Taxation and Treaty Rights: *Benoit v. Canada*'s Historical Context and Impact

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I. INTRODUCTION

This article analyzes *Benoit v. Canada*,[1] a decision released 7 March 2002 by the Federal Court of Canada. The central issue was whether Treaty No. 8[2] affords a tax exemption for Treaty 8 "Indians".[3] Justice Campbell found, at paragraph seven, that when the treaty was executed, there was a "fundamental misunderstanding" between the Government of Canada and the Cree and Dene Peoples as to whether such an exemption was provided, but that "the Aboriginal People believed a tax exemption Treaty promise was made."

The case focuses on competing interpretations of Treaty No. 8. The decision ultimately rests on who should take responsibility for the "misunderstanding" between the signatories. Justice Campbell found that "in order for the Honour of the Crown to be maintained, [the Government of Canada] is required to recognize and fulfil the tax assurance as it was understood by the Aboriginal People." Accordingly, Justice Campbell decided that "the Plaintiffs are entitled to claim the benefits of Treaty No. 8, including the Treaty Right not to have any tax imposed upon them at any time for any reason."[4]

The implications of the *Benoit* decision are more far-reaching than might first appear. While there is a common misapprehension that Aboriginal peoples

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1 *Benoit v. Canada*, [2002] F.C.J. No. 257.

2 *Treaty No. 8* (Ottawa: Queen's Printer, 1899).

3 The term "Indians" is used throughout this article as a specific reference to the definition provided under ss. 2 and 6 of the *Indian Act* R.S.C. 1985, c. I-5.

4 *Supra* note 1 at para. 369.

in Canada are not required to pay tax, in fact, a cursory analysis of the law reveals that the tax exemption is available only to "Indians" who live and/or work on a reserve.[5] The *Benoit* decision extends the tax exemption to all Treaty 8 "Indians" (approximately 40 000–50 000 in number) irrespective of where they live and work, or of the nature of their employment.[6] Thus, according to *Benoit*, a Treaty 8 "Indian" who has never set foot on a reserve will be exempt from taxation.

Moreover, that the tax exemption arrives as a treaty right, as opposed to a statutory right afforded by Section 87 of the *Indian Act*, is significant for another reason: a statutory right may be withdrawn at Parliament's whim,[7] whereas treaty rights are more firmly entrenched by Section 35 of the *Constitution Act, 1982*. This would mean that to infringe upon the tax exemption would require justifiability under the *R. v. Sparrow*[8] doctrine, discussed below.

Before delving into an analysis of the *Benoit* decision, it is appropriate to outline the law relating to Aboriginal and treaty rights so as to set the stage for Justice Campbell's rationale. It is also useful to bear in mind that there are, in fact, three possible sources of a tax exemption for First Nations: (1) Aboriginal rights; (2) treaty rights; and, (3) statute. Until *Benoit*, the courts recognized only the statutory source of the exemption codified in Section 87 of the *Indian Act*.

II. ABORIGINAL RIGHTS

Aboriginal rights are said to "inure to native peoples by virtue of their occupation upon certain lands from time immemorial."[9] First Nations are thus distinguished from all other Canadians because,

> [W]hen Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.[10]

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5 In keeping with the policy rationale behind the tax exemption afforded under Section 87 of the *Indian Act*, the Supreme Court of Canada found that the statutory exemption is available only to those persons who meet the so-called "connecting factors" test: *Williams v. The Queen*, [1992] 1 S.C.R. 877.

6 One of the "connecting factors" the courts will consider is whether the nature of the work benefits Indian people living on a reserve.

7 This notion is best understood as an expression of 'Parliamentary Sovereignty', which leading theorist A.V. Dicey described as Parliament's unreserved right to "make or unmake any law whatever": Richard Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980) at 71.

8 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

9 Peter Cumming and Neil Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: Indian – Eskimo Association of Canada, 1980) at 13.

As such, First Nations are afforded special treatment within Canada's legal and constitutional framework out of recognition of their distinct history and culture, which pre-dates first contact with Europeans.

The notion of Aboriginal rights has created difficulties within Canada's legal system because such rights are not easily explicable under a western jurisprudential analysis.[11] Two Supreme Court of Canada decisions have, however, assisted greatly in shaping the legal landscape regarding Aboriginal rights in Canada: *R. v. Van der Peet*[12] and *Delgamuukw v. British Columbia.*[13] In *Delgamuukw*, the Court established that Aboriginal rights fall into the following three basic categories:

> Aboriginal hunting, fishing and other sustenance rights over general tracts of land that were not sufficiently occupied to give rise to title; aboriginal hunting, fishing, and other rights exercised at a particular and specific site but in relation to which there was not sufficient occupation to give rise to title; and aboriginal title where the occupation was sufficient to establish title. In the first two categories, the right is the right to carry on the same activity in a contemporary form. In the third category, namely aboriginal title, the occupation must be shown to have been exclusive and continuous. But once title is established, the land can be used for every purpose, including purposes which were not traditional.[14]

The possibility of a tax exemption flowing from Aboriginal rights will, therefore, be analyzed in relation to all three categories.

A. Title Based on Practice and Custom: R. v. Van der Peet

R. v. Van der Peet was an appeal from the British Columbia Court of Appeal overturning a B.C. Supreme Court decision that originally allowed the appellant's appeal from conviction. The appellant, a member of the Stolo band, was convicted of selling fish contrary to Subsection 27(5) of the Fishery Regulations. The appellant argued that she was exercising an Aboriginal right to sell fish and that her conviction, therefore, violated Subsection 35(1) of the *Constitution Act, 1982*[15] which constitutionally protects "existing aboriginal and treaty rights of

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10 As *per* Lamer, C.J. in *R. v. Vander der Peet*, [1996] 2 S.C.R. 507 at para. 30.

11 Aboriginal rights were first described as being *sui generis* ("unique in law") in *Guerin v. The Queen* [1984] 2 S.C.R. 335, *per* Dickson C.J. at 342.

12 *Supra* note 10.

13 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

14 Justice Douglas Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. at para. 19.

15 Enacted under Schedule B of the *Canada Act, 1982*, c. 11 (U.K.), [hereinafter the *Constitution Act, 1982*].

the aboriginal peoples of Canada." The issue was whether Subsection 27(5) was of any force or effect with respect to the appellant.

Chief Justice Antonio Lamer, writing for the majority in a seven to two decision, took a momentous step and established a test to determine when a practice or tradition constitutes an Aboriginal right and is thus "recognized and affirmed" by Subsection 35(1) of the *Constitution Act, 1982*. He stated as follows at paragraphs 55–60:

> [T]he following test should be used to identify whether an applicant has established an aboriginal right: in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.... A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.... The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies[16] [emphasis added].

Accordingly, there are two critical elements in identifying Aboriginal rights when Aboriginal title has not been established: (1) the practice must be integral,[17] that is, of central significance to the Aboriginal society in question; and,

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16 As *per* Chief Justice Lamer in *Van der Peet*, *supra* note 10.

17 To that end, Chief Justice Lamer added, *ibid.* at para 55:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly made the society what it was.... The court cannot look at those aspects of the aboriginal society that are true of every human society (*e.g.*, eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question.

It should be noted that the "integral part" of an Aboriginal community's "distinctive culture" phraseology was first given effect by the Supreme Court of Canada in *R. v. Sparrow*, *supra* note 8 at 1099. The fact scenario in *Sparrow* was similar to that in *Van der Peet*, *supra* note 10: at issue was the constitutionality of the federal fishing regulations which required fishing permits and prohibited certain methods of fishing. The Supreme Court of Canada held that fishing for salmon in the Fraser River estuary, known as Canoe Passage, was an integral part of the Musqueam First Nation's cultural identity and that the federal fishing

(2) the practice must have continuity with practices that existed prior to first contact.[18]

It is now appropriate to analyze whether there might exist an "Aboriginal right" to a tax exemption in relation to these first two categories, that is, in the absence of Aboriginal title. Any such right would presumably find its roots in First Nations' pre-contact social structure. Hence, the argument that Indian people should be exempt from tax on the basis of respect for their traditional customs might run as follows: First Nations' ancestral social structures were communal, and tax is a mechanism that is foreign to a culture in which the materials necessary for survival are openly shared. Consequently, First Nations have a right not to be taxed because the absence of taxation is a defining feature of Aboriginal culture, which culture would be fundamentally altered if taxes were imposed.[19]

It would seem that First Nations placed little if any value on material possessions where property was "owned" communally and shared amongst band members. For example, in the seventeenth century St. Lawrence River Valley, Aboriginal people were "generous among themselves" and "not attached to property as were their European counterparts". The Jesuit priest, Paul Le Jeune, reported as follows in 1634:

> [The Aboriginal people] are contented with a mere living, not one gives himself to the Devil to acquire wealth.... Moreover, if it is a great blessing to be free from a great evil, our [Aboriginal peoples] are happy; for the two tyrants who provide hell and torture for many of our Europeans, do not reign in their great forests—I mean ambition and avarice.[20]

At the risk of overgeneralizing, First Nations were content to live without material possessions and "made a show of not being attached to the riches of the

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regulations were invalid because the appellants' Aboriginal right to fish was protected by s. 35(1) of the *Constitution Act, 1982*.

18 On this point, Chief Justice Lamer stated the following, *supra* note 10 at para. 56:

> This aspect of the integral to a distinctive culture test arises from the fact that Aboriginal rights have their [bases] in the prior occupation of Canada by distinctive Aboriginal societies. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the Aboriginal community and society have their origins pre-contact.

19 Robert Reiter, *Tax Manual for Canadian Indians* (First Nations Resource Council, 1990) at 2.14.

20 Reuban Thwaites (ed.), *The Jesuit Relations and Allied Documents—Travels and Explorations of Jesuit Missionaries in New France* (Cleveland: Burrows Bros. Company, 1896) vol.VI at 231.

Earth". As such, their culture was not conducive to the political or tax structures that existed throughout Western Europe. Simply stated, First Nations had no need for political institutions on a European scale (since property was shared amongst band members).

We must ask whether the absence of taxation is either (*a*) merely incidental to First Nations' social structure because forced distribution of wealth was unnecessary, due to their communal existence, or (*b*) the result of a positive decision not to compel band members to contribute because First Nations valued the right to exist in the absence of forced taxation. If pre-contact First Nations simply neglected to contemplate the imposition of taxes, it would be difficult to argue that living tax-free was integral to their culture. On the other hand, if the prospect of "forced sharing" was taken under consideration and rejected in favour of voluntary contributions, an argument could be made that the right to go untaxed was a defining and central attribute of Aboriginal culture.

It is unlikely, however, that there exists an Aboriginal right to a tax exemption based upon practice or custom alone. Even if First Nations could demonstrate that they highly valued the practice of voluntary contributions, Subsection 35(1) of the *Constitution Act, 1982* recognized and affirmed only those rights existing in 1982. By 1982, neither the absence of commercial transactions, nor the absence of "forced sharing", was integral to Aboriginal culture. This is borne out by the fact that the tax exemption would not be an issue if Aboriginal people were not engaged in commercial transactions involving income and profits, because tax only accrues on taxable income.

Moreover, various statutes and declarations have contemplated the taxation of Indians "sufficiently intelligent to be capable of managing their own affairs"[21] and granted bands limited powers of taxation.[22] Perhaps the most compelling

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[21] For example, section 14 of the *Act to Encourage the Gradual Civilization of Indian Tribes* S.C. 1857, c. 26 states:

> 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 his other property.

This section arguably relates more to the extinguishment of the right to be tax exempt, but in any event it serves to illustrate the point that any such right has a questionable basis under the rules extant: Richard Bartlett, *Indians and Taxation in Canada*, 3rd ed. (Saskatoon: Native Law Centre, 1992) at 2.

[22] Subsection 10(11) of the *Indian Advancement Act, 1884* S.C. 1884, c. 28, conferred limited powers of taxation upon Indian bands. This section now appears in modified form in s. 83 of the *Indian Act* R.S.C. 1985 (4th Supp.), c. 17 which reads:

> 83.(1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

evidence that the absence of taxation was not a defining feature of Aboriginal culture by 1982 is the Federation of Saskatchewan Indians 1977 declaration that:

> 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 powers to:
>
> 1. Determine the form of government;
> 2. Define the conditions of government;
> 3. Regulate the domestic relations of its members;
> 4. *Levy and collect taxes*[23] [emphasis added].

Accordingly, it would appear that the absence of taxation was not a defining feature of Aboriginal culture by 1982 and cannot, therefore, be recognized and affirmed by Section 35 of the *Constitution Act*.

B. Title Based on Occupation: *Delgamuukw v. British Columbia*

That there exists an Aboriginal right to a tax exemption on the basis of practice, custom or tradition is unlikely. It is necessary, therefore, to assess whether such a right might exist regarding Aboriginal title to the land.[24]

There is an important distinction between "lands to which First Nations have retained title' and 'Indian reserves".[25] The latter refers to the lands defined

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> (a) subject to subsections (2) and (3), *taxation for local purposes of land*, or interests in land, in the reserve, including rights to occupy, possess, or use land in the reserve... [emphasis added].

[23] Federation of Saskatchewan Indians, "Indian Government" (Prince Albert: 1977), cited in *Bartlett*, *supra* note 21 at 19.

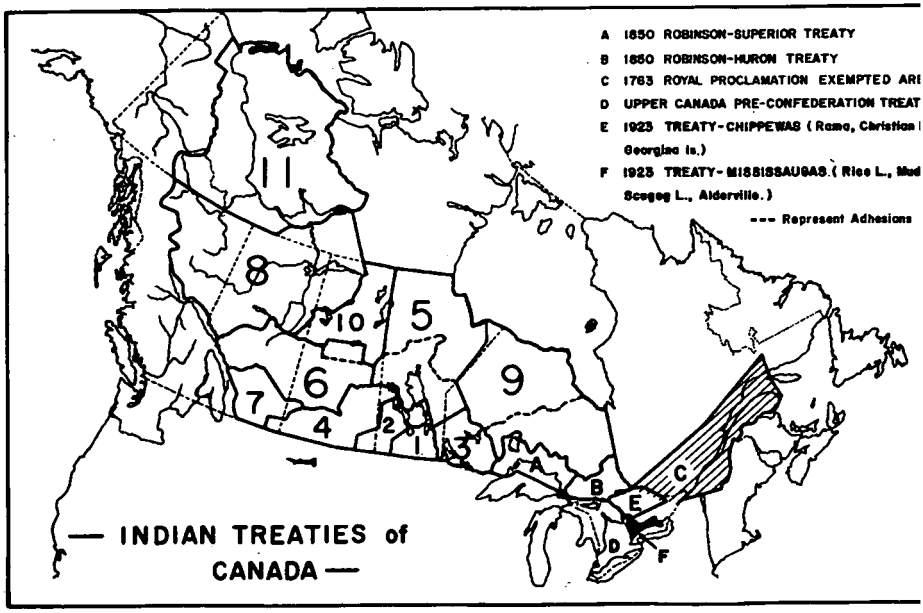
[24] This is the third of the three categories of Aboriginal rights as enunciated in *Delgamuukw*, *supra* note 13.

[25] Brian Slattery observed:

> North American lands claimed by the Crown were initially of two types. First, there were the Indian Territories, where the Crown held the ultimate title and an exclusive right of purchase, and the native peoples held rights of possession.... Second, there were the lands that have been withdrawn from the Indian Territories and made available for settlement ("General Lands"). Such lands were governed by European style land systems under which title was in principle derived from Crown grant.... These two categories of lands, "Indian Territories" and "General Lands", were at an early stage supplemented by a third category: "Indian Reserves". An Indian Reserve [is] land that has become permanently attached to a particular group of native people. [A]n Indian Reserve cannot be lost by its title holders simply by non-occupation.

under Subsection 2(1) and referred to under Section 18 of the *Indian Act*, whereas the former concerns the lands occupied by First Nations prior to the Crown's assertion of sovereignty that have not been the subject of proclamations, statutory provisions, or treaties. As is evident in the following illustration, large portions of British Columbia, North West Quebec and Labrador have not been the subject of treaties or proclamations and are therefore open to claims of Aboriginal title.

The distinction between lands to which First Nations have retained title and Indian reserves is vitally important in the context of taxation because, as mentioned earlier, the exemption afforded under Section 87 is essentially restricted to reserves. If there exists an Aboriginal right to go untaxed *vis-à-vis* Aboriginal title, it would geographically extend the exemption over the lands to which First Nations have retained title. It is equally important to note, however, that the issue of Aboriginal title is limited to those areas where it has never been extinguished by treaties or other colonial instruments.



Source: Cumming & Mickenberg, *Native Rights in Canada.*

(Brian Slattery, "Understanding Aboriginal Rights"; 66 (1987) Can. Bar Rev. at 741–742).

The notion of Aboriginal title as a legal right was confirmed in the leading authority, *Calder v. Attorney-General of British Columbia*[26] and reaffirmed in *Guerin v. The Queen*.[27] In *Guerin*, Chief Justice Dickson, writing on behalf of Beetz, Chouinard and Lamer JJ., held that Aboriginal land title is a legal right derived from the Aboriginal peoples' historical occupation of their tribal lands and is not dependent upon legislative enactments or treaties.[28] The Supreme Court of Canada qualified its position, however, holding that Aboriginal title encompasses a beneficial interest in lands as opposed to absolute dominion.[29] The beneficial interest arising out of Aboriginal title is said to give rise to a fiduciary duty upon surrender, whereby the Crown is obligated to deal with surrendered land for the benefit of the surrendering First Nations.[30] (The fiduciary duty element is discussed in greater detail below in relation to treaties.)

Since the *Guerin* decision pointed to the existence of Aboriginal rights arising from Aboriginal title, we must ask how such title might be established. The question as to the proof required was a central issue in *Delgamuukw v. British Columbia*. In that case, fifty-one Gitskan and Wet'suwet'en chiefs appealed a judgment by the B.C. Court of Appeal, upholding the dismissal of the appellants' action against the Province of British Columbia. The appellants sought damages and a declaration of ownership, jurisdiction, and Aboriginal rights over 58 000 square kilometres of land.

In a controversial decision, Chief Justice Allan McEachern for the B.C. Supreme Court ruled that the appellants' Aboriginal rights were extinguished by colonial instruments by the time British Columbia joined the Confederation (1871). At the B.C. Court of Appeal, the appellants replaced ownership and

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26 *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, concerned a claim by the Nisga'a people of British Columbia that they possessed Aboriginal title in respect of their traditional homeland in the Nass River Valley. Six of the seven Supreme Court of Canada judges held that the Nisga'a did have a right to the lands in question, but the same judges split evenly on the issue as to whether the rights had been validly extinguished.

27 *Guerin*, *supra* note 11 at 335, involved the surrender, by the Musqueam Indian Band, of a portion of their reserve lands to the Crown so that the Crown could lease the lands to a golf club. The evidence showed that the lands could have commanded a much higher rent and the Supreme Court of Canada awarded the band $10 000 000.00 in damages.

28 Aboriginal title was also recognized in the Royal Proclamation of 1763, but *Calder* and *Guerin* confirmed that Aboriginal title has an independent basis in Canadian common law: Slattery, *supra* note 25 at 729.

29 The notion that Aboriginal title entails only a beneficial interest finds its roots in *St. Catherine's Milling and Lumber Co. v. R.*, 2 C.N.L.C. 541 (J.C.P.C), where the Judicial Committee of the Privy Council held that Aboriginal land title comprised a "personal and usufructory right, dependent upon the good will of the Sovereign" at 549: Thomas Isaac, *Aboriginal Law, Cases Materials and Commentary* (Saskatoon: Purich Publishing, 1990) at 3.

30 *Supra* note 11 at 136, *per* Dickson C.J.

jurisdiction claims with Aboriginal title and self-government claims. The Court of Appeal varied the trial court decision in finding the appellants' Aboriginal rights were not extinguished prior to 1871 and that they did possess non-exclusive Aboriginal rights in certain lands, but that Aboriginal title had not been established. The appellants appealed and in ordering a new trial the Supreme Court of Canada took the opportunity to establish a test to determine whether a claim for Aboriginal title could succeed.

The Court asserted that there are three principle types of Aboriginal rights, the first two relating to tradition and custom, and the third to indigenous peoples' historical occupation of land. Moreover, Chief Justice Antonio Lamer ruled that Aboriginal rights fall along a spectrum respecting their degree of connection with the land. He stated:

> At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land.... At the other end of the spectrum is aboriginal title itself *which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures*[31] [emphasis added].

The distinction between rights resulting from custom or practice and rights arising through title is important because, where Aboriginal title is established, there is no need to demonstrate that the activities or practices undertaken thereon are integral to the distinctive culture of the person charged.[32] In other words, there would be no need to demonstrate that being free from tax, for example, was integral to the distinctive culture of the group asserting title.

Proof of title might, therefore, carry with it a tax exemption in the form of an Aboriginal right. The question thus becomes: how is Aboriginal title established?[33] Chief Justice Lamer addressed the issue as follows in the *Delgamuukw* decision:

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31 *Supra* note 13 at 1019.

32 This point was duly noted by Lamer, C.J., when he stated, *ibid.* at para. 111:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. *Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies.* Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title [emphasis added].

33 The leading case on proving Aboriginal title is *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17 (F.C.T.D.), in which the Supreme Court of Canada established a stringent four-part test to prove the existence of Aboriginal title. Under the *Baker Lake* test, to establish Aboriginal title an applicant was required to demonstrate:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[34]

Accordingly, when it is demonstrated that land was occupied exclusively, prior to the Crown's assertion of sovereignty, there will exist an Aboriginal right to that land in the form of Aboriginal title. When such title is established, the claimants may engage in whatever activities they desire, the only limitation being that "the values which made the site worth occupying, and continue to make it worth occupying, for the Aboriginal people should not be destroyed."[35] In other words, the land in question cannot be used in such a manner as to cause it irreparable harm, *e.g.*, strip mining or contaminated waste disposal.

The law relating to Aboriginal rights is still unsettled and to suggest that there exists an Aboriginal right to be exempted from tax, even where title can be established, would be imprudent and strained; the issue has yet to come before the courts. A stronger argument for a tax exemption rooted in Aboriginal title arises out of the right to self-government that necessarily ensues. Such an argument might proceed as follows: since the Supreme Court of Canada has acknowledged the existence of Aboriginal title, and since Aboriginal title is a collective right,[36] there is an implied recognition that First Nations, not having surrendered their title, *must* have some degree of self-government.[37] How else than

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1. Membership in an organized society;

2. Occupation by the organized society over the specific territory over which Aboriginal title is being claimed;

3. Occupation by the organized society was to the exclusion of other organized societies; and

4. That the occupation was an established fact at the time English sovereignty was asserted.

It wasn't until the *Calder* decision that the test was relaxed and possession of the land in question was taken as proof of Aboriginal title: Isaac, *supra* note 26 at 5.

34 *Supra* note 13 at para. 143.

35 *Lambert*, *supra* note 14 at para. 22.

36 Aboriginal land rights attribute to groups of Aboriginal peoples a collective title. "The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands." *Slattery*, *supra* note 25 at 746.

37 *Lambert*, *supra* note 14 at para. 58.

through a governing body would the group asserting title allocate use of the land, determine which resources should be harvested, thrash out compensation under infringement and justification arrangements, and negotiate with the Crown, should the community desire to surrender a portion of its land in exchange for compensation?

Finally, if an Aboriginal right of self-government exists, then it too will be protected under Subsection 35(1). In turn, tax immunity may exist as a corollary of the right of self-government, whereby First Nations' self-government imputes a form of sovereignty resulting in immunity from taxation by other sovereign powers, including the Crown.[38]

To summarize, Aboriginal rights exist because First Nations were once independent, self-governing entities possessed of most of the lands that Canada now comprises. There are three principle types of Aboriginal rights, two of which flow from the practice of a traditional activity or custom integral to First Nations' distinctive culture. The third is derived from the occupation of lands where Aboriginal title was never extinguished by constitutional amendment, or voluntarily surrendered in exchange for other rights or compensation. One means of surrendering Aboriginal rights is through the process of treaty negotiation, which brings us to the second possible source of a tax exemption for First Nations.

III. TREATY RIGHTS

A common thread runs through the treaties negotiated between the Crown and First Nations: they almost invariably involve the surrender of Aboriginal title. Simply stated, such treaties record the exchange of First Nations' land for various guarantees and Crown concessions. As one commentator expressed:

> Canada and the United States came into being, not simply through the activities of incoming European powers, but through a complex series of interactions among various settler groups and Aboriginal nations.[39]

Prior to the execution of the original treaties, commencing in the 1850s, First Nations retained title to almost all of what is now Canada. The Crown's primary goal in negotiating post-Confederation treaties was to extinguish Aboriginal title, the existence of which was confirmed in the Royal Proclamation of 1763.[40]

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38 Robert Strother, *Aboriginal Tax Exemption Outside the Indian Act* (Toronto: Report of Proceedings of the Forty-Fifth Tax Conference, 1993) at 56:3.

39 Brian Slattery, "Aboriginal Sovereignty and Imperial Claims: Reconstructing North American History" (1991) 29 Osgoode Hall L.J. 681 at 701.

40 The Royal Proclamation states that in the interests of security within the colonies, First Nations were not to be "molested or disturbed in the Possession of such Parts of [North

> The need for such an extinguishment evolved from the recognition given to aboriginal rights by British colonial policy and subsequently confirmed by the Royal Proclamation of 1763. The language of real property law used in the treaties and the reports of the Government negotiators indicates that the purpose of the treaties was to extinguish Indian title in order that lands could be opened up to white settlement. The treaties, therefore, can be best understood as agreements of a very special nature in which the Indians gave up their land rights in exchange for certain promises made by the Government[41] [emphasis added].

By the early nineteenth century, Britain's stake in North America was far less tenuous than it had been, and the need to procure a military alliance with First Nations was subsumed by a drive to open frontiers to European settlers who were moving westward at a rapid pace.[42] In other words, the Crown required the land to which First Nations retained title and made the acquisition of those lands its primary objective in negotiating treaties with First Nations from approximately 1850 onward.[43]

Treaty No. 8, which was at issue in *Benoit*, was one of the so-called "Numbered Treaties" negotiated in the late nineteenth and early twentieth centuries. It relates to certain lands occupied by the Cree and Dene peoples, illustrated on the following page:

America] as not having been ceded to or Purchased by [the Crown]...." The Royal Proclamation was drafted out of recognition of Britain's then-precarious military position, and the need to establish peaceful relations with First Nations, whose friendship was a source of military advantage. Such is evidenced in a series of correspondence preceding the Royal Proclamation between Lord Egremont and the Lords of Trade. The correspondence reveals the British Government's concern that Aboriginal title be respected, so as to avoid disturbances with First Nations:

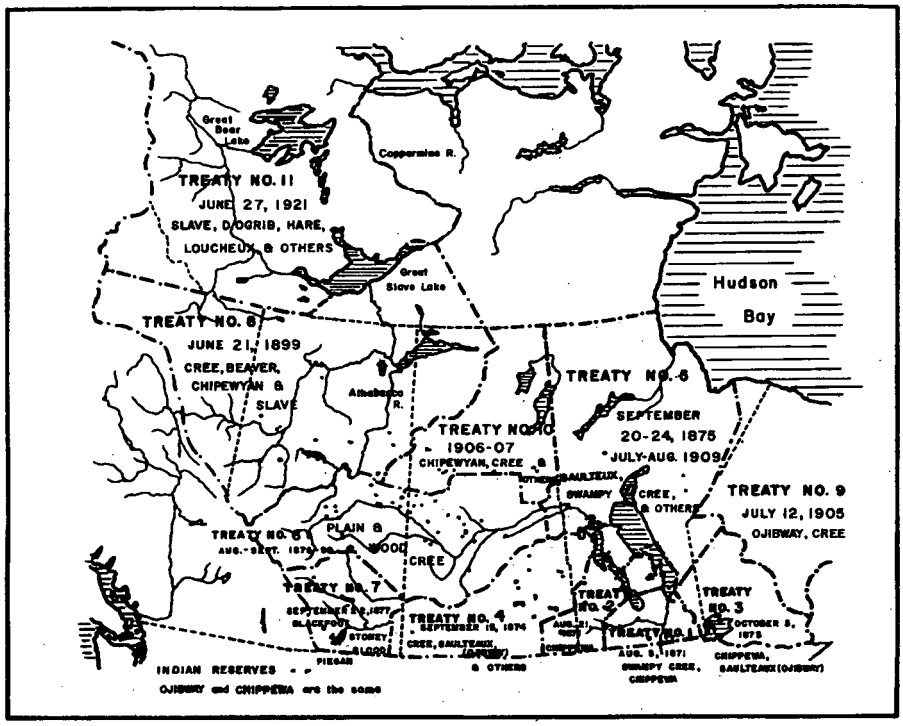
> The Second Question which relates to the Security of North America, seems to include Two Objects to be provided for; The first is, the Security of the whole against any European Power; The next is the Preservation of the internal Peace and Tranquility of the Country against any Indian Disturbances. Of these Two Objects, the latter appears to call more immediately for such Regulations and Precautions as Your Lordships shall think proper to suggest.

The British Government was thus motivated in 1763 to preserve Aboriginal title so as to quell First Nations' concerns about the influx of British settlers: Cumming & Mickenberg, *supra* note 9 at 26.

41 *Ibid.* at 53.

42 Peter Hogg, *Constitutional Law of Canada* (Scarborough: Carswell Student Edition, 1998) at 580.

43 In 1850 the Robinson Treaties were signed, followed by the numbered treaties (eleven in number) between 1871 and 1921: *ibid.* at 580.



Source: Cumming & Mickenberg, *Native Rights in Canada.*

Like Aboriginal rights, the treaties negotiated between the Crown and First Nations have been described as "*sui generis*".[44] They are different from international treaties,[45] and the term "treaty" should not be taken as conferring sovereign status upon First Nations.[46] Instead, treaties between the Crown and First Nations are more properly regarded as agreements between those two parties with the following characteristics:

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44 *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1043.

45 In *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 at 617, Davey J.A. held, "[A]n Indian treaty is not an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities."

46 Historically, the government did not regard First Nations as comprising sovereign states at the time the original treaties were negotiated. This is supported by the fact that, in the Commissioner's reports on the post-Confederation treaties, both the governmental representatives and the Aboriginal negotiators indicated that Aboriginal peoples were considered to be subjects of the Crown: Cumming & Mickenberg, *supra* note 9 at 54.

1. Parties: The parties to the treaty must be the Crown, on the one side, and an aboriginal nation on the other side.
2. Agency: The signatories of the treaty must have the authority to bind their principals, namely, the Crown and the aboriginal nation.
3. Intention to create legal relations: The parties must intend to create legally binding obligations.
4. *Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.*
5. Formality: There must be a certain measure of formality[47] [emphasis added].

The fourth characteristic encompasses the *quid pro quo* element of First Nations' treaties which, as Justice Campbell found in *Benoit*, is potentially the source of a tax exemption for Indians.

A. Explicit Exemption by Treaty Text (Oral or Written)

A useful starting point in determining whether the treaties negotiated between the Crown and First Nations confer a tax exemption is to examine the text of the treaties themselves. Unfortunately, with the exception of the more contemporary post-*Calder* treaties,[48] a tax exemption is not mentioned in the text of any treaty. There is, however, evidence of oral assurances and promises relating to taxation in relation to Treaty No. 8, for example, where "Report of Commissioners for Treaty No. 8" provides, in part, as follows:

> 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 not lead to taxation and forced 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.

The meaning of the above quoted passage, and whether its terms should be read into the text of the treaty, was a central issue in *Benoit*. Justice Campbell found that "from the evidence of the Treaty Report... it is reasonable to infer that there was concern amongst Aboriginal People in the Treaty 8 region about the payment of "tax", whatever that term can be interpreted to mean in the context of the time."[49]

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[47] Professor Hogg relied largely on *R. v. Sioui*, *supra* note 44 and *R. v. Simon* [1986] 1 C.N.L.R. 153 (S.C.C.) in compiling the five characteristics: Hogg, *supra* note 42 at 582.

[48] The James Bay (1975) and Northeastern Quebec (1978) agreements are but two examples.

[49] *Supra* note 1 at para. 35.

The Canada Customs and Revenue Agency has interpreted the commissioner's report narrowly to the effect that it represents only an assurance that Treaty No. 8 did not itself impose a tax, and not that it promised a tax exemption.[50] This narrow interpretation has met with criticism and is, in any event, probably inaccurate, given Chief Justice Dickson's pronouncement in *Nowegijick v. The Queen* that,

> ...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the [treaty] contains language which can reasonably be construed to confer a tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.[51]

Chief Justice Dickson cited an earlier American case in which the U.S. Supreme Court held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."[52] The notion that treaty language must be read in the sense that it would "naturally be understood by the Indians" is significant; it implies that oral assurances and promises should be construed into the terms of the treaties. This is, perhaps, the only means of rendering what was otherwise an unfair and inequitable process into something that does not reek of undue influence where, from the Aboriginal perspective, a foreign language and its vocabulary were involved.

The Crown possessed an unfair bargaining position in negotiating the numbered treaties. For example, First Nations did not historically place any emphasis upon written documentation of their rules and regulations, but instead relied upon oral evidence.[53]

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50 Robert Strother and Robert Brown, *Taxation of Aboriginal People in Canada* (Report of Proceedings of the Forty-Second Tax Conference, 1990 Conference Report) (Toronto: Canada Tax Foundation, 1990) at 47:13.

51 *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36.

52 *Jones v. Meehan*, 175 US 1 (1899).

53 Chief Justice Lamer provided the following account in *Delgamuukw* of the importance placed by First Nations in oral history and record keeping, *supra* note 13 at para. 85:

> [T]he Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time. In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige.... Oral accounts of the past include a good deal of subjective experience.

> Despite the insight and skill exhibited by their negotiators, it is clear that the Indians were not in an equal bargaining position with the Government. The Indians were a non-literate people and the concept of treaty was foreign to their culture.... The Indian culture followed the oral tradition and held verbal promises to be as binding as written promises. Their negotiators apparently relied upon the advice of missionaries and the North-West Mounted Police, neither of whom could be called disinterested parties.[54]

Simply stated, in the course of treaty negotiations it is reasonable to assume that First Nations did not appreciate the importance of inserting terms into the written body of a treaty and that they might well have understood that when oral assurances were made they automatically constituted a treaty provision.

Unfortunately, it is impossible to know for certain what the Aboriginal participants in early treaty negotiations thought they would receive in exchange for surrendering their title. Justice Campbell acknowledged as much, with regard to the Treaty 8 negotiations, stating as follows at paragraph 58:

> According to reports made at the time, on the next day, 21 June 1899, the Treaty Commissioners read aloud the written text of the Treaty and there was general dissatisfaction expressed by many of the Aboriginal People present. According to the Edmonton Bulletin, "after they had heard the terms read and were asked if they had anything to say, a hundred and one kicks were registered in as many minutes" (Edmonton Bulletin, 10 July 1899). [The Treaty Commissioner] described the situation as "critical". However, little detail was then reported by either Mr. Mair or the Edmonton Bulletin on the subsequent negotiations and so, on the written record, we know little of what was exactly said.

Moreover, at paragraphs 97 and 98 Justice Campbell observed as follows:

> During the negotiations, difficulties between the two parties to the treaty would have occurred because of language translation. For example, in Cree there is no word for "tax".... The Treaty Commissioners were unable to speak Cree or any other Aboriginal languages, so the job of explaining the Treaty to Aboriginal People fell to interpreters: in Lesser Slave Lake, Samuel Cunningham, Albert Tate and Father Lancombe were involved.

As such, the reason that such a wide berth must be given to the First Nations' perspective in interpreting early treaties is readily apparent.

> They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

54 Cumming & Mickenberg, *supra* note 9 at 122–123.

The following excellent overview of the principles to be followed in treaty interpretation, referred to by Justice Campbell in *Benoit*, is provided by Chief Justice McLachlin in *R. v. Marshall*:[55]

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.
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> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.
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> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068–69.
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> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.
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> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra* at paras. 52–54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.
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> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
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> 7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick*, *supra*.
>
> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra*, at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908.
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> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining [which] modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

Moreover, in *R. v. Badger*,[56] the Supreme Court of Canada indicated that oral assurances are important information in treaty interpretation and that, where appropriate, such assurances should be construed into the terms of a treaty.[57]

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[55] *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 78.

In rendering the *Benoit* decision, Justice Campbell acknowledged these principles and indicated four that were of particular importance in that case: (1) oral promises can be treaty terms; (2) finding the common intention of the parties is required; (3) treaty interpretation must be based on cogent evidence; and (4) in treaty interpretation the Honour of the Crown must be maintained.[58]

To summarize, the Supreme Court of Canada established in *Nowegijick* that a liberal approach is appropriate in interpreting treaties, and in *Badger* the Court confirmed that oral assurances made during treaty negotiations "are of great significance in their interpretation." It would stand to reason, therefore, that the oral assurances referred to in the commissioner's report concerning Treaty No. 8 should be read into the terms of that treaty. Also, the notion that the Aboriginal perspective should prevail in the face of vague or ambiguous language suggests that those assurances should confer a tax exemption, not mere recognition that Treaty No. 8 did not itself impose a system of taxation.

Finally, in light of the assurances and promises made by the Crown throughout the treaty negotiations generally, First Nations are at least entitled to a 'reasonable expectation' that the Crown should not act contrary to their fundamental interests.[59] This reasonable expectation flows not from the written terms of any treaty *per se*, but from the course of conduct between the principal actors in negotiating the treaties and the Crown's duty under the *Constitution Act 1867*, Subsection 91(24). The Supreme Court of Canada has indicated that 'reasonable expectations' give rise to fiduciary obligations that bear upon the parties to a treaty or contract.[60] For whatever reason, Justice Campbell did not emphasize the fiduciary duty concept in his ninety-four page decision.

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56 *R. v. Badger*, [1996] 1 S.C.R. 771. At issue in *Badger* was whether the treaty right to hunt provided a defence to a charge of hunting out of season and hunting without a license. The Court ruled that the right to hunt was a treaty right within the meaning of s. 35(1) of the *Constitution Act* and that the right to hunt for food, not put to an incompatible use (*e.g.*, used for commercial sale), was therefore protected.

57 The Court stated in *Badger*, *ibid.* at 792–793:

> The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.

58 *Benoit*, *supra* note 1 at paras. 11–16.

59 Peter Hutchins, David Schulze and Carol Hilling; "When Do Fiduciary Obligations To Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 20.

60 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 663. Mr Justice La Forest identified the reasonable expectation as being conclusive to the question of fiduciary obligations when he stated:

B. Implicit Exemption by Fiduciary Obligation

It would be grossly inequitable to expect that First Nations surrendered the lands to which they held title under the Royal Proclamation of 1763 for nothing more than what appears in the written terms of the early treaties.[61] First Nations did, after all, relinquish the rights to their lands and resources in negotiating the treaties, which, prior to the 1850s, composed almost all of what is now Canada. This must be acknowledged to underscore the magnitude of what was involved for Aboriginal participants in early treaty negotiations.

Therefore, additional consideration in the form of fiduciary duties should be read into the treaties if for no other reason than to minimize the disparity between the value of the lands and the consideration given in exchange.

> The existence of fiduciary obligations by the Crown should be presumed whenever Aboriginal peoples are constrained in exercising rights to lands or resources, or in the exercise of their internal or external sovereignty. This is because those constraints were either conceded by them in return for promises, or else the Crown has imposed them unilaterally and without justification. On the strength of the Crown's promises, Aboriginal peoples granted access to or agreed to share their lands and resources, agreed to be faithful allies, or agreed to put themselves under the protection of the European sovereign.[62]

Even with the addition of fiduciary duties to the list of obligations vested in the Crown, the treaty provisions are still inequitable. The Crown has long since acknowledged that First Nations deserve more than the texts of the treaties provide. These additional entitlements arise in the form of fiduciary duties, which are generated from the promises made by the Crown in exchange for Aboriginal title. After all, the Crown had nothing more than promises to offer First Nations in return for their lands.

> The visitors brought with them various goods and services—trade goods, military support, agricultural implements—and the ubiquitous promises: promises of protection, promises of civilization, promises of riches, promises of security. It was these promises and their acceptance by the Aboriginal peoples that laid the foundation for the fiduciary relationship between the parties and the resulting fiduciary obligations on the Crown.

> As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other.

61 For example, under the terms of Treaty No. 1, the Indians were to receive, *inter alia*, 160 acres of land per family of five, an initial payment of $3.00 per person, and a yearly annuity of $15.00 per family. Treaties 2 through 11 proceeded along much the same lines. This is hardly ample consideration for the surrender of land masses comprising an area the size of an entire province: Cumming & Mickenberg, *supra* note 9 at 122.

62 Hutchins, Schulze and Hilling, *supra* note 59 at 121.

> From ocean to ocean to ocean, on the strength of these promises, Aboriginal peoples granted access to, or agreed to share, their lands and resources, or agreed to be faithful allies, or to put themselves and their lands under the protection of the European sovereign. Through this process, the Crown took on the privilege and burden of being the sole beneficiary of any surrender of Aboriginal rights, titles or sovereignty.[63]

From the time when Europeans first set foot in North America, First Nations were expected to place their trust in the Crown and freely allow 'Canada' to engulf what was once their land.[64] It follows that the Crown should respect that trust by honouring its obligations to First Nations.

In *Guerin v. The Queen*,[65] the Supreme Court of Canada acknowledged the trust-like obligation assumed by the Crown when title is surrendered. The Court signalled that it was prepared to confront many of the basic unresolved issues concerning Aboriginal and treaty rights. Justice Dickson (as he was then) observed that:

> ...Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.... It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, *but it is also true... that the interest gives rise upon surrender to a distinctive fiduciary duty obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians*[66] [emphasis added].

The fiduciary duty is rooted in two originating factors: first, the existence of Aboriginal title, and second, the principle dating back to the Royal Proclamation of 1763 that Aboriginal title is inalienable, excepting, of course, when surrendered to the Crown. These together are the sources for the fiduciary obligation.

The Supreme Court of Canada reaffirmed *Guerin* in *R. v. Sparrow*,[67] stating as follows at 1099:

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63 *Ibid.* at 10.

64 Harold Cardinal provides a good synopsis of the First Nations' perspective on the importance of the Crown honouring its treaty obligations:

> To the Indians of Canada, the treaties represent an Indian Magna Carta. The treaties are important to us because we entered into these negotiations with faith, with hope for a better life with honour.... The treaties were the way in which white people legitimized in the eyes of the world their presence in our country. It was an attempt to settle the terms of occupancy on a just basis, legally and morally to extinguish the legitimate claims of our people to title to the lands in our country. H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) at 28–29.

65 *Supra* note 11.

66 *Ibid.* at 136.

67 *Supra* note 8.

> This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *Taylor and Williams* ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginal [peoples] is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Having established that a fiduciary duty arises upon the surrender of Aboriginal title, one is inclined to inquire into the scope of the obligation and ask what First Nations received in return for surrendering title. In addressing this question, one must be mindful of what the Crown gained from the treaty negotiations. As noted above, the Crown took title to the lands that eventually became the Prairie Provinces, a portion of western Ontario, and a portion of the North West Territories for its part in the Treaties numbered 1 through 11.[68]

Owing to the magnitude of what was at stake, it would not be excessive to suggest that the Crown's fiduciary duty should at least consist of a duty to ensure that the lands reserved for First Nations are not diminished in size. In his address at Lower Fort Garry in 1871, Lieutenant-Governor Archibald suggested as much when he explained the concept of the reserve system in the following terms:

> Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till the land and raise food, and store it up against a time for want. Your Great Mother, therefore will lay aside for you "lots" of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land[69] [emphasis added].

The Crown has long pointed to the duty to maintain reserve lands, as a means of justifying restrictions on Aboriginal title and to explain why the Crown acts as intermediary between First Nations and third parties.[70] In reality,

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68 Cumming & Mickenberg, *supra* note 9 at 119.

69 *Ibid.* at 121.

70 Dickson J., as he then was, drew attention to the restriction on alienation and its significance in *Guerin*, *supra* note 11 at 392, wherein he stated:

> The purpose of the surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been com-

the restriction on alienation actually served the Crown's interest because it prevented other European powers from usurping Aboriginal title and helped to preserve peaceful relations between the colony and First Nations when the Crown's existence in North America was precarious at best.[71]

That the Crown owes First Nations a duty to shield them from being dispossessed of the lands reserved for them was expressed in *Mitchell v. Peguis Indian Band*,[72] wherein Justice La Forest stated:

> [The] legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in possession and use of such lands as were reserved for their use.[73]

Implicit in the duty to protect reserved lands for "as long as the sun shall shine" is an obligation not to levy taxes upon First Nations, at least in respect of property located on a their reserves. This is a practical means of ensuring that the lands guaranteed to First Nations are not dwindled away because it is conceivable that, if Indian property on the reserve were liable to tax, a confiscatory charge could be placed on that property if taxes were not paid. This, in turn, could result in a forfeiture of that property under the garnishment provisions contained in the *Income Tax Act*,[74] thereby gradually chipping away at the Indian entitlement. Justice La Forest acknowledged that the *Indian Act* tax exemption exists for the purpose of guarding against the diminishment of reserved lands,[75] but he declined to comment on whether there was a corresponding fiduciary duty upon the Crown not to levy taxes.

The *quid pro quo* element relating to treaties, whereby valuable consideration must be provided to render a treaty binding, resonates in the *Mitchell v. Peguis* decision. Justice La Forest identified the surrender of Aboriginal title, and

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> mitted in purchasing Lands of the Indians to the great Prejudice of our Interest and to the Dissatisfaction of said Indians."

71 Slattery, *supra* note 25 at 753.

72 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

73 *Ibid.* at 131.

74 As contained in Part XV of the Act entitled "Administration and Enforcement", which include ss. 220–244.

75 To that end, Justice La Forest stated:

> In effect the sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like.

the protections owed in return, as forming the primary elements of the bargain in Indian treaties, stating:

> In summary, the historical record makes it clear that ss. 87 and 89 of the Indian Act, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on the Crown has always recognized that it is honour bound to shield Indians from any effort by non-natives to dispossess Indians of their property which they hold qua Indians, *i.e.*, their land base and the chattels on that land base[76] [emphasis added].

The terminology Justice La Forest employed is significant: phrases such as "bears the impress of an obligation" and "the Crown has always recognized that it is honour bound to shield Indians from any effort by non-natives" portend to the existence of a fiduciary duty. This implies that the provincial and federal governments, as non-Natives, must abstain from levying taxes in respect of property situated on a reserve, so as to negate the threat of dispossessing Indians of their reserved lands.

Unfortunately, Justice La Forest stopped short of saying that the Crown owes a fiduciary duty to provide a tax exemption, although he clearly implied that, in exchange for surrendering their title, the Crown owes First Nations a duty to protect their entitlements. This might suggest that the statutory protections afforded in Section 87, 89 and 90 of the *Indian Act* merely codify the fiduciary duty owed to First Nations to ensure that their lands are forever impervious to distraint.

In conclusion, by designating the tax exemption as a fiduciary duty arising out of treaty obligations, the rights flowing therefrom are, like Aboriginal rights, afforded constitutional protection under Subsection 35(1) of the *Constitution Act, 1982*. As a treaty right the tax exemption may only be withdrawn or infringed if that infringement is justifiable under the *R. v. Sparrow* doctrine.[77]

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[76] As *per* La Forest in *Mitchell, supra* note 72 at 132.

[77] It is important to note that the provincial government could not, under any circumstances, infringe upon a treaty right to a tax exemption. Under the current tax regime, both the federal and provincial governments impose income tax, as provided for by the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985 c. F-8. Because the collection agreement establishes that income tax levied by the provinces respectively is imposed under provincial, not federal, jurisdiction, the levying of provincial income tax is subject to being barred by the terms of any treaty, such as Treaty No. 8. This is owing to s. 88 of the *Indian Act*, which provides as follows:

> *Subject to the terms of any treaty*... 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 those laws are inconsistent with this Act.

> The justification analysis would proceed as follows. First is there a valid objective? Here the court would inquire into whether the objective of Parliament in authorising the department to enact regulations regarding [the infringement] is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example would be valid.... If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[78]

It might be possible to justify infringing upon a treaty-based tax exemption if levying a tax is necessary for preserving reserve infrastructures. For example, withdrawing the exemption under a revenue-raising objective required to provide reserve residents the services entitled to them, as *per* the terms of a treaty, might be acceptable. In any event, the second part of the *Sparrow* analysis would surely require that the tax be levied in a way that would never put reserved lands at risk of distraint.

C. Exemption According to the *Benoit* Decision

In *Benoit*, the court was asked to address one question: whether Treaty No. 8 entitled its benefactors to a tax exemption. It is obvious from his judgment that Justice Campbell took meticulous care in applying the principles of treaty interpretation.

As discussed earlier, although the treaty itself makes no reference to a tax exemption, the case turned on the parties' respective understandings of their obligations and entitlements under the treaty. Of central significance was the meaning and effect of the two particular references in the Treaty Report.[79]

> Hence, unless the federal government repeals s. 88 of the *Indian Act*, the existence of a treaty right to enjoy tax exempt status cannot be infringed by the provincial Crown.

78 *Sparrow*, *supra* note 8 at 1103–1104.

79 *Supra* note 1. The all important references provide as follows:

> 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 not lead to taxation and forced 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.

Justice Campbell found that the references provided "direct and cogent evidence of an 'assurance' being made to Aboriginal People by the Treaty Commissioners."[80] This led to the question as to what exactly was assured and whether the parties were in agreement regarding the nature of those assurances.

At the risk of playing devil's advocate, the meaning of those key passages in the Treaty Report is difficult to comprehend. For example, how could the Treaty Commissioners guarantee that the Treaty would not lead to any forced interference with the Aboriginal peoples' mode of life when the Treaty drastically confined Indian lands which would, in turn, naturally infringe their hunting and fishing rights and nomadic lifestyles? And what if the desire to live in the absence of taxation was a part of their way of life?

Furthermore, the fact that the Treaty did not open the way to the imposition of any tax can be taken two ways: (1) that the treaty itself did not impose any taxes; and (2) that by signing the treaty, and thereby allowing European colonization and politicization all around them, Aboriginal peoples would remain enclaved from the imposition of any of their taxes.

Justice Campbell concluded that the references contained in the Treaty Report were accepted by the Aboriginal peoples as a Treaty Promise and, as such, ought to be included as terms of the Treaty. He did so on the basis that oral assurances, where appropriate, should be construed into the terms of a treaty, as *per* Chief Justice Lamer in *R. v. Badger*,[81] which provides as follows at paragraph 52:

> The treaties, as written documents, recorded an original agreement that had already been reached orally and they did not always record the full extent of the oral agreement.... As a result, it is well settled that the words in a treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[82]

Having concluded that the tax assurances ought to be included as a treaty term, Justice Campbell set out to determine the meaning of the tax assurance. In so doing he rejected the expert evidence adduced by both sides as to the meaning of the tax assurances[83] and concluded that there existed a "fundamental misunderstanding" between the signatories as to the meaning of the assurances. He stated at paragraph 155:

> There is proof of common intention leading up to the signing of the Treaty. There is no doubt that both the Commissioners and the Aboriginal People shared the common

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80 *Ibid.* at para. 130.

81 *Supra* note 56.

82 *Ibid.* at para. 145.

83 *Ibid.* at para. 207.

> intention that it was necessary that a treaty be concluded on mutually acceptable terms and conditions. It is also fair to conclude that both the Commissioners and the Aboriginal People wanted to find accommodation with respect to the tax concern expressed by the Aboriginal side, and, indeed, since the negotiations were successfully completed, both understood that such an accommodation had been found. However, the problem lies in proving the content of the accommodation, not in proving that both sides believed it had been found.

Justice Campbell found that while the Commissioners did not intend to make the tax exemption a treaty promise, the Aboriginal participants in the negotiations believed that a tax exemption promise was extended.[84] Justice Campbell was persuaded in this regard by evidence provided by various elders, including Joseph Willier, whose uncle was a signatory to Treaty No. 8. Mr. Willier's testimony and an affidavit dated 13 August 1991 was admitted into evidence on the basis of the special status afforded to oral evidence of Aboriginal tradition and history.[85] The affidavit provides, *inter alia*, as follows:

> My father and his generation of leaders told me they were being paid for the land. The Commissioner promised that we would never have to pay tax. He said: "You will always be free from tax because you have already paid through selling your land." My uncles paid for those rights for us when they sold the land.[86]

As Justice Campbell was satisfied that there existed a misunderstanding between the parties as to the meaning of the tax assurance, his next task was to decide who should take responsibility for that misunderstanding.[87] In making this determination, he stressed two points: (1) that the honour of the Crown is always at stake in dealings with Aboriginal peoples and, as such, interpretations of treaties must be approached in a manner which maintains the integrity of the Crown; and (2) that treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories.[88]

As such, Justice Campbell found that the Crown should take responsibility for the misunderstanding and that Treaty No. 8 should be interpreted in such manner as to confer a tax exemption. He stated at para. 334:

> In my opinion, according to law and in its own interests and those of Treaty 8 Aboriginal People, Canada is required to recognize and fulfill the tax assurance as it was understood by the Aboriginal People in 1899. Accordingly, as claimed by the Plaintiffs, I find that the Treaty term found must be interpreted to provide to Aboriginal People

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84 *Benoit*, *supra* note 1 at para. 208

85 *Ibid.*, see paras. 211–212 for a synopsis of the law in relation to oral tradition evidence.

86 *Ibid.* at para. 227.

87 *Ibid.* at para. 320.

88 *Ibid.*, see para 321. Such an approach is in line with points two and four of Chief Justice McLachlin's guidelines to treaty interpretation provided in *Marshall*, *supra* note 55.

> who are entitled to the benefits of Treaty 8, a treaty right not to have tax imposed upon them at any time for any reason.

In the remainder of his decision, Justice Campbell addressed whether the right to the tax exemption might have been validly extinguished, or justifiably infringed, under a *Sparrow* analysis. The defendants postulated that the Treaty Right was "implicitly extinguished by the passage of the income tax legislation in 1915"[89] and that "considerations of economic and regional fairness" were a valid ground justifying the extinguishment of the tax exemption.[90] Justice Campbell found that the treaty right in question was not extinguished because there is no express legislative wording contained in the income tax legislation to extinguish the right, and that the treaty right was not incompatible with the tax legislation. On the question of justification, Justice Campbell stated:

> [T]o justify infringement of the Treaty Right in the present case, Canada is required to show: valid legislative objective; the Honour of the Crown is maintained in the infringement action taken; the right concerned has been infringed as little as possible; and, as is the case in conservation matters, some degree of consultation has taken place. I find that none of these requirements is met.

Justice Campbell's decision follows a cogent and careful analysis of the law relating to treaty interpretation. It recognizes that First Nations are entitled to more than the baubles and shiny objects afforded by the written terms of Treaty No. 8. Finally, and perhaps most importantly, the decision comports with the principle that treaties must be interpreted in a manner which maintains the integrity of the Crown.

As mentioned earlier, prior to *Benoit*, the courts recognized only the statutory source of the tax exemption. It is appropriate at this stage to examine briefly this all-important statutory provision.

IV. STATUTORY RIGHTS

The statutory tax exemption afforded First Nations is provided under Section 87 of the *Indian Act*, which reads:

> 87.(1) Notwithstanding any other Act of Parliament or any 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;

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89 *Benoit*, *supra* note 1 at para. 342.

90 *Ibid.* at para. 347

> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Hence, we are able to distinguish four constituent parts: (1) the levy or charge in question must qualify as taxation; (2) the person claiming the exemption must be an Indian or band; (3) the property in question must be either an "interest in a reserve or surrendered lands" or "the personal property of an Indian or band"; and (4) in the case of personal property, the subject matter must be "situated on a reserve". It is noteworthy that the term "personal property" includes all forms of incorporeal or intangible property, such as income (from business, investment or employment), annuities, shares, debts, and intellectual property.[91]

The statutory tax exemption derives from the historic commitment to shield the lands reserved for First Nations from erosion.[92] From its inception, the exemption attached to reserve lands that exemplifies that the underlying policy rationale was singularly purposive. In devising the exemption, legislators were unconcerned with the welfare of Aboriginal persons *per se*, intending only to shield reserved lands from erosion.

The exemption originally provided in 1850 remained unchanged until the advent of the first *Indian Act* in 1876,[93] Sections 64 and 65 of which provide as follows:

> 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 [emphasis added].

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[91] Howard Morry, "Taxation of Aboriginals in Canada", (1992) 21 Man. L.J. 426 at 428. However, until the landmark decision *Nowegijick*, *supra* note 51, the question remained as to whether "personal property" included taxable income.

[92] The earliest statutory tax exemption appears in *An Act for the protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S.C., 1850, c. 74. Section 4 provides as follows:

> IV. That no taxes shall be levied or assessed upon any Indian or any person intermarried 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 intermarried 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 [emphasis added].

[93] S.C., 1876, c. 18

> 65. All lands 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.

The policy ideal was thus maintained. Once again, legislators were apt to attach the exemption to reserved lands, which accounts for the following remarks by Justice La Forest in *Mitchell v. Peguis Indian Band*:[94]

> [The] legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763.
>
> The fact that the modern-day legislation, like its counterparts, is so careful to underline that the exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens.[95]

Indeed, the policy rationale for limiting the tax exemption to reserves is unmistakable: the exemption exists for no other reason than to protect reserved lands from distraint. The focus, therefore, in most litigation concerning the *Indian Act* tax exemption is 'location, location, location', with little if any regard for the litigant's personal circumstances, except insofar as they might denote a connection to a reserve.[96]

In 1951 the statutory exemption was rewritten[97] and appears in much the same form as contained in present *Indian Act*. In tracing the origins of the statutory exemption, we are able to account for the existing policy rationale and it is clear that the Crown's original aim was to shield Indians until such time as they were able to participate in Canada's commercial mainstream. That the exemption still exists, largely unchanged since 1850, suggests that the policy has failed and that it is time to re-think the tax treatment of First Nations and expose the paternalistic underpinnings at the root of many of the Crown's dealings with First Nations.

V. SUMMARY

There are three possible sources of a tax exemption for Aboriginal peoples: Aboriginal rights; treaty entitlements; and legislation. Until the *Benoit* decision

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94 *Mitchell*, *supra* note 72.

95 *Ibid.* at 131–132.

96 In *Williams*, *supra* note 5, the Supreme Court of Canada devised the so-called "connecting factors" test to determine whether income is situated in a reserve.

97 S.C., 1951, c. 29.

was released, neither the courts nor the Canada Customs Revenue Agency recognized a tax exemption on the basis of treaty entitlements. *Benoit* is, however, currently under appeal at the Federal Court of Appeal[98] and Justice Campbell's decision has been stayed pending final disposition of the appeal. The issue as to whether there exists an Aboriginal right to a tax exemption has yet to come before the courts.

Historical analysis explains why First Nations warrant special consideration within Canada's tax structure. First Nations sacrificed a great deal for European settlers. The benefit of the use of reserved lands and the corresponding guarantees as to their continued existence is just one form of compensation for giving the Crown a monopoly on the alienation of Aboriginal title. The *Benoit* decision recognizes another form of compensation: for the Crown to honour treaty obligations in the manner in which they were understood by First Nations when negotiating the treaties.

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[98] Under Court File No. A-47-02 [as of 31 May 2003].