

Taxation of Aboriginals in Canada

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I. INTRODUCTION

IN THE PAST COUPLE of years, Canadians have discovered their native people. Names like Elijah Harper and J.J. Harper, Phil Fontaine and Ovide Mercredi, and places like Oka have been indelibly burned into the minds and sometimes the hearts of Canadians.

Canada's Aboriginal heritage did not begin, however, with Meech Lake. The Aboriginal's relationship with the Crown extends back to 1763, when Britain declared that Natives living under their protection were entitled not to be "molested or disturbed in the possession of such parts of our Dominion and Territories as ... are reserved to them ... as their hunting grounds."¹

The Royal Proclamation of 1763 was the beginning of a long and sometimes ignominious relationship between Canada and its Aboriginal people. That relationship is framed by the Canadian Constitution, which gives to Parliament the right to make laws in relation to Indians and lands reserved for Indians.² The term "Indian" as it appears in the Constitution has been interpreted to include those persons who were entitled to be Indians in 1867 as well as the Inuit. The term includes many individuals whom we would commonly think of as non-status Indians or Métis and Inuit.³

Parliament, for the most part, however, has limited its law-making to those persons who are commonly called status or registered Indians. These are Indians who are registered or entitled to be registered under the *Indian Act*.⁴ When used in this paper, the term "Indian" will refer to status Indians.

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¹ *The Royal Proclamation of 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1.

² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24).

³ *Reference Re Term "Indians"*, [1939] S.C.R. 104.

⁴ *Indian Act*, R.S.C. 1985, c. I-5.

The Aboriginal relationship with the Crown is also defined for some Bands by treaties that were entered into with them. The *Constitution Act, 1982*⁵ affirms such treaty as well as Aboriginal rights which existed in 1982.

The Federal Government has delegated most of its administrative authority for Indians to the Department of Indian Affairs and Northern Development ("DIAND"). DIAND has been decentralizing the provision of its services over the past few years to Indian Bands and their tribal councils and organizations. However, DIAND still monitors such services and to a large extent carries out the Federal Government's policy regarding Indians and Bands.

The *Indian Act* contains somewhat of a code for Indians and Indian lands. The Act deals with, among other things, the definitions of Indians, Bands and reserve lands; with surrendered and designated reserve lands; with Indian wills and mental incompetency; and with the election of chiefs and councils. It also provides Indians and Bands with a series of protective measures and imposes on them a number of restrictions.

The limited tax exemption available to Indians and Bands is contained in the *Indian Act*. This exemption has existed in one form or another since 1850 and continues to this day.

This paper will review the tax exemption available to Indians and Bands and will consider how the exemption can be used in structuring Aboriginal businesses and claims settlements. It will also review the exemption of non-income taxes and conclude with a discussion on the future of Aboriginal taxation in Canada.

II. THE *INDIAN ACT* EXEMPTION

SECTION 87 OF THE *Indian Act* provides that:

1. Notwithstanding any other Act of the Parliament of Canada, or any other Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or a Band in reserve lands or surrendered lands;
and

(b) *the personal property of an Indian or a Band situated on a reserve.*

2. No Indian or Band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraphs 1(a) or (b) or is otherwise subject to taxation in respect of any such property ..." [Emphasis added.]

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

In order to understand the scope of this exemption, it is necessary to review its component parts:

A. Notwithstanding Any Other Act

This exemption supersedes any other federal or provincial law. This would mean, for example, that a federal or provincial law that would have the effect of taxing the personal property of an Indian or a Band situated on a reserve, would be invalid as against that property. There are a number of cases where provincial taxes have been held to be invalid as against Indians or Bands.⁶ Generally speaking, legislatures have the option of drafting an exemption that complies with the *Indian Act*, or, as in the case of s. 81(1)(a) of the *Income Tax Act*, providing an exemption for income or other property that is exempt under any other federal legislation.⁷

B. Personal Property

The personal property that is exempt from taxation includes both tangible and intangible property that is not real property. Personal property includes tangible movable property, such as vehicles,⁸ and intangible property, such as electricity.⁹

The term personal property also includes income and taxable income.¹⁰ Therefore, the income or taxable income of an Indian or band is exempt from taxation if such income is situated on a reserve.

C. Indian or Band

In order for personal property, whether tangible or intangible, to be exempt from taxation, it must be the personal property of an Indian or Band.

The term Indian for these purposes means an individual who is or is entitled to be registered under the *Indian Act*. Therefore, non-status Indians, Métis and Inuit generally are not eligible for the exemption.

⁶ *E.g.*, *Danes v. British Columbia (A.G.)* (1985), 18 D.L.R. (4th) 253 (B.C.C.A.) [hereinafter *Danes*] and *Leighton v. British Columbia (A.G.)*, [1989] 3 C.N.L.R. 13 (B.C.C.A.).

⁷ *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 81(1)(a).

⁸ See *e.g.*, *Danes*, *supra* note 6.

⁹ See *e.g.*, *Brown v. British Columbia (A.G.)* (1979), 107 D.L.R. (3d) 705 (B.C.C.A.) [hereinafter *Brown*].

¹⁰ See *e.g.*, *Nowegijick v. M.N.R.*, [1983] 1 S.C.R. 29 [hereinafter *Norwegijick*].

A Band usually refers to a body of Indians declared by the Governor in Council to be a Band for the purposes of the *Indian Act*.¹¹

The courts have held that a corporation is not an Indian or a Band, even if all of its shareholders are Indians, and, therefore, it is not entitled to the exemption.¹² (As discussed below, however, a corporation may be entitled to an exemption from tax under the *Income Tax Act*, as opposed to the *Indian Act*.)

It is also possible that, in law, a trust may not be an Indian or Band, even if the trustees and all of the beneficiaries are Indians.

D. Situated on a Reserve

The battle in the courts for the Indian tax exemption is usually fought over whether an Indian's or Band's property is situated on a reserve, because if it is situated on a reserve, it will be exempt from tax. For the purposes of the exemption, the term "reserve"¹³ includes designated lands; that is, reserve lands that have been surrendered to the Crown in right of Canada, but not absolutely. Usually, these lands are leased back for commercial development.

There are different tests for determining where property is situated, depending on the nature and type of property at issue.

The situs of personal property — such as motor vehicles or cigarettes — will usually be its "paramount location," which will normally depend on the pattern of use and safe keeping of the property. In *Danes* the Court considered whether a motor vehicle purchased on reserve by an Indian residing on reserve for use on and off reserve was situated on reserve for the purposes of s. 87 of the *Indian Act*. The Court found that the situs of the vehicle was the place where the vehicle would be kept when not in use, and that was ordinarily at the residence of the purchaser. The use of the property off reserve was not considered to be relevant. The Supreme Court of Canada has confirmed that the test to be used for tangible property is the paramount location of that property; the Court has also indicated that there must be a "discernible nexus" between the property at issue and the owner's occupancy of the reserve lands.¹⁴

¹¹ *Supra* note 4, s. 2.

¹² *Re Kinookimaw Beach Association and Saskatchewan* (1979), 102 D.L.R. (3d) 333 (C.A.); *Re Stony Plain Indian Reserve No. 135* (1981), 130 D.L.R. (3d) 636 (Alta. C.A.).

¹³ *Supra* note 4, s. 2.

¹⁴ *Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.) [hereinafter *Mitchell*].

The paramount location test for determining the situs of tangible personal property is usually used in assessing whether Indians and Bands are exempt from sales taxes. (See discussion of Retail Sales Taxes, below.)

The case law in this area also considers the situs of two types of intangible property — property which may be subject to sales or excise taxes (such as electricity or telephone service) and income or taxable income, which is otherwise subject to income taxes.

In *Brown*, the British Columbia Court of Appeal considered whether electricity delivered to and sold on reserve was situated on a reserve and found that it was. The Court in that case interpreted the term situated to mean “located” at the time the tax was imposed.

The situs rules for income and taxable income are somewhat more complex. In part, these rules depend on the type of income involved.

As an example, I consider below employment income, business income, and investment income.

1. *Employment Income*

In *Nowegijick*, Gene Nowegijick was employed by the Gull Bay Development Corporation, a Band-owned corporation, to cut timber in a location that was adjacent to the Gull Bay Reserve in Ontario. Revenue Canada assessed Mr. Nowegijick partly on the basis that his salary was not situated on a reserve. In assessing Mr. Nowegijick, Revenue Canada was relying on paragraph 6(b) of its Interpretation Bulletin IT-62,¹⁵ which provides, *inter alia*, that “salary and wages are considered to be earned where the services are performed.” The Interpretation Bulletin gives the example of a construction worker employed on a project. In that case, the services will be performed at the job site. The Interpretation Bulletin also provides that the principal office of the employer, the location where the employee is paid and from which the pay is issued, are not usually relevant in determining the location of income from an office or employment.

In *Nowegijick*, the Supreme Court of Canada disagreed with Revenue Canada’s Interpretation Bulletin and held that salaries are normally situated for conflict of laws purposes, and, therefore, for tax purposes, where the employer (or debtor) is to be found (which in the case of a corporation, such as the Gull Bay Development Corporation, is ordinarily its residence). Subsequent cases have introduced other “connecting factors” to take into account in determining the situs of salaries and wages, including, for example, the place where the duties

¹⁵ Dated 18 August 1972.

were carried out, the residence of the employee and the place where the employee was paid.

The Supreme Court of Canada surprised followers of this issue recently by appearing to reverse its earlier pronouncements in *Nowegijick*. In *Williams v. M.N.R.*,¹⁶ the Supreme Court of Canada held that the traditional conflict of laws test for determining the situs of intangible property may no longer be appropriate. In determining the appropriate test or tests, one must have regard to the factors connecting the income or other property to a reserve. The Supreme Court did not conclude which factors, if any, one should apply in a given case. However, the Court did hold that in determining the appropriate test, one must evaluate the purposes of the *Indian Act* exemption, the character of the property in question and the incidence of taxation upon that property. "Given the purpose of the exemption, the ultimate question is to what extent each factor is relevant in determining whether, to tax the particular kind of property would erode the entitlement of an Indian *qua* Indian to personal property on the reserve."¹⁷ Despite expressing some concern over the uncertainty of this test, the Supreme Court declined to comment on the relevant connecting factors that may be used in determining the situs of employment income.

Prior to the *Williams* case, most of the tax planning in this area revolved around ensuring that the employer of a status Indian was resident on a reserve. If the employer was a corporation, the time-honoured test was established by the House of Lords in *De Beers Consolidated Mines Ltd. v. Howe*.¹⁸ In that case, De Beers was incorporated in South Africa with its head office and management located in South Africa. However, its Board of Directors resided and met in England. The Court held that the company was resident in England. "[A] company resides for the purposes of income tax where its real business is carried on ... I regard that as the true rule, and the real business is carried on where the central management and control actually abides."¹⁹

In general, a corporation's central management and control will abide where the directors of the corporation create and exercise policy.

¹⁶ 92 D.T.C. 6320 [hereinafter *Williams*]. See also *Horn v. M.N.R.*, [1989] 3 C.N.L.R. 59 (T.C.C.) and *Bank of Nova Scotia v. Blood*, [1990] 1 C.N.L.R. 16 (Alta. C.A.).

¹⁷ *Williams*, *ibid.* at 6329.

¹⁸ [1906] A.C. 455.

¹⁹ *Ibid.* at 458.

If that is on a reserve, then the corporation will usually be resident on reserve and, generally speaking, any wages or other simple debts payable by the corporation will be situated on reserve.

In *M.N.R. v. National Indian Brotherhood*,²⁰ the Court considered peripherally whether the National Indian Brotherhood was resident on a reserve. In holding that it was not, the Court found that the directors met to exercise policy in Ottawa and not on a reserve.

Revenue Canada has stated in private discussions that in assessing corporate residence it will look beyond where the directors meet to where the administration is located, where the finance office is located, and where the records are kept, among other factors.

(The Department of Finance has also issued a Remission Order that extends the tax-free treatment of employment income beyond the *Indian Act*. See Taxation of Native Employees, below.)

2. Business Income

There are very few cases that consider the situs of business income. Since 1972, Revenue Canada has expressed the view that "business income (for the purposes of the *Indian Act* exemption) is normally allocable to the permanent establishment. For example, for a self employed merchant, it would be his store."²¹

In a recent private ruling, Revenue Canada stated that the appropriate test for determining the situs of business income is not merely the permanent establishment of the business, but also the place where the business is principally carried on. Relevant factors that Revenue Canada will consider are:

- (i) The location of the business office and the books and records of the business;
- (ii) The place where inventory is ordered and maintained;
- (iii) The place where the business transactions with the customers and suppliers are arranged;
- (iv) The place where employees report for work; and
- (v) The location from which employees are paid.

Income Tax Regulations 400 and 2600 define the term "permanent establishment" essentially as a fixed place of business, including an office, a branch, a mine, an oil well, a farm, a factory, etc. In the case of a corporation which does not have a fixed place of business, the per-

²⁰ (1978), 92 D.L.R. (3d) 333 (F.C.T.D.) [hereinafter *National Indian Brotherhood*].

²¹ Interpretation Bulletin IT-62, *supra* note 15.

manent establishment is where the corporation's business is carried on.

In *Charleston v. M.N.R.*,²² the Tax Court found that the income from a fishing business carried on outside of reserve boundaries was not situated on the reserve. The Court looked to where the taxpayers' "right of ownership of the business" was located. In this case, it found that it was located off the reserve. The Court took into account not only where the business was being carried on, but also where the customers paid their bills. The Court found that the bills were paid off reserve. The Court also left open the possibility that "the parties may provide where the debt may be payable." In the absence of such a provision, however, the "debt will be situated where in the ordinary course of business, it would be paid."

Until we hear from a higher authority on this issue, and particularly in light of the *Williams* case, there will continue to be uncertainty over the situs of business income.

3. Investment Income

Depending on the ultimate impact of the *Williams* case, the situs of investment income will ordinarily depend upon the nature of the income earned.

In Interpretation Bulletin IT-62, Revenue Canada refers to two types of investment income — interest and dividends. Paragraph 6(h)(iv) provides that interest in a bank account is earned at the location at which the funds are on deposit. Paragraph 6(h)(v) provides that dividends on shares for a company whose head office and principal business activity, registered office and payment of dividends are on the reserve will normally be considered to be earned on a reserve.

Again, subject to *Williams*, for the most part, the case law dealing with the situs of investment income has been drawn from principles used for conflict of laws.

The conflict of laws rules generally look to the nature of the particular property in determining where it is situated:

(I) BANK DEPOSITS

At common law, in order for interest income to be situated on reserve, the deposit must be made at a branch on the reserve. This branch must also be the place where payment would be made in the normal

²² 91 D.T.C. 844 (T.C.C.).

course of commercial usage and the debt must be payable from that branch under the terms of the deposit-taking agreement.

According to the *Bank Act*,²³ however, the bank's indebtedness to the depositor (and, therefore, the income therefrom), will be deemed for all purposes to be situated at the place where the "branch of account" is situated. The branch of account is ordinarily the branch, the address of which appears on the specimen signature card or other signing authority signed by a depositor with respect to the deposit account or that is designated by agreement between the company and the depositor at the time of the opening of the deposit account. If no branch has been identified or agreed upon, the branch account will be the branch which is designated by the company by notice in writing to the depositor.

(II) DIVIDENDS FROM CORPORATE STOCK

Notwithstanding Revenue Canada's position on the situs of dividends, at law, corporate shares, and by implication the dividends therefrom, are located at the place where the share register of the corporation is kept. However, where there is a transfer agent, the situs of the shares may be where the transfer takes place.

For the most part, unless the corporation is held by a Band or an Indian on reserve, the dividends therefrom will likely be situated off reserve.²⁴

(III) NEGOTIABLE INSTRUMENTS

Bonds, bills of exchange and other securities transferable by delivery and all negotiable instruments are situated where the paper representing the security is found.

A debt which is not governed by the rules respecting negotiable instruments (such as contract debts or bank deposits) can be governed by rules relating to negotiable instruments simply by making those debts negotiable. In *Manitoba (Provincial Treasury) v. Bennett*, for example, the Supreme Court of Canada held that a deposit receipt normally situated with the bank, was located where the receipt was found. The key element was that the bank treated the receipt as being

²³ S.C. 1991, c. 46, s. 461.

²⁴ *Williams v. R.*, [1942] 2 W.W.R. 321 (P.C.); *Royal Trust Company v. R.*, [1949] S.C.R. 325; *Ontario (A.G.) v. Blonde*, [1946] 3 W.W.R. 683 (P.C.).

negotiable. The receipt was negotiable because it contained the words, "this receipt is negotiable."²⁵

(IV) SPECIALTY DEBTS

A specialty debt is an obligation under seal or a debt owing by the Crown or under a statute. The general rule is that a debt due on a specialty, which has a species of corporeal existence in a sealed instrument, is located where that instrument is situated.²⁶

The rule respecting specialties should be applied in determining the situs of specialty instruments under s. 87 of the *Indian Act*. Thurlow A.C.J., in *National Indian Brotherhood*, quoted with approval a passage from *Commissioner of Stamps v. Hope*, which refers to specialty debts. In that case Lord Field held as follows:

... and a 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 by the debtor and nothing more — could have no other local existence than the personal residence of the debtor, where the assets to satisfy would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which it resided; ... and inasmuch as the debt under seal or specialty has a species of corporeal existence by which its locality might be reduced to a certainty, and is 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. [Emphasis added.]²⁷

4. Personal Property Deemed to be on Reserve

Notwithstanding the case law in this area, s. 90(1) of the *Indian Act* deems certain personal property always to be situated on a reserve, regardless of where it may actually be situated. Since the term personal property has been defined to include income or taxable income, s. 90(1) will deem some income to be situated on a reserve when it clearly is not situated on a reserve under the ordinary rules.

Section 90(1)(b) in particular arguably operates to exempt two types of income — personal property given to an Indian or Band from the Federal Government pursuant to a treaty or agreement between a Band and Her Majesty; and income earned on such personal property.

²⁵ [1937] S.C.R. 138.

²⁶ *Williams v. R.*, *supra* note 24.

²⁷ [1891] A.C. 476 (P.C.) at 481–482 as cited in *National Indian Brotherhood*, *supra* note 20 at 339.

In *Greyeyes v. M.N.R.*,²⁸ the Federal Government paid an Indian student scholarship monies pursuant to an agreement between the Federal Government and the Band. The Court held this otherwise taxable income to be deemed to be situated on a reserve and, therefore, tax exempt.

The Tax Court of Canada recently considered the issue of when money is "given." In *Pachanos v. M.N.R.*, the Court held that the term "given" does not apply to a loan. Tax Court Judge Lamarre Proulx went on to suggest that the term "given" also may not apply to monies

contributed for specific purposes and in accordance with terms and conditions pertaining to contracts for ... contributions ... It is normally characteristic of the contribution that the recipients cannot dispose of it as they wish and are accountable for the contributing agency for its use.²⁹

Another question to determine is whether a payment is made pursuant to a "treaty or agreement." There is some suggestion that the term "agreement" may be restricted to treaties or ancillary agreements. In *Mitchell*, for example, La Forest J. stated (in obiter) that "the statutory notional *situs* of s. 90(1)(b) is meant to extend solely to personal property which enures to Indians through the discharge by "Her Majesty" of her treaty or ancillary obligations."³⁰

The courts seem to accept that the income earned on monies deemed to be situated on a reserve is itself situated on a reserve, notwithstanding that the monies may be invested off reserve.³¹ This could have significant implications for the tax treatment of interest earned on monies paid to Indians and Bands across the country pursuant to alternative funding and other contribution agreements, so long as such agreements are in the nature of treaty agreements between a Band and Her Majesty.

E. Exempt From Taxation

If an Indian's or Band's personal property — whether tangible or intangible — is situated on a reserve, it will be exempt from "taxation." The term taxation clearly includes income taxation and retail sales taxes. It is less clear whether it includes levies such as unem-

²⁸ (1978), 84 D.L.R. (3d) 196 (F.C.T.D.).

²⁹ 90 D.T.C. 1668 at 1671.

³⁰ *Supra* note 14 at 235.

³¹ See e.g., *Royal Bank of Canada v. Whitebear Indian Band* (1991), 88 Sask. R. 289 (Q.B.).

ployment insurance contributions, worker's compensation, health insurance premiums, Canada Pension Plan contributions, license fees, and what are sometimes call "indirect taxes."³²

Generally speaking, in order for a levy to constitute a tax, it must be enforceable at law, imposed under the authority of a legislature, imposed by a public body and made for a public purpose. There is case law to suggest that if a levy is a "fee for service" and/or if the beneficiaries of the revenue raised are circumscribed by a particular activity or enterprise, the levy will not be considered to be a tax, and therefore, will not be exempt.³³

There is also some question as to whether the s. 87 exemption from taxation extends to "indirect taxation," that is taxes imposed on a manufacturer, wholesaler, or importer with the expectation that the taxes will be passed on to the ultimate consumer. The Courts thus far have held that the ultimate consumer is simply paying a higher price, and not a tax in these cases, and, an Indian or Band is not entitled to a rebate of the indirect tax. (See, for example, *Saugeen Indian Band v. Canada*.³⁴)

Indirect taxes are less of a concern now that the federal sales tax has been replaced by the Goods and Services Tax. (See discussion, below).

III. STRUCTURING ABORIGINAL BUSINESSES

IN STRUCTURING ABORIGINAL BUSINESSES, there are a number of factors to consider, only some of which are tax-driven. Non-tax issues may include, for example, exposure to creditors, compliance costs, simplicity, financing and transferability. From a tax perspective, the issue is usually how to eliminate or reduce the tax that would otherwise be imposed on the business income.

Using the s. 87 *Indian Act* exemption, there are a number of ways to eliminate or reduce business income, all of which endeavour to place in the hands of Indians or Bands income which is situated on the reserve. But there are also tax exemptions available through the *Income Tax Act* itself. These include, for example, using the exemp-

³² See e.g., J. Harley, "Indian Tax Exemption" (Address to the Canadian Bar Association National C.L.E. Conference, 30 March 1990) [unpublished].

³³ *Lawton v. Interior Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 and *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168 (P.C.).

³⁴ [1989] 1 C.N.L.R. 167 (F.C.T.D.).

tions available for municipal corporations, non-profit organizations and charitable organizations.

A. Taxable Corporations

As stated earlier, the courts have clearly held that corporations cannot be Indians or Bands and, therefore, they would never be entitled to the s. 87 *Indian Act* exemption. Tax planning for taxable corporations, therefore, usually revolves around trying to pass out the corporation's business income to tax exempt Indians or Bands, either as deductible fees of some nature or as non-deductible dividends.

For example, if a corporation earns \$100,000 and pays out the \$100,000 as a deductible fee to an Indian or a Band, the corporation will not have any taxable income and the Indian or Band will be able to exempt the fee from tax, provided that the income is situated on a reserve. In order for the fees to be deductible, they must be paid out for the purposes of earning income and they must be reasonable in the circumstances. There also must be a reasonable expectation of profit. (Paying out 100% of the corporation's income each year may in itself disqualify the deduction.³⁵) It is unclear whether Revenue Canada will take the same *laissez faire* position on these payments that they have taken with management bonuses, which are used to pay-down a corporation's income to \$200,000 a year. Revenue Canada may be less likely to overlook an unreasonable payment in these circumstances, if the resulting payment to the Indian or Band is tax exempt.

Such payments are not restricted to salaries, bonuses and consulting fees. Other fees can be considered, including rental fees and, in some cases, taxes imposed by Bands. In some cases, a combination of these fees is warranted.

With respect to the tax treatment of the receipt, the issue again is whether that salary, bonus, management fee, rent or Band levy is situated on a reserve.

As discussed earlier, once the fee is declared, the payment by the corporation will be a simple contract debt, the situs of which will likely be where the payor, being the corporation, is resident. Once again, that residence will likely be where the directors meet to create and exercise policy.

(If the fee is payable to a Band which is considered to be a Canadian municipality, as discussed below, the fee will not be taxable to the Band, regardless of where the income is situated.)

³⁵ *Supra* note 7, ss. 18(1)(a) and 67.

Assuming that the corporation is resident on a reserve, there may also be an opportunity for the corporation to pay out dividends to an Indian or Band shareholder. Dividends will not be deductible to the corporation when they are paid out and, therefore, the tax savings will be the tax that the shareholder would have paid on the dividends. The corporation will still have to pay tax on its own earnings.

With respect to the situs of dividends, as discussed earlier, it may not be sufficient to have the corporation resident on a reserve in order to have the dividends situated on a reserve and, therefore, tax exempt in the hands of an Indian or Band. It may be necessary to have the principal business activity and share register on the reserve as well.

There is a practical concern to this plan. If the company pays out its profits every year, either as dividends or as deductible fees, the company may not be able to reinvest its income and develop over time. Therefore, it should be clear that payees will be expected to reinvest at least some of the fees or dividends back in the company in the form of equity or shareholder's loans.

B. Municipal Corporations

If not less than 90% of the shares or capital of a corporation are owned by a Band, it may be arguable that, under s. 149(1)(d) of the *Income Tax Act*, no taxes are payable on the income of the corporation or its wholly owned subsidiary. The s. 149(1)(d) exemption is available to corporations held 90% or more by "Canadian municipalities." The question, therefore, is whether a Band is or can be a Canadian municipality.

The exemption is a valuable one, in that, firstly it is available to corporations, whereas the *Indian Act* exemption is not, and secondly, and perhaps more importantly, the exemption is available on all income, regardless of where it is situated.

Unfortunately, Revenue Canada has taken the administrative position that Bands cannot be Canadian municipalities for the purpose of this exemption, notwithstanding that Revenue Canada considers that a Band may in some cases be a Canadian municipality for the purposes of the exemption available to Canadian municipalities contained in s. 149(1)(c) of the *Income Tax Act*. (See discussion below under "Band-Operated Businesses.")

Given Revenue Canada's current position, it would not be prudent to undertake a plan in reliance upon the s. 149(1)(d) exemption. However, if faced with an assessment in the circumstances, it is certainly open to argue and, if necessary, to litigate the point.

C. Non-Profit Organizations

Section 149(1)(1) of the *Income Tax Act* also provides an exemption from taxation for non-profit organizations. A non-profit organization is defined as:

A club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof ...

The obvious question that arises after reviewing this definition is how a corporation operating a business could qualify, given that the corporation's purpose, by definition, would be to earn a profit. The answer appears to be that, at least in some cases, the courts are willing to treat a corporation operating a business as a tax-exempt non-profit organization.

In *Gull Bay Development Corp. v. Canada (A.G.)*,³⁶ the Court considered whether a non-share-capital corporation with its head office on a reserve was a non-profit organization for tax purposes. The objects of the corporation were to promote the economic and social welfare of persons of native origin who were members of the Gull Bay Development Corporation and to provide support for recognized benevolent and charitable enterprises, federations, agencies and societies engaged in assisting the development of native people who were members of the Gull Bay Indian Reserve.

The corporation's Letters Patent also provided that the corporation would be carried on "without purpose of gain for members and that any profits or other accretions to the corporation will be used for promoting its objects."³⁷

The corporation established a viable commercial logging operation and used its profits to train natives from the reserve to work as loggers and office managers; to carry out maintenance work on recreational and administrative holdings and facilities on the reserve; to preserve programs; to give food, clothing and other necessities to needy members of the reserve; to fund travelling expenses for educational excursions; and to provide other assistance on the reserve which was determined to be beneficial to the social and economic welfare of members of the reserve.

³⁶ 84 D.T.C. 6040 (F.C.T.D.).

³⁷ *Ibid.* at 6041.

Mr. Justice Walsh found that, despite the fact that the corporation was operating a business for profit, it was still a non-profit organization.

The real issue in the present case appears to be that the corporation was not set up, as its Letters Patent indicated, to carry on a commercial activity, although there is no doubt that the motive for forming the corporation may have been that it was desirable to provide employment and training to otherwise unemployed Indians on a reserve, by engaging in a commercial activity which would not only provide such employment, but raise funds to be used for the very worthy social and charitable activities required on the reserve. However, it was more efficient to carry on this activity through the corporation than to have the Band council attempt to do it itself ... If this lumbering operation had been carried out by the Band council itself, it is unlikely that any attempt would have been made to tax the profits of the enterprise. It is certainly the policy of the Department of Indian Affairs to encourage Indian Bands to become self-reliant and to improve living and social conditions on the reserve and there is no doubt from the evidence in this case, that a great deal has been accomplished in improving living conditions on the reserve by the work done by the employees of the corporation with funds derived from the lumbering operations and in providing gainful employment for members of the Band who would otherwise be on welfare ... The social and welfare activities of (the corporation) are not a cloak to avoid payment of taxation on a commercial enterprise, but are the real objectives of the corporation.³⁸

The Gull Bay decision appears to have served as the basis for a number of Band owned corporations, which engage in marginal economic activity and use their surplus for social objectives. Unfortunately, Revenue Canada does not register non-profit organizations, and therefore it is difficult to know with any certainty whether a corporation is at all times throughout the year a non-profit organization.

The exemption for non-profit organizations is more than likely only available to Band owned organizations which do not vigorously compete in the general marketplace and which use all of their profits for social objectives on the reserve.

D. Charitable Organizations

A company will also be exempt from taxation under the *Income Tax Act* if it is registered as a charitable organization under s. 149(1)(f). A charitable organization is an organization resident and created in Canada, all the resources of which are devoted to charitable activities carried on by the organization. As with a non-profit organization, no income may be payable for the personal benefit of the proprietor, member or shareholder. Once the corporation is registered with

³⁸ *Ibid.* at 6048.

Revenue Canada, it must comply with a number of restrictive rules, including rules relating to distribution of the surplus.

In order for the charity to be registered, it must be carrying on charitable activities. Revenue Canada is usually very strict in determining what constitutes a charitable activity. Generally speaking, a charitable activity has as its purpose the advancement of education or religion, the relief of poverty or the advancement of other purposes beneficial to the community.

In *Native Communications Society of British Columbia v. M.N.R.*,³⁹ the Federal Court of Appeal found that an organization whose primary purpose was to organize and develop non-profit communications programs for native people in British Columbia was engaged in charitable activities. The Court considered in particular the special cultural, economic and political circumstances of Indians.

The issue again for an Indian business would firstly be whether the business qualifies as a charity and, secondly, if it does, whether the profits are intended to be used for charitable purposes as opposed to for the benefit of the shareholders or members themselves. It is likely that most true native businesses would have difficulty registering as charities.

E. Partnerships

Under the *Income Tax Act*, s. 96, partnerships are not taxed as separate persons. Rather, each partner is taxed on his or its share of the income of the partnership.

If an Indian or a Band is allocated income from a partnership and the income is situated on a reserve, that income will be exempt from taxation.

Revenue Canada has stated that an Indian's or Band's income from a partnership will be situated at the permanent establishment of the business carried on by the partnership. As stated earlier, in considering where a business has its permanent establishment, Revenue Canada will consider factors such as the location of the business office and the books and records of the business, the place where the inventory is ordered and maintained, the place where the business transactions with customers and suppliers are arranged, the place where employees report for work and the location from which employees are paid.⁴⁰

³⁹ 86 D.T.C. 6353.

⁴⁰ *Supra* note 15.

Notwithstanding Revenue Canada's position on the status of business income allocated by a partnership to an Indian or Band, it may still be open to argue that a partner's business income is situated not where the business is carried on, but where the partnership is resident. There does not appear to be any case law on this point.

Where one or more of the partners is not a tax-exempt Indian or Band, there may be an opportunity to allocate taxable income to the tax-exempt partners. In these cases, Revenue Canada may decide, however, to reallocate the earnings pursuant to s. 103 of the *Income Tax Act*. In making its reallocation, Revenue Canada may consider a number of factors, including the capitalization of the partnership and the cash distributions made among the partners each year.

Another factor to consider in structuring a business operation as a partnership is whether it is desirable to limit the liability of one or more of the partners by establishing a limited partnership. Depending on the applicable provincial legislation, the limited partner would not be able to take an active part in the management of the business or the partnership. Indians and Bands already have protection from creditors seizing their property which is situated or deemed to be situated on a reserve.⁴¹ If the Band wishes to have the additional protection of a limited partner, there might be an issue as to whether any of the Bands' members could take part in the management of the partnership as a general partner or as a director or officer of a corporate general partner, without jeopardizing the maintenance of the Band's limited liability.

F. Joint Ventures

Joint ventures are similar to partnerships, but they are treated differently for tax purposes. From a legal perspective, each investor in a joint venture holds an undivided interest in the joint venture property and each partner holds an interest in the partnership and the partnership holds the property.

From a tax perspective, each joint venture investor calculates his or her or its share of the revenue and expenses of the joint venture whereas each partner is allocated a share of the partnership's profits. Because capital cost allowance is calculated at the investor's level in a joint venture, there may be opportunities for non-exempt investors to take advantage of tax preferences that would otherwise be lost with a tax-exempt Indian or Band.

⁴¹ *Supra* note 4, s. 89.

The difficulty in structuring a joint venture is often in ensuring that the relationship is, in fact, a joint venture and not a partnership. Stating in an agreement that the relationship is a joint venture is usually not sufficient. The true characterization will turn on the facts of the case.

G. Band-Operated Businesses

Some Bands operate their own businesses, although generally speaking if the business is of any significance, the Band will usually operate it through a corporation.

The first and most obvious issue for a Band-owned business is whether the Band has the legal status and authority to operate the business and, if it does, whether it is exercising its authority in the appropriate manner.

The second issue, as with a partnership, is whether the Band wishes to expose its off-reserve assets to creditors.

Assuming that the Band wishes to continue operating its business on its own, its income from the business will be tax exempt if the income is situated on a reserve, as discussed earlier.

If the Band is a Canadian municipality under s. 149(1)(c) of the *Income Tax Act*, its income will be tax exempt no matter where the income is situated. Section 149(1)(c) provides that no tax is payable under Part I of the *Income Tax Act* upon the taxable income of a person when that person was a municipal or a public body performing a function of government in Canada.

In its Interpretation Bulletin IT-62, Revenue Canada states that it will consider a Band to be a municipal or public body performing a function of government in Canada when "the Governor in Council declares that a Band has reached an advanced stage of development ... under s. 83 (of the *Indian Act*)." At the time this Bulletin was released, s. 83 authorized an advanced Band to pass by-laws to raise money by the taxation of land and the licensing of businesses, callings, trades and occupations. However, since the Bulletin's release, s. 83 of the *Indian Act* has been amended so that the Governor in Council is no longer required to declare a Band to be advanced before it can pass by-laws under s. 83. Revenue Canada has not amended its Interpretation Bulletin, but they have indicated in a private ruling to the author that they will consider a Band to be a Canadian municipality and therefore exempt under s. 149(1)(c) of the *Income Tax Act*, if that Band has passed by-laws pursuant to both s. 81 and s. 83 of the *Indian Act*.

H. Hybrid Arrangements

If a Band wishes to operate a business on its own (assuming it has the capacity and authority to do so), it may wish to have some of its more valuable off-reserve assets, including assets used in its business, held in a corporation for asset protection. If the business assets are required for the business, they could be leased to the Band, perhaps for a rent equal to the capital cost allowance deductible by the corporation, so as not to generate any taxable income.

It may be necessary for the shares of the holding corporation to be held by a trust, in order to prevent a creditor from seizing the shares of the corporation (in the event that the shares themselves are not protected by s. 89 of the *Indian Act*).

There may be other hybrid arrangements possible, including for example, combinations of partnerships and trusts.

IV. STRUCTURING CLAIMS SETTLEMENTS

INDIAN BANDS AND OTHER Aboriginal bodies have negotiated or entered into a number of claims agreements recently. Generally speaking, these claims take one of three forms:

1. A comprehensive claim made against the federal government in respect of Aboriginal rights;
2. A specific claim made against the federal government in respect of treaty rights or a failure by the federal government to live up to its obligations under the *Indian Act*; or
3. Damage claims against provinces or provincial Crown corporations, such as hydro-electric companies, for damages caused by flooding or other problems.

An analysis of each of these areas is beyond the scope of this paper.⁴² Instead, we will focus on some tax issues arising out of the structuring of these claims.

A. Non-Indian Claims

Settlements with the Métis, non-status and Inuit people are not eligible for the tax exemption under the *Indian Act*. Therefore, if the income arising from such a claims settlement is to be tax exempt, it must be exempt pursuant to the *Income Tax Act* or special legislation.

⁴² See e.g. R. Strother & R. Brown, "Taxation of Aboriginal People in Canada" in *Report of the Proceedings of the Annual Tax Conference* (Toronto: Canadian Tax Foundation, 1990) 47.

Most of these non-Indian settlements are paid to something commonly called a settlement corporation in order to access a limited tax exemption. Provided that specific rules relating to formation, investments and expenditures are met, the settlement corporation will not be taxed on the income earned from the financial compensation paid into the settlement corporation. This exemption is usually limited in duration (in at least one case to 15 years), following which the settlement corporation is required to follow the distribution rules of the charitable foundation in order to maintain its tax exempt status. Special legislation is required to create such a settlement corporation.

B. Indian Claims

In the event that a Band is involved in the settlement, it may be in a position to take advantage of the exemption under s. 87 of the *Indian Act*.

More often than not, the government or Crown corporation making the settlement with the Band wants to tie up the capital payment in trust for a period of time. If the Band receives the monies directly, the income earned from investing the settlement monies will be tax exempt if the Band is a Canadian municipality, if the settlement is deemed to be on reserve pursuant to s. 90 of the *Indian Act* or if the income from the investments is otherwise situated on a reserve.

If the settlement is paid to a trustee under negotiated conditions of trust, then a trust will likely arise for tax purposes. For income tax purposes, a trust is considered to be a separate individual.⁴³ It is unlikely, however, that a trust will be considered to be an Indian even if all of the trustees are Indian individuals.

Generally speaking, a trust is taxed on all of its income, unless that income is paid (or payable) to one or more of its beneficiaries in the year. In that regard, if the trust earns capital gains, which are income for tax purposes but not usually for trust law purposes, in order for those gains to be "payable" to the beneficiaries, the trust indenture will have to provide that such capital gains will be considered income or capital available for distribution or encroachment to the beneficiaries, as the case may be. (A preferred beneficiary election would not be available in this case to deem such capital gains to be taxable in the hands of a beneficiary.)

Once the trust's income is paid (or payable) in the year to the beneficiary, it will ordinarily be taxable in the hands of the beneficiary and not in the hands of the trust.

⁴³ *Supra* note 7, s. 104(2).

The treatment of the income in the hands of the beneficiary may depend upon the nature of the beneficiary as well as the nature of the income paid out.

If the beneficiary is a non-profit organization or a registered charity, the income paid out should be tax exempt, to the extent that the beneficiary remains a non-profit organization or a registered charity and to the extent that it complies with the restrictive rules applicable to non-profit organizations and charities, including disbursement quotas.

If the beneficiary is a Band, the income could be tax exempt in one of three cases:

1. The Band is a Canadian municipality or a public body performing a function of government in Canada under s. 149(1)(c) of the *Income Tax Act*, in which case all of its income is tax exempt, no matter where it is situated;
2. The income is deemed by s. 90 of the *Indian Act* to be situated on a reserve. It is less certain that s. 90 would follow a settlement of this nature, particularly if the payment is made directly by the Federal Government to the trust. It should not apply at all to a settlement made by a province or a provincial Crown corporation.
3. The income distributed to the Band is otherwise situated on a reserve.

If the Band is not a Canadian municipality and the income is not otherwise deemed to be on a reserve, it will be necessary to determine where that income is situated. Subject to the Supreme Court of Canada's recent comments on finding the proper "connecting factors," there are two arguments available for determining where such income is situated:

- (a) Where the underlying trust income is situated; or
- (b) Where the trustees are resident.

Section 108(5)(a) of the *Income Tax Act* provides that an amount included in computing the income for a taxation year of the beneficiary of the trust shall be deemed to be "the income of the beneficiary for the year from a property that is an interest in the trust and not from any other source."

The case law on this area generally provides that unless the beneficiary has an underlying proprietary interest in the trust assets, the income of a beneficiary from a trust will be situated where the trust is resident.⁴⁴ (Generally speaking, the test for determining whether the beneficiary has an underlying proprietary interest in the trust

⁴⁴ See e.g., *Nova Scotia (A.G.) v. Davis*, [1937] 3 D.L.R. 673 (N.S.S.C.).

assets is whether the beneficiary has a claim on particular trust assets as opposed to a cause of action to enforce the trust.)

If the income of a beneficiary from a trust is situated where the trust is the resident, the question is where is a trust resident. Generally speaking, a trust is resident where the trustees are resident.

In Interpretation Bulletin IT-447, Revenue Canada takes the position that although the residence of the trust is a question of fact to be considered according to the circumstances of each case, a trust is generally considered to be resident where the trustee who manages the trust or who controls the trust's assets is resident.

The Trustee who has management and control of the trust, while he may not have physical possession of the trust assets, will be the person who has most or all of the following powers and responsibilities:

- (a) Control over changes in the trust's investment portfolio,
- (b) Responsibility for the management of any business or property owned by the trust,
- (c) Responsibility for any banking and financing arrangements for the trust,
- (d) Control over any other trust assets,
- (e) Ultimate responsibility for preparation of the trust accounts and reporting to the beneficiaries of the trust, and
- (f) Power to contract with and deal with trust advisors, i.e., auditors and lawyers.

Revenue Canada has stated further that where more than one trustee is involved in exercising the management and control of the trust, if one trustee exercises a more substantial portion of the management and control than the others, the trust will reside in the jurisdiction in which that trustee resides. Otherwise, the trust will reside at the residence of the majority of the trustees.

Where management and control is unclear, Revenue Canada will look to other factors, such as the location where the legal rights with respect to the trust assets are enforceable and the location of the trust assets.

In the event that all of the trust's income is not payable in each year to the beneficiaries (which may be due to restrictions imposed by the government making the settlement with the Band), the income retained by the trust will usually be taxable, unless it is deemed to be the income of the beneficiary and not of the trust, pursuant to s. 75(2) of the *Income Tax Act*. Section 75(2) may apply in the event that the government pays the monies to the Band and the Band settles the trust on condition that, at some point, the property may revert back to the Band. (It may also apply if the Band determines who gets the property settled in trust or has a veto over whether and when the property may be disposed of.)

It is unclear whether Revenue Canada would allow s. 75(2) to apply in these circumstances. Revenue Canada could argue, for example, that the Band is not a person with a lifetime, as required by s. 75(2) and, therefore, the rules do not apply to Bands. There is still some uncertainty in this area.

If s. 75(2) of the *Income Tax Act* applies to property settled in trust, the income or loss from the settled property or any taxable capital gain or allowable capital loss from the disposition of such property will be taxed in the hands of the transferee, being the Band in this example. According to Revenue Canada's published position on s. 75(2),⁴⁵ the income of the trust attributed to the transferor is normally to be excluded from the trust's income. This is to avoid double taxation. However, since s. 75(2) is silent on this point, it is open to Revenue Canada to tax the beneficiary as well as the trust on the attributed income.

If the trust's income is attributed to a Band by virtue of s. 75(2), the income again should be tax exempt if the Band is a Canadian municipality. However, if the Band is not a Canadian municipality and it is necessary to determine the situs of the income attributed to the Band, it is not altogether clear where the attributed income would be situated. For example, it could be where the trust is resident (as with income payable by the trust) or it could be situated where the underlying trust income is otherwise situated, according to the rules dealing with the situs of investment income. There does not appear to be any case law in this area and, therefore, out of an abundance of caution, the trustee should ensure both that the trust is resident on a reserve and that the underlying trust income is situated on a reserve, if possible.

V. TAXATION OF INDIAN EMPLOYEES

AS DISCUSSED EARLIER, GENERALLY speaking, an Indian's salary and wages are tax exempt if the employer is resident on the reserve, regardless of where the employee provides his services, although the courts are now free to consider other "connecting factors."

However, an Indian employee may have other arguments available to him if his employer is resident off reserve or if there are sufficient factors connecting his salary to a reserve. The Department of Finance has issued a series of Remission Orders, which provide for a remission

⁴⁵ Interpretation Bulletin IT-369R, "Attribution of Trust Income to Settlor" (12 May 1990).

of taxes under the *Income Tax Act* with respect to "income earned by an Indian from an office or employment that is reasonably attributable to the duties of that office or employment performed by the Indian on a reserve." The Remission Orders also exempt certain periodic payments received by an Indian as or in lieu of payment of pension or superannuation payments under a registered fund or plan where those benefits arise from contributions made by the Indian or the employer in connection with his tax-exempt employment. The Remission Orders have more recently been extended to include lump sum pension payments and retirement allowances arising from tax exempt employment income.⁴⁶

VI. OTHER TAXES

AS STATED EARLIER, s. 87 of the *Indian Act* exempts not only income, but other personal property situated on a reserve. Section 87(2) also provides that no Indian or Band is subject to taxation with respect to the ownership, occupation, possession or use of such personal property or is otherwise subject to taxation in respect of any such property.

A. Retail Sales Tax

The provincial legislatures are authorized to levy direct taxes on ultimate consumers, and all provinces, except for Alberta, levy some form of retail sales tax. The provincial legislation imposing a retail sales tax either contains a tax exemption in some form for Indians and Bands or it is silent on the point and relies on administrative practice to administer the exemption provided by the *Indian Act*.

As stated earlier, to the extent that a province imposes tax that would otherwise be exempt under s. 87 of the *Indian Act*, that tax should be invalid. However, provinces are permitted to extend the *Indian Act* exemption, either legislatively or administratively.

(See earlier comments with respect to whether and when tangible personal property is situated on a reserve).

B. Tobacco and Fuel Taxes

Provinces that impose tobacco and fuel taxes generally impose the tax on the ultimate consumers, but appoint wholesalers to collect and remit the tax to the government at the time that the cigarettes or fuel are purchased. Generally speaking, the wholesaler will not collect the

⁴⁶ For an interpretation of the Remission Order, see *Henry v. M.N.R.*, 87 D.T.C. 338 (T.C.C.).

tax separately, but rather will increase the price by an amount equal to the tax and remit that amount to the provincial government.

So long as the tax is a direct tax, it should be within the jurisdiction of the provincial government to impose the tax. However, because the tax is generally hidden in the purchase price, it is difficult to provide a tax exemption for Indian or Band purchasers. Complicating matters further, that exemption is only available if the tobacco product or gasoline is situated on a reserve, which necessitates a determination of its "paramount location."

If the cigarettes or gasoline are purchased by Indians on a reserve, the purchasers should be entitled to an exemption at that time. Provincial governments are currently considering ways in which to provide the exemption. There is some question as to whether the wholesalers have a right to collect the tax and thereby compel the Indian purchaser to apply for a rebate.

C. Goods and Services Tax

Before the Goods and Services Tax was implemented, there was some question as to how s. 87 of the *Indian Act* would apply, particularly in respect of the tax on services. However, for the most part, the federal government's administrative policies on the Goods and Services Tax (particularly Technical Information Bulletin B-039) appear to provide a tax exemption to Indians and Bands beyond the exemption provided by s. 87 of the *Indian Act*.

Generally speaking, an acquisition of property by an Indian, Band or Band-empowered school, hospital or social service entity on a reserve will be exempt from GST. (The supplier, however, will still be entitled to an input tax credit.) Acquisitions of property off reserve by an Indian, an Indian Band or Tribal Council, or a Band-empowered entity situated on a reserve will be exempt from GST so long as the property is delivered to a reserve by the vendor or the vendor's agent.

Supplies and services made to Indians, Bands, Tribal Councils, and Band-empowered entities will not be subject to the GST if the services are in respect of "management activities" or in respect of real property on reserve. The GST will, however, apply to services acquired for "commercial" activities of the Band or Tribal Council or Band-empowered entity situated on a reserve.

VII. THE FUTURE OF ABORIGINAL TAXATION IN CANADA

IT IS ARGUABLE THAT when s. 35 of the *Constitution Act, 1982* was enacted, affirming existing treaty and Aboriginal rights, the protection

afforded by s. 87 was entrenched by reference in the Canadian Constitution, so that it cannot be unilaterally revoked by Parliament.

The future of Aboriginal taxation in Canada, however, may have turned to a large extent on the results of the recent referendum on the so-called Charlottetown Accord, although non-constitutional negotiations will continue between First Nations and the Government of Canada, particularly on the parameters of Aboriginal self-government. If the *Indian Act* is a victim of these negotiations, then the s. 87 tax exemption could be lost. On the other hand, Indians and perhaps other Aboriginals may continue to maintain a tax exemption of some sort, particularly within their jurisdictional boundaries.

In considering any tax planning for Aboriginals, therefore, it is important to consider not only the evolving case law in this area, but also the status of any continuing constitutional or political negotiations between Canada and its Aboriginal peoples.