permitted to assess taxes payable by Indians ultimately which would not be assessable if the corporate structure were not the vehicle for carrying out their project.

Accordingly, I am of the view that in this case the lifting of the corporate veil is justified and, having done that, I find that the appellant association is owned and controlled by Indian bands and carries out the works of the association on an Indian reserve. These Indian bands are, accordingly, entitled to the benefit of the tax exemption.⁷³

This reasoning was rejected by the Chief Justice of the Court of Appeal:

[T]he autonomous and independent existence of the corporate structure must be accepted and respected unless it can be shown that such structure is being deliberately used to defeat the intent and purpose of a particular law, or is intended to or does convey a false picture of independence between one or more corporate entities which, if recognized, would result in the defeat of a just and equitable right.⁷⁴

The Chief Justice stated that there was no doubt

as to the true legal position of the Association as related to the Indian Bands. Here the Indian Bands decided that the most efficient manner of attaining their objectives was through a corporate structure.

To grant to the Association the exemption from taxation provided for in Section 87 of the Indian Act, *supra*, would be to destroy the legal obligations of the Association as an independent corporate entity and to determine its obligations by the character of its shareholders.⁷⁵

73. *Id.* at 754.

74. Unreported as yet Sask. C.A., June 28, 1979, p. 5 of 7. Leave to Appeal to Supreme Court of Canada denied Nov. 6, 1979.

75. *Id.*, p. 6 of 7.

The Court of Appeal adopted the classic "form" rather than "substance" approach to the application of the tax exemption and relied upon the apothesis of such reasoning in *Pioneer Laundry v. Minister of National Revenue*.⁷⁶

The jurisprudence dealing with the lifting of the corporate veil is notorious in its unpredictability.⁷⁷ It appears unfortunate that both courts should consider it necessary to decide the case on this basis, and yet more unfortunate that the Court of Appeal should reject the approach of the lower court, which did at least seek to focus upon the object and intent of Section 87 of the Indian Act. The application of a literal formal approach devised by modern tax law to a right declared in oral assurances in treaties with the Indians of Canada a century ago dictates an unsympathetic and unrealistic appraisal of the intent of the legislature.

Whatever the merits of the decision of the Saskatchewan Court of Appeal, it is in accord with the announced practice of the Department of National Revenue in the collection of income tax. The Department has offered its opinion that:

Although "person" is defined for purposes of the Income Tax Act to include any body corporate or public, a corporation cannot meet the definition of "Indian" in the Indian Act and its income is not exempted from tax by these provisions, even where its only shareholders are Indians, its head office and physical assets are on a reserve and all of its business is carried on there.⁷⁸

What is Taxation? The Limits of the Exemption of Section 87

Section 87 affords an exemption only with respect to taxation; it affords no protection to financial contributions which are otherwise classified. In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*,⁷⁹ applying the British North America Act, the Privy Council described the elements of taxation: "compulsorily imposed by a statutory [public] committee . . . enforceable by law . . . compulsion is an essential feature of taxation . . . the imposition of these levies is

76. [1940] A.C. 127 (P.C.). That decision was immediately rejected by amendment to the Income Tax Act.

77. Professor Woods, now a member of the Saskatchewan Court of Appeal, has observed that, "It is not . . . possible to form a rationale pattern out of the court's handling of the various situations." (1957) 35 CAN. BAR. REV.

78. I.T.—62 Aug. 18, 1972, Dept. N.R.

79. [1933] 1 D.L.R. 82 (P.C.).

for public purposes.”⁸⁰ The Court declared that an “adjustment levy” imposed upon dairy farmers selling fluid milk, which was then apportioned among those selling manufactured dairy products, was a form of taxation within the meaning of the British North America Act. In *Workmen’s Compensation Board v. Canadian Pacific Railway*,⁸¹ the Privy Council concluded that levies upon employers “imposed with the object of establishing an institution which shall provide insurance benefits for employees,” was a form of taxation. With respect to unemployment insurance funded by levies upon employers and employees, the Privy Council found it unnecessary to decide whether the levies constituted taxation in *Attorney General for Canada v. Attorney General for Ontario*,⁸² but the majority of the Supreme Court of Canada appear to conclude that they did not:

I doubt whether the contribution received from the employee can properly be described as a tax. In fact, it would seem to me to partake more of the nature of an insurance premium or of a payment for services and individual benefits which are to be returned to the employee in proportion to his payments.⁸³

The ambit of the term “taxation” in Section 87 is not precisely defined. The interpretation adopted upon the application of the British North America Act of 1867 seems persuasive. Such interpretations suggest a broad range of levies that might be termed “taxation” as possessing the elements of compulsion,⁸⁴ enforceability, and public authorization for public purposes described by the Privy Council. This potential range probably caused the Federal Court of Appeal⁸⁵ to avoid deciding whether

80. *Id.* at 85, 86, per Lord Thankerton.

81. [1919] 48 D.L.R. 218 (P.C.).

82. [1937] A.C. 355, 368 (P.C.).

83. *Id.* at 454, per Rufret, J. (Crockett, J., concurring), 460, per Kerwin, J. (Rufret and Cannon, J.J., concurring). Duff, C.J. (Davis, J., concurring) dissented and determined that the levies were a form of taxation at 438-39, relying on *Lower Mainland v. Crystal Dairy* [1953] 1 D.L.R. 82 (P.C.).

84. In *Delisle v. Shawinigan Water & Power* [1941] 4 D.L.R. 556 (Que. S. Ct.), Demers, J., declared that a sales tax imposed on electricity delivered to the home of a member of an Indian band resident on a reserve was not a tax because it was not compulsory: “I maintain that there is no tax imposed on the plaintiff. The essential characteristics of a tax are that it is not a voluntary payment or donation but an enforced contribution. The plaintiff is not bound to take electricity. People may illumine their homes by other means.” It is suggested that this aspect of the decision may be ignored as being grossly inconsistent with the understanding of the Privy Council.

85. *Minister of National Revenue v. Iroquois of Caughnawaga*, [1977] C.T.C. 49 (Fed. C.A.). Section 66(2) of the Indian Act provides for the payment of unemployment

unemployment insurance premiums levied under statutory authority are "taxes" within the exemption of Section 87. The Court rejected a finding of the umpire to that effect upon another ground. Hospitalization taxes and provincial medicare premiums are not levied upon Indian reserve residents because the federal government assumes responsibility for the provision of health services to such persons,⁸⁶ and accordingly litigation has not been directed to the application of the exemption under Section 87. A viable argument might be that such levies are a form of income taxation or property taxation and if imposed upon income or property located upon the reserve, are exempt. A similar analysis might extend to government motor vehicle insurance.⁸⁷

The courts have distinguished between licenses and taxes in the application of Section 87 of the Indian Act. In *Attorney General for Quebec v. Williams*,⁸⁸ the court appeared to adopt the distinction that a "license fee is a tax when imposed mainly for the purposes of revenue." The essence of a license is the permission granted thereby. The court convicted an Indian band member for selling tobacco on a reserve without a license required by the Tobacco Tax Act.

I am of the opinion that the sum of one dollar imposed by the Government for acquiring a license for the sale of tobacco, which remains in force until it is rescinded, can represent only the cost of acquisition of a license, and does not constitute a tax within the legal and constitutional meaning of the word.⁸⁹

Similarly, a motor vehicle registration fee, a driver's license fee,⁹⁰ and a city street vendor's license fee⁹¹ have been held not to constitute taxation within the meaning of Section 87. The exemption cannot, of course, benefit a non-Indian doing business on a reserve so as to avoid the requirement of a license fee.⁹²

insurance premiums in certain circumstances. Such might suggest that the levies are not "taxation" within s. 87, but cannot be considered conclusive because the exemption of Section 87 does not, of course, preclude taxation upon property situated off a reserve.

86. See *R. v. Swimmer*, [1971] 1 W.W.R. 756 (Sask. C.A.).

87. Cf. *R. v. Twyoungment*, [1979] 5 W.W.R. 712 (Sask. C.A.) (application of Section 87 was not considered).

88. [1944] 82 C.C.C. 166 (Que. J.P.).

89. *Id.* at 169.

90. *Feldman v. Jocks*, [1935] 74 Que. S. Ct. 56. The decision is not beyond criticism insofar as the court utilized the finding that the levies were not taxes so as to apply the exemption from taxation under the Indian Act. The exemption was worded at that time in the manner depicted in the text accompanying note 6 *supra*.

91. *Montreal v. Blue-Feather* (1933) 39 REVUE DE JUR. 100.

92. [1933] 3 W.W.R. 639 (Alta. Dist. Ct.). Such requirement may, however, be in

Income Taxation

Both the federal and provincial governments impose income tax, albeit the revenue is in the main collected by the federal branch. The Federal-Provincial Fiscal Arrangements and Established Programs Financing Act 1977⁹³ provides for federal-provincial collection agreements under which the federal government collects provincial income tax, along with its own, in joint federal-provincial tax returns. Agreements for the collection by the federal government of the provincial tax on individuals have been entered into by all the provinces except Quebec and agreements for the collection of the tax on corporations by all the provinces except Ontario and Quebec. Fundamental to such agreements is a common tax base. The exemption conferred by Section 87 of the Indian Act applies "notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province" and is applicable in respect of both fiscs (treasuries). The collection arrangements make clear that income tax levied for provincial purposes is imposed under provincial jurisdiction, rather than by a "renting" of that power to the federal government, and accordingly the provincial tax is subject to being treaty barred under Section 88 of the Indian Act.

Departmental Practice

The Department of National Revenue has announced its practice in the collection of federal and provincial income tax as follows:

While the exemption in the Indian Act refers to "property" and the tax imposed under the Income Tax Act is a tax calculated on the income of a person rather than a tax in respect of his property, it is considered that the intention of the Indian Act is not to tax Indians on income earned on a reserve. Income earned by an Indian off a reserve, however, does not come within this exemption, and is therefore subject to tax under the Income Tax Act.

Section 87 exempts property "situated on a reserve" from taxation. The Department has declared:

conflict with Section 83(1)(a)(ii) empowering the band council to license businesses upon a reserve.

93. S.C. 1976-77 c. 10.

(g) The key factor in determining whether or not a specific item of income received by an Indian is taxable or exempt is the location where the income is earned. Income earned on a reserve by an Indian is considered exempt. Income earned away from the reserve is taxable.

(h) Different types of income have different criteria for establishing whether they are on or off the reserve. Some of the types of income may be classified as follows:

(i) Salary and wages are considered to be earned where the services are performed. For an office worker this is the office at or out of which his duties are performed; for a construction worker employed on a project it is the job-site; for a teacher it is the school and so on. The principal office of his employer, the location where he is paid or from which the pay is issued are not usually relevant in determining the location of income from an office or employment. In some cases it will be found that employment is partly on and partly off the reserve. In these cases a reasonable allocation must be made between exempt and taxable income, based on the facts of the particular case.

(ii) Business income is normally allocable to the permanent establishment. For example, for a self-employed merchant it would be at his store.

(iii) Rental income is earned at the location of the property rented.

(iv) Interest on a bank account is earned at the location at which the funds are on deposit, i.e. the specific bank branch address.

(v) Dividends on shares from a company whose head office, principal business activity and share-register are on a reserve will normally be considered to be earned on the reserve.

(vi) Income from other sources is generally considered to be located at the payer's principal place of business for purposes of determining whether or not it is on a reserve. This general rule will apply to such amounts as annuity payments, unemployment insurance benefits, old age security payments and supplement, scholarships, bursaries, pension and Canada Pension plan benefits.⁹⁴

94. I.T. 62, Aug. 18, 1972, Department of National Revenue, Ottawa.

The Established Jurisprudence

The practice of the Department may be ascribed to a series of cases that established that income constituted personal property and was exempt under Section 89(1) of the Indian Act or its predecessor, if situated on a reserve, from "charge, pledge, mortgage, attachment, levy, seizure, duties or execution" by a non-Indian. In *Simkevitz v. Thompson*⁹⁵ it was first acknowledged that income might be regarded as a debt and accordingly as a form of personal property to which the protection of the exempting provision could extend. The leading case is *Petersen v. Cree*,⁹⁶ wherein the creditor sought to attach the wages of a member of the Oka Band of Indians whose domicile was on the reserve but who resided and worked in Montreal. MacKinnon, J., held the wages attachable and declared that "personal property means all property not immovable and includes chose-in-action."

The learned judge in *Petersen v. Cree* adopted the analysis of the British Columbia Court of Appeal in *Avery v. Cayuga*⁹⁷ in identifying the situs of the income. The Court of Appeal had cryptically observed that "it seems not to be open to question" that a bank deposit was "property situate outside of the reserve" and therefore not exempt. The Court recited the leading Privy Council cases⁹⁸ in the establishment of the situs of personalty for the purpose of succession and stamp duties. Lord Field described such rules of situs:

Now a debt per se, although a chattel and part of the personal estate which the probato confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor

95. [1910] 16 O.W.R. 865 (Ont. C. Ct.).

96. [1941] 79 C.S. 1 (Que. S. Ct.).

97. [1913] 13 D.L.R. 275 (B.C.C.A.).

98. *Commissioner of Stamps v. Hope*, [1891] A.C. 476, 481-82 (P.C.); *Lovitt v. The King*, 43 S.C.R. 106; *The King v. Lovitt* [1911] 28 T.L.R. 41 (P.C.).

where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was "conspicuous," i.e., within the jurisdiction within which the specialty was found at the time of death.⁹⁹

In *Petersen v. Cree*, MacKinnon, J., regarded the income of the defendant Indian as a simple contract debt that was located at the "residence of the debtor": "The Court considers that defendant's wages were *earned* in Montreal, they are primarily payable there and are so situated. *King v. Lovitt*, *Avery v. Cayuga*." It is considered that the practice of the Department is directly attributable to the language of MacKinnon.

The rules of situs applied in *Avery v. Cayuga* allow Indian bands to plan the economic development of reserve lands and lands adjacent to it so as to avoid the imposition of personal income tax. In *Nowegijick v. The Queen*¹⁰⁰ the Development Corporation of the Gull Bay Indian Reserve was engaged in logging operations ten miles from the reserve. The plaintiff, a member of the band, was employed by the corporation, which had its head office located on the reserve. Mahoney, J., held that the wages paid to the plaintiff constituted personal property situated on the reserve which was not subject to charge.

Wages, once received, lose the character of wages and become simply a negotiable instrument or money in their recipient's hands. Only up to the point of receipt are they wages. Wages are a contract debt, a chose in action, personal property which, strictly speaking, has no situs; however, where the law has found it necessary to attribute a situs to a debt, that situs has been the debtor's residence.

It was not argued that the fact the services by which the wages were earned were performed off the Gull Bay Reserve is determinative of anything. No reason has occurred to me why it should. The Corporation had but one residence: the Gull

99. [1891] A.C. 476, 481-82 (P.C.).

100. [1979] C.T.C. 195 (F.C.T.D.).

Bay Reserve. Wages payable by it to the Plaintiff were situated there.

The judge affirmed the application of the statutory exemption to income taxation:

The Income Tax Act does not, however, impose a tax on property; it imposes a tax on persons. The question is whether taxation of the Plaintiff in an amount determined by reference to his taxable income is taxation "in respect of" those wages when they are included in the computation of his taxable income. I think that it is.

The tax payable by an individual under the Income Tax Act is determined by application of prescribed rates to his taxable income calculated in the prescribed manner. If his taxable income is increased by the inclusion of his wages in it, he will pay more tax. The amount of the increase will be determined by direct reference to the amount of those wages. I do not see that such a process and result admits of any other conclusion than that the individual is thereby taxed in respect of his wages.¹⁰¹

The decision in *Nowegijick* demands a change in the practice of the Department of National Revenue. It suggests that the emphasis must properly be focused upon the residence of the debtor rather than the location at which the income is earned. *Nowegijick* was in accord with *The Queen v. National Indian Brotherhood*¹⁰² decided a few months previously, in which Acting Chief Justice Thurlow adopted the reasoning as to situs on or off a reserve suggested in *Avery v. Cayuga*.

A Rational Notional Situs

The application of rules of situs to an aspect of property that has no "absolute local existence" appears arbitrary and removed from considerations of the purpose of the exemption. A rationale proposed in this area should properly include the adoption of a criterion that will encourage self-government and economic development by Indian bands. Such a criterion has long existed in the law adopted by the Canadian government in the taxation of its subjects. The Canadian Income Tax Act purports to tax the world income of residents in Canada and the active income, including that derived from employment or business, of

101. *Id.* at 197.

102. Oct. 16, 1978 (F.C.T.D.).

nonresidents.¹⁰³ It seems appropriate to suggest that Indian bands might properly aspire to tax the income of band members wherever earned and the income of nonband members earned on the reserve. Corresponding exemptions from taxation by federal and provincial governments would complement such aspirations.

Judicial support for an exemption from taxation of Indians residing upon a reserve is evident in the decision of the British Columbia Court of Appeal in *Armstrong Grocers' Assoc. v. Harris*,¹⁰⁴ in which a creditor sought to attach monies owing to an Indian reserve farmer by an off-reserve purchaser of wheat. In an opinion by MacDonald, J.A., the court held that the income was not subject to charge:

The wheat while on the reserve, would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation. It might, I do not say it would, be different where the Indian received the proceeds and deposited it, say, in a bank outside the reserve, but here, the debtor was obliged to seek his creditor at home on the reserve and pay him there. But even apart from this technical rule, I think there is a clear intention shown in the Act to exempt from taxation such a chose in action as we have here.¹⁰⁵

The analysis employed in *Avery v. Cayuga* was considered and rejected by McPhillips and MacDonald. The denial of a charge upon a debt owed to an Indian resident upon a reserve was affirmed in *Crepin v. Delorimier et Banque Canadienne Nationale*.¹⁰⁶ Demers, J., observed that: "This deposit, it is a credit—an incorporeal right—which by its nature has no point of situs. If it must have one, it will be the domicile of the creditor."¹⁰⁷ The decision in *Armstrong* and *Crepin* may explain the practice of the Department of National Revenue prior to 1967.

Residence

(e) Prior to 1967 the residence of an Indian, i.e. whether on or off a reserve, was considered significant in determining whether his income was taxable or not. This factor was in addi-

103. Section 2 Income Tax S.C. 1970-71-72 c. 63.

104. [1924] 1 W.W.R. 729 (B.C.C.A.).

105. *Id.* at 730.

106. [1930] 68 C.J. 36 (Que. S. Ct.).

107. *Id.* at 37.

tion to the other criteria referred to in this bulletin, with the result that all income earned by an Indian who lived off the reserve was considered to be taxable income regardless of where it was earned. Since 1967 no importance has been attached to whether an individual Indian lived on or off the reserve.

(f) The question of whether or not he is resident in Canada has the same relevance for an Indian as for all other persons.¹⁰⁸

The inconsistency of the reasoning employed in *Armstrong* with that of *Avery v. Cayuga* is obvious. The analysis in *Armstrong* was rejected in *Petersen v. Cree*¹⁰⁹ and, more recently, in *Snow v. The Queen*¹¹⁰ and *The Queen v. National Indian Brotherhood*.¹¹¹

In the latter case the Tax Review Board¹¹² upheld the exemption of employees of that Indian organization who were employed at the head office in Ottawa. Acting Justice Frost declared:

[I]n the present case, the facts are somewhat extraordinary, and quite different from the *Snow* case referred to by counsel for the respondent. Here a number of unenfranchised Indians temporarily leave their reserve to join the staff of the appellant, an organization of a purely non-commercial nature acting on behalf of Indians and in respect of purely Indian affairs, and financed by moneys appropriated for the Indian cause by Parliament. Their domicile is their reserve and they were certainly employed as members of their band. In no way do I consider these people as having left the reserve to seek their fortune and earn a living in the non-Indian society. One could consider them as an extended arm of their bands, operating in Ottawa at the convenience of Indian and non-Indian parties concerned with the well-being and interests of unenfranchised Indians. It seems to me that the Indian Act should be interpreted and applied in a flexible way which does justice to the underlying philosophy of the Act.¹¹³

108. I.T.-62, Aug. 18, 1972, Department of National Revenue, Ottawa.

109. [1941] 79 C.J. 1 (Que. S. Ct.).

110. [1978] D.T.C. 6335 (F.C.T.D.), *aff'd* (1979) C.T.C. 227 (F.C.A.).

111. Oct. 16, 1978 (F.C.T.D.).

112. [1975] C.T.C. 2112 (T.R.B.).

113. *Id.* at 211.

The Federal Court Trial Division decisively rejected such an approach and asserted: "There is no legal basis notwithstanding the history of the exemption, and the special position of Indians in Canadian society, for extending it by reference to any notional extension of reserves or what may be considered as being done on reserves."¹¹⁴ The situs of the income and the application of the exemption was determined by the rules set down in *Commissioner of Stamps v. Hope* and *Avery v. Cayuga*.

Some judicial authority rejects not only the concept of exempting Indians according to residence, but *any* notional (theoretical) concept of situs of property in the interpretation of Section 87. This was emphatically declared by Kellock, J. (Abbot, J., concurring) in the Supreme Court of Canada in *Francis v. The Queen*¹¹⁵: "It is quite plain from this section that the actual situation of the personal property on a reserve is contemplated by section [87] and that any argument suggesting a notional situation is not within the intentions of that section." The Court rejected a claim for exemptions from federal customs and excise taxes imposed upon importation of personal property by an Indian resident upon a reserve. By rejecting any notional concept of situs, the Court is challenging the application of the exemption of Section 87 to an "intangible" such as income.

A Statutory Situs

In 1951, Section 90¹¹⁶ was introduced into the Indian Act. The section declares that:

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.

In *The Queen v. National Indian Brotherhood*,¹¹⁷ it was contended that, as the funding of the defendant's operation was

114. Oct. 16, 1978 (F.C.T.D.).

115. [1956] S.C.R. 618.

116. The origins of the provision may be traced to Section 69 of the Indian Act, c. 18, which barred from seizure the "presents" or "annuities" of the Indians, and Civilization and Enforcement of Indians Act, S.C. 1854 c. 4.

117. Oct. 16, 1978 (F.C.T.D.).

largely provided by appropriations of Parliament for the use and benefit of Indians, paragraph 90(1)(a) applied to the salaries of the defendants' Indian employees so as to deem them to be property situate on a reserve; it would follow that the individual Indian would be exempt from taxation with respect to his salary. Thurlow rejected the argument:

In my opinion, it is not possible to regard the salaries here in question as "personal property that was purchased by Her Majesty" within the meaning of paragraph 90(1)(a) and I am unable to accept counsel's submission that the paragraph should be interpreted as if it read "personal property that was . . . moneys appropriated by Parliament" as I think that grammatically the words "purchased by Her Majesty with" govern the whole of the remainder of the paragraph. The provision therefore cannot apply.¹¹⁸

The Court denied the application of Section 90(1)(a) to income because it was not susceptible to description by adjectives appropriate to tangible personalty.¹¹⁹ Income taxation was considered to be beyond the ambit of the extension of the exemption conferred by Section 90(1)(a).

The "numbered" treaties between the Indians of western Canada and the Crown provided that "Her Majesty agrees to maintain schools for instruction in such reserves." Indian organizations have argued that such terms and the oral assurances accompanying them place an obligation upon the Crown to support Indian students in all forms of education. The Crown has provided such support pursuant to agreements between the Department of Indian Affairs and Indian bands. In *Greyeyes v. The Queen*¹²⁰ the Federal Court Trial Division held that a scholarship paid to an Indian student by the Department of Indian Affairs to attend a university off reserve lands was deemed situate on a reserve by the operation of the provisions of Section 90(1)(b). The statement of agreed facts provided that "the said funds . . . were given to her pursuant to an agreement and treaty between the plaintiff's band and Ottawa and specifically pursuant to an agreement to assist band members in their education in compliance with the obligations of the Federal Government under

118. *Id.*

119. An approach adopted in *Kuhn v. Starr*, [1978] 4 C.N.L.B. 89 (Oct. 28, 1976, Man. Q.B.).

120. [1978] 84 D.L.R.3d 196 (F.C.T.D.) presently under appeal to the Federal Court of Appeal.

Treaty #6.” The decision suggests powerful arguments as to the exemption of salaries paid by agreement and in contemplation of treaty obligations to further the self-government and economic development of Indian bands. It is doubtful that a Crown attorney will again agree that such salaries were “given under a treaty or agreement,” and the Crown is unlikely to miss the opportunity in the future to point to the inconsistency between Section 90(1) (a) and (b) and suggest that both should properly be confined to more tangible forms of personality.¹²¹

But Is It Income Exempt Under Section 87? The Snow Case

The arguments of Indian organizations and the practice of the Department of National Revenue have been questioned by the Federal Court of Appeal. On April 19, 1979, in *Snow v. The Queen*¹²² the Court declared that income taxation was not subject to the exemption of Section 87.

This position was judicially evident in 1956 in the decision of the Supreme Court of Canada in *Francis v. The Queen*.¹²³ All members of the Court rejected any notional concept of the situs of personal property and in doing so doubted the application of Section 87 to intangible property such as income. Rand, J. (Cartwright, J., concurring) observed with respect to that section's predecessor: “To be taxed as by s. 102 ‘at the same rate as other persons in the locality’ refers obviously and only to personal or real property under local taxation.”¹²⁴ The judge was clearly of the opinion that the ambit of that exemption was confined to local property taxation.

In 1972, Russell Snow, a member of the Caughnawga Indian Band, challenged the imposition of taxation upon income earned off the reserve. In November, 1974, Roland St. Onge, Q.C., for the Tax Review Board, suggested that there was no exemption from income taxation conferred by Section 87 irrespective of where the income was earned.

Because the Income Tax Act taxes all the residents of Canada and does not exclude the Indian as an actual taxpayer, and as the Indian Act is completely silent on this important matter of income tax, it is self-evident that an Indian falls under the In-

121. See obiter in *Kuhn v. Starr*, [1978] 4 C.N.L.B. 89 (Oct. 28, 1976, Man. Q.B.).

122. [1979] C.T.C. 227 (F.C.A.).

123. [1956] S.C.R. 618.

124. *Id.* at 632.

come Tax Act, especially when his income is earned outside the Reserve.¹²⁵

In *The Queen v. National Indian Brotherhood*, decided four months later, Frost, for the Tax Review Board, applied the exemption of Section 87 to income taxation and offered this explanation of his resolution of the dilemma:

Statutory law exempting Indians from taxation preceded, by many years, the Income Tax Act, and established the broad principle that all property of an Indian situated on a reserve is exempt from taxation, thereby raising a presumption in law that the Income Tax Act cannot be taken to apply to the property of Indians on a reserve unless it is spelled out in clear unambiguous language and there is no conflict. Although the language of the Indian Act and the Income Tax Act appear to be repugnant in respect of taxation, it cannot be supposed that Parliament intended to contradict itself by exempting Indians under the earlier legislation and then tearing up the earlier statutes by imposing liabilities on them under the Income Tax Act. Besides the question of repugnancy, the Indian Act is a special Act which tends to be derogatory of the Income Tax Act, which is a general taxing Act. To avoid collision between these two statutes, the logical construction is simply that the Income Tax Act as a general statute applies to Indians only in respect of those areas of taxation wherein the Indian Act is silent. The Indian Act, however, is not silent but speaks with rather a loud voice, on the subject of taxability of Indians. The appropriate sections read as follows [sections 87 and 90 are recited]:

The language of the above provisions is broad and speaks to exclude all other tax legislation, and thereby constitutes special legislation overriding the Income Tax Act. It is only where the Indian Act is silent that other statutes can affect the rights of unenfranchised Indians.¹²⁶

Upon appeal of both cases to the Federal Court Trial Division, argument was confined to the question of situs of the income and the Court was able, in the language of Thurlow in *The Queen v. National Indian Brotherhood*,¹²⁷ to "assume that the taxation imposed by the Income Tax Act is taxation in respect of individuals

125. [1974] C.T.C. 2327 (T.R.B.).

126. [1975] C.T.C. 2112 (T.R.B.).

127. Oct. 16, 1978 (F.C.T.D.) and *Snow v. The Queen* [1978] D.T.C. 6335.

in respect of property and that a salary or a right to salary is property." Shortly prior thereto a fellow judge of the Trial Division had found that a scholarship did constitute "property" within the exemption of Section 87 in the face of the argument that "the Income Tax Act levies a tax on persons, not on property." Mahoney, in *Greyeyes v. The Queen*,¹²⁸ however, refused to accept the soundness of the Crown's position in citing *Sura v. M.N.R.*¹²⁹ wherein Mr. Justice Taschereau for the Supreme Court of Canada observed:

Nothing in subsequent amendments of the [Income Tax] Act changes the rule that it is not ownership of property which is taxable, but that tax is imposed on a taxpayer. . . .

As Mignault J. [said] in *McLeod v. Minister of Customs*:¹³⁰ "All of this is in accord with the general policy of the Act which imposes the Income Tax on the persons and not on the property."

The Federal Court of Appeal was not as reticent as the Trial Division. In *M.N.R. v. Iroquois of Caughnawaga*,¹³¹ Chief Justice Jackett (Pratte, J., and Hyde, D.J., concurring on this matter) declared that the obligation of an employer to pay statutory unemployment insurance premiums is not "'taxation on property' within the ambit of section 87."¹³² The Chief Justice commented:

From one point of view, all taxation is directly or indirectly taxation on property; from another point of view, all taxation is directly or indirectly taxation on persons. It is my view, however, that when section 87 exempts "personal property of an Indian or band situated on a reserve" from "taxation," its effect is to exempt what can properly be classified as direct taxation on property. The courts have had to develop jurisprudence as to when taxation is taxation on property and when it is taxation on persons for the purposes of subsection 92(2) of the British North America Act, 1867, and there would seem to be no reason why such jurisprudence should not be applied to the interpretation of section 87 of the Indian Act. See,

128. [1978] 84 D.L.R.3d 146 (F.C.T.D.).

129. [1961] 32 D.L.R.2d 282, 283-84, [1962] S.C.R. 65.

130. [1917-27] C.T.C. 290, 296.

131. [1977] C.T.C. 49.

132. *Id.* at 50.

for example, with reference to subsection 92(2). *Provincial Treasurer of Alberta v. Kerr*.¹³³

The Chief Justice asserted that the exemption conferred by Section 87 should be confined to indirect taxation.¹³⁴ The jurisprudence the learned judge refers to distinguishes direct and indirect taxation for the purpose of determining whether it is within provincial competence under Section 92(2) of the British North America Act.¹³⁵ The arbitrary character of this suggestion is apparent in the confusion of the learned judge in equating indirect taxation with taxation on property after first asserting that the exemption of Section 87 is confined to "direct taxation on property." A more substantial objection resides in the language employed upon the adoption of the exemption in the 1876 Indian Act. If it was intended that the distinction suggested by the Chief Justice should be applied in the interpretation of the exemption introduced nine years after the British North America Act was passed, surely the "direct" and "indirect" language of that statute would have been employed. A perhaps fatal objection to the analysis of the Chief Justice is the specific exemption from succession duty conferred by Section 87. Succession duty was considered by the Privy Council to be a direct form of taxation in the case relied upon by the Chief Justice, *Provincial Treasurer of Alberta v. Kerr*.¹³⁶

Doubts as to the soundness of the rationale offered by the Chief Justice may explain the brevity of the judgment of the Federal Court of Appeal in *Snow v. The Queen*.¹³⁷ In a stunningly brief judgment, Justice Le Dain observed:

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, is not taxation in respect of personal property within the meaning of section [87] of the Indian Act. In our opinion section [87] 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

133. [1933] A.C. 710 (P.C.).

134. [1977] C.T.C. 50, 51.

135. See text accompanying notes 54-55 *supra*.

136. [1933] A.C. 710 (P.C.).

137. [1979] C.T.C. 277 (Fed. C.A.).

a matter of calculation by application of the provisions of the Act.¹³⁸

The dramatic curtailment of an exemption recognized throughout the history of the administration of income taxation demands greater explanation.

An examination of the history of taxation in Canada, as found in the earlier part of this article, offers some explanation of the ambiguity presented by Section 87. The exemption from taxation introduced in 1876 was, and has continued to be, confined to "property." Federal income taxation was not levied until 1917,¹³⁹ and even then it was thought to be temporary. The rigidity of the Indian Act throughout its history may explain the failure to amend its language so as to accommodate changing forms of taxation,¹⁴⁰ including income taxation. The 1876 exemption repealed the exemption conferred by the Province of Canada in 1850, which was not restricted to "property,"¹⁴¹ and the Parliament of 1941 in a clarification of its extent did not alter the focus on "property."

A significant guide to the intent of Parliament in the enactment of the modern form of the exemption is presented in the debates in the House of Commons concerning the requirement of a waiver of the exemption before an Indian might vote in a federal election.¹⁴² The debates proceeded on the assumption that the taxation from which the waiver of the exemption was sought was income taxation. This is easy to understand insofar as federal income taxation was by far the most significant form of taxation to which the Indians might be subject, and the only form that might explain attaching the federal franchise to the imposition thereof.

In an area of ambiguity it is appropriate to consider the assurances of the Treaty Commissioner. As the United States Supreme Court declared in *United States v. Powers*¹⁴³: "If possible, legislation subsequent to the Treaty must be interpreted in

138. *Id.* at 227.

139. See text accompanying notes 26-30 *supra*. The income taxes levied in British Columbia in 1876 and Prince Edward Island in 1894 were minimal and not considered significant in the determination of parliamentary intent. Also see Saskatchewan Indian "Our Way" (1973).

140. See Bartlett, *The Indian Act of Canada*, 27 BUFFALO L. REV. 581 (1978).

141. See text accompanying notes 1-2.

142. See the section on Franchise and Taxation; *supra*, at notes 24-44.

143. [1939] 59 S. Ct. 344.

harmony with its plain purposes." And as Cartwright, J., observed in *The Queen v. George*¹⁴⁴:

In *St. Saviour's Southward (Churchwardens)* case,¹⁴⁵ Lord Coke said:

"If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant."

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.¹⁴⁶

The language of Section 87 has been consistently judicially construed to extend to income as a form of "property"; if there is an ambiguity it appears subject to construction in favor of both the "King's honour" and the Indians.

The practice of the Department of National Revenue since the introduction of income taxation and the understanding of the Indians derived therefrom do not support the change suggested by the Federal Court of Appeal. Neither the Department of National Revenue nor the Indians have ever doubted the application of the exemption to the taxation of income.

One may refer to the inappropriate benefits conferred upon provincial treasuries. The decision of the Federal Court of Appeal would permit a provincial levy on all income earned in the province, including Indian reserves, in spite of the lack of jurisdiction of the provincial governments in important spheres to provide services to reserves. Provincial governments do not accept financial responsibility for education, health, or social services of Indians on reserves and yet would claim revenue derived

144. [1966] S.C.R. 267.

145. [1613] 10 Co. Rep. 366, 66b, 77 E.R. 1025, 1027.

146. [1966] S.C.R. 267.

therefrom without any obligation to provide the services upon which such revenue is customarily expended.

Upon appeal to the Supreme Court of Canada, a consideration of such factors is surely necessary to the case's disposition. A construction of Section 87 of the Indian Act must be adopted with regard to the purposes of that statute, rather than mere emphasis upon a literal interpretation of the charging provisions of the Income Tax Act.

Real Property Taxation

Section 87 declares that the "interest of an Indian or a band in a reserve or surrendered lands" is exempt from taxation and "no Indian or band is subject to taxation in respect of the ownership, occupation, provision or use of any [such] property." The exemption clearly includes local property taxation.¹⁴⁷ Local real property taxation under provincial jurisdiction provides the major source of funding for local services provided by urban and rural municipalities in Canada and is normally assessed on the basis of the value of the land occupied. Services are not provided by municipalities on reserves. The exemption conferred upon Indians and bands by Section 87 allows for taxation by a band authorized to do so by Section 83(1)(a).

Taxation of reserves and surrendered lands occupied by non-Indians presents a remarkably different legal and fiscal result. Albeit services are not provided by the municipalities in respect of the taxes collected, a consistent line of authority has upheld municipal real property taxation of non-Indian occupation of reserve lands.¹⁴⁸ In the leading case of *City of Vancouver v. Chow Chee*,¹⁴⁹ the British Columbia Court of Appeal adopted the explanation of Viscount Haldane in *Smith v. Vermillion Hills*.¹⁵⁰ "[A]lthough the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the opera-

147. *Francis v. The Queen*, [1956] S.C.R. 618, per Rand, J.

148. *Commissaires d'écoles du Canton de Manivaki v. Brady*, [1928] 66 R.I.Q. 41 (Que. S. Ct.) (school taxes imposed upon non-Indian occupier of reserve); *City of Vancouver v. Chow Chee*, [1941] 1 W.W.R. 72 (B.C.C.A.) (municipal taxation of non-Indian enter off of reserve land); *Provincial Municipal Assessor v. Rural Municipality of Harrison*, [1971] 3 W.W.R. 735 (Man. Q.B.) (municipal taxation of non-Indian lessee of reserve land); *Sammantino v. Attorney General of British Columbia*, [1972] 1 W.W.R. 24 (B.C.C.A.) (provincial property taxation of non-Indian occupier of reserve land).

149. [1942] 1 W.W.R. 72 (B.C.C.A.).

150. [1916] 2 A.C. 569, 574 (P.C.).

tion of the statute imposing the tax is limited to the appellant's own interest." Local property taxes are construed as a tax upon the occupier's interest, not upon the land itself, despite the reduction in "the power of the federal government and the band council to control and direct economic development activity on Indian reserve land."¹⁵¹ Macdonald, J.A., for the British Columbia Court of Appeal, dismissed as immaterial "the contention that the lands in question would necessarily bring a lower rental if the occupant is subject to taxation, than they would otherwise bring."¹⁵² Section 87 appears to have been drafted in 1951 so as to accommodate the existing jurisprudence and only exempt the "interest of an Indian or a band" and not that of a non-Indian occupier.

The nature of the Indian Act is such that a non-Indian may only secure an occupier's interest in reserve lands. Accordingly, any attempt to impose a tax upon an interest other than that of an occupier of reserve lands must fail. In *Kamsack v. Canadian Northern Town Properties*,¹⁵³ an attempt to recover taxes assessed upon the non-Indian occupant as "owner" of surrendered but unsold reserve lands was rejected. Similarly, in *Sammartino v. Attorney General of British Columbia*,¹⁵⁴ school taxes could not be levied upon the non-Indian lessee of reserve lands as "owner" thereof.

The application of provincial property taxation to non-Indian occupiers of reserve lands is, as indicated, supported by substantial judicial authority. Provincial governments have not, however, always chosen to impose or allow the imposition of such taxation. Alberta, Ontario, and Saskatchewan bar municipal taxation of non-Indian occupants of reserve lands. In 1968 the Alberta legislature bluntly declared: "An Indian reserve is not a part of a municipality for any purpose whatsoever."¹⁵⁵ Saskatchewan introduced similar legislation in 1972.¹⁵⁶ Ontario expressly denied municipal taxation of non-Indian occupants of reserve

151. Union of British Columbia Indian Chiefs: Submission to the Province of British Columbia on the Relationship of Indian Reserves to Provincial Laws relating to Local Government and Taxation (1974).

152. [1942] 1 W.W.R. 72, 74 (B.C.C.A.).

153. [1924] 4 D.L.R. 824 (Can. S. Ct.).

154. [1972] 1 W.W.R. 24 (B.C.C.A.).

155. Municipal Government Act, S.A. 1968 c. 68 s. 6, R.S.A. 1970 c. 246 s. 6.

156. Rural Municipalities Act, S.S. 1972 c. 101, R.S.S. 1978 c. R-26 s. 5(b). See also Urban Municipalities Act, S.S. 1970 c. 78, R.S.S. 1978 c. U-10 s. 347 (no Indian reserves located adjacent to or within the boundaries of urban municipalities in Saskatchewan).

lands in 1973.¹⁵⁷ Legislation in British Columbia, Manitoba, Nova Scotia, and Prince Edward Island excludes taxation of reserve lands but permits taxation of non-Indian occupants thereof.¹⁵⁸ Legislation in New Brunswick and Quebec provides no reference or restriction upon the taxation of reserve lands.¹⁵⁹ The taxation of non-Indian occupants of reserve lands has presented the most severe problems in British Columbia, where they were exacerbated by the action of the provincial government in 1973 in reorganizing municipal boundaries so as to include reserve lands in many instances. A member of the Kamloops Indian Band in that province described the difficulty:

The situation of my Band illustrates the seriousness of the problem as it affects economic and self-reliance. The Kamloops Indian Band has developed an industrial park over the past 12 to 15 years which, when fully developed, will encompass about 500 acres of Band land. In addition, there are substantial portions of individually owned lands, bringing the overall total acreage to approximately 1,000 acres. At the present time, the Province of British Columbia levies property taxes on both buildings and lands, under the taxation act, against all of non-Band occupants of reserve lands. This has been occurring since the inception of the development of the park, and continues to 1978.

The only exclusion from the provincial taxing of our lessees was a three-year period when the industrial park was included within the boundaries of the City of Kamloops, and the city levied even higher taxes during this period of time. The City of Kamloops, when we were within their boundary gave us no services. They didn't even pick up our garbage. I would estimate that over the past 12-15 years, approximately 1.6 million in taxes has been collected from the lessees in our industrial park. The total monies that have been expended by a combination of provincial government and the City of Kamloops, on providing services, or improvements of any kind, has been about 15 thousand dollars and fire protection provided by the City of

157. Act to Amend Assessment Act, S.O. 1973 c. 26. See Riley, *Winning at Saugeen*, 2 RIKKA (1976).

158. Municipal Act, R.S.B.C. 1960 c. 255 s. 327(1)(f); Municipal Assessment Act, R.S.N.S. 1967 c. 14; Real Property Tax Act, R.S.P.E.I. 1974 c. R-6.

159. Assessment Act, S.N.B. A-15; Cities and Towns Act, R.S.Q. 1964 c. 193.

Kamloops for the three years that the park was in the boundaries of the city.¹⁶⁰

Such provincial taxation policies are a clear obstacle to effective self-government and economic development upon reserve lands. As observed in the Fields-Stanbury Report:

Indians continue to fail to obtain maximum potential benefit from their reserve lands when they lease them to non-Indians. The effects of such leases is that the rents received by the Band are reduced by the amount of taxes paid by the lessee to the municipality or the Province.¹⁶¹

It is suggested that a more generous interpretation of Section 87 might more properly reflect the intent of Parliament in the furtherance of self-government by Indian bands in construing the exemption so as to bar taxation of the interest of non-Indian occupants of reserve lands.¹⁶² It is, however, considered that the draftsmen adopted the language of Section 87 so as to recognize the existing taxation of non-Indian occupants. This conclusion suggests the necessity for the amendment of Section 87 so as to facilitate Indian self-government and taxation under some authority such as that described in Section 83, which specifically recognizes the subjection of Indian occupants thereto.

Sales Taxation

Situs of Transaction Determines Exemption

Section 87 provides that "the personal property of an Indian or band situated on a reserve" is exempt from taxation, and no "Indian or band is subject to taxation in respect of the ownership, occupation, possession or use" thereof. The application of the exemption to taxes levied upon sales transactions must be considered to be subject to the ruling in *Francis v. The Queen*.¹⁶³ The federal Customs Act imposed a tax upon the importer of goods from a foreign jurisdiction at the point of entry into Canada.

160. Minutes of the Taxation Workshop, Jan. 1978, Edmonton, Alberta, National Indian Brotherhood, Mary Leonard, band member.

161. FIELDS & STANBURY, ECONOMIC IMPACT OF PUBLIC SECTOR UPON INDIANS OF BRITISH COLUMBIA (Vancouver, 1973).

162. Union of British Columbia Indian Chiefs, Submission to the Province of British Columbia on Relationship of Indian reserves to Provincial loss relating to Local Government and Taxation (1974).

163. [1956] S.C.R. 618. See also *Pope v. Paul* [1957] 2 W.W.R. 449 (B.C. Co. Ct.).

The importation was in respect of household appliances which were taken directly to the Indian importer's home on a reserve. The Supreme Court of Canada unanimously declared that Section 87 afforded no exemption because, in the words of Chief Justice Kerwin (Taschereau and Fauteux, JJ., concurring): "clause (b) of section [87] of the Indian Act does not apply, because customs duties are not taxes upon the personal property of an Indian situated on a reserve but are imposed upon the importation of goods into Canada."¹⁶⁴ Rand, J. (Carwright, J., concurring), observed: "in section [87(1)], property 'situated on a reserve' is unequivocal and does not mean property entering this country or passing an international boundary."¹⁶⁵ Kellock, J. (Abbot, J., concurring), bluntly commented: "Before the property here in question could become situated on a reserve, it had become liable to customs duty at the border. There has been no attempt to impose any other tax."¹⁶⁶ The reasoning employed by the Supreme Court of Canada appears directly applicable to the imposition of sales tax at the point of sale off a reserve. In the vast majority of sales transactions involving Indian purchases in Canada, the sale takes place off the reserve, and according to *Francis*, are not subject to the exemption conferred by Section 87.

The analysis employed in *Francis* is in accord with the reasoning of the Quebec Superior Court some years earlier in *Delisle v. Shawingan Water & Power Co.*¹⁶⁷ The court denied an exemption to an Indian resident of a reserve from the imposition of a federal sales tax upon electricity furnished to the band member's home. Demers, J., in a confusing judgment, decided *inter alia* that the tax was of a type that was "levied upon commodities *before they reach the consumer*" and "[Indians] cannot pretend that any tax is being imposed on their *real or personal property*."¹⁶⁸ The judge apparently considered that the tax was imposed *off* the reserve insofar as it was collected from the power company, even though "the buyer must pay for the increase of the cost."

Not Personal Property Within Section 87

The rationale adopted by Demers to explain the conclusion that the tax was levied off the reserve, and therefore was not exempt,

164. *Id.*

165. *Id.*

166. *Id.*

167. [1941] 4 D.L.R. 556 (Que. S. Ct.).

168. *Id.* at 560 (the judge's own italics).

appears to have been sufficiently unconvincing to provoke a later judge to offer an alternative explanation for such denial. In *Lillian Brown v. Attorney General of British Columbia*,¹⁶⁹ in circumstances very similar to those in *Delisle*, MacDonald, J., declared that although electricity was personal property, it was not "personal property" within the meaning of Section 87. In a strained attempt to avoid the consequences of finding electricity to be personal property in the general law, the learned judge devised a special meaning for that concept referable to the Indian Act. MacDonald observed:

Favouring the interpretation urged on behalf of the plaintiffs [Indians] is the Indian Act as a whole. It is a paternalistic statute, making many special provisions for Indians. As was stated by Rand, J. in *St. Anne's Island Shooting and Fishing Club Limited v. The King*,¹⁷⁰

"The language of the Statute embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation."

But it is clear that Parliament has not gone so far as to say that an Indian residing on a reserve is not subject to any tax or duty. Notwithstanding s. 87, if he imports goods without paying customs duties, and takes those goods to his home on the reserve, he is liable for those duties. *Francis v. The Queen*. If in British Columbia he leaves the reserve and purchases tangible personal property, he will be liable for tax under the Social Services Tax Act on the same basis as any other purchaser. . . .

There is another consideration which I think provides an indication of the legislators' intent. Electricity is intangible. It is not a chose in action and it is not property capable of being subject of a succession. When s. 87 goes on to provide the personal property talked about is not to be subject to succession duty, inheritance tax or estate duty, it suggests that what is contemplated is property which, might otherwise, be subject to such levies.¹⁷¹

MacDonald sought to buttress his conclusion by reference to the seemingly irrelevant considerations that the plaintiffs must prove

169. B.C. TAX REP. 200-103, Apr. 28, 1978 (B.C. S. Ct.).

170. [1950] S.C.R. 211, 219.

171. B.C. TAX REP. 200-103, Apr. 28, 1978 (B.C. S. Ct.) p. 10 of 11.

as a matter of evidence that they came within the exemption and that preference should be given to a construction that will avoid a constitutional collision. The only substantial reason offered by the trial judge in restricting the ambit of Section 87 to tangible property is the reference therein to "succession duty, inheritance tax or estate duty." It is submitted that the structure of the section is incompatible with such an analysis. The reference to named taxes in Section 87 appears as a mere partial particularization of the application of the section. MacDonald's analysis appears to be a classic example of the misapplication of the "*expressio unius, est exclusio alterius*" rule of construction of the type rejected by the Supreme Court of Canada in *Turgeon v. Dominion Band*.¹⁷² A rejection of MacDonald's approach is supported by an examination of the history of the exemption from taxes conferred in the Indian Act.¹⁷³ Until the 1951 revision no such argument as tendered by MacDonald could have been maintained, and it is not considered that the amendment sought to restrict its historic ambit but rather to clarify its application. Surely a sales tax on electricity is readily encompassed by the language of a section which declares that "no Indian or band is subject to taxation in respect of the . . . use of [personal] property."¹⁷⁴

Sales of Personal Property On a Reserve

Francis v. The Queen denied an exemption from federal customs duties because the tax was levied before the property was situate on a reserve. The case would seem to lend substantial authority to the notion that sales conducted upon a reserve cannot be the subject of taxation imposed upon an Indian purchaser. In *Rex v. GrosLouis*¹⁷⁵ it was declared that the Quebec Retail Sales Tax Act could not be applied to such transactions. The judge observed:

172. [1930] S.C.R. 67. See Diredger, CONSTRUCTION OF STATUTES 100 (Butterworths, Toronto, 1974).

173. See the section on Canadian Indian Legislation and Policy, *supra* at notes 1-10.

174. *But see* Crepin v. Delormier, [1930] 68 c. 536 (Que. S. Ct.), where Demers, J., observed that: "I am of the opinion that section 102 [now Section 87] has in view only a tax on immovables and corporeal moveables situated without the territorial limits of the reserve." In a judgment delivered on Dec. 6, 1979, the British Columbia Court of Appeal overturned the decision of MacDonald, J., in *Lillian Brown*. The judgment is not yet available but is understood to accept electricity as "property" which Section 87 exempts from imposition of a sales tax when delivered on a reserve.

175. [1943] 81 C.C.C. 167 (Que. J.P.). *See also* Attorney General for Quebec v. Williams, [1944] 82 C.C.C. 166 (Que. J.P.).

[I]t is clear that the property of an Indian, whether real or personal, can only be taxed if such property is outside the reserve. . . .

If the Indian, a merchant, only sells to Indians inhabiting his reserve, it would be logical to conclude that the Attorney General of the Province cannot demand legally of this Indian, a merchant, that he comply with [the registration requirements of the Tax Act].

. . . I must say that the Indian not being liable to be taxed for his chattels, the provincial sales tax does not apply to the Indian, a merchant. . . .¹⁷⁶

The court went on to hold that the tax was payable by non-Indians who purchased goods on the reserve,¹⁷⁷ who, of course, are not exempted by Section 87. The conclusion in *GrosLouis* is of considerable significance to the operation of bands' and Hudson's Bay Company stores on reserves and suggests that sales tax cannot be imposed upon Indian purchases thereat. It was assumed to be correct in the recent decision in *Kinoosimin v. The Queen*.¹⁷⁸

Sales Tax Legislation and Administrative Practice

Sales taxes were introduced by the provinces in the Depression and have generally been levied by legislation or administrative practice so as to exempt Indian "purchases for consumption or use on a reserve."¹⁷⁹ The legislation and regulations that have been introduced in Manitoba (1974), New Brunswick (1974), Nova Scotia (1973), Ontario, Prince Edward Island (1978), and Quebec (1974) have all followed such an approach.¹⁸⁰ The provision in the Manitoba Retail Sales Tax Act is typical:

176. *Id.* at 170, 173.

177. *Id.* at 173.

178. Unreported, June 28, 1979 (Sask. C.A.), [1978] 6 W.W.R. 749 (Sask. Q.B.). The facts do not clearly indicate where the sales were completed, on or off the reserve. It may be that a broader construct of the decision is appropriate insofar as Chief Justice Culliton in the Court of Appeal merely indicates that the goods were produced for the Association's "own use or consumption."

179. Opinion of Deputy Attorney General of Saskatchewan, July 9, 1937, in response to an enquiry by the Hudson's Bay Company.

180. New Brunswick Social Services and Education Tax Act, R.S.N.B. 1973 c. S-10, as amended by S.N.B. 1974 c. 83, section 11.1:

"11.1(1) Goods, other than prepared meals, spirits, wine, beer or accommodations that

"(a) are purchased by an Indian as defined in the Indian Act, Chapter 1-6 of the

Exempt purchases by Indians—Notwithstanding section 3, no tax is payable under this Act in respect of tangible personal property

(a) that is purchased by an Indian

(i) on a reserve for consumption or use by an Indian on a reserve, or

(ii) off a reserve for consumption or use by an Indian on a reserve if the tangible personal property is delivered

Revised Statutes of Canada 1970,

“(b) have a value of less than three hundred dollars, and

“(c) are delivered to a reserve, are exempt from taxation.

“(2) An Indian purchasing goods of a value of three hundred dollars or more for delivery to a reserve may obtain a refund of tax paid by him on such goods by applying for a refund in accordance with the regulations.”

Nova Scotia Health Services Tax Act, R.S.N.S. 1967 c. 126, *as amended* by S.N.S. 1973 c. 35. Section 10(a)(b) excludes: “tangible personal property, when delivered to and consumed or used on a reserve as defined by the Indian Act, Chapter 1-6 of the Revised Statutes Canada, 1970, and motor vehicle within the meaning of the Motor Vehicle Act and a snow vehicle within the meaning of the Snow Vehicles Act, when such tangible personal property, motor vehicle or snow vehicle is purchased or used by an Indian whose name is entered in the Band List as provided by the said Indian Act.”

Ontario Retail Sales Act, R.S.O. 1970 c. 415. Section 5 excludes:

“64. tangible personal property situated on a reserve, as defined by the Indian Act (Canada) or by the Minister when purchased by an Indian, and tangible personal property purchased by an Indian off the reserve when delivered to the reserve for consumption or use by an Indian:

“65. taxable services used on a reserve, as defined by the Indian Act (Canada) or by the Minister, when purchased by an Indian; . . .”

Prince Edward Island Revenue Tax Act, R.S.P.E.I. 1974 c. R-14 *as amended* by S.P.E.I. 1978 c. 20. Section 10(2):

“(2) Exemption for Indians,—A consumer who is an Indian as defined in the Indian Act, R.S.C. 1970, Cap. 1-6 is not liable to pay the tax in respect of the purchase of goods, other than prepared meals, spirits, wines or beer, that are to be consumed on a reserve.”

Quebec Retail Sales Tax Act, R.S.Q. 1964 c. 71 Reg. O.C. 2244:

“2.01 The following are exempt from the retail sales tax:

“(a) the retail sale of any moveable property made on a reserve between Indian or to an Indian; and

“(b) the retail sale of any moveable property other than a motor vehicle made to an Indian outside a reserve, if the property is delivered on the reserve by the vendor, to be consumed or used thereon by that Indian. . . .

“3.01 Where a motor vehicle is sold retail to an Indian by a vendor outside the reserve, the Indian must pay the vendor the tax on the purchase of such property.

“3.02 An Indian who has paid the tax contemplated in section 3.01 may obtain a refund of this tax by making an application to the Minister to that effect and submitting documentary evidence of his status as an Indian within the meaning of this Regulation, of the fact that the vehicle in question was bought for his personal use or for the use, at his expense, of any other person and that he has paid the tax contemplated in section 3.01.”

Note that Alberta imposes no sales tax on goods generally.

by the seller to the reserve or shipped by the seller by common carrier for delivery to the reserve, and

(b) that is not

- (i) a motor vehicle as that word is defined in The Highway Traffic Act, or
- (ii) tangible personal property which in the opinion of the minister is for commercial use, or
- (iii) liquor as that word is defined in The Liquor Control Act.¹⁸¹

The provincial legislation generally exempts sales of personal property that are to be delivered to a reserve for consumption or use on the reserve. Such an exemption would necessarily include most sales made upon a reserve to Indian purchasers.

Nova Scotia has extended its legislative exemption by an administrative practice so as to exempt Indian purchases of property that is not delivered to the reserve where an exemption certificate indicating band membership is presented. Saskatchewan, which has not legislated upon the subject, exempts purchases by Indians on or off the reserve irrespective of the place of delivery. By contrast, British Columbia, which also has no legislation specifically concerned with the exemption of Indians, has by administrative practice exempted only sales made to an Indian purchaser at a store located on a reserve.¹⁸² No exemption for sales off a reserve for delivery to a reserve has been allowed.

British Columbia policy appears most in accord with the decision of the Supreme Court of Canada in *Francis v. The Queen*. The approach of the other provinces appears to be based on historic practice and caution in the exercise of their constitutional jurisdiction to levy *direct* sales taxation. The validity of provincial sales taxation is confined to its imposition in respect of "purchases for consumption or use" in which circumstances the tax

181. R.S.M. 1970 C.R. 150, as amended by S.M. 1974 c. 57, § 4(12).

182. Letter by Social Services Tax Commissioner to Union of British Columbia Indian Chiefs, dated Aug. 29, 1973: "You will appreciate the fact that there is no specific exemption under the Act [The Social Services Act, not the Indian Act] for purchases made by Indians on or off the reserve. Notwithstanding this, there is a special administrative provision whereby Indians residing on the Reserve may purchase goods tax-free from a store located on the reserve. This has not been extended to include electricity or telephone services. . . ."

In an earlier letter dated July 17, 1973, the Commissioner stated: "Sales made by a store not located on a Reserve to Indians on a reserve, even though they may be delivered to the Indian's home, are not covered by this administrative exemption." (Emphasis added.)

cannot be passed on. Several provinces have adopted the situs of the "consumption or use" as determinative of the situs of the product purchased for the purpose of the exemption under Section 87. It is suggested that the rules of situs developed under Section 87 of the Indian Act should not be modified by the constraints of the criterion developed to distinguish "direct" and "indirect" taxation. The constitutional authority of the provinces to levy sales taxation would not be overextended by taxation of purchases made off a reserve for "consumption or use" on a reserve. The constitutional validity of the taxation depends upon its inability to be "passed on" and not upon any situs where the "consumption or use" takes place.

At the present time the exemption established by the majority of provinces in regard to sales tax would likely be viewed as more "generous" than that of British Columbia. It should, however, be recognized that in the future the decision in *Francis v. The Queen* and the policy of British Columbia would offer a powerful incentive to the development of stores on reserves. *Francis v. The Queen* seemingly suggests that the exemption would apply to any sale made upon a reserve, irrespective of place of delivery, which would surely encourage Indians to purchase on reserve rather than off.

Sales taxes are levied upon all forms of tangible and intangible personal property by the provinces. The provinces have not, however, applied the exemption demanded by Section 87 to a similar degree. In the main, liquor, tobacco, gasoline, electricity, and telephone services are excluded from the exemption, as in Alberta, Manitoba, Prince Edward Island, and Quebec.¹⁸³ Saskatchewan¹⁸⁴ and New Brunswick differ only in including telephone services within the exemption. Ontario, in addition to exempting telephone services, exempts liquor, and has introduced a trial program whereby taxes are not levied upon gasoline delivered to a reserve. Nova Scotia includes within the exemption liquor, tobacco, telephone services, and electricity, but not gasoline. At the other extreme, Manitoba denies the application of the exemption to motor vehicles and commercial property. The varieties of property considered by the provinces to be excluded from Section 87 are clearly not dictated by the language of that

183. British Columbia policy in this regard is not known.

184. On account of administrative difficulties, Saskatchewan exempts the actual rental of a telephone located on a reserve and taxes all long distance toll charges.

section nor by the judgments of the member of the Supreme Court in *Francis v. The Queen*. It is suggested that the collection of such taxes in relation to a sale conducted upon a reserve constitutes a clear violation of Section 87, and in respect to items consumed on a reserve but not sold there, a deviation from the opinion and provincial practice that would generally exempt such items.

The objections to extending the exemption to the excluded items generally cited relate to administrative difficulties, the degree of loss of revenue to the fisc, and the conclusion that the items are largely consumed off the reserve.¹⁸⁵ Liquor and tobacco taxes are also supported as discouraging undue consumption.¹⁸⁶ Considering the absence of stores, service stations, and liquor outlets on many reserves, it might be appropriate to view the imposition of taxes upon such items as a compromise by both Indians and governments of the *Francis* decision, so as to spread the benefit of the exemption among all Indians, not merely those who are fortunate enough to be members of a band that possesses such facilities.

The federal Excise Tax Act¹⁸⁷ imposes a tax upon the sale price of goods produced or manufactured in Canada or imported into Canada. The tax is levied upon the manufacturer or importer. The federal government does not consider that the tax is subject to the exemption of Section 87 since, relying on *Francis v. The Queen*, it is levied off the reserve. Pursuant to a 1976 amendment, Indian bands are considered to constitute "municipalities"¹⁸⁸ within the meaning of the Act and are therefore able to take advantage of exemptions relating to goods purchased in the provision of municipal services.

Subject to Treaty

Section 88 of the Indian Act provides that provincial taxing legislation can only apply to Indians "subject to the terms of any treaty." It has been often asserted by Indians and Indian

185. Such a comment in relation to liquor appears particularly opportunistic insofar as Section 94 of the Indian Act prohibits the sale of liquor or the establishment of a bar on a reserve and Section 95 provides for prohibition on a reserve in the absence of referendum of the band members favoring a "wet" reserve.

186. Director of Revenue, Saskatchewan, quoted as suggesting that the exemption to liquor sales to Indians possessed "no sociological advantage." Brenda Ryan, "Provincial Taxation and Indian Residents on a Reserve." (Unpublished Paper 1971).

187. R.S.C. 1970 c. E-13.

188. *Id.* § 2(1).

organizations that as health, education, and social services constitute a treaty obligation of the federal government, Section 88 bars the imposition of provincial sales taxes on Indians that are designated as the "Education and Health Tax" in Saskatchewan, the "Health Services Tax" in Nova Scotia, the "Social Services Tax" in British Columbia, and the "Social Services and Education Tax" in New Brunswick. The decisions of the Saskatchewan Court of Appeal in *R. v. Swimmer*¹⁸⁹ and *R. v. Johnston*¹⁹⁰ in adopting a narrow interpretation of the terms of the treaties do not suggest a great likelihood of success of such arguments.

Customs Duty

The federal Customs Tariff Act¹⁹¹ imposes a duty on goods imported into Canada in addition to that payable under the Excise Tax Act. It provides no exemption for the personal property of Indians and bands and none was recognized by the Supreme Court of Canada in *Francis v. The Queen*.¹⁹² A member of the Saint Regis band of the Six Nations Indians in Quebec imported household appliances for delivery to his home on the reserve which bordered on the international boundary. The federal government sought to levy taxes under the Customs Tariff Act and the Excise Tax Act upon the importation of the items. Francis sought to rely upon Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, and generally known as the Jay Treaty:

No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

The provision was all that remained of the British proposal to establish a neutral Indian buffer state between Canada and the

189. [1966] 56 W.W.R. 565 (Sask. C.A.).

190. [1971] 1 W.W.R. 756 (Sask. C.A.).

191. R.S.C. 1970 c. C-41.

192. [1956] S.C.R. 618.

United States, and merely sought to protect the integrity of the Six Nations Tribe on both sides of the international boundary.¹⁹³ The exemption from duty was implemented in Lower Canada by ordinance under an enabling act of 1796.¹⁹⁴ The regulation lapsed in 1813.¹⁹⁵ The provision was first implemented by statute in Upper Canada in 1801,¹⁹⁶ and remained in force till it was repealed in 1824.¹⁹⁷ The exemption has not been implemented by statute or ordinance anywhere in Canada since that time.

The Supreme Court of Canada declared that the exemption could only take effect in the municipal law of Canada if implemented by legislation or ordinance, and since there was no such provision Francis could not rely upon the terms of the treaty.¹⁹⁸ The Court unanimously concluded that the taxes were payable upon the appliances because "custom duties are not taxes upon personal property of an Indian situated on a reserve but are imposed upon the importation of goods into Canada"¹⁹⁹ and are accordingly not subject to the exemption of Section 87 of the Indian Act.

Counsel for Francis did argue that the movement of the appliances across the border directly onto the adjacent reserve constituted the goods as "personal property situated on a reserve" at the time of the levy. Such argument appears to be in accord with the intent of the provision of the Jay Treaty in the protection of the Six Nations Tribe located about the border. Without any inquiry as to the object of the treaty provision, Rand, J., rejected the argument, observing: "On the argument made, the exemption would be limited to situations in which that boundary bounded also the reserve and could be a special indulgence to the small fraction of Indians living on such reserve, a consequence which itself appears to me to be a sufficient answer."²⁰⁰

Indians frequently assert the protection of the Jay Treaty in crossing the Canada-United States border. Administrative practice is difficult to determine, and perhaps is best described in the

193. BEMIS, *JAY'S TREATY* (1962).

194. 36 Geo. III (1796) c. 7.

195. 52 Geo. III (1812) c. 5.

196. 41 Geo. III (1801) c. 5 s. 6.

197. 4 Geo. IV (1824) c. 11.

198. Cameron, J., at trial [1954] Ex. C.R. 590, described the jurisprudence in the United States at pp. 604-606.

199. [1956] S.C.R. 618, per Kerwin, C.J. (Taschereau and Fauteux, JJ., concurring).

200. *Id.*

words of a taxation guide published by the Union of British Columbia Indian Chiefs.²⁰¹

As a matter of fact, both before and after the *Francis* decision, the Government had adopted a policy of not strictly enforcing the customs laws against Indians. Occasionally, the government will attempt to enforce them, which, as in 1968, produced a strong reaction from affected persons and renewed the pressure on government to pass exempting legislation. It is impossible to say in what circumstances any Indian may, as a matter of policy, be able to import certain kinds of property without being required to pay duty.

Succession Duties and Estate Taxes

Section 87 of the Indian Act specifically denies liability to "succession duty, inheritance tax or estate duty payable on the death of any Indian in respect of" reserve lands or personal property situate on a reserve. The exemption does not extend to property of an Indian situate off a reserve. Only the province of Quebec presently levies succession duty in Canada²⁰²; Ontario repealed its tax in May, 1979,²⁰³ and the federal government vacated the area in 1972.

Indian Band Power to Tax

Taxing power was first conferred upon band councils in 1884 in the Indian Advancement Act.²⁰⁴ Its object was described in the House of Commons by Sir John A. Macdonald:

[T]his Act is merely an experimental one, for the purpose of enabling the Indians to do by an elective council what the chiefs, by the Statute of 1880, have already the power to do. In some of the tribes or bands, those chiefs are elected now, in others the office is hereditary, and in other bands there is a mixture of both systems. This Bill is to provide that in those larger reserves where the Indians are more advanced in education, and feel more self-confident, more willing to undertake power and self-government, they shall elect their councils

201. Union of British Columbia Indian Chiefs, Nov. 1978, p. 73.

202. S.Q. 1978 c. 37.

203. S.O. 1979 c. 20.

204. S.C. 1880 c. 28.

much the same as the whites do in the neighbouring townships.²⁰⁵

The Act sought to establish a framework of municipal government for the more "advanced" reserves.²⁰⁶ The rationale appears unaltered in Section 83 of the Indian Act today. The taxing power conferred by that section may only be exercised "where the Governor in Council declares that a band has reached an advanced stage of development" and are "subject to the approval of the Minister." In conformity with the remarks of the Prime Minister in 1884, it is difficult not to construe the powers conferred as "municipal" in nature. The taxing powers extend to: "(1)(a) the raising of money by (i) the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof, and (ii) the licensing of businesses, callings, trades and occupations; . . ."

The imposition of real property taxes is confined to "persons lawfully in possession" of reserve lands. Such persons appear to be those members of a band to whom "possession of the land has been allotted . . . by the council of the band" in accordance with Section 20(1) of the Indian Act. Section 20(1) declares that "no Indian is lawfully in possession of land in a reserve" until such allotment takes place and ministerial approval is granted. The special usage of "lawfully in possession" as a reference to band members to whom land has been allotted in such fashion is maintained throughout the Indian Act.²⁰⁷ Non-Indians may possess land on a reserve by ministerial authorization,²⁰⁸ permit,²⁰⁹ and ministerial lease.²¹⁰ None of the provisions that allow such non-Indian possession employ the expression "lawfully in possession," and it appears not to apply to such occupation. Such an interpretation would delimit the band power to impose real property taxation to the same degree that Indian and band interests are exempt from municipal taxation. The matter is not free from doubt and it has been suggested that the ordinary meaning of the expression should be adopted so as not to limit the ambit of the taxing power to Indians.²¹¹ The denial of the power to tax non-

205. H.C. Debates, Feb. 26, 1884.

206. See Bartlett, *Indian Act of Canada*, 27 BUFFALO L. REV. 581 (1978).

207. Sections 20, 22, 24, 25, 42, and 111.

208. Section 18(2).

209. Section 28(2).

210. Section 58.

211. D. Sanders, "Legal Aspects of Economic Development on Indian Reserve Lands," Department of Indian Affairs and Northern Development, 1975.

Indian property interests on a reserve bars valuable revenue to the band in the economic development of a reserve and encourages the imposition of provincial property taxes. Of perhaps greater significance than the "municipal" property taxing and licensing powers declared in Section 83(1)(a) is the power described in 83(1)(f), which was added by amendment in 1956²¹²: "(f) the raising of money from band members to support land projects." No explanation for the amendment is evident in the debates in Parliament or the Annual Report of the Indian Affairs Branch. The section would seem to permit the imposition of any form of tax, including, of course, income tax, upon band members by the band council. It represents a marked deviation from the municipal model of taxation.

The significance of the taxing power declared in Section 83 is illusory insofar as the ambit is as yet untested and its potential unrealized. In 1975 it was observed: "While some bands have been designated as having reached an advanced state of development only two bands in Canada have considered enacting taxing by-laws and apparently no band presently has a taxing by-law in force."²¹³

As Section 87 makes clear, the exemption therein declared is "subject to section 83" and thus would not be effective to preclude a band council imposing a full range of taxes upon its members in the furtherance of self-government and economic development. The introduction of taxing bylaws under Section 83 would be effective, however, to bar the imposition of provincial taxes upon reserve interests if "such laws are inconsistent"²¹⁴ with the bylaw. If the imposition of income taxation or the taxation of non-Indian property interests upon reserves was considered a valid exercise of power within Section 83, such inconsistency may be denied in accordance with the constitutional principle that "two taxations . . . can stand side by side without interfering."²¹⁵ It is suggested that such principle may be inapplicable in the determination of the extent to which band council bylaws may exclude provincial taxing legislation. The context of the Indian Act does not suggest or require anything other than the ordinary meaning of "inconsistent," and municipal real property taxation

212. S.C. 1956 c. 40 s. 21.

213. Sanders, *supra* note 212. See also Taxation Workshop Minutes, 1978, Edmonton, Alberta, National Indian Brotherhood.

214. Section 88, Indian Act, R.S.C. 1970 c. 1-6.

215. *Lachine v. Montreal Light, Heat & Power* (1932) 70 Que. S.C.; 442 *Re Silver Bros.* [1932] A.C. 514 per Viscount Dunedin.

of non-Indians upon a reserve already imposing taxation upon such interests surely creates an "inconsistency."

Conclusion

The exemption from taxation of Indians and Indian bands was first declared by legislation in treaty negotiations in the nineteenth century. The exemption was directed to protecting the Indian people until their integration into Canadian society. The Hawthorne Committee²¹⁶ reported a century later that "integration or assimilation are not objectives which anyone else can properly hold for the Indian. The effort of the Indian Affairs Branch should be concentrated on a series of specific middle range objectives, such as increasing their real income, and adding to their life expectancy."

If integration is no longer an appropriate objective, economic development of reserves clearly is. In 1975 the Federation of Saskatchewan Indians estimated that 72 percent of the Saskatchewan Indian population were unemployed compared with 3.5 percent of the non-Indian population.²¹⁷ The average annual wage of the Indian population was calculated as \$1,530 compared with \$9,997 of the non-Indian population. The exemption from taxation affords a valuable incentive to the economic development of reserve lands. Manipulation of the tax base has, of course, commonly been used to further and control economic development in other areas. In respect of Indians and Indian reserve lands, a proper recognition of the exemption would not only achieve such object but would enable the Crown to keep faith with the assurances of the Treaty Commissioner and of Prime Minister Macdonald a century ago. The present language of the exemption is readily capable of such a construction, so as to deny the imposition of all forms of federal and provincial taxation upon reserves and Indians thereon.

Such exemption would, it is hoped, be complemented by the expansion of the jurisdiction of band councils so as to enable the taxation of non-Indians occupying or doing business upon a reserve. The amendment of Section 83 of the Indian Act in con-

216. Indian Affairs Branch, Hawthorne Comm., *Survey of Contemporary Indians of Canada* (Ottawa 1966).

217. Federation of Saskatchewan Indians, *Profile of Saskatchewan Indians*, 1975. See also Submission of Saskatchewan to Joint Committee of Senate and Commons, June 12, 1960.

junction with a purposive construction of the exemption in Section 87 would accord with the counsel of George Manuel, former president of the National Indian Brotherhood and founder of the World Council of Indigenous Peoples: "[T]he fastest way to bring about change among an oppressed people is to put the decision making authority and the economic resources that go with it, into their own hands."²¹⁸

218. G. MANUEL, *THE FOURTH WORLD, AN INDIAN REALITY* 246 (1974).