Fiscal Decolonization-Indigenous Fiscal Autonomy and Tax Jurisdiction

by

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Abstract:

This thesis focuses on the relationship between Indigenous fiscal autonomy and self-determination. Indigenous nations' ability to achieve self-determination is dependent upon their ability to autonomously finance self-government. Unfortunately, Canada's colonial policies have weakened Indigenous economies and rendered them dependent upon the Crown. Due to Indigenous nations' lack of fiscal autonomy, Crown policies designed to promote Indigenous self-government have proven inadequate. This thesis argues for using the United Nations Declaration on the Rights of Indigenous Peoples as a blueprint for developing more equitable economic relations. While there are various elements to Crown-Indigenous economic relations, this thesis focuses on the distribution of tax jurisdiction between the federal government and the provinces to the exclusion of Indigenous nations. Taxation is an important factor in wealth creation and distribution that can play an integral role in helping Indigenous nations achieve fiscal autonomy. However, current laws influencing Indigenous taxation rights and exemptions are a continuation of Canada's colonization project. Therefore, facilitating Indigenous fiscal autonomy requires a reassessment of laws influencing taxation rights and exemptions as they apply to Indigenous nations. This thesis argues for using the principles contained within the United Nations Declaration on the Rights of Indigenous Peoples as a blueprint for developing laws recognizing Indigenous nations inherent right to control tax policy within their jurisdiction. The recognition of Indigenous nations' inherent right to control tax policy within their jurisdiction can be achieved by (1) exempting from federal and provincial taxation the personal property of members of Indigenous nations, without qualification; and (2) by signing agreements recognizing Indigenous nations' inherent right to tax corporate profits made on Indigenous lands.

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*Any errors or omissions are my own.

Chapter 1 - Introduction & Background

1.1-Introduction

This thesis begins with a quick note on terminology. The terms used to refer to the original inhabitants of North America have been evolving with the changing political landscape in Canada. The Canadian government has made use of the terms "Indian" and "Aboriginal" in reference to the original inhabitants of North America. These terms are found in legislation, case law, policy statements and the Constitution.

As part of the process of decolonization, it is necessary to attend to ways in which the original inhabitants of North America identify and self-define. While still in use, the terms "Aboriginal" and "Indian" have become outdated. Instead, the term Indigenous is preferred as it dissociates the identification of Indigenous peoples from colonial law and policy.[1]

This thesis uses the term "Indigenous" wherever possible to refer to the original inhabitants of North America. The term "Indigenous nation" will be used to refer to a group of Indigenous peoples with a shared identity and occupying a particular territory. However, when referring to cases, legislation, and the Constitution the terms used in those documents will be used in an effort to minimize confusion.

This thesis encourages Parliament to implement policies and legislation that give meaningful effect to Indigenous peoples' inherent right to self-determination and self-government. In order to meaningfully promote Indigenous peoples' right to self-determination and self-government Canada must promote Indigenous fiscal autonomy by redistributing taxation rights and exemption in a manner consistent with the United Nations Declaration on the Rights

[1] Colleen M Flood & Lorne Sossin, *Administrative Law in Context* 3rd ed (Toronto: Edmond Montgomery, 2018) ch 3 (Jenna Promislow & Naomi Metallic) at 88.

of Indigenous Peoples.[2] Indigenous fiscal autonomy is an essential element of meaningful self-government without which Indigenous peoples' right to self-determination cannot be achieved.[3] Therefore, this thesis argues for enacting laws which facilitate Indigenous fiscal autonomy. Facilitating Indigenous fiscal autonomy will help redefine the Indigenous-Crown relationship from one of dependence to one of cooperation and, therefore, promote self-determination and self-government.[4]

Addressing the topic of tax jurisdiction is important not only because it raises issues of representation and citizenship,[5] but also because societies have used taxation to establish control over lands and people.[6] In Canada, the distribution of tax jurisdiction has been used to undermine Indigenous peoples' interests in their lands and resources. For example, the *Constitution Act, 1982* distributes tax jurisdiction between two orders of government, federal and provincial.[7] And

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[2] Canada, Crown-Indigenous Relations and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Policy) online: Government of Canada <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#PartI> [Self-government Policy]. Canada recognizes Indigenous peoples' inherent right to self-government. However, Canada maintains that self-government can only be achieved through negotiations.

[3] Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol 2 (Ottawa: Ministry of Supply and Services, 1996) at 290-93 [Report of the Royal Commission].

[4] Dean Neu & Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Black Point, Nova Scotia: Fernwood Publishing, 2003). Currently, Indigenous-Crown relations are overwhelmingly defined by Indigenous dependence on federal monetary policy. This is a result of years of mismanagement and outright theft committed by the Crown.

[5] John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Toronto: LexisNexis, 2018) at 947 [Borrows, "Aboriginal Legal Issues"].

[6] Allison Christians, "Introduction to Tax Policy and Theory" (2018) Social Science Research Network at 15-16, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791>; See also EA Heaman, *Tax, Order and Good Governance: A New Political History of Canada, 1867-1917* (Montreal & Kingston: McGill-Queen's University Press, 2017) at 88-95 & 117. For example, in Canada's early tax history it is clear that in places such as British Columbia the electorate, mainly white settlers, attempted to establish a "white rule" and used the tax system to accomplish their goals. This is succinctly summarized by Heaman in the following passage: "The state chose fiscal policy as a privileged place to negotiate with public prejudices and translate them into finely calibrated, legally rigorous criteria for citizenship. Taxation provided a crucial initial mediation between the cultural labels attached to the categories "Chinese' and "Indian" and the **exercise of state coercive power**." See also, *An Act to Amend the Dominion Elections Act*, 1938, SC 1950, c 35, s 1. The federal franchise allowing Indigenous peoples to vote would not be extended to Indigenous peoples **UNLESS they waived their tax exemption under the *Indian Act***.

[7] *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 91(3), 92 (2) [*Constitution Act*].

unlike the United States of America, Canada, with minor exceptions, does not recognize Indigenous nations' authority to tax non-Indigenous persons conducting business on Indigenous lands. Limiting tax jurisdiction to federal and provincial governments means that Indigenous governments have no inherent right to raise revenue, an essential element of self-government.[8] While negotiated agreements are Canada's preferred method of giving effect to Indigenous peoples' inherent right to self-government and determination,[9] it is necessary to enact legislation recognizing and protecting Indigenous governments' tax bases until such agreements are concluded.

The current fiscal arrangement provides little room for the development of Indigenous fiscal autonomy. Instead of recognizing Indigenous nations' inherent right to control economic policy within their own jurisdiction, Canada has pursued a policy of assimilation by limiting Indigenous nations' ability to raise revenue through taxation and by allowing federal and provincial governments to tax value derived from Indigenous lands and resources, undermining Indigenous nations' tax base and wealth.[10]

This thesis focuses on the legal rules governing Indigenous nations' tax relations with Canada. Most of these rules can be found in the *Indian Act* and *Income Tax Act*.[11] The *Indian Act*

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[8] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 950; See also, *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 100 SCt 2069, 65 Led 2d (1980) (Colville) [*Washington*]. The United States Supreme Court recognizes that Indigenous government power to tax is necessary to self-government and territorial management.

[9] Self-government Policy, *supra* note 2.

[10] While section 87 of the *Indian Act* prevents the federal and provincial government from taxing Indigenous interests on reserve, the protection does not extend to interests held by corporate entities. See *Indian Act*, RSC 1985, c I-5, s 87.

> 87 (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
> (b) the personal property of an Indian or a band situated on a reserve.

[11] Certain provisions within *Income Tax Act* have been interpreted to provide Indigenous nations with broad tax exemptions in order to facilitate self-government. Paragraph 149(1)(c) of the *Income Tax Act* exempts public bodies from liability for Part I income tax. It has been the Canada Revenue Agency's policy since 2016 to consider Indigenous

contains provisions exempting Indigenous persons and bands from taxation and provisions permitting Indigenous bands to impose tax in very limited circumstances. For example, the *Indian Act* provides First Nations peoples and bands with tax exemptions for the personal property situated on reserve.[12] The purpose of the exemption reflects Canada's paternalistic attitude towards Indigenous peoples. The exemption is designed to protect property allocated to Indigenous peoples by the federal government. It is not designed to facilitate self-government or economic development.[13] Furthermore, the exemption is limited in two important ways. It only applies to "Indians" as defined by the *Indian Act* and it only applies to personal property situated on reserve.[14] In this thesis I argue for enacting laws exempting members of Indigenous nations from federal and provincial taxation without qualifications and laws recognizing Indigenous nations' right to tax corporations deriving value from Indigenous lands and resources.

Provisions within the *Indian Act* permitting Indigenous government to impose property tax is a recent development that is reflective of Canada's effort to provide Indigenous nations with greater fiscal autonomy. A series of amendments to the *Indian Act* known as the Kamloops Amendments allowed Indigenous nations to impose real property tax on non-Indigenous businesses on reserve.[15] The purpose of the Kamloops amendments is to facilitate Indigenous nations' ability to self-govern.[16] This thesis argues that Indigenous taxation jurisdiction must go

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bands public bodies. See *Income Tax Act,* RSC 1985, c 1 (5th Supp), s 18(1)(b); See also, Canada Revenue Agency, Interpretation Bulletin, IT-064503117, "Indian Act Bands" (July 27, 2016).

[12] *Ibid*.

[13] *Williams v Canada*, [1992] 1 SCR 877 at 885, 90 DLR (4th) 129 [*Williams 1*]. The Supreme Court states that the purpose of section 87 was to "preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of government to tax. …"; See also, *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161 at para 8, 161 DLR (4th) 193.

[14] *Indian Act*, *supra* note 10 s 2.

[15] See *Ontario Lottery and Gaming Corporation v Mississaugas of Scugog Island First Nation*, 2019 FC 813 at para 10. See also, Bill C-115, *An Act to Amend the Indian Act* (Designated Lands), SC 1988, amending the *Indian Act*, RS, c I-6, as amended.

[16] *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 18, 122 DLR (4th) 129 [*Canadian Pacific*].

beyond municipal style property taxation powers for meaningful self-determination. This can be facilitated by enacting laws recognizing Indigenous nations' inherent right to their tax base.

In arguing for recognizing and giving effect to Indigenous nations' inherent right to control tax policy on Indigenous territories, I rely on the *United Nations Declaration on the Rights of Indigenous Peoples*,[17] section 35 Aboriginal Rights and policy arguments furthering the government's goal of reconciliation.

Chapter 2 highlights the limitations of section 35 Aboriginal rights jurisprudence in the promotion of Indigenous peoples' right to self-determination. The assertion of Crown sovereignty over Indigenous peoples created conflicts in the areas of governance, rights to resources and land. To minimize conflict and reconcile the prior existence of Indigenous peoples with the assertion of Crown sovereignty, Canada enacted section 35 of the *Constitution Act, 1982*. Unfortunately, the Supreme Court of Canada has defined "Aboriginal rights" too narrowly and, as a result, the evolution of section 35 jurisprudence has followed a path which fails to consider and rectify the historic wrongs committed by the Crown towards Indigenous peoples. Therefore, Section 35 has been inadequate in promoting Indigenous peoples right to self-determination and self-government.

In Chapter 3, I argue that Canada's obligations as a signatory under the United Nations Declaration on the Rights of Indigenous People require it to take positive actions to implement the UNDRIP. Article 3 recognizes Indigenous peoples' right to self-determination, which includes their right to freely pursue their economic development.[18] Article 4 recognizes the need for mechanisms by which Indigenous governments finance their autonomous function.[19] In

[17] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st Sess. Annex, UN Doc A/Res/61/295 (2007) ("United Nations Declaration on the Rights of Indigenous Peoples (2007)").
[18] *Ibid*, art 3.
[19] *Ibid*, art 4.

order to respect Indigenous peoples' inherent right to self-determination, it is necessary to provide Indigenous peoples with the ability to achieve fiscal autonomy so that they can pursue their economic and social development free from federal and provincial interference. Granting Indigenous nations tax jurisdiction over their own citizens and over businesses deriving value from Indigenous lands can help in the promotion of Indigenous fiscal autonomy and the implementation of UNDRIP.

Chapter 4 looks at Canada's fiscal constitution, defined by the OECD as "the body of fundamental laws and regulations that frames decision-making in the area of fiscal policy,"[20] identifying its insufficiencies and making recommendations for aligning it with UNDRIP and the Canadian government's promise to recognize Indigenous peoples right to self-determination. This thesis argues for an arrangement that (1) creates the conditions necessary for Indigenous autonomy within Canada's federal structure;[21] and (2) recognizes the unique relations Indigenous nations have with the Canadian government. Part 1 of Chapter 4 provides a brief overview of where Indigenous nations fit within Canada's fiscal landscape. It explores the fiscal arrangements present within Canada with a focus on federal and provincial money raising and spending powers and explores fiscal federalism as it governs federal-provincial social and economic policies. Part 1 concludes by arguing that the current fiscal structure fails to promote or respect Indigenous peoples' right to self-determination and government. Part 2 canvasses the special relationship Canada has to Indigenous peoples. Canada's relationship to Indigenous peoples requires it to not only alter its approach to funding Indigenous services but also take

[20] Hansjörg Blöchliger and Junghun Kim, *Fiscal Federalism 2016: Making Decentralisation Work* (Paris: Organisation for Economic Co-operation and Development, 2016), at 32.
[21] This approach is in line with Canada's promise to implement self-government. Canada's approach to the implementation of Indigenous peoples' inherent right to self-government does not include a right of sovereignty. The government's approach or goal is to include Indigenous government within the Canadian confederation. See Self-government policy, *supra* note 2.

steps recognizing Indigenous sovereignty over fiscal matters falling within Indigenous jurisdiction, which includes taxation rights.

In section 1.2, I offer a brief overview of the circumstances giving rise to Canada's unique relations with Indigenous peoples, which serves as the foundation for the arguments to come. I do so by exploring some of the events resulting in Indigenous financial dependence and the laws and regulation used to control Indigenous finances. This will provide the reader with the context necessary to understand the problems with Canadian laws controlling access to Indigenous taxation rights. By understanding how Canada's tax laws are an extension of colonial policies of control and assimilation, the reader will better understand the importance of legislation recognizing Indigenous peoples **inherent** right to fiscal autonomy free from state interference and control.

1.2-Background

1.2.1-Canada's Assault on Indigenous Fiscal Autonomy

The purpose of enacting laws recognizing and giving effect to Indigenous nations' tax rights is to promote Indigenous peoples' right to self-determination. Self-determination cannot be achieved without effective self-government and effective self-government cannot be achieved without fiscal autonomy.[22] This is most clearly elucidated by the words of Chief Clarence T. Jules of the Kamloops First Nation: "We want control of our destiny and a peaceful co-existence with Canadian society. For this to happen, First Nations must have an equitable share of lands, resources and jurisdiction, and fiscal capability to fulfill their responsibilities as self-determining peoples."[23]

[22] See Report of the Royal Commission, *supra* note 3. Chief Jules position is evident in the report of the royal commission on aboriginal peoples. Chief Jules' position is that effective self-government cannot be achieved without fiscal autonomy. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1011.
[23] See Report of the Royal Commission, *supra* note 3 at 290-93.

This section describes the process by which colonial governments created a relationship of dependence with Indigenous peoples: a relationship that has been used to steal Indigenous resources and pursue policies of cultural genocide. This is accomplished by (1) highlighting the interconnection between land, Indigenous culture, and fiscal autonomy; (2) summarizing the process by which the British and Canadian governments acquired Indigenous lands and resources, with the ultimate result of diminishing Indigenous fiscal autonomy and cultural identity; and (3) the bureaucratic mechanisms the British and Canadian governments used and continue to use to assimilate Indigenous peoples into Canadian society.

The theft of Indigenous lands and the forceful assimilation of Indigenous peoples into Canadian society was facilitated by the interconnection between the loss of lands, the loss of fiscal autonomy and cultural genocide. This thesis argues that the loss of lands resulted in a loss of fiscal autonomy which created the conditions allowing the federal government to pursue policies of cultural genocide. It will be argued that the destruction of Indigenous cultures exacerbated the loss of lands and fiscal autonomy. By regaining fiscal autonomy, Indigenous nations can rebuild and develop their economic, political, and social institutions free from federal and provincial interference.[24]

1.2.2-Interconnections Between Land, Fiscal Autonomy & Indigenous Cultural Identity

The unique relationship between Indigenous peoples and their lands required colonial governments to engage in a series of economic, political and social actions targeted at destroying Indigenous cultures.[25] Unlike European societies, Indigenous societies believe in the

[24] *Ibid*. A government dependent upon others cannot freely pursue its own economic and political objectives.
[25] Neu, *supra* note 4 at 15. See also, Wendy Moss & Elain Gardner-O'Toole, Law and Government Division November 1987, *Aboriginal Peoples: History of Discriminatory Laws*, online: < http://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#2.%20Restricted%20Right%20to%20Sell%20Agricultural%20Products(txt)>.

interconnectedness of all things.[26] The interconnections inherent in Indigenous worldviews are best explained by Chief John Snow, a member of the Stoney Indian Reserve in Alberta, who explains that members of the Stoney Indian Reserve do not lead a fragmented, compartmentalized life. For example, the social structure governing members of the Stoney Indian Reserve ensures that economic, political, religious, and environmental concerns are all interconnected and observed with every activity.[27] Furthermore, land and nature hold a special place in Indigenous societies. The centrality of land in Indigenous societies is elucidated through the following statement made by Shawnee leader Tecumseh: "No tribe has the right to sell, even to each other, much less to strangers. … Sell a country! Why not sell the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children."[28] Since land is an integral part of Indigenous peoples' culture, colonial governments have pursued policies of cultural genocide to facilitate the acquisition of Indigenous lands.[29]

In aggressively pursuing policies of cultural genocide, colonial governments used a variety of tools and methods to destroy Indigenous cultures.[30] However, the most important

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[26] For example, the social and political importance of the connection between humans and nature is reflected in principles of Anishinabek law which regards some places on earth as sentient. In other words, earth has a legal personality that must be consulted and respected when making decision on how to use the land. See Basil Johnston, *Ojibway Heritage*, (Toronto: McClelland and Stewart, 1976) at 24-25.

[27] Chief John Snow, *These Mountains Are Our Sacred Places: The Story of the Stoney Indians* (Toronto: Samuel Stevens, 1977) at 2-3, 12-13. See also, Manitoba, The Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Queen's Printer, 1991) ch 5 at 115-116 [Manitoba Report]. Land is inseparable from Indigenous cultures and identity.

[28] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 183. See also, FW Turner III, ed, T*he Portable North America Indian Reader* (Harmondsworth, England: Penguin, 1977) at 246.

[29] Canada, Report of the Royal Commission on Aboriginal Peoples, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Montreal & Kingston: McGill-Queen's University Press, 2015); See also, Neu, *supra* note 4 at 15. In this thesis the term "cultural genocide" is used to refer to economic, political and bureaucratic mechanisms that have been used to erase Indigenous cultures; See also, John Paul Tasker, "Residential School findings point to 'cultural genocide,' commission chair says' *CBC* (29 May 2015), online: < https://www.cbc.ca/news/politics/residential-schools-findings-point-to-cultural-genocide-commission-chair-says-1.3093580>.

[30] Some of the methods used by colonial governments include placing bounties on Indigenous scalps, suppression of cultural practices, containment of populations, residential school systems, and creation of the reserve system. See Jon Tattrie, "Edward Cornwallis" (January 13, 2008) in *The Canadian Encyclopedia*, online: < https://www.thecanadianencyclopedia.ca/en/article/edward-cornwallis>; See also, René R Gadacz, "Potlash" in *The*

element was the destruction of Indigenous fiscal autonomy/livelihoods.[31] For example, through laws and regulations Canada criminalized traditional Indigenous economic activities such as trading in tobacco.[32] The use of laws and regulations to undermine Indigenous fiscal autonomy facilitated and accelerated the theft of Indigenous lands. The loss of Indigenous lands and Indigenous dependence allowed colonial governments to pursue policies of cultural genocide.[33] From an economic perspective, the importance of land cannot be overstated as the loss of lands and rights associated with land ownership have resulted in the loss of fiscal autonomy and the creation a relationship of dependence between Indigenous peoples and the Crown.[34] For example, the loss of land often entailed a loss of traditional rights associated with the lands such as fishing, hunting, trapping, etc.[35] This resulted in extreme economic hardship for Indigenous

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Canadian Encyclopedia (7 February 2006), online: < https://www.thecanadianencyclopedia.ca/en/article/potlatch>; See also JR Miller, "Residential Schools in Canada" in *The Canadian Encyclopedia* (10 October 2012), online: < https://www.thecanadianencyclopedia.ca/en/article/residential-schools>; See also Harvey A McCue, "Reserves" in *The Canadian Encyclopedia* (31 May 2011), online: < https://www.thecanadianencyclopedia.ca/en/article/aboriginal-reserves>.

[31] Neu, *supra* note 4 at 32. Colonial governments have done everything in their power in order to destroy Indigenous economies and render Indigenous nations dependent upon the Crown. For example, in addition to the theft of land, colonial governments have criminalized Indigenous trade in certain goods such as tobacco. See also Yellow Head Institute, *Cash Back* (2021), online: <https://cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Cash-Back-A-Yellowhead-Institute-Red-Paper.pdf> [Yellowhead].

[32] As recent as 2014 Canada was still promoting legislation hindering Indigenous economic activities. See e.g. Bill C-10, *An Act to amend the Criminal Code*, 2nd Sess, 41st Parl, 2014, (assented to 6 November 2014), SC 2014, c 23. Bill C-10 introduced harsher penalties for trafficking in contraband tobacco.

[33] Yellowhead, *supra* note 31 at 29. For example, The North-West Mounted Police (a para-military force established in 1873 to maintain order), sought to control Indigenous nations in the prairies by depriving Indigenous nations from access to bison. The Crown criminalized the trade in alcohol, which used bison hide. These efforts lead many Indigenous nations to the brink of starvation, forcing them to negotiate with colonial governments for the surrender of lands and/or rights associated with land.

[34] Indigenous peoples living on reserves remain among the poorest groups within Canadian society. The median income of Indigenous persons living on reserve is less than half that of non-indigenous populations. This is a result of long-standing Crown conduct which has undermined Indigenous people's traditional ways of life and livelihoods. See Canada, Indigenous Services Canada: Annual Report to Parliament 2020, online: < https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711#chp3> [ISC Annual Report 2020]. Indigenous peoples are now dependent upon the of the federal government to have the most basic of services on reserve lands. See, *Constitution Act*, *supra* note 7 s 91(24). There is a significant lack of accountability in areas where the federal government exercises its responsibility over Indigenous peoples. See Flood, *supra* note 1 ch 3 at 93.

[35] See e.g. *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 [*Marshall*]. This is one of many cases involving a situation where government regulations have interfered with Indigenous peoples' ability to engage in traditional activities for moderate livelihoods. The implementation of government regulations interfering with Indigenous peoples' ability to sustain themselves has been a constant issue in Indigenous Crown relations. Other examples include logging and hunting regulations. See e.g. *Forests Act*, RSNS, c 179. While conservation or resource

peoples that has been exploited by the Crown to assimilate Indigenous peoples into mainstream Canadian society.[36]

The destruction of Indigenous fiscal autonomy created a relationship of dependence through federal funding mechanisms allowing the federal government to remodel Indigenous societies. For example, in order to pursue its colonial objectives in what is now known as Canada, colonial governments provided Indigenous nations with annuity payments. These payments came in the form of presents, as opposed to money. This was a deliberate design mechanism allowing colonial governments to incentivize "civilized" behaviour.[37] This is most clearly elucidated by changes in annuity payments leading up to confederation where it was necessary to change the hunter and gatherer lifestyles of Indigenous peoples in order to acquire their lands. In remodelling Indigenous society, colonial governments shifted from supplying items such as clothing, hunting supplies and blankets, to building supplies and agricultural tools.[38] More recently, Canada maintains its ability to remodel Indigenous societies through unilateral funding agreements.[39]

1.2.2A-Loss of Lands and Economic Dependence[40]

The loss of Indigenous lands and resources is a result of concrete efforts of the Crown to dispossess Indigenous peoples of land and to a much lesser extent misunderstandings between

management statutes are well intentioned, they have the effect of undermining Indigenous livelihoods. There are now limited exceptions where aboriginal rights are concerned. However, this is a very recent development that accompanied the constitutional entrenchment of aboriginal rights. See *Constitution Act*, *supra* note 7 s 35.

[36] Neu, *supra* note 4 at 87.

[37] Neu, *supra* note 4 at 19.

[38] Neu, *supra* note 4 at 62. These changes have been described by colonial administrators of Great Britain as "active steps to civilize and educate the Indians…"

[39] See e.g. Russell A Evans, "Budgeting Practices in Canadian First Nations Settings: A Study of the Persistence of Arbitrary-set Social Hierarchies", online: <https://www.ryerson.ca/content/dam/tedrogersschool/cpao-symposium/Budgeting-Practices-in-Canadian-First-Nations-Settings-Evans.pdf>.

[40] See Yellowhead, *supra* note 31 at 34-46.

Indigenous peoples and the Crown.[41] The loss of lands can be broken down into two periods: (1) pre-confederation and (2) post-confederation. Pre-confederation, Britain engaged in two forms of bargaining with Indigenous peoples: (a) the purchase of land; and (b) the exchange of goods for military support.[42] These were necessary transactions for the success of Britain's colonial ambitions which necessitated Indigenous military support against other imperialist nations including France and subsequently the United States.[43] While misunderstandings were present in land transactions,[44] the defeat of France removed pressures incentivizing Britain to honour promises made to Indigenous nations.[45]

A prime example of how Britain's consolidation of power in North America facilitated its broken promises and theft of land can be found in the *Royal Proclamation of 1763*.[46] The *Royal Proclamation of 1763* was declared shortly after the defeat of France in North America.[47] Its purpose was to outline jurisdictional boundaries between Indigenous nations and the Crown. One of its central tenets is a promise to protect Indigenous peoples from fraud in the purchase of their lands. This was to be accomplished by requiring third parties wishing to purchase Indigenous lands to do so through the Crown. In other words, the Crown had a monopoly over purchasing Indigenous lands.[48]

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[41] Neu, *supra* note 4 ch 1. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 ch 3 at 183.
[42] Neu, *supra* note 4 at 30 & 32-33. The loss of Indigenous territories was not limited to treaties and misunderstandings. Land was also lost as a result of the use of force by colonial governments. For example, Governor Edward Cornwallis issued a Scalp Proclamation in 1749 promising ten Guineas for every "Indian Micmac taken or killed". It is estimated that Nova Scotia's Mikmaw population decreased by approximately 80% three years following the Proclamation.
[43] *Ibid*.
[44] A careful examination of the historic record coupled with an examination of Indigenous worldviews supports the conclusion that land could not have been given away. Indigenous peoples believed that land was being shared in exchange for valuable consideration. See e.g. Borrows, "Aboriginal Legal Issues", *supra* note 5 at 183-84. See also, Neu, *supra* note 4 at 33. See also, Manitoba Report, *supra* note 27.
[45] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 204-05. See also, Neu, *supra* note 4 at 30.
[46] *Royal Proclamation of 7 October, 1763*, RSC 1985, App II, No 1.
[47] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 204-05.
[48] *Ibid*.

Ironically, instead of serving to protect Indigenous land interests, the *Royal Proclamation of 1763* coupled with Indigenous peoples' fiscal dependence and dire economic conditions facilitated the theft of Indigenous lands. The Royal Proclamation of 1763's effect was to create a monopsony over the purchase of lands. By preventing the general population from purchasing Indigenous lands, colonial governments were able to dissociate the value of Indigenous lands from the influence of the free market. This fact coupled with Indigenous peoples' dire economic conditions created through unjust colonial policies allowed colonial governments to not only manipulate the value of land but also structure the transaction so that capital payments were not required.[49]

Post-confederation, the federal and provincial governments acquired title to all Indigenous territories in what is now known as Canada.[50] A variety of methods were used to legitimize colonial governments' assertion of sovereignty.[51] For example, the de facto assertion of sovereignty over Indigenous territories in British Columbia was legitimized through the *Proclamation Relating to the Acquisition of Land, 1859*, which asserted Crown title to all land in British Columbia.[52] Similar to the British Colonial policy, the government of British Columbia

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[49] John Leonard Taylor, Treaties and Historical Research Centre Indian and Northern Affairs Canada 1985, *Treaty Research Report Treaty Six (1876),* online: < https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/tre6_1100100028707_eng.pdf>; See also, Neu, *supra* note 4 at 59. Treaty Six represents an instance where Indigenous peoples were forced to surrender land to fend off **starvation and death.** It is evident from Alexander Morris', commissioner and signatory of Treaty Six, report that Cree Chiefs were mainly concerned with starvation, disease, poverty, etc. while the Crown was merely concerned with the acquisition of land. The monopoly acquired by Canada was not only used to lower the value of Indigenous lands but was also used to steal revenues generated from the sale of Indigenous lands. For example, the Crown established an Indian Trust Fund to manage the proceeds of sale of Indigenous lands. The Trust Funds were used for colonial purposes without any input or consent from Indigenous nations. See Yellowhead, *supra* note 31 at 19.

[50] *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385 [*Sparrow*]. The Supreme Court states that there "was never any doubt that sovereignty and legislative power, … vested in the Crown." There is no convincing reasoning or sound logic that the Supreme Court provides for vesting sovereignty in the Crown. It is simply accepted as a fact without further scrutiny. For a more in-depth discussion of some of the doctrines historically used to justify the de facto assertion of sovereignty, refer to Borrows, "Aboriginal Legal Issues", *supra* note 5 at 188-196.

[51] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 189-94. The methods and legal instruments used to justify Canada's sovereignty include numerous colonial doctrine (terra nullius, adverse possession, etc.).

[52] *Proclamation Relating to the Acquisition of Land*, *1859* (reprinted in RSBC 1871, App No 13).

adopted a policy of pre-emption that prohibited the acquisition of Indigenous lands.[53] Unfortunately, the officials responsible for implementing the pre-emption system usually failed in taking the steps necessary to identify the sites of Indigenous peoples, to mark them out as reserved and to question the pre-emptions that had taken place when it became apparent that they were claiming Indigenous lands.[54]

1.2.3-Weaponized Bureaucracy

Having described the manner in which Indigenous peoples were stripped of their lands and resources, this section summarizes the bureaucratic mechanisms governments have used to ensure that funding can be used as a tool of institutional assimilation.[55] Without understanding bureaucracy's role in institutional assimilation, it is difficult to criticize policies that may on the surface appear to give Indigenous nations self-government rights but in reality are simply a continuation of the federal government's goal of assimilating Indigenous peoples. For example, municipal style government, money-bylaws and taxation policies are all forms of coercive tutelage.[56]

The delegation of authority in municipal style governance structures, restrictive money bylaws and paternalistic taxation policies are part of the governments' arsenal of bureaucratic

[53] See *Proclamation Relating to Acquisition of Land*, 1860, (reprinted in RSBC 1871, App No 15). See also, *William's Lake Indian Band v Canada* (Aboriginal Affairs and Northern Development), 2018 SCC 4 at para 9, [*Williams 2*]. The violation of treaties is a constant theme in Indigenous-colonial relations. For example, in 1869 HBC sold large tracts of Indigenous lands to Canada in clear violation of the Royal Proclamation. See Yellowhead, *supra* note 34 at 19.
[54] *Williams 2, supra* note 53 at para 13.
[55] Neu, *supra* note 4 at 26. The assimilation of Indigenous peoples into Canadian society was part of colonial governments' policies. These policies were accomplished through the use of bureaucracy.
[56] *Ibid* at 6. See also, Diana M Jones, *First Nations and the Canadian State: Autonomy and Accountability in the Building of Self-Government* (LLM Thesis), (Carleton University, 1998) at 23. For example, the destruction of Indigenous nations' governing structures, customs and laws and their integration into a hierarchical colonial bureaucratic structure in which decisions rest outside the sole purview of Indigenous nations is a form of forced assimilation that does not give effect to meaningful self-government.

mechanisms used to separate moral questions from questions of administrative efficiency.[57] In other words, the dangers of bureaucracy lie in the fact that government genocidal policies may be hidden in administrative practices with a rational goal.[58] For example, the tight control over reserve membership, movement of individuals, annuity payments and legislative interferences with money matters, including taxation rights, were all passed under the guise of cost-cutting and efficiency rationales.[59]

The government's instrument of choice in drowning Indigenous cultures and institutions in a web of bureaucracy is the *Indian Act* (1876).[60] In combination with Indigenous peoples' economic dependence, the delegation of authority through the *Indian Act* created an asymmetric power structure enabling the federal government to move forward with its assimilation project under the guise of Indigenous self-governance.[61] The *Indian Act* allowed for the administration of Indigenous peoples through a federal bureaucracy.[62] This project dates as far back as 1869, with the *Gradual Enfranchisement Act*, where the federal government began to introduce legislation replacing Indigenous forms of government with municipal style governments.[63] The general rule was that Indigenous governments only exist within a hierarchical structure where

[57] *Ibid*. See also, Neu, *supra* note 4.
[58] Neu, *supra* note 4 at 29.
[59] *Ibid* at 23 & 38. It is interesting to note that cost cutting rationales have been a constant feature of colonial-Indigenous relations from pre-confederations until this day. For example, in the early 1800s Britain was contemplating reducing the costs associates with "maintaining the empire" by abolishing the need for the "Indian Department". Cost cutting legislation was introduced with direct effects on Indigenous livelihoods. By using accounting techniques and the introduction of laws controlling land and immigration, Britain reframed the Indigenous problem as a land problem.
[60] See Isabelle Montpetit, "Background: The Indian Act", *CBC* (14 July 2011) online: <https://www.cbc.ca/news/canada/background-the-indian-act-1.1056988>. See also, *Indian Act*, *supra* note 10.
[61] For example, in the 1960s The Department of Indian Affairs and Northern Development began to devolve service delivery through funding agreements. However, the level of funding and the mechanisms in which that funding is spent was decided by the federal government based on federal fiscal policy. See Jones, *supra* note 56 at 32-33 & 48.
[62] *Ibid* at 27.
[63] *Gradual Enfranchisement Act*, SC 1869, c 6 ss 10-12. This was part of a larger scheme to erase Indigenous governments and replace them institutional structures compatible with Canadian political structures. See Jones, *supra* note 56 at 28.

their decisions were subject to the approval of federal government officials.[64] This resulted in the development of initiatives that on the surface seemed to extend Indigenous autonomy but in reality merely entrenched the status quo.[65]

The fiscal problems inherent in the hierarchical federal-Indigenous relations are most salient in self-government initiatives and can mainly be addressed by promoting Indigenous fiscal autonomy. Due to the dependency of Indigenous nations on federal funding, legislation enabling self-government is often accompanied by paternalistic funding arrangements.[66] For example, since First Nation Band Council structures under the Indian Act are subordinate municipal style governments, the level of funding and the restrictions imposed upon its delivery remain subject to the fiscal priorities of the federal government.[67] Federal funding arrangements are often guided by considerations such as budget management and availability of federal resources.[68] Promoting Indigenous fiscal autonomy by recognizes Indigenous nations' inherent right to controlling taxation laws within their jurisdiction is an important step in unwinding the hierarchical federal-Indigenous relations.

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[64] See e.g. *Indian Act*, *supra* note 10 s 83. Section 83 of the *Indian Act* permits a band council to introduce a taxation by law. However, that by law may be subject to the approval of the Minister. In some provinces such as British Columbia, Indigenous nations must provide notice to the Minister of Aboriginal Relations and Reconciliation before passing any taxation by laws. See *Indian Self Government Enabling Act*, RSBC, c 129 s 9 [ISGEA].

[65] Neu, *supra* note 4 at 132-33. As will be discussed in Chapter 2, extending property taxation rights to Indigenous bands is a prime example of government policy that on the surface appears to facilitate Indigenous autonomy but in reality, merely entrenches the status quo.

[66] See, Canada, Indigenous and Northern Affairs Canada, *Funding Approaches*, online: <https://www.aadnc-aandc.gc.ca/eng/1322746046651/1322746652148>. For more recent funding policies see, Canada, National Funding Agreement Models 2021-2022: *Comprehensive Funding Agreement (with year grant) 2021-2022,* online: <https://www.sac-isc.gc.ca/eng/1607871542349/1607871577300> [Funding Agreements].

[67] Diana, *supra* note 56 at 66. The Manitoba Framework Agreement was part of a government initiative aimed at dismantling the Department of Indian Affairs in Manitoba and transferring powers to the Sixty Indigenous nations signatories. It has been criticized due to the fact that funding was subject to the fiscal priorities of the federal government. The federal government has used its position of power to secure a fiscal arrangement involving both provincial and Indigenous governments to reduce its financial and fiduciary obligations towards Indigenous nations.

[68] *Ibid*. See also, Neu, *supra* note 4 at 133. In determining funding arrangements with Indigenous nations Parliament has often used "prioritization" criteria where Parliament implements the priorities of cabinet. These arrangements cannot defensibly be described as respecting Indigenous nations' inherent right to self-government.

1.3-Reconciliation or Gentle Assimilation through Fiscal Control?

The development of the welfare state in Canada accompanied by heightened public awareness of the poor socioeconomic conditions on reserves forced the federal government to focus on increasing Indigenous nations' decision-making powers in service delivery on reserves.[69] By the early 1970s, Indigenous nations were administering their own government programs through funding arrangements with the goal of increasing Indigenous independence.[70] By the 1990s, the Department of Indian and Northern Development was a funding agency with Indigenous nations responsible for program delivery.[71] However, these agreements were all concluded within a hierarchical structure where Indigenous governments are subject to the priorities of the federal government.[72]

While the increased participation of Indigenous nations in service delivery is a welcome development, the funding relationships remain highly problematic. Despite the development of numerous funding approaches[73] to promote Indigenous self-governance,[74] problems persist. Regardless of the type of funding arrangement and degree of control it gives Indigenous nations, current funding arrangements do not grant Indigenous nations independence over those funds.[75] For example, the "grant approach",[76] may appear to provide Indigenous nations with fiscal autonomy. However, the requirements for qualifying for grants necessitate that Indigenous nations conform to westernized systems of accountability.[77] Furthermore, the government's

[69] Neu, *supra* note 4 at 132.
[70] *Ibid*.
[71] Jones, *supra* note 56 at 31-32; See also, Neu, *supra* note 4 at 133.
[72] See Gina van den Burg, "The Absence of Democracy in Aboriginal Self-Government Policy" 2009 6:1 Federal Governance 1 at 7.
[73] See Funding Agreements, *supra* note 66.
[74] *Department of Indigenous Services Act*, SC 2019, c 29 s 336 [Preamble].
[75] See Funding Agreements, *supra* note 66.
[76] *Ibid*.
[77] *Ibid*. See also, Neu, *supra* note 4 at 136.

funding agreements maintain the relationship of dependence that has been characteristic of Crown-Indigenous relations. For example, Indigenous Services Canada's ("ISC") "model comprehensive agreement" grants the federal government the right to adjust or cancel any funding with one year notice. It also imposes and maintains the historic paternalistic relationship with Indigenous nations through onerous reporting requirements.[78]

The issue with the current funding arrangements maintaining the federal government's paternalistic role in relation to Indigenous nations is that it undermines their rights to self-determination and self-government.[79] It is doubtful that a government dependent upon the fiscal priorities and political ideologies of another government will ever be capable of self-determination.[80] A potential solution that this thesis proposes is to grant Indigenous nations tax jurisdiction over their own people and resources. This will enable them to better develop their own economies and, more importantly, to ultimately break free of the relationship of dependence characteristic of Crown-Indigenous relations.[81]

[78] Funding Agreement, *supra* note 66.
[79] See Report of the Royal Commission, *supra* note 3 at 290-93.
[80] *Ibid*.
[81] Neu, *supra* note 4 at 6-9.

1.4-Research Methodology:

As with most legal research, this thesis relies on the doctrinal method. The arguments are supported by careful identification, analysis, and evaluation of the laws (common laws, statutory laws, constitutional laws, and international law) and regulations pertaining to Indigenous nations' tax jurisdiction. In doing so, I pay careful attention to the underlying theories, economic realities and historical events giving rise to the doctrine we now call law. Failure to do so would remove important context, which would lead to the erasure of some of the harmful judgements and assumptions laying behind the logic that has been used to assimilate Indigenous peoples into Canadian society. This thesis argues for providing Indigenous nations with greater fiscal autonomy by identifying insufficiencies in Canadian law and policy. Canadian laws and policies have proven inadequate in promoting Indigenous fiscal autonomy and self-determination. Indigenous fiscal autonomy and self-determination are critical for achieving reconciliation. As a result, this thesis argues for using UNDRIP as the legal framework for restructuring economic relations between Canada and Indigenous nations. As a remedial human rights instrument endorsed by the Truth and Reconciliation commission and recognized through Bill C-15, UNDRIP will be used to assess the sufficiency of current laws in promoting and respecting Indigenous peoples' right to self-determination.

Chapter 2 - Section 35 Aboriginal Rights & Self-determination

Canada's colonial policies towards Indigenous nations have created numerous issues that stand in the way of Indigenous nations and their ability to achieve self-determination. Canada's unilateral assertion of sovereignty over Indigenous peoples and lands created conflicts in the areas of governance, general rights to resources, and to land.[82] For example, Canada's unilateral assertion of sovereignty has limited Indigenous peoples' ability to live their lives under their own laws and traditions and to develop their economies in a manner consistent with their cultures and beliefs.[83] In an effort to reconcile the existence of Indigenous societies with Canadian sovereignty, Canada recognized and protected Aboriginal rights through section 35 of the *Constitution Act*.[84]

Despite the benefits arising from constitutionally protecting Aboriginal rights through section 35 of the *Constitution Act, 1982*[85], section 35 has failed to give effect to Indigenous nations' right to self-determination. The Canadian Constitution controls law-making authority within the Canadian state.[86] In other words, it controls what the Crown can and cannot do in relation to Indigenous nations.[87] Section 35 of the *Constitution Act, 1982* prevents the Crown from passing laws or regulations that violate an Aboriginal right or treaty.[88] Unfortunately, in

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[82] Flood, *supra* note 1 at 108.
[83] See e.g. *R v Pamajewon*, [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204 [*Pamajewon*]. See also, Yellowhead, *supra* note 31.
[84] *Constitution Act, supra* note 7 s 35.
[85] *Ibid*.
[86] Patrick Macklem, "*Canadian Constitutional Law*" 5th ed (Toronto, Canada: Emond Publishing, 2017). Section 35 of the *Constitution Act* allows the judicial branch to review government decisions and ensure they do not violate an aboriginal right or treaty.
[87] *Ibid*.
[88] *Ibid*.

amending the Constitution to recognize and protect Aboriginal rights, the Canadian government failed to define what Aboriginal rights entail.[89] This failure to define Aboriginal rights has been referred to as the "empty box" approach.[90]

The difficulties associated with amending the Canadian Constitution and the political beliefs of the various provinces gave rise to the empty box approach.[91] The empty box approach is limited to protecting existing Aboriginal and treaty rights, which are defined by the courts on a case-by-case basis.[92] As a result, the empty box approach fails to recognize or protect Indigenous peoples right to autonomy or self-determination.[93] Failing to explicitly recognize Indigenous peoples' right to autonomy or self-determination creates insurmountable difficulties in resolving issues related to governance, resources, and land.[94] In other words, the Supreme Court's interpretation of section 35 is premised on the unquestioned sovereignty of the Crown over Indigenous peoples and lands.[95] And as a result, attempts to achieve self-determination through section 35 litigation has in most cases failed.[96]

In the area of self-government and economic development, section 35 jurisprudence has failed in furthering Indigenous peoples' ability to achieve self-determination. By failing to define Aboriginal rights, section 35 of the *Constitution Act, 1982* has proven to be an inadequate tool in furthering Indigenous nations' right to self-determination. For example, in *R v Pamajewon* members of the Shawanaga First Nation or Eagle Lake Band were convicted of keeping a

[89] Flood, *supra* note 1 at 108-10.
[90] Ardith Walkem & Hallie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus, 2003). See also, Flood, *supra* note 1 at 109.
[91] See Flood, *supra* note 1 at 110.
[92] *Ibid*. The Judiciary was tasked with defining and resolving issues surrounding Aboriginal rights.
[93] *Ibid*.
[94] See e.g. *Pamajewon*, *supra* note 83.
[95] *Sparrow*, *supra* note 50 at 1103.
[96] See e.g. *Pamajewon, supra* note 83.

common gaming house on reserve contrary to section 201 of the Criminal Code.[97] In appealing to the Supreme Court the appellants argued that high stakes gambling was an Aboriginal right protected under section 35 of the *Constitution Act, 1982*.[98] In rejecting the appellants' claim, the Supreme Court refused to accept the appellants' definition of the claim as a right to manage the use of their reserve lands. The Court stated that "to so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group."[99]

In limiting Aboriginal rights to those integral to the history and culture of the Aboriginal group claiming a specific right, the Supreme Court confirmed the test laid out in *R v Van der peet.*[100] In order for an Aboriginal right to fall within the scope of section 35 protections it must be a part of a practice, custom and tradition integral to the Aboriginal society that existed prior to contact with Europeans.[101] This test is in line with the purpose of enacting section 35 which was to reconcile the pre-existence of Aboriginal societies with Crown sovereignty.[102]

The purpose of section 35 and the test developed for recognizing and protecting Aboriginal rights is fundamentally at odds with Aboriginal autonomy and right to self-determination. First, the purpose of section 35 as defined by the Supreme Court is incompatible with Indigenous peoples understanding of sovereignty. Section 35 is premised on the Crown

[97] *Ibid* at para 1.
[98] *Ibid* at para 21.
[99] *Ibid* at para 27.
[100] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].
[101] *Van der Peet*, *supra* note 100 at para 52.
[102] *Ibid* at para 10. The Supreme Court reasons that section 35 was not enacted to further the goals and objectives of Aboriginal communities and emphasizes that section 35 is designed only to protect from legislative encroachments of Aboriginal rights which are the "traditional aboriginal practices integral to the culture and traditional way of life of the native community."

sovereignty over Indigenous peoples.[103] Indigenous peoples, on the other hand, believe that sovereignty cannot be surrendered or taken away.[104] Second, the test laid down for determining whether an "Aboriginal right" exists is narrow and fails to consider and rectify the historic wrongs committed by the Crown towards Indigenous peoples.[105] As a result, the judiciary has emphasized the need for the negotiated settlement of aboriginal rights.[106] Negotiated settlements of Aboriginal rights have come in the form of modern treaties.

2.1-Modern Treaties and Tax Jurisdiction

Modern treaties recognizing and transferring tax jurisdiction to Indigenous nations are a recent development spurred by the development of the doctrine of Aboriginal title and section 35 of the *Constitution Act, 1982*. Canada's position regarding Aboriginal title[107] to Indigenous peoples' traditional territories has historically been that it was non-existent unless preserved by treaty or legislation.[108] In 1973, the Supreme Court's decision in *Calder* forced Canada to reconsider Aboriginal title. In *Calder*, the Supreme Court held that Canada's sovereignty was subject to rights of occupancy of Indigenous peoples, thus, placing very minor limits on Canada's sovereignty.[109] Limits on Canada's sovereignty were later expanded with the development of the concept of Aboriginal title. Aboriginal title confers upon Indigenous peoples

[103] *Sparrow*, *supra* note 50 at 1103.
[104] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3.
[105] *Van der Peet*, *supra* note 100 at para 52. The purpose of section 35 is limited to protecting aboriginal rights from legislative encroachments.
[106] Flood, *supra* note 1 at 112. See also, Douglas R Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights" (2015) at 27, online: <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf>.
[107] Aboriginal title is a subset of Aboriginal rights that grants Indigenous peoples the right to exclusive occupation and use of their traditional territories. See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [Delgamuukw].
[108] Chris Sprysak, "Aboriginal Taxation Update: Where Are We Now and Where Are We Going?" in *2007 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2007), 13:1-24, online: <https://taxfind.ca/#/document/2007_ppc_paper_13>.
[109] *Calder v British Columbia (Attorney General)*, [1973] SCR 313, 34 DLR (3d) 145.

the right to exclusive use and occupation of unceded territories.[110] As a result of *Calder*, Canada created its first ever land claims negotiation policy.[111]

The evolution of Aboriginal title jurisprudence gave rise to comprehensive land claim agreements and eventually self-government agreements.[112] Comprehensive land claims agreements can be thought of as a compromise. They are an exchange of uncertain Aboriginal rights in land and resources for a defined package of rights and benefits.[113] Comprehensive land claims agreements such as the Nisga'a Final Agreement often contain chapters transferring tax jurisdiction from federal and/or provincial governments to Indigenous government.[114] The Nisga'a Final Agreement replaces the taxation provision within the *Indian Act* with a completely new scheme created in collaboration with the Nisga'a nation.[115] For example, the Nisga'a Final Agreement grants the Nisga'a government the power to enact taxation laws affecting Nisga'a citizens on Nisga'a lands, including property taxation.[116] In exchange for taxation rights, Nisga'a citizens would eventually lose their sales tax exemption in 8 years and their income tax exemption in 12 years.[117]

Unfortunately, the Canadian government has failed in tailoring comprehensive land claims and self-government agreements to the unique needs of Indigenous nations in Canada.[118]

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[110] *Delgamuukw*, *supra* note 107.
[111] See Nisgaa Nation, Understanding the Treaty: Nisga'a Lisims Government, online: < https://www.nisgaanation.ca/understanding-treaty>. See also, Canada, Mark L Stevenson & Albert Peeling, "Executive Summary of Memorandum Re Canada's Comprehensive Claims Policy", online: <https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9225222/br-external/StevensonLMark-e.pdf>.
[112] *Ibid*. The inclusion of self-government in the land negotiation process did not occur until the early 1980s.
[113] Sprysak, *supra* note 108 at 22.
[114] The Nisga'a Final Agreement is a comprehensive land and self-government agreement. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1019.
[115] *Ibid*.
[116] *Ibid*. The Nisga'a Agreement provides Nisga'a government with a right to raise revenues through direct taxation.
[117] *Ibid*.
[118] See e.g. W. Graham Allen, "Taxation Aspects of the Sechelt Agreement-in-Principle" (2000) 48:6 *Canadian Tax Journal* 1817-1828, online: <https://taxfind.ca/#/document/2000_ctj_paper_6_1817>.

For example, negotiations between Canada, British Columbia and the Sechelt Indian Band failed because the government of British Columbia insisted on composing a treaty where Sechelt Indian Band members would lose their sales tax exemption after 8 years and income tax exemptions after 12 years.[119] Instead of tailoring agreements to the particular circumstances of each Indigenous nation, British Columbia followed an approach where the terms of the Nisga'a Final Agreement were treated as the only deal available to any other Indigenous nation.[120]

In the context of comprehensive land claims agreements, tax agreements need to be tailored to the circumstances of each Indigenous nation. The use of the same formula in calculating the phasing of the *Indian Act* tax exemption in exchange for clearly defined rights is arbitrary. In rejecting the government's proposal under the Sechelt Agreement-in-Principle, the Sechelt Indian Band objected due to the arbitrariness and inequity that would result from accepting the Nisga'a deal as the only possible deal available to Indigenous nations.[121] For at least 20 years, the Sechelt Indian Band argued that if the purpose of maintaining section 87 tax exemption was in part related to the promotion of Indigenous economic development, then it would make sense to extend it to all Indigenous peoples without exception. And that the exemption should be maintained for a realistic transition period with clearly defined goals. For example, if a large socioeconomic gap exists between a particular Indigenous nation and the rest of Canadian society, then the exemption should be maintained for however long is necessary to close the gap.[122]

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[119] *Ibid* at 1818.
[120] *Ibid* at 1818-19. For example, in a letter of protest the Sechelt Indian Band Council indicated that the government's position was a replica of section 28 of the Nisga'a Final Agreement. In other words, the Sechelt Indian Band were lead to believe that they were negotiating when in fact the government had already decided how the agreement would proceed.
[121] *Ibid*.
[122] *Ibid* at 1820-21.

The test developed by Supreme Court for defining and protecting Aboriginal rights is incapable of requiring the Crown to enter into tax agreements or respect tax agreements that are equitable and fair to Indigenous nations. For example, in April 2021 the New Brunswick government decided to abruptly scrap a tax-sharing agreement with Indigenous nations.[123] In supporting the decision to scrap the agreements, Premier Higgs described the agreements as "unsustainable and unfair".[124] This comment was made even though Indigenous nations are using the revenues from tax agreements to supplement inadequate fiscal transfers for health, education and social programs.[125] The Higgs government maintains that the tax agreements are independent commercial agreements not protected under section 35 of the *Constitution Act, 1982*.[126]

[123] Jacques Poitras, "Higgs government pulls out of gas-tax sharing with First Nations", *CBC* (13 April 2021), online: < https://www.cbc.ca/news/canada/new-brunswick/department-of-finance-blaine-higgs-1.5985206>.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.

Chapter 3 - The United Nations Declaration on the Rights of Indigenous Peoples and Indigenous Fiscal Autonomy

> The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests, and which sets the framework for the future. It is a tool for peace and justice, based upon mutual recognition and respect.[127]

3.1 Introduction

This chapter highlights the importance of aligning Canadian laws and policies with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada has endorsed UNDRIP at the international level and recently passed implementing legislation at the domestic level.[128] Therefore, Canada is legally bound to give effect to Indigenous peoples right to self-determination and self-government.[129] Self-determination entails the ability to independently finance self-government in order to develop Indigenous economic, political and social systems and institutions of governance.[130] This chapter contains three distinct, but interconnected, analytical sections. First, it traces the origins and development of UNDRIP as a remedial human rights instrument requiring Canada to modify or enact legislation promoting Indigenous fiscal autonomy and Indigenous self-determination. Second, it highlights the importance of Indigenous fiscal autonomy in achieving reconciliation and facilitating the implementation of UNDRIP. Third, it provides an overview of Canadian laws governing Indigenous taxation rights and exemptions, concluding that they fail to promote Indigenous fiscal

[127] Les Malezer, Chair of the Global Indigenous Peoples' Caucus, welcoming the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in a statement to the 61st session of the UN General Assembly on September 13, 2007.
[128] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.
[129] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3, 4. See also, Brenda L Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada" (2013) 31:1 Windsor YB Access Just 147 at 150 [Gunn, "Overcoming Obstacles"].
[130] *Ibid*.

autonomy and Indigenous self-determination. The meaningful recognition of Indigenous peoples right to self-determination requires Canada to acknowledge Indigenous peoples' inherent right to control economic policy through taxation within their jurisdiction. This can be achieved by enacting new legislation and tax agreements that are developed in conformity with the principles contained within UNDRIP.

3.2-Origins and Development

UNDRIP is a remedial human rights instrument.[131] In the most general sense, declarations are not legally binding. However, this does not mean that they have no legal effect. Declarations have often been described as "solemn commitments" where maximum compliance is expected by member states.[132] Similar to other human rights instruments, declarations are meant to protect minority groups (i.e., Indigenous peoples) by setting the minimum standards necessary for their "survival, dignity and well-being."[133] By setting minimum standards, declarations play an important role in narrowing the gap between human rights and the laws in

[131] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17. The United Nations system of human right protections is based on two categories: (1) Charter protections; and (2) treaty protections. UNDRIP falls under treaty protection. See Frans Viljoen, In*ternational Human Rights Law: A Short History*, online: <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history>. See also Gunn, "Overcoming Obstacles", *supra* note 129 at 147.

[132] While declarations are not legally binding, they do have legal effect in Canada. Members of the legal community have often conflated declarations with conventions, leading them to conclude that declarations have no legal effect. This may be the result of the Supreme Court's reasoning in Baker v Canada. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69, 79, 174 DLR (4th) 193. The SCC states "It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation." See also, C*apital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 145, 81 DLR (3d) 609. Similar to conventions, declarations are not legally binding without further action. However, declaration do have legal effect. The United Nations describes a declaration as a "formal and solemn instrument" resorted to "only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected." See Siegfried Wiessner, "United Nations Declaration on the Rights of Indigenous Peoples", online: < https://legal.un.org/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf>. See also, *R v Hape*, 2007 SCC 26 at 53 [*Hape*]. Canada has developed judicial doctrines requiring the alignment of Canadian law with Canada's international obligations which include UNDRIP.

[133] United Nations, United Nations Declaration on the Rights of Indigenous Peoples, online: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> ["UN Declaration"].

place to protect the human rights of an oppressed group within society.[134] This is done by setting standards that will one day be transformed into binding treaties.[135] For example, the *Universal Declaration on Human Rights* was adopted in 1948 as non-binding declaration but has subsequently developed into the standard by which member states conduct their affairs.[136]

The purpose of UNDRIP is to slow down and eventually reverse the destructive effects colonialism has had on Indigenous cultural, political, legal and economic autonomy.[137] Unlike other United Nations declarations, UNDRIP is unique in that it is the only Declaration created in collaboration with the right-holders themselves.[138] It is therefore an opportunity for nations to restructure their relationships with their Indigenous communities.[139] In order for this opportunity to be realized, the Declaration has had to (1) be adopted by the United Nations; and (2) be implemented by member states.[140] This Chapter argues that the adoption of UNDRIP by the United Nations and its endorsement by Canada create a positive obligation upon the Canadian government to implement legislation giving effect to Indigenous peoples' right to self-determination. The following section traces the events leading to the Declaration's adoption by

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[134] Examples of agreed upon categories of human rights can be found in the universal declaration of human rights. Canada has a long history of violating numerous agreed upon human rights of Indigenous peoples. Example of violated human rights include but are not limited to equal dignity, freedom to pursue cultural life, limitation on freedom of thought, conscience and religion, and the failure to provide adequate standards of living. See, *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) arts 1, 18, 21, 22, 25 & 27 [Universal Declaration]. See also, What is the Universal Declaration of Human Rights?", Amnesty International UK (21 October 2017), online: <https://www.amnesty.org.uk/universal-declaration-human-rights-UDHR>.

[135] Viljoen, *supra* note 131.

[136] Universal Declaration, *supra* note 134. See also, Viljoen, *supra* note 131.

[137] Larry Chartrand et al, "Preface" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the rights of Indigenous Peoples* (Montreal: Centre for International Governance Innovation, 2019) at xii.

[138] Paul Oldham & Miriam Anne Frank, "'We the Peoples…' the United Nations Declaration on the Rights of Indigenous Peoples" (2008) 24:2 Anthropology Today 5 online: < https://www.jstor.org/stable/20179902>. Canadian Indigenous groups have played an important part in the development of UNDRIP. See Gunn, "Overcoming Obstacles", *supra* note 129 at 148.

[139] Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the rights of Indigenous Peoples* (Montreal: Centre for International Governance Innovation, 2019) at 21.

[140] *Ibid*. See also, Oldham, *supra* note 138.

the United Nations while canvassing some of the impediments standing in the way of effective implementation in Canada.

3.2.1-Twenty-Three Years in the Making: The Long and Bumpy Road to Adoption

UNDRIP is arguably the result of a number of catalysts most important of which are the increased involvement of Indigenous peoples in the United Nations' system of human rights and increased public awareness to violations of Indigenous political, economic and human rights.[141] The origins of UNDRIP can be traced to the 1970s where the international Indigenous peoples' movement focussed on the United Nation's system for the advancement of Indigenous rights.[142] In 1971, Martinez Cobo published the results of his study, the *Study of the Problem of Discrimination Against Indigenous Populations,* highlighting discrimination faced by Indigenous populations.[143] As a result, the United Nations established a working group on Indigenous populations (WGIP).[144] The working group was tasked with setting the minimum standards needed for the protection of Indigenous peoples. Their work led to the first draft of UNDRIP, which included 46 operative articles including the right to self-determination.[145]

The drafting of UNDRIP was a highly complex process owing to the disagreement that existed regarding definitions of Indigenous rights, rights to self-determination, rights to lands and

[141] Oldham, *supra* note 138.
[142] *Ibid*. While focusing on the United Nations system to improve Indigenous affairs started in the 1970s and accelerated in the 1980s, efforts to use international law to recognize Indigenous rights can be traced to the early 1920s where Haudenosaunee Chief Deskaheh traveled to Geneva to speak to the League of Nations and defend his peoples' right to govern themselves under their own laws. He was not allowed to speak. See United Nations, Indigenous Peoples at the United Nations, online: https://www.un.org/development/desa/indigenouspeoples/about-us.html>.
[143] Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Final Report of the Study of the Problem of Discrimination Against Indigenous Populations* UNESCOR, 34th Sess, GE 81-166790 (1981).
[144] UN Declaration, *supra* note 133. See also, Oldham, *supra* note 138.
[145] See "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 art 3.

resources, etc.[146] It was not until 2006 that a compromise draft was finalized and with few exceptions was positively received.[147] One of the exceptions was brought forward by Namibia, acting on behalf of a number of African nations. Namibia tabled a proposal to postpone the resolution for further consideration. A number of African nations expressed concerns regarding the lack of definition of "Indigenous peoples" and a concern that the right to self-determination would be interpreted by Indigenous peoples as conferring a unilateral right of self-determination causing instability in nation states.[148]

On the 31st of August 2007 the Steering Committee responsible for seeing the UNDRIP project to fruition circulated a report entitled UN Declaration on the Rights of Indigenous Peoples: Report of the Global Indigenous Peoples' Caucus Steering Committee. The Report consisted of 3 annexes: (1) a compromise agreement tabled by Mexico and Namibia on behalf of the African nations ("the compromise agreement"); (2) the original proposal by the African nations; and (3) a new and restrictive proposal from Canada, Colombia, New Zealand and the Russian Federation with major changes to 13 articles.[149] Namibia explained that if the compromise agreement was accepted by Indigenous groups, the African nations would vote down any proposed amendment by opposing states (**Canada**, Australia, New Zealand and the United states). Ultimately the compromise agreement was accepted by Indigenous groups.[150]

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[146] For many years the Declaration was stuck in the drafting stage due to the failure of states and representative of Indigenous peoples to reach a compromise. See Oldham, *supra* note 138.
[147] See Erin Hanson, "UN Declaration on the Rights of Indigenous Peoples," *Indigenous Foundations*, online: <https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/#_ftn1>.
[148] These concerns were forwarded in the form of 36 proposed amendments. For example, reference to self-determination were replaced by the right 'to participate in the political affairs of the State'. See Oldham, *supra* note 138.
[149] *Ibid*. See also, Report of the Global Indigenous Peoples' Caucus Steering Committee (31 August 2007) online: <https://humanrights.gov.au/sites/default/files/content/social_justice/declaration/screport_070831.pdf> [Steering Committee Report].
[150] *Ibid*.

By September 13, 2007, the Declaration was tabled at the UN General Assembly and adopted following a vote.[151] Opposing states including Canada would not allow for its adoption without a vote.[152] The Declaration was voted on with the final vote result being 144 in favour, 4 against (**Canada**, New Zealand, Australia, and the United States), and 11 abstentions. As a result, the Declaration was officially adopted by the UN General Assembly and, thus, became part of international law.[153] Canada elaborated on its concerns in the following statement:

> Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; **on self-government without recognition of the importance of negotiations**; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties.[154]

Canada's concern with UNDRIP mainly related to the level of generality it contains.[155] UNDRIP is composed of twenty-four preambular paragraphs and forty-six operative vehicles.[156] The preamble contains a recognition of the historic wrongs committed towards Indigenous peoples with a promise of fostering cooperative relations with the goal of achieving reconciliation.[157] The forty-six operative vehicles cover aspects of Indigenous peoples lives but

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[151] UN Declaration, *supra* note 133. See also, "Canada votes 'no' as UN native rights declaration passes", *CBC* (13 September 2007), online:< https://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160>.
[152] *Ibid*. Opposing member states had significant concerns regarding Indigenous peoples' right to self-determination, land, and territories.
[153] UN Declaration, *supra* note 133. The abstentions originated from the following states: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine.
[154] See, GAOR, 61st session, 107th plenary meeting, 13 September 2007, UN Doc A/61/PV.107. See also, Gunn, "Overcoming Obstacles", *supra* note 129 at 149.
[155] Gunn, "Overcoming Obstacles", *supra* note 129 at 148. Canada expressed concerns about the level of generality contained within UNDRIP when it voted against its adoption at the United Nations. See also, Stephen Allen, "The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Portland: Hart Publishing, 2011) 225 at 234-5.
[156] Gunn, "Overcoming Obstacles", *supra* note 129 at 150. See also, "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17.
[157] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17, Preamble.

are grounded in Article 3 which recognizes Indigenous peoples' right to self-determination.[158] The right to self-determination includes the right to govern oneself independently, without interference from other levels of government.[159]

Despite Canada's concerns regarding the level of generality contained within UNDRIP, by 2010-11 Canada's attitude towards UNDRIP was beginning to change. In 2010 Canada reversed its negative vote by expressing a qualified endorsement of UNDRIP.[160] In other words, Canada's position towards UNDRIP did not substantively change. Canada viewed UNDRIP as aspirational with no force or effect on Canadian law.[161] It was not until 2016 that Canada substantively changed its position on UNDRIP. On May 2016, Indigenous and Northern Affairs Minister Carolyn Bennett, addressing the United Nations at the Permanent Forum on Indigenous Issues, fully endorsed UNDRIP.[162] Unlike the 2010 endorsement, the 2016 confirmation of

[158] *Ibid,* arts 3, 4. See also, Gunn, "Overcoming Obstacles", *supra* note 129 at 150.
[159] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3-6. Self-determining peoples have a right to define their own cultures, traditions and the right to control their own destinies without interference.
[160] On November 12, 2010, Canada expressed a "qualified endorsement" of UNDRIP. Indigenous and Northern Affairs Canada released a statement claiming that UNDRIP is merely an aspirational document that does not reflect customary international law or Canadian law. Furthermore, Indigenous and Northern Affairs Canada attempted to limit the extent to which UNDRIP can influence Canadian law by stating "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework." See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (12 November 2010), online: <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> [Statement of Support]. See also, "Canada endorses indigenous rights declaration", *CBC* (12 November 2010), online: <https://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779>. See also, United Nations, Historic Overview, online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>.
[161] *Ibid*.
[162] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th Session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016). See also, Chartland, *supra* note 137 at ix. Unlike Canada's qualified endorsement in 2010, by 2016 Canada was taking substantive steps to align Canadian laws with UNDRIP. For example, Prime Minister Trudeau mandated the Minister of Justice and Attorney General of Canada to chair a working group to review all federal laws and policies relating to Indigenous peoples. See Prime Minister of Canada, News Release, "Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples" (22 February 2017), online: < https://pm.gc.ca/en/news/news-releases/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and>.

endorsement was accompanied by stronger political will to align Canadian laws with UNDRIP.[163]

3.2.2-Implementation in Canada

As a declaration, UNDRIP provides guidance on the legal criteria necessary for the protection of Indigenous rights.[164] Since its adoption by the UN General Assembly, important issues concerning UNDRIP's influence on Canadian law and Indigenous rights have been raised.[165] Some have argued that international instruments negotiated and concluded outside of Canada must be subject to Canadian Parliamentary procedures before having any legal effect.[166] This is a misconception that misconstrues the nature and effect of declarations.[167]

Canada has a moral and political obligation to meaningfully implement UNDRIP.[168] Implementation is systematic in nature and requires not only judicial notice through the application of customary international law and the principle of conformity but also policy reform in the form of legislative initiatives aimed at promoting and respecting the principles contained within UNDRIP.[169] The alignment of judicial and legislative avenues towards the goal of achieving reconciliation will hopefully result in meaningful implementation.

Unfortunately, since its adoption by the UN General Assembly, UNDRIP has faced significant barriers to its implementation in Canada.[170] Examples include (1) wide-spread ignorance concerning the nature and effect of UNDRIP as an international instrument; (2) lack of

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[163] *Ibid*.
[164] Gunn, "Overcoming Obstacles", *supra* note 129 at 152.
[165] Sheryl Lightfoot, *supra* note 139 at 21-22.
[166] See Statement of Support, *supra* note 160. See also Gunn, "Overcoming Obstacles", *supra* note 129 at 152.
[167] See, Gunn, "Overcoming Obstacles", *supra* note 129 at 154.
[168] *Ibid* at 159.
[169] Lightfoot, *supra* note 139 at 21-22. The UN Declaration is designed to help nations restructure their relationships with their Indigenous populations in a meaningful way. This requires redesigning current programs, the amendment of existing laws and the development of future laws in line with the principles outlined in the Declaration.
[170] Gunn, "Overcoming Obstacles", *supra* note 129.

political will; and (3) financial constraints.[171] The following two sections explain that meaningful implementation in the context of self-determination entail (1) the alignment of Canadian law with international law; and (2) the development of legislation aimed at facilitating nation-to-nation relationships.

3.2.3A-The application of International Law in Canada: Customary International Law

The meaningful implementation of UNDRIP requires aligning Canadian law with international law. However, this has been difficult to achieve due to general lack of awareness on the nature and effect of international law among the Canadian legal community.[172] For example, in *Mississaugas of Scugog Island First Nations v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, Sharpe J.A. refused to consider the draft of UNDRIP. Sharpe J.A. held that the draft of UNDRIP does not provide any meaningful assistance in resolving the issues of Canadian constitutional law raised.[173] In doing so Sharpe J.A. conflated declarations and conventions and mistakenly believed that a declaration requires endorsement before having **any** legal effect.[174]

While a declaration cannot by itself create enforceable legal obligations, it does have legal effect in Canada and should be used to influence the development of Canadian law.[175] Part of the confusion concerning the application of declarations in Canada may stem from Canada's dualist approach to international treaties. Without further action, international treaties do not impact

[171] *Ibid* at at 148, 152-53. See also, Brenda Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" 53:4 UBC L Rev at 3 [Gunn, "Legislation and Beyond"]. See also, Lightfoot, *supra* note 139 at 22.
[172] Gunn, overcoming obstacles, *supra* note 129 at 153.
[173] *Mississaugas of Scugog Island First Nations v National Automobile, Aerospace, Transportation and General Workers Union of Canada,* 2017 ONCA 814 at para 46 [*Scugog Island FN*].
[174] Gunn, "overcoming obstacles", *supra* note 129 at 153.
[175] Gunn, "Legislation and Beyond", *supra* note 171.

domestic law or individual rights in Canada.[176] However, declarations can have legal effect in Canada through the application of customary international law and through the presumption of conformity.[177]

A number of provisions within UNDRIP are now part of customary international law.[178] Customary international law refers to state obligations arising from established international practices.[179] There are two requirements for UNDRIP articles to be considered part of customary international law. First, the practice in relation to a particular article must be "sufficiently general, widespread, representative and consistent."[180] Second, the practice must be "undertaken with a sense of legal right or obligation", as "distinguished from mere usage or habit".[181]

In 2010, the Rights of Indigenous Peoples Committee of the International Law Association concluded that the following articles are part of customary international law:

> Indigenous peoples have the **right to self-determination**, that secures to indigenous peoples have the right to decide [*sic*], within the territory of the State in which they live, what their future will be; indigenous peoples have the right to **autonomy** or **self-government.** Indigenous peoples have the right to recognition and preservation of their cultural identity.[182]

As a result, Canada has an obligation to interpret existing laws in a manner that gives effect to the principle of self-determination. Canadian Courts have embraced an adoptionist approach towards customary international law. Absent clear conflicting laws, domestic law should be interpreted in conformity with customary international law.[183] This is most clearly stated by

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[176] See Laura Barnett, Legal and Legislative Affairs, Library of Parliament, Canada's Approach to the Treaty-Making Process, online: < https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E>. See also, Chartland, *supra* note 137 at xiii.
[177] Gunn, "Legislation and Beyond", *supra* note 171.
[178] International Law Association, Rights of Indigenous Peoples Committee, "Interim Report", Report of the Seventy-Fourth Conference, The Hague (2012) 834 at 898 [Hague Report].
[179] See *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 77 [*Nevsun*].
[180] *Ibid*.
[181] *Ibid* at para 78.
[182] Hague Report, *supra* note 178 at 910–11. See also, Gunn, "Legislation and Beyond", supra note 171 at 7.
[183] *Hape*, *supra* note 132. See also *Nevsun*, *supra* note 179 at paras 76-79.

the Supreme Court in *Nevsun Resources*: "Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the 'choir' of domestic court judgments around the world shaping the 'substance of international law'"[184]

3.2.3B-The application of International Law in Canada: Presumption of Conformity

Courts have an important role to play in aligning Canadian law with international law. Courts can align Canadian laws with international law through the presumption of conformity. The presumption of conformity requires Canadian courts to interpret Canadian law in a manner that is consistent with Canada's international obligations.[185] For example, in *Ordon Estate*, Iacobacci and Major Js. held that "although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community."[186] Therefore, the presumption of conformity allows courts to use instruments such as UNDRIP in interpreting Canadian laws.[187]

Historically the presumption of conformity was not used effectively in applying UNDRIP by the Supreme Court.[188] *Mitchell v MNR* involved a dispute concerning Indigenous exemptions from customs duties imposed by Canada. In concluding that Indigenous peoples do not have a right to an exemption from customs duties, the Supreme Court held that the draft version of UNDRIP can be used in interpreting Aboriginal rights.[189] Despite stating that the draft version of

[184] *Nevsun*, *supra* note 179 at para 72.
[185] *Ordon Estate v Grail*, [1998] 3 SCR 437, 166 DLR (4th).
[186] *Ibid* at para 137.
[187] Gunn, "Legislation and Beyond", *supra* note 171 at 10.
[188] *Mitchell v MNR*, 2001 SCC 33 [*Mitchell*].
[189] *Ibid* at paras 80-84.

UNDRIP can be used to interpret Aboriginal rights, the Supreme Court did not use UNDRIP in defining the scope of the asserted right.[190]

3.2.4-Implementation Through Legislative Initiatives and Reform

In order to respect Indigenous nations' right to self-determination and government, the principles embodied in UNDRIP need to be better understood and respected by the Canadian legal and political communities.[191] This requires that (1) the courts understand the nature of UNDRIP and rights it contains and (2) Parliament implement legislation facilitating self-determination for Indigenous nations.[192] The barriers standing in the way of the effective implementation of UNDRIP can be attributed to widespread ignorance within the legal community as to the nature and effect of UNDRIP.[193] Failure to understand the nature and effect of UNDRIP has stood in the way of legislative reform facilitating the implementation of UNDRIP. This has been described as a "lack of political will."[194] The recently enacted Bill C-15 will play an important role in clarifying the nature and effect of UNDRIP and will play an important role in facilitating the effective implementation of UNDRIP.[195] The passage of Bill C-15 will help create a much-needed legislative framework for effective implementation efforts.[196]

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[190] Gunn, "Legislation and Beyond", *supra* note 171 at 12-13. See also *Mitchell*, *supra* note 188 at paras 80-84.
[191] *Ibid* at 3-4.
[192] Lightfoot, *supra* note 139 at 21-22.
[193] For example, the courts have historically misunderstood the nature of declarations and as a result limited the application of UNDRIP in Canada and Parliament has been slow to implement legislation facilitating the implementation of UNDRIP. See e.g. *Scugog Island FN*, *supra* note 173. See also, Gunn, "Legislation and Beyond", *supra* note 171 at 1-2.
[194] Gunn, "Legislation and Beyond", *supra* note 171 at 1-2.
[195] *Ibid* at 1-3. See also, Gunn, "Overcoming Obstacles", *supra* note 129 at 152. Se See also, Victoria Tauli-Corpuz, Report of the Special Rapportuer of the Human Rights Council on the rights of indigenous peoples, UNGA, 72nd Sess, UN Doc A/72/186 (2017) at para 22. The UN special rapporteur called upon all States to pursue reforms at the judicial, legislative and executive levels of government. See also, Lightfoot, *supra* note 139 at 24. See also, "United Nations Declaration on the Rights of Indigenous Peoples (2007)", supra note 17 art 38.

> States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

[196] *Ibid*. See also, Lightfoot, *supra* note 139 at 21-27. Unfortunately, implementation gaps exist between the legal recognition of Indigenous rights and the legal frameworks in place to protect Indigenous rights. A 2014 UN special

One of the main provisions contained within UNDRIP pertains to Indigenous peoples right to self-determination and governance.[197] Without Indigenous fiscal autonomy, Indigenous peoples right to self-determination cannot be achieved.[198] It is therefore imperative that Parliament enact legislation facilitating Indigenous fiscal autonomy. This includes (1) preventing other levels of governments from diluting Indigenous nations' resources through taxation; and (2) allowing Indigenous nations to pass their own tax laws to facilitate governmental functions. The recently enacted Bill C-15 will be extremely helpful in clarifying the effect UNDRIP has on Canadian law and policy.[199] Bill C-15 was not the first attempt at having UNDRIP recognize by Parliament. The following section provides a brief overview on legislative initiatives undertaken to have UNDRIP recognized by Parliament.

3.2.4A-Bill C-262-April 21, 2016

Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, introduced by the Honourable Romeo Saganash in 2016 was the second attempt at the federal level to have Canada align its laws with the minimum standards set by UNDRIP.[200] While Bill C-262 was passed by the House of

rapporteur's report on Canada's progress towards implementing UNDRIP indicates that the many initiatives undertaken by the federal, provincial and territorial levels are insufficient. See James Anaya, Report of the Special Rapportuer on the rights of indigenous peoples, Addendum, the situation of indigenous peoples in Canada, UNHRC, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014) at para 81.

[197] Gunn, "overcoming Obstacles", *supra* note 129 at 151. Self-determination is integral to the proper attainment of all other rights contained within UNDRIP.

[198] Report of the Royal Commission, *supra* note 3 at 290-93.

[199] Lightfoot, *supra* note 139 at 21-27.

[200] Bill C-262*, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018). The first attempt was through Bill C-641, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Right of Indigenous Peoples*, 2nd Sess, 41st Parl, 2014 (first Reading 4 December 2014). Unfortunately, Bill C-641 did not go past the first reading. See also Lightfoot, *supra* note 89 at 27.

Commons, it died on the Senate floor due to the efforts of Conservative Senators and MPs who delayed the vote in an effort to prevent Bill C-262 from becoming law.[201]

There are five aspects to Bill C-262 that will help develop a blueprint ensuring that federal laws and policies are consistent with the minimum standards set by UNDRIP.[202] First, Bill C-262 will clarify that UNDRIP has legal effect in Canada. Second, it places a positive obligation on government to ensure that laws are in alignment with the principles set out in UNDRIP. Third, it requires the government to develop a national action plan to achieve the goals of UNDRIP. Fourth, it creates an annual reporting requirement on the progress made as a result of the national action plan. Fifth, the Bill highlights that the *Act* would not negatively affect any rights recognized and affirmed by section 35(1) of the *Constitution Act*, 1982.[203]

Bill C-262 never became law due to concerns of members of the Conservative Party of Canada. First, Conservatives believed that recognizing UNDRIP through Bill C-262 was unnecessary. For example, Mrs. Cathy McLeod suggested that any problems relating to Indigenous rights in Canada were not the result of an inadequate legal framework, but a result of Canada's failure to live up to the honour of the Crown.[204] Second, Conservatives voiced concerns regarding the uncertainty the bill would introduce. For example, Mrs. McLeod emphasized confusion that would result if politicians and members of the legal community cannot precisely explain how "Free, prior, and informed consent" or rights to territories, land and

[201] House of Commons Debates, 42nd Parl, 1st Sess, No 245 (5 December 2017) at 1815-1820 (Cathy McLeod).
[202] House of Commons Debates, 42nd Parl, 1st Sess, No 245 (5 December 2017) at 1805 (Yvonne Jones). See also, Gunn, "Legislation and Beyond", supra note 121 at 3.
[203] Gunn, "Legislation and Beyond", supra note 121 at 3.
[204] House of Commons Debates, 42nd Parl, 1st Sess, No 245 (5 December 2017) at 1815 (Cathy McLeod).

resources are to be interpreted.[205] As a result, conservative Senators and MPs through delay tactics prevented Bill C-262 from proceeding to a vote and, as a result, died on the floor.[206]

3.2.4B-Bill C-15-December 3, 2020

As part of the Liberal government's promise to introduce legislation facilitating the implementation of UNDRIP, the Minister of Justice and Attorney General of Canada introduced Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, on December 3, 2020.[207] Bill C-15 is similar in spirit to Bill C-262 with minor technical changes.[208] Similar to Bill C-262, Bill C-15 focuses on the implementation and development of an action plan to achieve the goals of UNDRIP. It helps create a framework for ensuring that federal laws are consistent with UNDRIP and for developing laws to aid in the implementation of UNDRIP. Furthermore, it creates mechanisms to ensure accountability and provides for dispute resolution mechanisms.[209]

One of the major themes in Bill C-15 concerns the development of an action plan for the implementation of UNDRIP.[210] Indigenous groups participating in the development of Bill C-15

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[205] *Ibid* at 1820. See also House of Commons Debates, 42nd Parl, 1st Sess, No 257 (5 February 2018) at 1135 (Kevin Waugh).
[206] See Marie-Danielle Smith, "Dozens of bills, including on sexual assault and UNDRIP, die in Senate amid Conservative filibuster", *National Post* (21 June 2019), online: <https://nationalpost.com/news/politics/dozens-of-bills-including-on-sexual-assault-and-undrip-die-in-senate-amid-conservative-filibuster>.
[207] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020 (assented to 21 June 2021). See also, Liberal Party of Canada, The UN Declaration On The Rights of Indigenous Peoples, online: https://liberal.ca/our-platform/the-un-declaration-on-the-rights-of-indigenous-peoples/.
[208] Canada, *What we Learned*, report: online: <https://www.justice.gc.ca/eng/declaration/wwl-cna/index.html#s1> [What we learned]. Bill C-15 differs from Bill C-262 in 3 main areas: (1) includes new language in the preamble highlighting the Bill's potential to facilitate reconciliation; (2) includes a purpose clause addressing the application of UNDRIP in Canadian law; (3) provides clarity on the process for tabling action plans and annual reports. See also, Canada, Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act, online: < https://www.justice.gc.ca/eng/declaration/about-apropos.html> [Backgrounder].
[209] Backgrounder, *supra* note 208.
[210] Bill C-15, *supra* note 207 s 4(b).

> "The purpose of this Act is to provide a framework for the Government of Canada's implementation of the Declaration."

highlighted the need for legislation that addresses gaps in education, housing, food security, healthcare, child welfare and measures protecting indigenous cultures.[211] Funding is a major concern in regards to the above goals.

The Conservative Party of Canada has raised similar concerns to those seen in its opposition to UNDRIP at the international level and its opposition to Bill C-262.[212] For example, during the second reading of Bill C-15, Conservative MP Mr. Jamie Schmale raised concerns regarding "the broadly worded provision and the implications of that working and the lack of definition on a number of them."[213] More specifically, Conservative members of Parliament and Conservative Senators are fixated on the principle of free, prior and informed consent (FPIC) and have equated it to a veto power.[214] This is despite the fact that not even the UN views FPIC as a veto power.[215]

The Conservative government's refusal to allow Bills recognizing UNDRIP is not grounded in any legal rationale.[216] As explained, UNDRIP already applies in Canada through principles of customary international law and through the presumption of conformity. Implementing legislation would provide the education necessary for Parliamentarians and

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[211] What we learned, *supra* note 208.
[212] See e.g., Keith Borkowsky, Conservative governments voice concerns over Bill C-15, Toronto Star (18 January 2021), online: < https://www.thestar.com/news/canada/2021/01/18/conservative-governments-voice-concerns-over-bill-c-15.html>.
[213] House of Commons Debates, 43rd Parl, 2nd Sess, No 060 (17 February 2021) at 1820 (Jamie Schmale).
[214] *Ibid* at 1830 (Jamie Schmale). "We have to worry that the undefined statement of free, prior and informed consent could be interpreted as a de facto veto right, and thus have profound detrimental effects not only for a variety of industries across Canada, but for indigenous communities as well."
[215] Members of the academic community and the special rapporteur for the United Nations have emphasized that the principle of free, prior and informed consent does **NOT** amount to a veto power. The wording of Article 32 of UNDRIP has led many commentators to state that consent **may** be required ONLY where the impact of a proposal will substantially affect Indigenous rights. See Michael Coyle, "From Consultation to Consent: Squaring the Circle" (2016) 67 UNBLJ 235 at 238. See also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, HRC, 12th Sess, UN Doc A/HRC/12/34 (2009).
[216] Gunn, "Overcoming Obstacles", supra note 129 at 153.

members of the judicial branch to enact and interpret laws in a manner consistent with the minimum standards necessary to respect Indigenous peoples' human rights.[217]

While not necessary in the legal sense, the passage of Bill C-15 will be highly beneficial to implementing UNDRIP in Canada. The major obstacles standing in the way of meaningful implementation are lack of political will and ignorance.[218] The passage of Bill C-15 signals a change in political will and will serve to educate the judiciary on their roles. This will speed up the process of implementation through the development of legislation addressing major areas of concern that may lay outside of the judiciary's jurisdiction.[219] For meaningful implementation, parliamentarians must implement new legislation or amend existing legislation to recognize and affirm Indigenous peoples right to self-determination and government.[220]

3.3-Reconciliation, Indigenous Fiscal Autonomy and UNDRIP

The theft of Indigenous lands and resources and the construction of systems of governance designed to eliminate Indigenous social, political, and economic institutions has resulted in wide-spread harms suffered by Indigenous communities.[221] Canada's residential school system is a prime example of the harms Canada was willing to inflict upon Indigenous nations in pursuing its objectives. According to the Davin Report, the Indian residential school system was designed

[217] *Ibid*.
[218] *Ibid*.
[219] Lightfoot, *supra* note 139 at 24. Parliamentarians have a critical role to play in the meaningful implementation of UNDRIP.
[220] John Borrows, "Policy Paper: Implementing Indigenous Self-Determination Through Legislation in Canada (20 April 2017)", online: < https://www.afn.ca/wp-content/uploads/2018/09/2017-04-20-Implementing-Indigenous-self-determination-through-policy-legislation.pdf>.
[221] See Flood, *supra* note 1 at 90. For almost 100 years, the main goal of Canada's policies were to erase Indigenous government and ignore all forms of Aboriginal rights. As a result, Indigenous communities suffer from higher rates of poverty compared to the general population. See Canadian Poverty Institute, *Poverty in Canada*, online: <https://www.povertyinstitute.ca/poverty-canada>.

to take Indigenous children and place them in a civilized environment.[222] Under this system many Indigenous children suffered physical, emotional, and cultural abuse causing wide-spread intergenerational trauma.[223] As a result of this tragedy, Canada established the Truth and Reconciliation Commission ("Commission") to address the harms caused by residential schools.[224]

The Commission was established to facilitate reconciliation among Canada's residential school survivors and all Canadians.[225] As part of its final report, the Commission emphasized that effectively combating the pervasive effects of colonialism, which gave rise and justified the existence residential schools, requires Canada to adopt a holistic approach which includes facilitating Indigenous economic development and fiscal autonomy. For example, the Commission's Final Report highlighted the importance of economic development by noting "the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-aboriginal relations and connection to the land."[226]

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[222] The Indian residential school system was established based upon the recommendation of the Davin Report, published in 1879. The Davin report emphasized the importance of the boarding school approach stating that it "…took [the Aboriginal child] from the reserve and kept him in the constant circle of civilization, assured attendance, removed him from the "retarding influence of his parents …". See Indigenous Corporate Training Inc, *Indian Residential Schools* (18 April 2012), online: < https://www.ictinc.ca/indian-residential-schools>.

[223] Piotr Wilk, Alana Maltby & Martin Cook, "Residential schools and the effects on Indigenous health and well-being in Canada—a scoping review" Public Health Rev 38:8 (2017), online: <https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0055-6>.

[224] Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Truth and Reconciliation Commission of Canada*, online: < https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525>.

[225] *Ibid*. The Truth and Reconciliation Commission describes reconciliation as "…establishing and maintaining a mutually beneficial relationship between Aboriginal and non-Aboriginal peoples in this country." See Canada, The Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015 at 6, online: <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Reconciliation].

[226] Canada, Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation*, Vol 6 (McGill-Queen's University's Press, 2015) at 29, online: < http://www.trc.ca/assets/pdf/Principles%20of%20Truth%20and%20Reconciliation.pdf> ["TRC, What We Have Learned"]. Land is a major economic driver for many Indigenous nations. Unfortunately, Canada has for many years taken actions to dispossess Indigenous nations of their lands and resources. This has been done directly through treaty violations or indirectly through restrictive and unjust laws, including tax laws. This has placed indigenous peoples among the poorest in the country and forced indigenous nations to be dependent upon the federal

Achieving reconciliation requires a strong appreciation for the linkage between Indigenous fiscal autonomy, cultures, and political self-determination.[227] Without fiscal autonomy, Indigenous nations cannot have the freedom necessary to protect their cultural practices. For example, in *Lubicon Lake Band v Canada*, the Human Rights Committee concluded that control over natural resource development over ancestral lands was critical to the cultural survival of the Lubicon Lake Band.[228]

Similarly, Indigenous fiscal autonomy is strongly connected to Indigenous political determination.[229] The main vehicle for achieving Indigenous political determination is through self-government.[230] However, meaningful self-government requires institutions with the ability to make policy without reliance and accountability to other levels of government. This cannot be achieved if Indigenous governments are reliant upon conditional funding agreements subjecting them to the priorities and ideologies of colonial governments.[231]

The importance of fiscal autonomy to cultural identity and political determination has been verified by the Harvard Project on American Indian Economic Development ("Harvard Project").[232] The Harvard Project was created by Stephen Cornell and Joseph P. Kalt to understand the conditions necessary for fostering "sustained, self-determined social and economic development."[233] The results indicate that successful economic development requires a

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government for their subsistence. See Lorie M Graham, "Resolving Indigenous Claims to Self-Determination" (2004) 10:2 ILSA J Int'l & Comp L 385 at 399.

[227] Graham, *supra* note 226 at 399.

[228] *Ibid*. See also Lubicon Lake Band v Canada, Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) at 1, online: <http://hrlibrary.umn.edu/undocs/session45/167-1984.htm>. See also *Lubicon Lake Band v Canada*, [1981] 2 FC 317, 117 DLR (3d) 247.

[229] Graham, *supra* note 226 at 400.

[230] *Ibid*.

[231] *Ibid*. See also, Report of the Royal Commission, *supra* note 3.

[232] Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis Canada, 2017) at 9.

[233] *Ibid*.

degree of tribal sovereignty allowing Indigenous nations to develop institutions and strategies free from external influences.[234]

The linkage between fiscal autonomy, self-determination and cultural survival is reflected in UNDRIP.[235] As a result, the Truth and Reconciliation Commission strongly recommends the full and meaningful implementation of UNDRIP to achieve reconciliation.[236] While UNDRIP contains numerous provisions, the right to self-determination is critical to the meaningful implementation of all other rights contained within UNDRIP.[237] Since self-determination cannot be achieved without effective self-government and effective self-government requires fiscal independence, Canada is required to take the necessary steps to facilitate fiscal independence.[238] The importance of fiscal autonomy to self-determination and reconciliation is most evident in articles 3, 4, and 20 of UNDRIP:[239]

> Article 3: Indigenous Peoples have the right to **self-determination**. By virtue of that right they freely determine their political status and **freely pursue their economic, social and cultural development**.
>
> Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to **autonomy or self-government** in matters relating to their internal and local affairs, as well as ways and **means for financing their autonomous functions**.
>
> Article 20(1): Indigenous peoples **have the right to maintain and develop their political, economic and social systems or institutions**, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

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[234] *Ibid*.
[235] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3, 4, 20.
[236] Canada, Truth and Reconciliation Commission of Canada, *Calls to Action*, (McGill-Queen's University Press, 2015) art 43-44 [TRC, Calls to action].

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.

[237] Gunn, "Overcoming Obstacles", *supra* note 129 at 151.
[238] See Report of the Royal Commission, *supra* note 3.
[239] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3, 4, 20.

However, encouraging and facilitating Indigenous economic development by itself is not sufficient to ensure Indigenous nations' right to self-determination is respected.[240] The changing legal and political attitudes towards Indigenous nations has led the Canadian government to implement policies facilitating Indigenous economic development.[241] However, the Federal and Provincial governments still have the ability to influence and undermine Indigenous economic interests through taxation. The *Constitution Act of 1982* grants taxation rights to the federal and provincial governments.[242] While the *Indian Act* and *Income Tax Act* contain exemptions for Indigenous peoples and governments, they fail to respect Indigenous autonomy and, therefore, impede their right to self-determination.[243]

In addition to undermining Indigenous economic interests through the ability to tax Indigenous resources, current tax laws hinder Indigenous governments' ability to develop political, economic, and social systems of governance. The ability to tax Indigenous lands, resources and peoples allows colonial governments to control Indigenous lands, resources and peoples.[244] By preventing Indigenous nations from raising revenue through taxation and by taxing indigenous interests, the Canadian government has forced Indigenous governments to rely on federal fiscal transfers.[245] By undermining Indigenous governments' ability to finance themselves, they have become subject to the priorities of the federal government.[246]

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[240] Self-determination is achieved when Indigenous peoples have the ability to control their own economic, political and social development. While economic development is a necessary aspect, it is not sufficient by itself. Another critically important aspect is the ability to develop their own economic and political institutions free from federal and provincial interference. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3. See also, Hanna, *supra* note 232 at 2-6.
[241] Hanna, *supra* note 232 at 2.
[242] *Constitution Act*, *supra* note 7 ss 91(3), 92 (2).
[243] Section 2.3 provides an assessment of existing tax laws and highlights the extent to which they fall short of the standards set by UNDRIP.
[244] Christians, *supra* note 6 at 15-16. See also, Heaman, *supra* note 6 at 117.
[245] See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1011. See also, Hanna, *supra* note 232. While Indigenous governments have the ability to raise taxes, those abilities are very limited. A more in-depth discussion of Indigenous taxation powers is provided in section 2.3.
[246] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1011.

By becoming subject to the priorities of other levels of government, Indigenous nations' abilities to develop their own political, economic and social institutions have been undermined.[247]

Section 3.4-Canadian Legislation and Indigenous Taxation Rights and Exemptions: A Need for Reform

This section explores Canadian laws impacting Indigenous taxation rights and exemptions[248] and argues that these laws fail to facilitate the meaningful implementation of UNDRIP. The laws contained within the *Indian Act* and *Income Tax Act* are a continuation of Canada's colonization project with minor modifications.[249] By failing to recognize Indigenous peoples' inherent right to control their tax jurisdiction, Canada has severely undermined Indigenous peoples' right to self-determination and territorial management.[250] Without an ability to manage their lands and resources, Indigenous nations' will be lacking an essential element for self-determination.[251]

The meaningful implementation of Indigenous peoples' right to self-determination requires Parliament to acknowledge and give effect to Indigenous nations' right to control

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[247] *Ibid* at 3. Self-determination includes the ability to make decision without interreference from other levels of government. By being dependent upon other levels of government for funding, Indigenous nations cannot make independent decisions. See also, J Peter Ranson, "The Evolution of Aboriginal Tax Exemptions: The Past, Present, and the Future" in *Report of Proceedings of Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006) 24:1-48 at 2, online: <https://taxfind.ca/#/document/2005_cr_paper_24>. Economic development is central to indigenous self-sufficiency and taxation is inseparable from issues of economic development. Control over taxation laws is integral to Indigenous nations ability to retain wealth from economic development within their communities and use that wealth for political, social and cultural development.

[248] This section focuses on income tax. However, the arguments made are equally applicable to customs and excise tax.

[249] Chartland, *supra* note 137 xii.

[250] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 950. See also, *Washington*, *supra* note 8. The US Supreme Court states that "the power to tax is an essential attribute of Indian sovereignty because it is necessary for self-determination and territorial management." Similarly, without providing Indigenous nations with exclusive tax jurisdiction, they cannot exercise their power to tax. Therefore, their right to self-determination will be severely undermined.

[251] *Ibid*.

economic activity within their jurisdiction, which includes tax policies.[252] In *Mitchell v MNR,* Justice Binnie explains that Crown Sovereignty did not terminate Indigenous sovereignty. Instead, the assertion of Crown Sovereignty gave effect to the idea of "merged sovereignty." The concept of merged sovereignty reflects the fact that Indigenous nations are not subordinate to Crown sovereignty.[253] If Justice Binnie's reasoning is to have legal effect, Canadian laws controlling or delegating taxation rights and exemption to Indigenous nations must reflect Indigenous peoples' inherent right to control taxation rights and privileges within their own sovereign sphere.

This section explores the origins and purpose of sections 87 of the *Indian Act*, section 149 of the *Income Tax Act* and section 83 of the *Indian Act*, concluding that they fail to recognize and give effect to Indigenous nations' inherent right to self-government. It will be argued that section 87 of the *Indian Act* and section 149 of the *Income Tax Act* are premised upon the superior status of Crown sovereignty. Any tax exemptions enjoyed by Indigenous nations as a result of section 87 of the *Indian Act* or section 149 of the *Income Tax Act* is a result of the Crown's good will. On the other hand, section 83 of the *Indian Act* represents a mere delegation of taxation rights. It fails to recognize and acknowledge Indigenous peoples' inherent right to control economic activity within their jurisdiction. Aligning Canadian laws and policies with the principles contained within UNDRIP would give effect to the idea of merged sovereignty and would form the necessary foundation upon which Canada and Indigenous nations can negotiate tax agreements.

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[252] Indigenous peoples strongly believe that they are immune from taxation based on the fact that they never lost their sovereignty over their lands and peoples. However, Canadian laws have the effect of undermining Indigenous sovereignty by interfering with Indigenous wealth either by taxing Indigenous peoples and/or taxing corporations deriving value from Indigenous lands. In order to achieve reconciliation, outdated laws must be amended to reflect the fact that Indigenous peoples never lost their sovereignty and retain a right to self-govern. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 947. See also, TRC reconciliation, *supra* note 225 at 6.

[253] *Mitchell*, *supra* note 188 at para 129-30.

3.4.1-Section 87 of the *Indian Act* Tax Exemption

Section 87 of the *Indian Act* is a continuation of colonial policy exempting Indigenous peoples from taxation. The origins of statutory tax exemptions can be traced to an *Act of the Province of Canada* passed in 1850.[254] This exemption was continued, with minor modifications, with the passage of the first version of the *Indian Act* in 1867.[255] The purpose of section 87 tax exemption is to protect property allocated to Indigenous peoples by the Crown.[256] *Mitchell v Peguis Indian Band* involved a dispute arising when an invalid tax was imposed upon the Peguis Indian Band by Manitoba Hydro for the sale of electricity on reserve.[257] Despite the case revolving around the ability of a court to issue a garnishing order against Indigenous personal property, La Forest J offers a judicial interpretation on the purpose of section 87 of the *Indian Act*. La Forest J. reasons that section 87 is rooted in Indigenous peoples' acknowledgment of the ultimate sovereignty of the Crown. On this basis, he reasons "the exemption from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government will erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. …"[258]

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[254] SC 1850, c 74 s 4.
> "And be it enacted, That no taxes shall be levied or assessed upon any Indian or any person inter-married with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person inter-married with any Indian so long as he, she or they shall reside on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians."

[255] *Indian Act*, SC 1867, c 18 ss 64-65. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 947.
[256] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193 [*Mitchell 2*].
[257] *Ibid*. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 971.
[258] *Mitchell 2*, *supra* note 256 at 130.

While s 87 of the *Indian Act* exempts certain indigenous interest from federal and provincial taxation,[259] it fails to adequately respect Indigenous nations' right to self-determination. First, it is premised upon Indigenous peoples' acceptance of Crown sovereignty over Indigenous peoples and lands, which is factually incorrect.[260] And second, self-determining peoples have the right to develop their own political and cultural institutions free of the supervision of a sovereign authority (i.e., Canada).[261] This is simply not the case for section 87 tax exemption. It is a matter of well settled law that section 87 of the *Indian Act* represents a right to an exemption as opposed to an immunity from tax.[262] The *Indian Act* exemption is contingent upon the federal government's legislative will as a sovereign authority with the power to control Indigenous peoples' economic and political affairs.[263]

3.4.1A-Limitations of Section 87 of the *Indian Act*

As a right to an exemption based upon Canada's sovereignty over Indigenous nations, section 87 stands in the way of Indigenous economic development and territorial management. The limitations of section 87 of the *Indian Act* have caused Indigenous peoples to engage in extensive litigation and spend significant resources structuring business activity in order to retain wealth within their communities.[264] This is a result of the inherent limitation in section 87 of the

[259] The wording of section 87 of the Indian Act exemption clearly indicate that it is paramount to any federal and provincial Acts.
[260] Indigenous nations claim immunity from taxation based on their sovereignty over their own peoples and territories. They claim immunity from all forms of taxation by all levels of government. Indigenous nations' immunity flows from their inherent right to self-government which grants Indigenous nations complete authority over all fiscal issues including taxation. Canadian Parliament and Canadian courts strongly disagree with Indigenous nations understanding of the *Indian Act* tax exemption. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 947-48. See also, Robert C. Strother, "Sources of Aboriginal Tax Exemption Outside the Indian Act," in *Report of Proceedings of Forty-Fifth Tax Conference*, 1993 Conference Report (Toronto: Canadian Tax Foundation, 1994), 56:1-20, online: <https://taxfind.ca/#/document/1993_cr_paper_56>.
[261] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3.
[262] Strother, *supra* note 260. See also *Mitchell 2*, *supra* note 256 at 131.
[263] *Mitchell 2*, *supra* note 256 at 131.
[264] See Hanna, *supra* note 232 at 169-172.

Indian Act.[265] In order for section 87 to apply, Indigenous peoples must meet three conditions.[266] First, the property in question must be held by an "Indian" or "Indian band" as defined by the *Indian Act*.[267] Second, the property in question must be "personal property".[268] And third, the personal property must be situated on reserve.[269]

The complexity of determining the *situs* of income has permitted government officials to limit the application of tax exemptions applicable to both employment and business income.[270] The leading case for determining the *situs* of income is *Williams v Canada* (*Williams*).[271] In *Williams* the Supreme Court created a test for determining the *situs* of employment income. Shortly after the Supreme Court rendered its decision in *Williams v Canada*, the Federal Court narrowed the scope of section 87 for business income by requiring income earned by an Indigenous business to be "integral to the life of the reserve".[272] It was not until 2011 that the Supreme Court reversed the Federal Court's decision, broadening the scope of section 87 by

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[265] *Indian Act*, *supra* note 10 s 87.
[266] See Joseph Gill, Judith Charbonneau Kaplan, and Nicole Watson, "First Nations Tax Issues with a Business Focus," in *2018 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2018), 6:1-28, online: <https://taxfind.ca/#/document/2018_ppc_paper_6>. Section 87 tax exemption is narrow and has historically been narrowly interpreted.
[267] *Indian Act, supra* note 10 ss 2, 87(1)(a). Indigenous peoples living on reserve have no control over who is considered an "Indian" for the purposes of the *Indian Act*.
[268] *Ibid* s 87(1)(b). See also, *R v Nowegijick*, [1983] 2 SCR 29, 144 DLR (3d) 193 [*Nowegijick*]. Taxable income of Indigenous peoples is personal property for the purposes of section 87 of the *Indian Act*.
[269] *Ibid*.
[270] Government officials have limited the scope of section 87 as the Supreme Court confined its purpose to protecting Indigenous property. As a result, government officials have engaged in litigation to ensure that Indigenous peoples dealing with property are treated similarly to other Canadians. See *Mitchell*, *supra* note 193 at 131. See also, *Nowegijick*, *supra* note 268 at 36. Dickson J states at page 36 "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."
[271] *Williams I*, *supra* note 13.
[272] See *Southwind v Canada*, 156 DLR (4th) 87 at para 13, [1998] 1 CTC 265 (FCA).

affirming the "connecting factors" in *Williams* and decreasing the importance of the connection between the income and "traditional native ways of life."[273]

Another significant impediment to wealth generation and retention on reserves is the fact that section 87 tax exemption only applies to status Indians or bands.[274] As a result, if Indigenous peoples or government decide to incorporate to further their business interests, they will lose the benefits of section 87 of the *Indian Act*, regardless of whether the controlling shareholder is an "Indian" or "band".[275] As a result, Indigenous peoples have to engage in significant tax planning in order to balance business and tax considerations including income tax, GST, PST and other indirect taxes.[276] For example, Indians or Indian bands[277] will incorporate and enter into management services agreements in order to access the benefits of incorporation while maintaining the section 87 exemption.[278]

3.4.1B-Section 87 of the Indian Act and UNDRIP

Section 87 of the *Indian Act* fails to provide Indigenous peoples with a means of financing their autonomous function and developing their social, political and economic institutions. Therefore section 87, as currently worded and interpreted, cannot be used to meaningfully implement articles 3, 4 and 20 of UNDRIP.[279] First, section 87 cannot respect Indigenous peoples' right to self-determination as it is a continuation of colonial paternalistic attitudes towards Indigenous peoples and interferes with Indigenous people's ability to freely

[273] See Hanna, *supra* note 232 at 170. See *Bastien Estate v Canada*, 2011 SCC 38. See also, *Dubé v Canada*, 2011 SCC 39.
[274] *Indian Act*, *supra* note 10 s 87.
[275] Gill, *supra* note 266. There is no exemption for corporation in the *Indian Act*. However, corporation may be exempt under the *Income Tax Act*. This will be discussed later on in this chapter.
[276] *Ibid*.
[277] As defined in the *Indian Act*, *supra* note 10 s 2(1).
[278] Gill, *supra* note 266.
[279] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3, 4, 20.

pursue their economic development.[280] Second, section 87 fails to protect Indigenous governments' tax base and, therefore, hinders their ability to finance their own autonomous function.[281] And third, by failing to prevent other levels of government from taxing Indigenous interests, section 87 fails to promote Indigenous peoples ability to develop their own political and economic institutions.[282]

Section 87 of the *Indian Act* fails to acknowledge Indigenous nations' sovereignty over taxation rights within their jurisdiction. A critical element of self-government and territorial management is the ability to control economic activity within Indigenous jurisdiction.[283] In other words, self-government and territorial management involves a degree of sovereignty.[284] Section 87 is premised on Crown sovereignty and is paternalistic in nature.[285] As paternalistic legislation premised on Crown sovereignty over Indigenous nations, section 87 cannot provide Indigenous peoples with the right to self-determination. According to the courts, the purpose of section 87 is to protect Indigenous property in exchange for Indigenous peoples' acknowledgement and acceptance of Crown sovereignty. Indigenous peoples have never accepted Crown sovereignty over them.[286]

Section 87 fails to promote the development of Indigenous political and economic institutions. The development of Indigenous political and economic institutions requires

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[280] Hanna, *supra* note 232 at 173-74. The purpose of section 87 is to ensure the federal government protects Indigenous peoples and their lands from exploitation.
[281] Section 87 of the *Indian Act* does nothing to alter the constitution distribution of tax jurisdiction between the federal and provincial governments. See *Constitution Act*, *supra* note 7 ss 91(3), 92(2).
[282] The development of economic and political institution free from external interference requires Indigenous jurisdiction over Indigenous lands and resources. See Hanna, *supra* note 232 at 9-10. See also, Stephen Cornell & Joseph P Kalt, "About the Harvard Project, The Harvard Project on American Indian Economic Development", (2016), online: <https://hpaied.org/about>.
[283] *Ibid*.
[284] *Ibid*.
[285] Strother, *supra* note 260 at 1. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3.
[286] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3.

Indigenous nations to have the ability to generate revenues from individuals and persons engaged in economic activities within Indigenous territories.[287] While section 87 does not concern Indigenous governments' right to tax, it fails to protect Indigenous governments' tax base. By failing to protect Indigenous resources, section 87 cannot meaningfully facilitate Indigenous governments' ability to develop institutions and competencies necessary for self-government and territorial management.[288]

3.4.2-Municipal and Public Body Exemption section 149 of the *Income Tax Act*

Section 149 of the *Income Tax Act* provides Indigenous government with tax protections if they are performing the function of a public body. Unlike section 87 of the *Indian Act*, paragraph 149(1)(c) (Public body exemption) of the *Income Tax Act* has been interpreted broadly and provides Indigenous nations the widest possible exemption from taxation.[289] Paragraph 149(1)(c) of the I*ncome Tax Act* exempts municipalities and public bodies performing the function of government in Canada from Part I income taxation.[290] Prior to 2016, the ability of an Indigenous government to utilize the public body exemption was determined on a case-by-case basis.[291] By 2016, the CRA adopted a policy considering all bands, as defined by the *Indian Act*,

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[287] *Washington*, *supra* note 8.
[288] See Hanna, *supra* note 232 at 9-10.
[289] Unlike s 87 of the *Indian Act*. s. 149(1)(c) of the *Income Tax Act* places no restriction on where the income is generated. The income can therefore be completely unconnected to the reserve yet remain exempt from taxation. However, it is only available to municipalities or public bodies performing the function of government. See Income Tax Act, *supra* note 11 s 149(1)(c).

> 149(1) No tax is payable under this Part on the taxable income of a person for a period when that person was [….]
>
> (c) a municipality in Canada, or a municipal or public body performing a function of government in Canada.

[290] *Income Tax Act*, *supra* note 11 s 149(1)(c). See also, Hanna, *supra* note 232 at 199. It is important to note that s 149(1)(c) only applies to Part I tax. Therefore, Indigenous nations are still subject to all the procedural requirements mandated by the *Income Tax Act*. See Gill, *supra* note 266 at 9.
[291] Gill, *supra* note 266 at 7. To reduce uncertainty and manage risk, Indigenous bodies often obtained rulings from the CRA to confirm their tax-exempt status. Factors weighing in favour of granting the public body tax exemption included: (a) legislative powers to govern; (b) impact on the community; (c) community accountability; and (d) the provision of public services such as education and healthcare.

to be public bodies performing the function of government.[292] The CRA's position is supported by bands' ability (1) to create by-laws for the benefit of the community; (2) to levy taxes and impose fines; (3) to manage reserve lands, resources and finances; and (4) to govern (within the framework of the *Indian Act*).[293]

While section 149 of the *Income Tax Act* provides Indigenous government with a broad tax exemption, it is nonetheless limited. Section 149 is premised upon the Crown sovereignty over Indigenous nations and only applies to a small subset of Indigenous governments. For example, paragraph 149(1)(c) only applies to Indigenous governments that are considered a "municipality" or "public body".[294] Furthermore, legal entities separate from the public body cannot benefit from the exemption unless they meet the criteria set out in paragraphs 149(1)(d.5) and 149(d.6).[295] For example, in order for legal entities owned by Indigenous public bodies to benefit from subsection 149(1)(c) at least 90% of income must be generated on reserve. In other words, paragraphs 149(1)(d.5) and 149(d.6) are limited in terms of "capital" ownership and geographic location where income is earned.[296]

3.4.2.1-Section 149 and UNDRIP

Section 149 of the *Income Tax Act* provides Indigenous nations with a limited ability to achieve self-determination. By exempting Indigenous governing bodies from taxation, section 149 of the *Income Tax Act* permits Indigenous governing bodies to generate revenues without

[292] Canada Revenue Agency, Interpretation Bulletin, IT-064503117, "Indian Act Bands" (July 27, 2016). The CRA states "the very nature of an Indian band and its council under the Indian Act is that of a local government, similar in nature to a municipality."
[293] *Ibid*. See also, Gill, *supra* note 266 at 7-8.
[294] *Income Tax Act*, *supra* note 11 s 149(1)(c).
[295] *Ibid* ss 149(1)(d.5), 149(1)(d.6).
[296] *Income Tax Act, supra* note 11 ss 149(1)(d.5), 149(1)(d.6), 149(11). See also Hanna, *supra* note 232 at 200-202. See also Gill, *supra* note 266 at 12-13.

federal or provincial interference.[297] Allowing Indigenous government to generate their own revenues, which are not subject to accounting or reporting requirements imposed by the federal government, enhances their ability to achieve self-determination.[298] However, the ability to generate revenue and self-govern is achieved within a system premised on the sovereignty of the Crown over Indigenous nations and within tightly controlled parameters. First, in order to be used by Indigenous governing bodies paragraph 149(1)(c) must be used by an unincorporated entity, forcing Indigenous governments to be exposed to third-party liability.[299] Second, section 149(1)(c) does not apply to Indigenous governing bodies that do not fit the definition of a "band" within the *Indian Act*.[300]

Limiting the application of paragraph 149(1)(c) to bands as defined by the *Indian Act* severely limits Indigenous nations' ability to develop their own political and economic institutions. One of the major critiques of Canada's attempts to grant Indigenous peoples the right to self-determination and jurisdiction over resources is that it is too narrow and represents "little more than a modified version of the status quo."[301] Since the tax exemption in paragraph 149(1)(c) is confined to "bands" as determined by the federal government, it is arguably nothing more than a continuation of the status quo.

Furthermore, an essential element of self-government and determination is the ability to generate revenue from a government's own jurisdiction in order to develop independent political

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[297] *Income Tax Act, supra* note 11 s 149(1)(c). However, only if they fit the definition of "public body" as interpreted by the CRA.
[298] Self-determining peoples have the ability to make decisions concerning their communities and develop programs free from the direction and supervision of outsiders. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 3.
[299] Ranson, *supra* note 247 at 24. The alternative would be to use the exemptions found in paragraphs 149(1)(d.5) or 149(1)(d.6). However, as already discussed these paragraph place restrictive capital and geographic requirements. See *Income Tax Act*, *supra* note 11 ss 149(1)(d.5), 149(1)(d.6).
[300] *Income Tax Act, supra* note 11 s 149(1)(c). See also, Hanna, *supra* note 232 at 201-202.
[301] Chartland, *supra* note 137 at xii. See also, Hayden King & Shiri Pasternak, *Canada's emerging Indigenous Rights Framework: A Critical Analysis*, Yellowhead Institute, Special Report, 5 June 2018, online: <https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>.

and economic institutions.[302] The tax exemptions contained within section 149 of the *Income Tax Act* do not grant Indigenous nations the authority to collect revenues from individuals or persons deriving value from Indigenous lands and resources.[303] The exemption is limited to revenues generated by business activity of the public body itself and, therefore, does not go as far as implementing articles 3,4 or 20 of UNDRIP.

3.4.3-Property Taxation, Indigenous Self-Governance and UNDRIP

Recent developments granting Indigenous nations the legal right to impose property taxes on non-Indigenous leaseholds located on reserves have had the effect of promoting the development of Indigenous economic and political institutions, which will in turn facilitate self-government.[304] Historically, Indigenous nations had no authority to impose property tax on non-indigenous persons with interests located on reserve lands.[305] By preventing Indigenous nations from imposing property tax and by failing to protect Indigenous tax jurisdiction, Canada has permitted provincial, municipal and local governments to impose property taxation on Indigenous interests without requiring them to provide services in exchange.[306] In 1988,

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[302] See *Washington*, *supra* note 8. The Supreme Court of the United States held that the power to tax is essential to self-government and territorial management.
[303] *Income Tax Act*, *supra* note 11 s 149.
[304] John Gailus & Caitlin E Mason, "Property Taxation as an Effective Tool of Self Government" (2013) Devlin Gailus Barristers and Solicitors, online: <http://www.dgwlaw.ca/web/wp-content/uploads/2014/12/Aboriginal_Taxation_Paper.pdf>.
[305] The current version of section 83 of the *Indian Act* was enacted in 1988. Prior to 1988 Indigenous governments had no legal basis to tax property interests of non-indigenous leaseholders located on reserve. See Bill C-115, *An Act to Amend the Indian Act and another Act in consequence thereof,* 2nd Sess, 33rd Parl, 1988 (assented to 28 June 1988, SC 1998). See also, *Indian Act*, *supra* note 10 s 83.
[306] See Gailus, *supra* note 304 at 1. Section 87 prevents the federal and provincial governments from taxing Indigenous reserve lands. However, section 87 does not prevent provincial and municipal governments from taxing the property interests of non-indigenous persons on reserves. It is important to note that not all provinces have permitted their local governments and municipalities to tax interests located on reserve lands. For example, Ontario, Manitoba and the Prairie provinces all prohibit their municipalities from imposing taxes on non-indigenous interests located on reserve lands. See Jonathan R Kesselman, "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy" (2000) 48:5 Canadian Tax Journal 1525 at 1533-34, online: <https://taxfind.ca/#/document/2000_ctj_paper_5_1525>.

Parliament enacted legislation enabling Indigenous governments to tax non-Indigenous property interests located on reserve.[307] By extending the right to tax property interests on reserve to Indigenous governments, Parliament promoted the development of Indigenous economic and political institutions.[308]

This section proceeds by outlining the conditions giving rise to the 1988 *Indian Act* amendment granting Indigenous nations the right to tax non-indigenous interests located on reserve. It then highlights the benefits that can arise from protecting Indigenous tax jurisdiction and granting Indigenous nations the legal right to tax organizations conducting business on reserve. Finally, it argues that while the 1988 amendment is a step in the right direction that has promoted the development of Indigenous economic and political institutions, it is nonetheless limited. It will be argued that the 1988 amendment is problematic in that it is premised upon Crown Sovereignty over Indigenous peoples and is a continuation of the old practice of replacing traditional systems of governance with inferior municipal style band government. In order to maintain the benefits arising from initiatives such as the 1988 amendment while respecting Indigenous sovereignty, Parliament must enact legislation recognizing Indigenous peoples' inherent right to control tax policy within Indigenous jurisdiction. Initiatives such as the 1988 amendment would then be premised upon Indigenous peoples' inherent right to control taxation rights and privileges within Indigenous jurisdiction.

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[307] See *Indian Act*, *supra* note 10 s 83. The term Indigenous governments refers to "bands" as defined in the *Indian Act*.

[308] See Robert Bish et al, "First Nation Property Tax, Services and Economic Development in British Colubmia"(2014), online: <https://www.uvic.ca/hsd/publicadmin/assets/docs/BBish/FirstNationTaxationServicesEcDevRevised.pdf> [Bish, "Property Tax"].

3.4.3.1-Property Taxation on Reserve Lands: Pre-1988

In the Province of British Columbia,[309] forty-five reserves were located within the boundaries of various British Columbian governments. These governments collected property taxes from leaseholds occupied by non-Indigenous peoples on reserve lands.[310] There are a number of issues that arise when local governments collect property taxes on Indigenous reserves. First, while local governments have the legal authority to collect property taxes, they have no legal requirement to provide services in exchange for the taxes collected.[311] Second, by imposing property taxes on reserve lands without providing services, local government lowered the value of reserve lands.[312] Third, imposing taxes on Indigenous reserves undermined Indigenous governments' abilities to manage their own territories.[313] As a result, Indigenous nations strongly opposed property taxes imposed by non-Indigenous governments. Indigenous opposition created administrative difficulties with the collection of delinquent taxes.[314] For example, in 1986 the British Columbia Provincial Surveyor of Taxes reported a 59.8% delinquency rate on current and back taxes on reserves.[315]

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[309] The Province of British Columbia is an excellent case study as it is one of Canada's more densely populated provinces that allows local government to tax non-Indigenous interests in reserve land. See Kesselman, *supra* note 306 at 1534.
[310] *Ibid*. Technically speaking, BC governments did not impose a "property tax" in a strict legal sense. They imposed a tax on non-Indigenous leaseholders that amounted to a property tax.
[311] *Ibid*.
[312] *Ibid*.
[313] *Ibid*. Prior to the Kamloops amendments, it was extremely difficult for Indigenous nations to generate revenues in order to finance services required for on reserve economic development. For example, one of the motivating factors for the amendment of section 83 was the inability of the Kamloops Indian Band of British Columbia to raise revenue through property taxes in order to finance service delivery for tenants of an industrial park located on reserve. See Kesselman, *supra* note 306 at 1534.
[314] *Ibid*.
[315] See Robert L Bish, "Property Taxation and the Provision of Government Services on Indian Reserves in British Columbia" (1987), Centre for Public Sector Studies School of Public Administration at 9, online: < https://static1.squarespace.com/static/5f32d90f7ffc124f3a797d0f/t/5f5161fde6617e2fc9ae4b75/1599169022261/BISH_taxation_and_services.pdf>.

The issues surrounding the imposition of property taxes on Indigenous lands led to the development of Bill C-115. Bill C-115 was developed by Kamloops Indian Band Chief Manny Jules and received support from Indigenous and Northern Affairs Canada, resulting in the 1988 amendment to the *Indian Act* (Kamloops Amendment).[316] The purpose of Bill C-115 was to clarify Indigenous jurisdiction over "designated lands". Designated lands are conditionally surrendered reserve lands that remain part of Indigenous reserves.[317] The Kamloops amendment, through section 83, granted Indigenous nations the right to impose property taxes on designated lands.[318]

By granting Indigenous nations the authority to impose taxes on designated lands, the Kamloops amendment created Indigenous property tax jurisdiction which increased revenue options for Indigenous nations and expanded their jurisdictional authority.[319] However, Indigenous tax jurisdiction granted by the Kamloops Amendment did not oust the provincial and

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[316] *Ibid* at 5. See also, Bill C-115, *supra* note 15. This was not the first attempt to establish Indigenous tax jurisdiction. In 1875, the Mohawks of Tyendinaga attempted to impose property taxation on their territory but were denied from doing so by the Department of Indian Affairs. See "30th Anniversary of Bill C-115", *First Nations Tax Commission* (20 July 2018), online: < https://fntc.ca/30th-anniversary-of-bill-c-115/> ["Anniversary of Bill C-115"]. Bill C-115 which expanded Indigenous taxation powers was a result of Chief Manning's attempt to impose property taxes in order to provide services for tenants of an Industrial Park located on reserve. See Kesselman, *supra* note 256 at 1534. See also, Indian Taxation Advisory Board, *Introduction to Real Property Taxation on Reserve* (Ottawa: ITAB, 1990) at 7-8.

[317] *Indian Act*, *supra* note 10 s 2(1). "Designated lands means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition." See also Bill C-115, *supra* note 15 cl 1a. The amendment contained within Bill C-115 would provide that "designated lands" form part of a reserve.

[318] See Bill C-115, *supra* note 15 cl 1(2). See also *Indian Act*, *supra* note 10 s 83.

> **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,
>
> > **(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;
> >
> > (4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

[319] *Ibid*. See also Anniversary of Bill C-115, *supra* note 316.

local governments' ability to impose property taxes on Indigenous property.[320] In British Columbia, this issue was resolved with the passage of provincial legislation clarifying the effects of section 83 of the *Indian Act* on provincial tax authority.[321]

The passage of Bill C-115 required British Columbia to reassess its taxing practices and laws affecting Indigenous reserve lands. British Columbia responded with Bills 77 and 64.[322] Bill 77 was shortly replaced by Bill 64 as it failed to address the issue of taxing Indigenous lands without the authority of Indigenous nations and without requiring local government to provide services.[323] Bill 64, the *Indian Self Government Enabling Act*, provided Indigenous nations with three taxation options: (1) concurrent property tax jurisdiction; (2) independent property tax jurisdiction; and (3) Indian Districts organizations.[324] The different options allowed Indigenous nations to have choice in structuring their relationships with local governments.[325]

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[320] See Bish, "Property Tax", *supra* note 308 at 5. While Bill C-115 does not oust provincial authority to impose property taxes on reserve lands, legal opinion held that courts would rule to against provincial imposed property taxes. This uncertainty was resolved with the passage of Bill 64. See also, Robert L Bish, Eric G Clemens & Hector G Topham, "Indian Government Taxes and Services in British Columbia: Alternatives Under Bill C-115 and Bill 64 (1991), online: < https://www.uvic.ca/hsd/publicadmin/assets/docs/BBish/taxes_services.pdf> at 1 [Bish, "Bill 64"].

[321] See e.g. British Columbia, Bill-77, *Indian Land Tax Cooperation Act*, 3rd Sess, 34th Parl 1989. Bill 77 did not become law as it failed to acknowledge that Indigenous nations had jurisdiction over reserve taxation. See Kesselman, supra note 306 at 1540. Bill-77 was followed by Bill-64 giving rise to the *Indian Self-Government Enabling Act*. *ISGEA*, *supra* note 64.

[322] *Ibid*.

[323] British Columbia, Legislative Assembly, *Hansard*, 34th Parl, 3rd Sess, (13 July 1989) at 8538 (Hon Mr. Weisgerber). Mr. Weisgerber explained: "The Intent of the act is to allow for taxation on reserve land that's conditionally surrendered and occupied by non-Indian leaseholders." However, it was clear from the Legislative debates that the whole purpose is not to recognize Indigenous tax jurisdiction on reserve lands but to enable Indigneous government and municipalities to sit down and agree upon which areas of taxation each will have. See also British Columbia, Legislative Assembly, *Hansard*, 34th Parl, 3rd Sess, (13 July 1989) at 8539.

[324] See *ISGEA*, *supra* note 64 ss 2, 8, 16. Concurrent taxation requires the Band to negotiate with the appropriate government for the delivery of services to leaseholders. In exchange the relevant government will reduce or eliminate taxes it imposes upon leaseholders on reserve. The Independent band taxation option would exempt leaseholders from all taxes and would require the band to supply all services. The Indian district organization would provide the band with an "Indian district" recognition entitling it to all the benefits enjoyed by B.C. municipalities. See also Bish, "Bill 64", *supra* note 320 at 5.

[325] See Kesselman, supra note 306 at 1540.

3.4.3.1-Indigenous Tax Jurisdiction: A Path Towards Self-Determination?

The Kamloops Amendment resulted in the creation of a number of Indigenous institutions furthering Indigenous economic and political development. Examples of Indigenous institutions include the Indian Taxation Advisory Board (ITAB), First Nations Tax Commission (FNTC), First Nations Financial Management Board (FMB), and the First Nations Finance Authority (FNFA). Furthermore, the Kamloops Amendment encouraged Parliament to pass a number of Acts facilitating Indigenous economic development and resource management.[326]

3.4.3.1A-Indian Taxation Advisory Board (ITAB)

ITAB was responsible for the regulation of Indigenous property tax.[327] When section 83 of the *Indian Act* was amended to allow Indigenous nations to impose property taxes on non-Indigenous leaseholders, Indigenous nations had no experience designing or administering property taxes.[328] As a result, ITAB was established in 1989 by the Department of Indian Affairs and Northern Development (DIAND) to assist in the implementation of section 83 of the *Indian Act*. DIAND described the purpose of ITAB by stating:

> The Board's primary purpose is to provide recommendations to the Minister on the approval of taxation by-laws, and to promote the exercise of these new Indian taxation powers. The Board represents a new concept in that it is the first Indian-controlled administrative body to be involved in the exercise of the Minister's decision-making power under the Indian Act.[329]

ITAB would achieve its goals by providing Indigenous nations with the necessary skills to efficiently administer property taxes. For example, ITAB hired experienced professionals to

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[326] See e.g. *First Nations Land Management Act*, SC 1999, c 24 [FNLMA]. See also, *First Nations Commercial and Industrial Development Act*, SC 2005, c 53 [FNCID].
[327] The Indian Taxation Advisory Board was established in 1989 to regulate and help the Minister of Indian and Northern Affairs Canada approve property tax by-laws enacted pursuant to the *Indian Act*.
[328] Bish, "Property Tax", *supra* note 308 at 11, 15.
[329] See Canada, Department of Indian Affairs and Northern Development, Band Property Taxation Powers on Reserve, Information Sheet (Ottawa: the department, January 1993). See also, Kesselman, *supra* note 306 at 1537.

teach courses focused on assessment policies and practices, appeals, rate setting, and collection systems and enforcement.[330]

Establishing ITAB led to the development of Indigenous institutions and provided a road map for the future Indigenous economic development within the Canadian federation. However, it also highlighted the need to develop institutions with the ability to develop a framework for navigating the fiscal and service relationships between Indigenous governments and federal and provincial governments.[331] This led to the enactment of various pieces of legislation and the development of a number of institutions designed to address these challenges.[332]

3.4.3.1B-First Nation Tax Commission (FNTC)

Prior to the enactment of the *First Nations Fiscal Management Act* (FMA) in 2005, Indigenous nations' authority to impose property taxes was subject to Ministerial approval through section 83 of the *Indian Act*.[333] In 2005, the FMA was passed resulting in the establishment of the First Nations Tax Commission (FNTC), the successor of ITAB, an institution with federal law-approval powers.[334]

The creation of FNTC with federal-law approval powers appears to grant Indigenous nations greater independence in the design and implementation of their own property taxation policies. However, while the Minister no longer enjoys a veto power over property tax by-laws

[330] Bish, "Property Tax", *supra* note 308 at 11-12.
[331] *Ibid* at 15.
[332] *Ibid*.
[333] *First Nations Fiscal Management Act*, SC 2005 c 9 [*FMA*].
[334] *Ibid* s 17(1). "There is hereby established a commission, to be known as the First Nations Tax Commission, consisting of 10 commissioners, including a Chief Commissioner and Deputy Chief Commissioner."

enacted through the *FMA*, the Minister retains control over the appointment process of all commissioners serving as part of the FNTC.[335]

Despite not providing Indigenous nations with complete autonomy in developing and administering their property tax regime, the *FMA* has helped facilitate Indigenous economic development, service delivery and fiscal integration.[336] The *FMA* achieves its goal by creating the regulatory framework necessary for the development of Indigenous revenue and expenditure systems.[337] By establishing the FNTC, First Nations Financial Management Board (FMB)[338] and the First Nations Finance Authority (FNFA)[339], the *FMA* creates the necessary institutions for revenue generation and financial management.

3.4.3.1C-First Nations Financial Management Board (FMB)

The FMB aids Indigenous nations in developing their economies by ensuring they have the proper regulatory framework in place.[340] The FMB has a number of purposes including but not limited to assisting First Nations in managing their shared fiscal responsibilities with other levels of government, and establishing, maintaining and improving Indigenous financial relations with financial institutions and third parties.[341] The purpose of the FMB is to provide confidence

[335] *Ibid* ss 19(1), 20(1). It is only on the recommendation of the Minister that the Governor in Council appoints the Chief Commissioner and Deputy Chief Commissioner. Similarly, the Minister recommendation also controls the appointment of all other Commissioners.
[336] Bish, "Property Tax", *supra* note 308 at 16. Bish argues that the *FMA* is designed to elevate Indigenous revenue raising powers to a level similar to that of other governments in Canada. This goal is achieved by increasing Indigenous governments' ability to borrow funds through capital markets and by enhancing Indigenous investment climate. This is supported by the preamble of the FMA which states that one of the goals of the legislation is to create Aboriginal institutions that will assist First Nations in exercising their right to tax real property located on reserves and to enable First Nations government to access capital market financing for the development of public infrastructure. See *FMA*, *supra* note 333 [preamble].
[337] *FMA*, *supra* note 333 [preamble].
[338] *Ibid* s 38.
[339] *Ibid* s 58.
[340] Bish, "property tax", *supra* note 308 at 18. See also *FMA*, *supra* note 333 s 49.
[341] *FMA*, *supra* note 333 s 49.

in Indigenous financial management systems to taxpayers, the Indigenous community and investors.[342]

The FMB helps in the development of Indigenous fiscal capabilities and institutions in a cooperative effort with the federal government. The *FMA* requires the FMB to be composed of a minimum of 9 and a maximum of 13 directors.[343] The Minister controls the appointment of the Chairperson. However, the remaining directors are appointed by the Governor in Council and the Aboriginal Financial Officer Association.[344]

3.4.3.1D-First Nations Finance Authority (FNFA)

The FNFA helps provide Indigenous nations with financing through capital markets. In 1992, a group of Indigenous leaders contemplated a non-profit Indigenous owned and controlled institution which would provide Indigenous governments with financing.[345] With the passage of the *First Nation Fiscal Management Act* in 2005, the First Nations Fiscal Management Authority (FNFA) was established.[346] The FNFA is a voluntary non-profit organization without share capital.[347] Its purpose is to secure the borrowing of members through the use of property tax revenues.[348] To provide short and long-term borrowing options for its members, the FNFA provides investment services such as the creation of borrowing pools through the marketing and sale of debentures.[349]

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[342] Bish, "property tax", *supra* note 308 at 18.
[343] *FMA*, *supra* note 333 s 38.
[344] *Ibid* ss 40-41(1), 41(2).
[345] First Nations Finance Authority, *History, Mission and Mandate*, online: < https://www.fnfa.ca/en/about/mission-and-purpose/>.
[346] *FMA*, *supra* note 333 s 58.
[347] *Ibid*.
[348] *Ibid* s 74.
[349] *Ibid*. See also Bish, "property tax", *supra* note 308 at 18.

3.4.3.2-The First Nations Fiscal Management Act and UNDRIP

Recognizing and protecting Indigenous nations' right to tax non-Indigenous persons with leaseholds on reserve has promoted Indigenous economic development and the development of Indigenous economic and political institutions.[350] However, the Kamloops amendment falls short in meeting Canada's obligation to promote Indigenous self-determination as it is premised on Crown sovereignty over Indigenous nations and is a continuation the old practice of replacing traditional Indigenous systems of governance with municipal style band governments.[351] Only Indigenous nations that conform to the federal government's idea of what responsible and accountable government entail are permitted to levy property taxes on non-indigenous leaseholders situated on reserve.[352] Articles 3, 4 and 20 of UNDRIP require Canada to forge a nation-to-nation relationship that recognizes and respects Indigenous peoples right to self-determination.[353] In order to meaningfully implement articles 3, 4, and 20 of UNDRIP Canada must take actions which recognize Indigenous peoples' inherent right to self-governance independent of Canada's influence and control.[354] This can be done by recognizing Indigenous

[350] Examples include the First Nation Tax Commission, First Nation Financial Management Board, and the First Nation Finance Authority. As a result of the Kamloops amendment, there are over 120 Indigenous nations levying property taxes on reserves. They are estimated to have raised over 800 million dollars since 1989. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1015.

[351] Jones, *supra* note 56 at 28, 50. Implementing Indigenous rights through forced incorporation into Canada's political framework, fails to address Indigenous peoples' inherent right to govern their own lands and territories independently of outside influence and control. The right to self-government is a right to an **independent** jurisdiction over their affairs.

[352] Only "bands" as defined by the *Indian Act* can benefit from section 83. See *Indian Act*, *supra* note 10 s 83. This critique is in line with Aboriginal law scholars expressing concern that Canada's approach to Indigenous jurisdiction and autonomy is too narrow and little more than a modified version of the status quo. See Chartland, *supra* note 137 xii.

[353] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3, 4, 20. See also, Chartland, *supra* note 137 xii.

[354] "United Nations Declaration on the Rights of Indigenous Peoples (2007)", *supra* note 17 arts 3,4, 20. Section 83 of the *Indian Act* permits the Minister to approve or deny any money by-law (property tax) imposed by Indigenous nations. See *Indian Act*, *supra* note 10 s 83. While Indigenous nations can avoid Ministerial supervision by levying property taxes through the *First Nations Fiscal Management Act*, the Minister controls the appointment of commissioners on the First Nations Tax Commission. See *FMA*, *supra* note 333 s18.

nations' inherent right to control tax policy as it relates to Indigenous peoples and corporations deriving value from Indigenous lands.[355]

The goal of providing Indigenous nations with the ability to self-govern and determine their own destinies, is part of the larger goal of addressing the destructive effects colonialism has had on Indigenous peoples.[356] Addressing the destructive effects of colonialism requires undoing colonial systems of domination and oppression.[357] Colonial domination in Canada has followed a two-pronged approach: (1) bureaucratic control; and (2) economic exploitation.[358] While Canada's shifting politics combined with increased public awareness have decreased the extent to which Canada will economically exploit Indigenous peoples, the bureaucratic mechanisms of control remain intact.[359] For example, the purpose of the Kamloops amendment is to enable Indigenous nations to self-govern.[360] However, the wording of section 83 of the *Indian Act* and the *FNFMA* ensure that ultimate control rests with the Crown.[361]

Meaningfully implementing Indigenous peoples right to self-determination requires colonial governments to take actions recognizing Indigenous peoples **inherent right** to self-

[355] Amending section 87 of the *Indian Act* is the first step in recognizing Indigenous nations inherent right to manage their own lands and economy. The second step would entail building individual and institutional expertise in designing and implementing taxation regime in line with the rest of Canadian society.
[356] Chartland, *supra* note 137 at xi. Canada has a colonial legacy of racist policies and broken promises that resulted in significant harms to Indigenous peoples. The implementation of UNDRIP and, more specifically, the right to self-govern is thought of as a "way forward" to correct past wrongs and strengthen the fabric of Canadian society by forging a nation-to-nation relationship with Indigenous communities.
[357] See John Borrows, "Introduction" in Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the rights of Indigenous Peoples* (Montreal: Centre for International Governance Innovation, 2019) at 1-2. UNDIRP cannot be implemented without bringing international law in line with Indigenous legal traditions. This cannot be achieved without restructuring the unjust relationship Canada has established with Indigenous peoples. For example, the *Indian Act* fails to recognize traditional Indigenous governance practices and replaced them with colonial systems of governance. See William B Henderson, "Indian Act" in *The Canadian Encyclopedia* (2006), online: <https://www.thecanadianencyclopedia.ca/en/article/indian-act>.
[358] Yellowhead, *supra* note 31 at 7.
[359] See Sossin, *supra* note 1 at 94, 98.
[360] In Canadian Pacific Ltd v Matsqui Indian Band, the Supreme Court reasoned that the Kamloops amendment was designed to "facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserve." See *Canadian Pacific*, *supra* note 16 at para 18.
[361] See *Indian Act*, *supra* note 10 s 83. See also *FMA*, *supra* note 333 s 18.

determination and government.[362] Meaningful recognition of Indigenous peoples right to self-determination is achieved through actions unwinding the bureaucratic mechanisms of control used to assimilate indigenous peoples into Canadian society.[363] Recognizing Indigenous peoples' inherent right to control tax policy within their own jurisdiction by using UNDRIP to restructure tax relations between the Crown and Indigenous nations would highlight the Canadian government's seriousness in facilitating Indigenous self-determination.[364] Unlike section 83, the recognition of Indigenous nations' right to their own tax base would be premised upon Indigenous nations' inherent right to control their economic destinies.[365]

Taxation and economic development are intricately interwind.[366] Recognizing and protecting Indigenous people right to control tax policy within their own jurisdiction is critical for building Indigenous economies.[367] Unlike Canada's economy[368], Indigenous economies are built upon foundations which balance social, economic and political concerns. Indigenous economies protect Indigenous peoples, cultures and worldviews.[369] For example, "Anishinaabe economies are based on Minobimaastisiiwin—intimate knowledge of a place—and the principle of minobimaatisiiwin, meaning good life, characterized by "continuous rebirth.""[370] Therefore,

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[362] Diane Jones writes: "The constitutional right to self-government, then, is the right to freedom from interference in the independent jurisdiction of First Nations over their internal affairs." See Jones, *supra* note 56 at 50.
[363] See Neu, *supra* note 4 at 168-171.
[364] Despite Canada's statements highlighting the importance of reconciliation, Canada has failed to take substantial steps facilitating Indigenous financial independence. Even the most substantial step taken (allowing Indigenous government to impose property taxes on reserve) is subject to Ministerial approval.
[365] In 1999, the Supreme Court of Canada considered the constitutional basis for Indigenous taxation powers under section 83. The Supreme Court found the basis for section 83 of the Indian Act to fall under section 91(3) of the Constitution Act, 1867. No reference was made of Indigenous peoples' inherent right to control economic activity or tax activities within their own jurisdiction. See *Westbank First Nation v BC Hydro and Power Authority*, [1999] 3 SCR 134, 176 DLR (4th) 276. See also Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1013.
[366] John FJ Toye & David Lim, *Taxation and Economic Development: Twelve Critical Studies,* 1st ed (Oxfordshire, UK: Routledge, 2014) at 1. The ability to design efficient tax systems is essential for a nation's ability to build its economy.
[367] *Ibid*.
[368] The Canadian economy is very different from the economies that organize Indigenous lives. Indigenous economies are not limited to the wealth of a region. See Yellowhead, *supra* note 31 at 6.
[369] *Ibid* at 6-7.
[370] *Ibid* at 7.

the development of Indigenous economies requires Indigenous control over economic design, including tax policies.[371]

Recognizing Indigenous peoples' inherent right to control economic policy within their jurisdictions by enacting legislation recognizing that right would promote Indigenous fiscal autonomy and break away from Canada's symbolic actions maintaining the status quo. Canada has maintained a policy of granting Indigenous peoples limited rights which maintain the status quo. For example, Indigenous peoples are granted a right to hunt or fish but can only do so in a limited manner.[372] The courts have been reluctant to recognize Indigenous peoples right to manage their lands and interest because of a fear of interfering with non-indigenous rights and other constitutional concerns.[373]

As a result of Canada's concerns with the effects of recognizing Indigenous rights, it has preferred to implement Indigenous rights through negotiated agreements.[374] The recognition of Indigenous nations' right to control taxation policies within their jurisdiction will serve as the foundation for future fiscal agreements. Furthermore, exempting Indigenous citizens from taxation would have little effect on federal and provincial rights and budgets.[375] The exemption of corporations deriving value from reserves would clear up space for Indigenous nations to raise revenue needed for economic, social and political development.[376] Finally, the taxation of corporations does not raise issues of "taxation without representation" that have been subject to

[371] *Ibid*.
[372] See *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [Gladstone]. See also, *R v Van der Peet*, *supra* note 100.
[373] Yellowhead, *supra* note 31 at 9-10.
[374] Self-government Policy, *supra* note 2.
[375] See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 951.
[376] Legislation recognizing and permitting Indigenous nations to impose property taxes has allowed Indigenous nations to raise significant revenues for self-government. See Bish, "Property Tax", *supra* note 308 at 1.

controversy with the imposition of property taxation on non-indigenous leaseholders living on reserve.[377]

[377] See e.g. Kesselman, *supra* note 306.

Chapter 4 - Canada's Fiscal Constitution

Implementing UNDRIP within the Canadian federation requires that fiscal arrangements between Canada and Indigenous nations adopt a rights-based approach that respects Indigenous nations' inherent right to self-determination. Unfortunately, the current fiscal relations between Canada and Indigenous nations are paternalistic, inefficient, and harmful.[378] In implementing UNDRIP, Canada must develop a new fiscal arrangement that recognizes Indigenous peoples' right to develop fiscal policies within their jurisdictions.[379] This is supported by the Government of Canada's *Statement of Principle respecting the Government of Canada's relationship with Indigenous peoples* which states "The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development."[380] A new and more equitable fiscal relationship can be achieved through various mechanisms including new tax arrangements.[381]

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[378] Canada, Crown-Indigenous Relations and Northern Affairs Canada, A *New Approach: Co-Development of a New Fiscal Relationship Between Canada and First Nations* (2017), online: < https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf> at 1 [A New Fiscal Relationship]. The Assembly of First Nations calls for the development of a new fiscal relationship designed around Indigenous nations right to self-determination. A new fiscal relationship is necessary for the meaningful implementation of UNDRIP. See ("United Nations Declaration on the Rights of Indigenous Peoples (2007)"), *supra* note 17 art 4. Article 4 of UNDRIP calls for the development of fiscal arrangements ensuring Indigenous nations have a way of financing their autonomous function.

[379] TRC, Calls to action, *supra* note 236. The Truth and Reconciliation Commission's call to action #45 calls for the establishment of a nation-to-nation relationship with Indigenous peoples. A nation-to-nation relationship is established by the repudiation of the doctrine of discovery and the implementation of UNDRIP. A nation-to-nation relationship requires Canada to recognize and give effect to Indigenous fiscal sovereignty within their jurisdiction.

[380] Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (2018), online: <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf> at 15. The Government of Canada indicates that a new fiscal relationship can be achieved through various mechanisms including **new tax arrangements**.

[381] *Ibid*.

As a federal state, Canada has developed a complex fiscal constitution governing fiscal relations between the federal and provincial governments while ignoring Indigenous nations.[382] "Fiscal constitution" is a term used to refer to "the body of fundamental laws and regulations that frames decision-making in the area of fiscal policy."[383] Canada's fiscal constitution was first developed with the passage of the *British North America Act (BNA)*[384] which allocated taxation powers to the federal and provincial governments.[385] The *BNA* was silent in regard to Indigenous taxation rights.

Canada's fiscal constitution can evolve to accommodate Indigenous nations' right to self-determination. The Canadian Constitution provides us with a partial understanding of the ever-changing laws and regulations shaping taxation and fiscal transfers in Canada. Fiscal arrangements between the federal government and the provinces have mostly been shaped through negotiated agreements between the executives of the various governments making up Canada.[386] These negotiations were undertaken in response to the changing social and economic needs of the federation.[387] Given Canada's commitment to achieve reconciliation with Indigenous nations, Canada's fiscal constitution must further evolve to facilitate Indigenous fiscal autonomy.[388]

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[382] Monetary policies on reserve have historically been and continue to be reliant on the fiscal priorities of the federal government. See Jones, *supra* note 56.
[383] Blöchliger, *supra* note 20 at 32.
[384] Now the *Constitution Act*, *supra* note 7.
[385] *Ibid*.
[386] Richard M. Bird, "Policy Forum: Equalization and Canada's Fiscal Constitution," (2018), vol 66:4 *Canadian Tax Journal*, 847-869 at 850, online: <https://taxfind.ca/#/document/2018_ctj_paper_4_847>. See also, Robin Boadway & Ronald Watts, "Fiscal Federalism in Canada", (2000) Institute of Intergovernmental Relations working paper, online: <https://www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/WorkingPapers/watts/WattsFiscalFederalismCanada2000.pdf>.
[387] *Ibid* at 13
[388] Self-government Policy, *supra* note 2.

Chapter 3 is broken down into three parts. Part 1 begins by providing a brief overview of where Indigenous nations fit within Canada's fiscal landscape. It explores the fiscal arrangements present within Canada with a focus on federal and provincial money raising and spending powers and explores fiscal federalism as it governs federal-provincial social and economic policies. Part 1 concludes by arguing that the current fiscal structure fails to promote or respect Indigenous peoples' right to self-determination and government. Part 2 canvasses the special relationship Canada has to Indigenous peoples. Canada's relationship to Indigenous peoples requires it to not only alter its approach to funding Indigenous services but also take steps recognizing Indigenous sovereignty over fiscal matters falling within Indigenous jurisdiction. Part 3 explores Canada's commitment to promoting Indigenous self-government and argues that the recognition of Indigenous taxation rights is an essential element of meaningful self-government.

4.1.1-The Canadian Federation

The Canadian federation, established in 1867 in an effort to facilitate economic growth, territorial expansion and national defense, has the potential to accommodate Indigenous autonomy and self-government.[389] The diversity that existed within the territories now referred to as Canada, required a political system of governance that divided power between a central federal legislature and the provincial legislatures.[390] This arrangement has permitted the federal government to pursue policies facilitating economic growth, territorial expansion and national

[389] Canada ranks among one of the most decentralized federations in the world. The Canadian federal structure guarantees regional autonomy in certain core areas. See *Constitution Act*, *supra* note 7 s 92. See also Boadway, *supra* note 386. See also, Garth Stevenson, "Federalism in Canada", The Canadian Encyclopedia, (7 February 2006), online: <https://www.thecanadianencyclopedia.ca/en/article/federalism>.

[390] See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 43, 1 DLR (4th) 385. The Supreme Court of Canada states that federalism was a legal response to the underlying political and cultural realities that existed at confederation and continue to exist today. Canada was established as a federalist state with the ability to reconcile the diversity that existed with unity.

defense while at the same time respecting provincial autonomy.[391] In other words, it provided the provinces with the autonomy needed to develop their own societies by enacting their own laws and policies within their designated sovereign spheres of jurisdiction.[392]

The division of powers found in the *Constitution Act* reflect the underlying motivations in establishing Canada as a federalist state. In 1867, the major objective of creating a confederation was economic development through regional integration.[393] As a result, the federal government was assigned the power to raise revenues by "any mode or system of taxation" while the provinces were limited to raising revenues through direct taxation.[394] The federal government's expansive revenue raising powers corresponded to the expenditure requirements of establishing a national economy.[395]

In establishing Canada as a federalist state, Indigenous populations had little to no political power and as a result were considered a federal responsibility under section 91(24) of the *Constitution Act, 1982*.[396] The terms of establishing Canada were initially negotiated by the Province of Canada (Ontario and Quebec), New Brunswick and Nova Scotia. Once the negotiations were concluded, the British Parliament passed the *BNA* (now known as the *Constitution Act, 1867*), establishing Canada.[397] As a result, Indigenous sovereignty was ignored, and the Crown viewed Indigenous peoples as subjects of the state.[398]

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[391] *Ibid*.
[392] See *Constitution Act*, *supra* note 7 s 92.
[393] The development of infrastructure linking the regional economies required building railways, roads, canals, harbors, etc. The federal government was responsible for these undertakings. See Boadway, *supra* note 386 at 7.
[394] *Constitution Act*, *supra* note 7 91(3), 92(2). The provinces are only allowed to raise revenues by direct taxation within the province and for raising revenues for provincial purposes. The difference between direct and indirect taxes is that direct taxes require every person subject to the tax bear the incidence of taxation. While indirect taxes are levied upon one person with the expectation that the incidence of the tax will be passed on to another person. See Vern Krishna, "The Fiscal Landscape: Part 1" (2018) 28:5 Can Current Tax 37 at 44.
[395] Boadway, *supra* note 386 at 7.
[396] Canada was establishment as a result of negotiation conducted between the provinces. See Stevenson, *supra* note 389.
[397] *Ibid*.
[398] *Constitution Act*, *supra* note 7 s 91(24).

4.1.2-Fiscal Federalism and Provincial Economic Unity

Federal states like Canada have developed mechanisms for ensuring relative economic equality between the various regions making up the federation. Relative economic equality is necessary for the provision of comparable essential services to citizens of the various regions within the federation. This section explores the mechanisms the federal government employs to ensure the provinces have the necessary funds to provide comparable levels of social services. The purpose of this section is to provide the reader with an appreciation of the fiscal arrangements allowing various governments to operate within their own sovereign spheres and contrast that to the paternalistic and inadequate fiscal arrangements the federal government has with Indigenous nations.[399]

Canada has developed two main systems of intergovernmental transfers to address fiscal imbalances between the federal and provincial governments. From the 1940s onward, Canada experienced a rapid expansion of the welfare state.[400] As a result, the responsibilities of provincial governments in service development and delivery increased dramatically which resulted in a corresponding increase in provincial financial obligations.[401] The increasing provincial financial obligations resulted fiscal imbalances. As a result, Canada developed a system of intergovernmental transfers to address fiscal imbalance between the provinces themselves and between the provinces and the federal government.[402]

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[399] Fiscal arrangements between the federal government and Indigenous nations are explored in chapter 3.1.4.
[400] Flood, *supra* note 1 at 10. Boadway, *supra* note 386 at 8. The "welfare state" refers to obligations undertaken by the state to provide a wide range of social services to the general population. Examples include pension plans, healthcare, education, childcare, etc.
[401] The federal government was instrumental in initiating welfare programs in Canada. Since then, the federal government's role in the development of social policy and spending has been in decline. Many of the programs initiated by the federal government are now designed and funded by the provincial governments. See Boadway, *supra* note 386 at 19.
[402] Boadway, *supra* note 386 at 8.

Fiscal imbalances in a federal state such as Canada can be broken down into vertical fiscal imbalances (VFI) and horizontal fiscal imbalances (HFI). VFIs and HFIs are used to balance the discrepancies between provincial revenues and responsibilities arising out of an expansive federal revenue base and wealth discrepancies between the provinces.[403] Vertical fiscal imbalances refer to a mismatch between federal revenues and expenditure responsibilities.[404] Horizontal fiscal imbalances refer to a mismatch between provincial revenues resulting from the different economic conditions present within the provinces.[405] To address horizontal and vertical fiscal imbalances, the federal government developed two types of transfers: conditional and unconditional transfers.[406]

Vertical fiscal imbalances are remedied through conditional federal fiscal transfers to the provinces. Federal transfers intended to address vertical fiscal imbalances usually have modest conditions attached to them. For example, funds transferred must be spent in areas falling under provincial jurisdiction (i.e., healthcare). These transfers are made through the federal spending power.[407]

Horizontal fiscal imbalances are a result of the provinces varying abilities to raise revenues for public service delivery.[408] Horizontal fiscal imbalances are remedied through a fiscal transfer system known as equalization.[409] The rationale for equalization payments is to ensure that Canadian citizens enjoy comparable services at a comparable level of taxation regardless of where in Canada they reside.[410] Equalization transfers are unconditional transfers

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[403] *Ibid*.
[404] *Ibid* at 39. A larger vertical fiscal imbalance implies stronger provincial reliance on federal transfers to fund expenditures.
[405] *Ibid*.
[406] *Ibid*.
[407] *Ibid*. There is no explicit constitutional provision recognizing the federal spending power.
[408] *Ibid* at 42.
[409] See *Constitution Act*, *supra* note 7 s 36(2).
[410] Bird, *supra* note 386 at 851. See also, Boadway, *supra* note 386 at 10.

received by provinces with smaller tax bases.[411] Provincial per capita equalization transfers are calculated measuring provincial tax capacity compared to a national standard.[412]

4.1.3- Federalism, Social Programs & Indigenous Peoples

Indigenous peoples were neglected in the development of social programs across the country. For almost 100-years, Canada aimed to assimilate Indigenous peoples into Canadian society. Canadian federalism and Crown sovereignty are premised the doctrine of discovery.[413] The doctrine of discovery ignored the existence of Indigenous peoples in the territories now referred to as Canada.[414] As a result, for the first 100 years post-confederation Canada adopted a policy of assimilation or annihilation. Indigenous peoples that failed to integrate into Canadian society were placed on reserve lands. Reserves were often harsh lands that were difficult to live on. By placing Indigenous peoples on reserves and by preventing Indigenous peoples from engaging in traditional activities necessary for survival, Canada hoped Indigenous peoples would die from disease or starvation.[415] The government's goal would be achieved by adopting an "enough to keep them alive" policy where rations were provided sparingly and only to the elderly and ill.[416]

Following the Second World War, Canada implemented various social assistance policies and programs aimed at creating minimal living standards for Canadians.[417] Both the federal and provincial governments implemented social services legislation within their spheres of

[411] Boadway, *supra* note 386 at 9.
[412] *Ibid* at 53.
[413] See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 188.
[414] *Ibid*.
[415] Flood, *supra* note 1 at 94.
[416] *Ibid*. See also, H Shewell "Enough to Keep Them Alive"—Indian Welfare in Canada, 1873-1965 (Toronto: University of Toronto Press, 2004) at 327. See also, Yellowhead, *supra* note 31.
[417] Flood, *supra* note 1 at 97.

jurisdiction.[418] In doing so, the federal and provincial governments failed to take responsibility for providing services to Indigenous peoples.[419] The provinces argued that Indigenous peoples were the federal government's responsibility under section 91(24) of the *Constitution Act*.[420] And the federal government argued that the provision of services to Indigenous nations was a provincial responsibility.[421]As a result, Indigenous peoples living on reserve were not afforded the right to receive benefits arising from federal and provincial social programs or services.[422]

The federal government unsuccessfully pursued a number of different methods aimed at transferring jurisdiction over the provision of services to Indigenous peoples to the provinces.[423] In 1951, the federal government attempted to unilaterally transfer jurisdiction over the provision of services to Indigenous peoples to the provinces by allowing provincial laws of general application to apply to Indigenous peoples.[424] However, this attempt failed as the federal government could not force provincial governments to spend money on extending social programs to Indigenous peoples.[425] As a result, the federal government attempted to negotiate with the provinces for the provision of services to Indigenous peoples.[426] During this time the deteriorating living conditions on reserve combined with increasing public awareness forced the

[418] *Ibid*. For example, the provinces would legislate within their areas of jurisdiction (healthcare, child welfare, education, etc.) and the federal government would legislate for the creation of national programs (pension programs, family allowances, etc.)
[419] *Ibid*.
[420] *Ibid*.
[421] *Ibid*.
[422] *Ibid*. See also, H Shewell & A Spagnut, "The First Nations of Canada: Social Welfare and the Quest for self-government" in J Dixon & RP Scheurell, eds, *Social Welfare with Indigenous Peoples* (London: Routledge, 1995) at 3.
[423] Flood, *supra* note 1 at 97
[424] This was achieved by amending the Indian Act to allow provincial laws to apply to Indigenous peoples in cases where no conflict exited with the Indian Act, its regulation, or treaties. See Flood, *supra* note 1 at 97. See also, *Indian Act*, 1951, s 87 (now *Indian Act*, RSC 1985 c I-5, s 88).
[425] Flood, *supra* note 1 at 97.
[426] *Ibid*. See also, Canada, Department of Indian Affairs, Income Assistance Program National Manual (Ottawa: Public Works and Government Services Canada, 2005) at 13. This was to be accomplished through legislative initiatives such as the *Canada Assistance Plan*, 1966 SC c 45.

federal government to assume responsibility for the provision of social services on reserve.[427] The federal government assumed responsibility for the provision of social services through a treasury board directive permitting the Department of Indian Affairs[428] to spend federal funds on the delivery of social programs on reserve. The amount of funding would be comparable to that of the provinces.[429]

4.1.4-Fiscal Federalism and Indigenous Fiscal Autonomy

For the past 30-40 years, Canada has been transitioning from a relationship of domination and assimilation with Indigenous nations to a relationship of reconciliation.[430] Part of the process of reconciliation involves recognizing Indigenous nations' right to control social policies within reserves and the provision of resources necessary to ensure that Indigenous peoples have access to similar programs enjoyed by the rest of Canadian society.[431] Unfortunately, Canada has failed to give effect to Indigenous peoples' right to control social policy or provide Indigenous nations with their share of Canadian resources necessary for self-administration.[432] Instead, Canada has adopted a "self-administration" policy by transferring responsibility for service delivery to Indigenous nations.[433]

The "self-administration" policy is not tailored to the needs of Indigenous communities and is paternalistic in nature.[434] There are five major issues with the current Crown-Indigenous fiscal relationship: (1) inadequate transfers; (2) inadequate and underutilized revenue generating

[427] Shewell, *supra* note 416 at 4.
[428] The Department of Indian Affairs was the precursor of Indigenous and Northern Affairs Canada (INAC). This is the same department with a different name.
[429] Flood, *supra* note 1 at 98.
[430] See Flood, *supra* note 1 at 94. See also TRC Reconciliation, *supra* note 225.
[431] Yellowhead, *supra* note 31.
[432] *Ibid*.
[433] Neu, *supra* note 4 at 133. See also, Flood, *supra* note 1 at 99.
[434] For example, in 1997-98 INAC's budget was cut by 2% making it impossible for the budget to respond to Indigenous populations growth rates. See Yellowhead, *supra* note 31 at 40.

opportunities; (3) unpredictable and arbitrary funding arrangements; (4) excessive administrative and reporting requirements; and (5) excessive focus on compliance.[435]

The level of funding given to Indigenous communities is based upon a comparability standard.[436] Comparability standards fail to consider the conditions of Indigenous peoples and determine the level of funding necessary for their unique needs.[437] Indigenous nations have been subjected to the government's assimilation policies for many years. As a result, Indigenous nations are not in a similar positions as provincial or territorial governments. They require greater investment to build the infrastructure necessary to deliver services such as healthcare, housing, education, etc.[438]

In addition to failing to tailor self-administration agreements to the needs of Indigenous nations, the agreements are paternalistic in nature and maintain colonial relations between Indigenous nations and the federal government.[439] The Department of Indian and Northern Development evolved into a funding agency signing "contribution agreements" with Indigenous nations.[440] Unlike federal fiscal transfers to the provinces, federal transfers Indigenous nations often had stringent conditions attached to the funds transferred.[441] In situations where an

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[435] A New Fiscal Relationship, *supra* note 378 at 9.
[436] "Comparability" refers to the manner in which the federal government determines the amount of funding given to Indigenous nations. Comparability requires Indigenous nations funding formulas to be comparable to that of the provinces and territories. See Yellowhead, *supra* note 31 at 38. See also, "Sufficiency: Comparability and Various Institutional or Other Arrangements to Support New Approaches to Comparability" (2017), A*ssembly of First Nations*, online: < https://www.afn.ca/wp-content/uploads/2018/11/Comparability-Report.pdf>.
[437] A New Fiscal Relationship, *supra* note 378 at 17. Furthermore, by relying on a comparability standard, the federal government focuses on compliance as opposed to focusing on measuring socio-economic and wellbeing outcomes of Indigenous peoples.
[438] Yellowhead, *supra* note 31.
[439] *Ibid*. See also Flood, *supra* note 1 at 99. See also, Jones, *supra* note 56.
[440] Jones, *supra* note 56 at 31-32; See also, Neu, *supra* note 4 at 133. See also, Flood, *supra* note 1 at 99. See also, Treasury Board of Canada Secretariate, *From Red Tape to Clear Results—The Report of the Independent Blue Ribbon Panel on Grant and Contribution Programs*, December 2006 at 3.
[441] Flood, *supra* note 1 at 99. It is estimated that the average Indigenous nation is required to complete 168 reports annually to maintain funding for essential services. See also, Funding Agreement, *supra* note 66. Canada's most recent comprehensive funding agreement template provides for stringent reporting requirements.

Indigenous nation fails to adhere to the federal government's funding requirements, the federal government has the right to cancel the funding or take over the management and delivery of service on reserve.[442]

For example, in *Thunderchild First Nation v Canada*, the federal government took over the financial management duties of five Manitoba bands after refusing to sign annual funding agreements with the federal government.[443] The dispute arose due to the federal government's unilateral exercise of power and systemic underfunding for essential services.[444] At the federal court Justice Locke held that INAC had the power to limit the bands abilities to administer financial programs where bands fail to agree on conditions imposed by INAC.[445] Justice Locke confirmed the federal government's broad power to limit the band's ability to self-govern despite previous criticisms at the federal court. In *Attawapiskate First Nation v Canada* Justice Phelan described the funding agreements as "…essentially an adhesion contract imposed as a condition of receiving funding."[446]

The problems encountered in *Thunderchild First Nation* (TFN) can only be addressed by redeveloping Indigenous-Crown fiscal relations.[447] The problems arising in TFN are a result of a fiscal arrangement that is paternalistic in nature. The current arrangement presents a difficult choice for Indigenous nations: (a) federal paternalism and inadequate funding; or (b) self-

[442] *Ibid*.
[443] *Ibid* at 106. See also, *Thunderchild First Nation v Canada (Indian Affairs and Northern Development)*, 2015 FC 200 [*Thunderchild*]
[444] *Thunderchild*, *supra* note 443.
[445] *Ibid* at para 31.
[446] *Attawapiskat First Nation v Canada*, 2012 FC 948 at para 59.
[447] A New Fiscal Relationship, *supra* note 378 at 1. There are countless examples highlighting the fact that the existing fiscal arrangement between Indigenous nations and Canada is fundamentally flawed. The relationship is not responsive to Indigenous peoples' needs nor does it respect their right to self-determination.

administration and inadequate funding.[448] By refusing to sign an agreement with unacceptable terms, TFN was forced to endure federal paternalism with inadequate funding.[449]

The current fiscal arrangement allowed Justice Locke to justify the federal government's broad powers by arguing for the importance of protecting public funds and maintaining service delivery on reserve. For example, in holding that INAC had the right to take over financial management of the TFN, Justice Locke balanced the interests of the TFN with the importance of maintaining funding for essential programs and services and the protection of public funds.[450] He therefore concluded that the federal government was justified in taking over the financial management of the Band in situations where the Band refuses to sign a unilateral funding agreement.[451]

The situation in TFN provides a prime example of how the current fiscal relations fail to adopt a rights-based approach. In adjudicating the dispute between TFN and the Crown, Justice Locke was constrained by the absence of laws and oversight mechanisms holding the Crown accountable for service delivery to Indigenous nations.[452] For example, Justice Locke did not question the adequacy of funding or the federal government's unilateral changes to the funding agreement.[453] It is therefore necessary to re-develop Crown-Indigenous relations from the current status of government-to-administrator to that of government-to-government.

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[448] *Ibid* at 12. The fiscal relationship between Indigenous nations and the Crown fails has a long way to go before developing into a nation-to-nation relationship. The current relationship is better described as one of government-to-administrator.
[449] *Thunderchild*, *supra* note 443.
[450] *Ibid* at para 31.
[451] *Ibid*.
[452] The lack of accountability and overbroad discretion in service delivery and funding has been a constant theme in Indigenous Crown relations. See Flood, *supra* note 1 at 102.
[453] *Thunderchild*, *supra* note 443.

Transforming Indigenous-Crown relations into true government-to-government relations requires a new model for fiscal relations.[454] The new fiscal relationship can come in many forms.[455] However, it must maintain elements of respect and independence similar to those found in federal-provincial fiscal relations.[456] Federal-provincial relations are guided by clear legislation outlining the level of funding and support required for the provision of agreed upon services.[457] Accountability, transparency and respect are the hallmarks of a government-to-government relationship based upon cooperation and partnership.[458]

Both the government of Canada and the Assembly of First Nations agree that a renewed fiscal relationship can benefit from providing Indigenous peoples with the ability to generate revenues from taxation.[459] While imperfect, the *First Nations Fiscal Management Act*[460] can provide a starting point for the development of a new fiscal relationship between Indigenous nations and Canada. The recognition of Indigenous nations' right to tax non-Indigenous persons with leaseholds on reserve has promoted Indigenous economic development and the development of Indigenous political institutions.[461] This has prompted Chief Manny Jules, President of the First Nations Taxation Commission, to argue for the expansion of the *First Nations Fiscal Management Act* framework to support greater Indigenous taxation jurisdiction.[462] The development of a new fiscal relationship can partially be achieved by the

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[454] A New Fiscal Relationship, *supra* note 378.
[455] *Ibid* at 15.
[456] A New Fiscal Relationship, *supra* note 378.
[457] *Ibid*.
[458] *Ibid* at 12.
[459] *Ibid* at 16.
[460] *FMA*, *supra* note 333.
[461] Examples include the First Nation Tax Commission, First Nation Financial Management Board, and the First Nation Finance Authority. As a result of the Kamloops amendment, there are over 120 Indigenous nations levying property taxes on reserves. They are estimated to have raised over 800 million dollars since 1989. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1015. The development of economic and political institutions is essential to the realization of Indigenous peoples' right to self-determination.
[462] A New Fiscal Relationship, *supra* note 378 at 11. Indigenous groups in Halifax, Yellowknife, and Saskatoon have argued for access to greater revenue generating opportunities, including taxation.

extension of Indigenous taxation exemptions to create space for Indigenous governments to develop their own revenue free of the stringent conditions attached to federal transfers.

4.2-Reconciliation and Crown Obligations

The idea of granting Indigenous nations tax exemptions yet requiring the federal and/or provincial governments to provide services is not without controversy. Groups such as the Canadian Taxpayers Federation, a non-profit educational and advocacy organization, argues that income is the only measure that should be used to provide tax exemption.[463] Therefore, they argue for the abolishing of the *Indian Act* tax exemption. More specifically they argue that federal, provincial, and municipal taxation should apply to Indigenous peoples and interests whether on or off reserve.[464] It is interesting to note that some commentators have referred to the Indigenous tax exemptions as "unjustified tax exemptions for on-reserve commerce and individuals."[465] They refer to the effects of the exemption as "tax losses for government" and the creation of "uneven playing field with off-reserve business."[466] The belief that income should be the only measure by which tax exemption are enacted as led commentators to ponder why Indigenous peoples are tax exempt while receiving benefits from the Canadian government.[467]

Arguments for the elimination of Indigenous tax exemption on the basis that "income" is the only valid criterion for exemptions fails to consider the complex history that Indigenous

[463] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 951. See also, Tanis Fiss, "The Lost Century Moving Aboriginal Policy from the 19th Century to the 21st", Canadian Taxpayers Federation (November 2002) , online: < https://www.taxpayer.com/media/26.pdf> [Canadian Taxpayer's Federation]. See also, Lee Harding, "First Nations Tax Exemptions Aren't Helping Aboriginals, Yet They Cost Over $1 Billion", *Financial Post* (13 July 2017), online: < https://financialpost.com/opinion/first-nations-tax-exemptions-arent-helping-aboriginals-yet-they-cost-over-1-billion>.
[464] Canadian Taxpayer's Federation, *supra* note 463.
[465] Harding, *supra* note 463.
[466] *Ibid*.
[467] *Ibid*. See also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 951

nations have with the Crown and the Crown's obligations arising out of this history.[468] Proponents for the elimination of Indigenous tax exemptions have argued that tax exemptions do not benefit Indigenous peoples and that scrapping the exemption is necessary to create a more equitable society and place Indigenous peoples on equal footing with the rest of Canadian society.[469]

Ignoring the unique position of Indigenous nations in Canadian society while arguing for their integration into federal and provincial governance structures for their own benefit follows the same line of reasoning found in Jean Chrétien's 1969 White Paper.[470] The White Paper called for the elimination of the *Indian Act* and the full integration of Indigenous peoples into Canadian society.[471] The purpose of the White Paper was stated as the "full free and non-discriminatory participation of Indian people in Canadian society."[472] In other words, the White Paper argued for the assimilation of Indigenous peoples into Canadian society for their own benefit. As a result, the White Paper received strong backlash as it failed to recognize Indigenous autonomy and aimed to assimilate Indigenous peoples into Canadian society.[473] Similarly calls for the elimination of Indigenous tax exemptions also rely on arguments stating that eliminating the exemptions are in the best interest of Indigenous peoples as tax exemptions fail to help Indigenous peoples and create an "unfair" advantage for Indigenous peoples.[474]

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[468] This reasoning is grounded in the unquestioned acceptance of Crown Sovereignty and the elimination of Indigenous sovereignty over lands and resources.
[469] Harding, *supra* note 463.
[470] See Canada, Department of Indian Affairs and Northern Development, Stat*ement of the Government of Canada on Indian Policy* (The White Paper), 1969.
[471] *Ibid*. See also, Canadian Taxpayer's Federation, *supra* note 463 at 2.
[472] *Ibid*.
[473] Naithan Lagace & Niigaanwewidam James Sinclair, The Canadian Encyclopedia, *The White Paper, 1969* (24 September 2015), online: < https://www.thecanadianencyclopedia.ca/en/article/the-white-paper-1969>. The backlash to the whitepaper was comprehensive and long lasting. It resulted the development of activist movements, academic commentary, and judicial decisions concerning Indigenous rights in Canadian society.
[474] Canadian Taxpayer's Federation, *supra* note 463 at 2.

Chapter 3.2 argues that Canada has a moral and legal obligation to fund essential services for Indigenous peoples and provide Indigenous peoples with the right to control tax policies concerning their peoples and territories. This argument is supported by (1) the debt Canada owes to Indigenous peoples for the theft of resources used to establish Canada; (2) the honour of the Crown and Crown fiduciary obligations; and (3) UNDRIP.

4.2.1-Reconciliation and Restitution

The development of Indigenous economies and the provision of services to Indigenous peoples is not an act of charity on part of the federal or provincial governments. It is a long overdue debt that Canada has failed to pay.[475] It is no coincidence that Indigenous peoples are among the poorest peoples in Canadian society.[476] For many years Canada has been stealing Indigenous lands and resources.[477] Additionally, Canada has subjected Indigenous peoples to all forms of discrimination through the *Indian Act*.[478] Canada's actions towards Indigenous peoples have had real life consequences that Indigenous peoples suffer from to this very day. Therefore, achieving meaningful reconciliation requires Canada to take responsibility for the cost of rebuilding Indigenous economies that Canada has destroyed.[479] This section explains that the provision of services to Indigenous nations while respecting their right to manage their economies is not an act of charity. Indigenous nations are not benefiting from "special

[475] Yellowhead, *supra* note 31.
[476] Neu, *supra* note 4. Indigenous peoples suffer higher levels of poverty affecting housing, education, food, water and childcare. For examples of the impact poverty has on Indigenous peoples, see the TrueNorthAid's educational material at TrueNorthAid, online: <https://truenorthaid.ca>. See also, "Half of First Nations Children on reserve live in poverty, new study says," *APTN National News* (09 June 2019), online: <https://www.aptnnews.ca/national-news/half-of-first-nations-children-on-reserve-live-in-poverty-new-study-says/>.
[477] Graham, *supra* note 226.
[478] *Ibid*.
[479] Yellowhead, *supra* note 31 at 5.

privileges" unfairly. They are merely attempting to regain the ability to self-govern and have living standards comparable to those of the general population.[480]

4.2.1A-Artificial Dependence

Achieving reconciliation and respecting Indigenous peoples' right to self-determination requires emphasizing the importance of Indigenous sovereignty[481] as the basis for Indigenous legal, social, and economic orders and overturning the narrative of Indigenous dependence.[482] Critics of Indigenous tax exemptions have completely ignored Indigenous sovereignty and have ignored the circumstances which led to Indigenous economic dependence.[483] Chapter 3.2.1A argues that the sole reason Indigenous peoples are dependent on Canada for the provision of essential services is because of Canada's actions which include but are not limited to stealing Indigenous lands, restricting Indigenous economies, and committing acts of genocide aimed at assimilating Indigenous peoples into mainstream Canadian society.[484] In other words, Indigenous dependence is a direct result of Canada's actions. And as stated in Chapter 1, Canada purposively structured its relations with Indigenous nations to be one of dependence to control Indigenous peoples.[485] Therefore, arguing for Canada to respect Indigenous nations' tax

[480] Organizations such as the TrueNorthAid argue that promoting Indigenous self-governance and determination is essential to closing the poverty gap between Indigenous communities and the rest of Canada's population. See The TrueNorthAid, online: <https://truenorthaid.ca/about/>.
[481] Reconciliation is about re-establishing the nation-to-nation relationship that was characteristic of early Crown-Indigenous relations. See TRC, Calls to action, *supra* note 236. The Truth and Reconciliation Commission's call to action #45 calls for the establishment of a nation-to-nation relationship with Indigenous peoples. A nation-to-nation relationship requires Canada to recognize and give effect to Indigenous fiscal sovereignty within their jurisdiction.
[482] Unfortunately, many Canadians and Canadian institutions believe that Indigenous peoples have special privileges granting them unfair advantages at the expense of Canadians or the Canadian economy. This cannot be further from the truth. Indigenous peoples have suffered from widespread economic discrimination (i.e., theft of land). The dominant narrative is that Indigenous nations are dependent upon government handouts because they are lazy, incapable of managing their affairs, or successfully participating in Canada's economy. The truth is that Canada has enacted laws and regulations ensuring that Indigenous peoples remain dependent on and under the control of the federal government. See Yellowhead, *supra* note 31 at 6.
[483] See e.g., Harding, *supra* note 463.
[484] Yellowhead, *supra* note 31.
[485] Neu, *supra* note 4.

jurisdiction while at the same time providing Indigenous nations with financial support to achieve self-determination is not an act of charity. It is part of decolonisation necessary for achieving Indigenous self-determination and government.[486]

4.2.1B-Indigenous Peoples and the Canadian Economy

Indigenous peoples have played an integral role in the development of the Canadian economy without being fairly compensated. This chapter focuses on how Indigenous peoples were forced to surrender lands and resources for the benefit of Canada's economy and the way the Canadian government has infringed and continues to infringe upon Indigenous economic rights for the benefit of the Canadian economy. Despite Indigenous nations' significant contributions to the development of the Canadian economy, they have not received any substantial benefits arising from their contributions.[487] It is difficult to highlight all of Canada's theft of Indigenous lands and resources. This Chapter focuses on a select few examples highlighting how Indigenous lands and resources form the backbone of Canada's economy.[488]

Indigenous peoples have played and continue to play a significant role in the development and maintenance of the Canadian economy. The Canadian economy is built around Indigenous lands and resources. Canada generates wealth from selling, leasing, and developing lands it does not legitimately own.[489] Initially Canada justified its encroachment upon Indigenous

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[486] Yellowhead, *supra* note 31 at 5. The Authors of Cashback, a Yellowhead Institute paper, describe colonization as an economic project based upon land theft and a political system operating through domination.
[487] For example, Indigenous peoples were not compensated for lands lost due to the Crown's assertion of sovereignty. It is an unquestioned fact that the Crown enjoys sovereignty over Indigenous territories. However, Canada does recognize that land to which legal title belongs to the Crown is part of Indigenous nations' traditional territories. As a result, corporations developing this land often enter into impact-benefit-agreements with Indigenous nations. Unfortunately, the terms of these agreements are often unfavorable and cause many problems for Indigenous nations. See e.g., "Attawapiskat First Nation versus De Beers Diamond Mine," *The Bullet* (2 October 2020), online: <https://socialistproject.ca/2020/10/attawapiskat-first-nation-vs-debeers-diamond-mine/>.
[488] For a more thorough discussion see Yellowhead, *supra* note 31.
[489] Canada assertion of sovereignty over Indigenous territories are based upon archaic and flawed logic. See Borrows, "Aboriginal Legal Issues", *supra* note 5 at 188. See also, Yellowhead, *supra* note 31 at 19.

territories through royal charters. For example, in 1670 investors in the Hudson's Bay Company (HBC) were granted a royal charter for exclusive trading rights along Hudson Bay.[490] Prince Rupert, First Governor appointed to the HBC, had a third of what is now known as Canada named after him.[491] It is important to emphasize that the HBC could not legally own Rupert's land as it did not occupy nor control Rupert's land.[492]

Despite not legally owning Rupert's land, the HBC sold Rupert's land to Canada in 1869 for 300,000 pounds sterling (approximately $60 million Canadian, accounting for inflation).[493] Furthermore, Rupert's Land was sold to Canada despite the sale being in violation of the Royal Proclamation of 1763 and the Treaty of Niagara.[494] Indigenous rights or claims to land were for the most part ignored. Article 14 of the 1870 order-in-council stated: "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."[495]

In addition to unjustified land grabs, Canada mismanaged and stole money from Indigenous trust funds. Indigenous trust funds were designed to hold revenues arising from the surrender of land to the Crown.[496] At the time of Confederation, it is estimated that Indigenous

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[490] Yellowhead, *supra* note 31 at 12.
[491] Shirlee Anne Smith, "Rupert's Land" in *The Canadian Encyclopedia* (7 February 2006), online: <https://www.thecanadianencyclopedia.ca/en/article/ruperts-land>.
[492] According to settler/Canadian law, the doctrine of discovery can justify a state's assertion of sovereignty over uninhabited lands. Canadian sovereignty is often justified by using the doctrine of discovery. However, for a state to assert sovereignty over an uninhabited land, it must first occupy that land. Even if we assume that Rupert's land was not occupied (which is not true), the HBC would still be required to occupy the land before the doctrine of discovery can be used to legitimize its ownership. The HBC could not legally own Rupert's land as (1) Rupert's land was occupied by Indigenous peoples; and (2) the HBC did not occupy Rupert's land. See Yellowhead, *supra* note 31 at 19. See also, Borrows, *supra* note 5 at 189.
[493] Yellowhead, *supra* note 31 at 19.
[494] *Ibid*.
[495] *Ibid*.
[496] Neu, *supra* note 4. See also, Yellowhead, *supra* note 31 at 12.

trust funds contributed to approximately 10% of Canada's annual revenues.[497] For example, in 1834, the Province of Upper Canada invested Six Nation's money held in trust to fund the Grand River Navigation Company. This investment was made without obtaining Six Nation's consent.[498] When the Grand River Navigation Company failed, the moneys and community land were lost and never compensated.[499]

One noteworthy mention on how Indigenous nations bankrolled Canada against their will is the *Dominion Lands Act*.[500] The *Dominion Lands Act* provided a blueprint for land grants to companies in exchange for development promises.[501] Numerous companies received lands at discounted rates in exchange for the promise to build bridges, roads and to promote migration and settlement.[502] As a result, millions of settlers established homes on the territories of Indigenous nations such as the Cree, Siksikaitsitapi (Blackfoot Confederacy), Nakoda Oyadebi (Assiniboine), Dene, etc.[503]

To curb Indigenous protests Canada employed Royal Canadian Mounted Police (RCMP). The RCMP was used to remove Indigenous peoples protecting their lands.[504] Furthermore, Canada employed various measures ensuring Indigenous peoples did not politically organize to push back against unfair "treaties" and Canada's unilateral assertion of sovereignty.[505] As a result, Indigenous peoples were forced to sign treaties as a last resort to protect their lands.[506] To

[497] Yellowhead, *supra* note 31 at 12.
[498] *Ibid*.
[499] *Ibid*.
[500] *Ibid* at 21.
[501] *Ibid*.
[502] *Ibid*
[503] *Ibid*.
[504] *Ibid* at 21-22.
[505] For example, in the 1880s the "pass system" was enacted allowing the government to monitor Indigenous nations in the prairies. It was designed to prevent Indigenous peoples from politically organizing to fight for their rights. *Ibid* at 21.
[506] *Ibid* at 22.

make matters worse Canada has failed to honour the treaties signed with Indigenous nations. For example, Canada interprets treaties as contracts of settler law as opposed to international agreements between nations, as recommended by the UN.[507]

The Canadian Constitution explicitly recognizes the existence of Aboriginal economic rights as a subset of section 35 Aboriginal rights. However, Canadian courts have limited the extent to which Indigenous peoples can benefit from their inherent economic rights in the interest of the Canadian population.[508] In the late 1900s while Canada was contemplating Constitutional reform the Assembly of First Nations drafted a Declaration outlining their inherent rights, independent of Canada's control.[509] While Canada did not fully acknowledge the existence of specific inherent rights outside of Canada's control, Canada did acknowledge the existence of Aboriginal rights. In 1982, the newly amended *Constitution Act, 1982* recognized the existence and provided protection for Aboriginal rights.[510] Unfortunately, the *Constitution Act, 1982* failed to explain what aboriginal rights entailed and, therefore, it was left up to the courts to determine the content and scope of Aboriginal rights.[511]

The Supreme Court of Canada narrowly defined Aboriginal rights by limiting such rights to those integral and distinctive to Indigenous societies.[512] However, the Supreme Court did recognize the existence of Indigenous economic rights that are constitutionally protected.[513] In 1999, the Supreme Court recognized a Mi'kmaq commercial fishing right for "moderate

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[507] *Ibid*. See also, Migeul Alfonso Martinez, UN Special Rapportuer on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Study on Treaties, agreements and other constructive arrangements between States and Indigenous populations: final report (Geneva: UN, June 1999), online: < https://digitallibrary.un.org/record/276353?ln=en>.
[508] See e.g. *Gladstone*, *supra* note 372.
[509] Borrows, "Aboriginal Legal Issues", *supra* note 5 at 96-98.
[510] *Constitution Act*, *supra* note 7 s 35(1): "The existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed."
[511] Flood, *supra* note 1 at 110.
[512] See *Van Der Peet, supra* note 100 at para 46.
[513] See e.g. *Marshall, supra* note 35.

livelihood", a term left undefined.[514] In the same decision the Supreme Court maintained the Crown's ability to encroach upon Indigenous economic rights through regulations.[515] Indigenous economic rights can be regulated and infringed for a variety of reasons including for the benefit of settler economic rights.[516] For example, in *Delgamuukw* the Supreme Court stated that Aboriginal rights can be infringed for "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims. .."[517]

Canada has often used economic regulation to maintain political power within the state and keep Indigenous peoples dependent. For example, Canada has limited Indigenous economic development through regulations designed to protect commercial rights of settler society. In 2014, the Criminal Code was amended to introduce harsher penalties for the trade in contraband tobacco.[518] This was seen as a necessary step in maintaining the power of the state to regulate economic activity for the benefit of settler society and at the expense of Indigenous peoples.[519]

A shallow probe into Canada's history as it relates to the theft of Indigenous lands is sufficient to dispose of any arguments insinuating in any way that Indigenous nations are receiving unearned benefits through tax exemptions or taxation rights. The legacy of dispossession is that the Canadian economy is built upon stolen Indigenous wealth and that Indigenous peoples are dependent upon the Crown. Therefore, any benefits attributed to the Canadian economy can be linked to Indigenous dispossession. For example, Arthur Manuel

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[514] *Ibid* at 67.
[515] *Ibid* at 59-61. In delivering the Supreme Court's judgment Binnie J. limited the Mi'kmaq right to fish to "moderate livelihood".
[516] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.
[517] *Ibid* at para 165.
[518] Yellowhead, *supra* note 31 at 10.
[519] *Ibid*.

describes the legacy of Indigenous land grabs as "…The wealth and economy of Canada and the provinces is based on this colonial constitution that basically dispossesses Indigenous peoples and makes us dependent on the federal and provincial governments. Dispossession and dependency is humiliating and creates a great upheaval in our social, political, economic, cultural and spiritual life."[520]

[520] See Art Manuel, "Colonial Oppression at Elsipogtog: Right to self-determination," *West Coast Native News*, (30 October 2013), online: <https://unsettlingamerica.wordpress.com/2013/10/30/colonial-oppression-at-elsipogtog-right-to-self-determination/>. See also, Yellowhead, *supra* note 31 at 28.

Chapter 5 - Conclusion

Canada's colonial policies towards Indigenous nations have weakened Indigenous economies and rendered them dependent upon the Crown. The theft of Indigenous lands, forced relocation of Indigenous peoples into less desirable parcels of land, and the tight control over Indigenous economies have created a relationship of dependence between Indigenous nations and the Crown.[521] The Crown's dominant position has allowed it to structure relations with Indigenous nations in a manner which undermines Indigenous peoples right to self-determination.[522]

In recent years, Canada has been attempting to modify its relations with Indigenous nations and recognize their rights to self-government and self-determination.[523] An integral component of self-government is fiscal autonomy.[524] Unfortunately, Canada has been slow to adopt policies and implement laws facilitating Indigenous fiscal autonomy. In the area of taxation, Canada maintains its ability to tax members of Indigenous nations and fails to recognize Indigenous nations' inherent right to control tax policies on Indigenous lands.[525] On reserves, Indigenous governments have only been granted limited rights to impose property taxation.[526] On lands to which Indigenous nations have Aboriginal title, Canada has been extremely reluctant in negotiating and concluding tax agreements that are fair and equitable.[527]

With the recent enactment of Bill C-15, there is a strong argument for redeveloping Crown-Indigenous fiscal relations using UNDRIP as a blueprint. The current Crown-Indigenous

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[521] See Neu, supra note 4.
[522] See Flood, *supra* note 1.
[523] See Flood, *supra* note 1 at 94. See also TRC Reconciliation, *supra* note 225.
[524] See Report of the Royal Commission, *supra* note 3. see also, Borrows, "Aboriginal Legal Issues", *supra* note 5 at 1011.
[525] See Hanna, *supra* note 232 at 9-10.
[526] See e.g. *Indian Act*, *supra* note 10 s 83.
[527] Allen, *supra* note 118.

fiscal relations are paternalistic in nature and hinder the development of autonomous Indigenous governments.[528] For example, Indigenous governments, through fiscal transfers, are dependent upon the Crown for funding government operations.[529] The Crown's fiscal arrangements with Indigenous nations suffer from a number of flaws including: (1) inadequate funding; (2) unpredictable and arbitrary funding arrangements; (3) paternalistic requirements such as excessive reporting requirements and focus on compliance.[530]

In this thesis I have argued that Canada's current laws and policies regarding Indigenous economic rights are inadequate in promoting Indigenous self-determination. As a result, I propose using UNDRIP as a blueprint for restructuring economic relations and focus on taxation as a potential avenue for promoting Indigenous fiscal autonomy. Both the government of Canada and the Assembly of First Nations believe that a renewed fiscal relationship can benefit from providing Indigenous nations with the ability to generate revenue from taxation.[531] The promotion of Indigenous nations' right to self-government and territorial management through taxation can be facilitated by (1) exempting members of Indigenous communities from federal and provincial taxation without qualification; and (2) respecting Indigenous nations' right to tax businesses deriving value from Indigenous lands. Recognizing and respecting Indigenous nations' right to control tax policy within their jurisdiction will render Canada in greater compliance with UNDRIP.

[528] Jones, *supra* note 56 at 31-32; See also, Neu, *supra* note 4 at 133. See also, Flood, *supra* note 1 at 99.
[529] See e.g. Funding Agreements, *supra* note 66. Funding agreements are subject to unilateral modifications by the Crown.
[530] A New Fiscal Relationship, *supra* note 378 at 9.
[531] *Ibid* at 16.

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