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## **Bridging The Gap: Taxation and First Nations Governance**

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DES PREMIÈRES NATIONS

**Research Paper for the  
National Centre for  
First Nations Governance**

*May, 2008*

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### **Introduction: Demystifying Gaps in Canadian Tax Policy**

In 1966, the *Report of the Royal Commission on Taxation* framed the discussion with respect to Canadian tax policy along four fundamental objectives: (1) to maximize the current and future output of goods and services desired by Canadians; (2) to ensure that this flow of goods and services is distributed equitably among individuals or groups; (3) to protect the liberties and rights of individuals through the preservation of representative, responsible government and the maintenance of the rule of law; and (4) to maintain and strengthen the Canadian federation.<sup>1</sup> These four objectives shape Canadian tax policy because the power to tax and redistribute wealth is the means by which representative governments – including First Nations governments - fulfill key public policy objectives and mandates (i.e., maintaining universal healthcare).

Tax policy operates at a very broad level. For example, an aging Aboriginal population or, an increase in Aboriginal youth incarceration correlates with an increase in public expenditures (i.e., health care and correctional services). And yet, an increase in government expenditures requires adequate public funding through taxation. Likewise, a government may attempt to control a public expenditure by taxing at the source. For instance, increased health care costs can be controlled by taxing harmful products such as alcohol and tobacco. Finally, a government can employ tax policy to change consumption patterns. For instance, it could offer a one hundred percent income tax credit for personal health club memberships to encourage active and healthy living; the treasury would lose income tax revenue, but the government would save on long-term health care expenditures. These examples also illustrate behavioral aspects of taxation: governments can strategically change consumer behavior in deciding what to tax, how to tax, and how much tax to levy.

With respect to First Nations governance, these four objectives reflect a significant challenge: historic marginalization of First Nations governments has created a

significant gap in the law and politics surrounding tax policy. For example, Parliament amended the *Citizenship Act* in 1956 to include status Indians, conferring the right to vote for on reserve Indians - a significant gap in light of the tax policy objective to preserve representative and responsible government.<sup>2</sup> As Jean Barman observes “the signifier of citizenship was the right to vote, which from the time Canada became a Dominion in 1867 equated with being born or naturalized a British subject.”<sup>3</sup>

This paper is about looking for every possible opportunity to close the gap, to join ideas on tax policy with First Nations sovereignty, and recognizes that tax policy and sovereignty are intertwined; that finances too, the money used to pay for First Nations governance is directly linked to the capacity of First Nations people to actualize sustainable self-governance. In its current form, Canadian tax policy characterizes First Nations governments as mere public expenditures when it should be looking to develop capacity and resources for First Nations communities. Traditionally, the tax policy debates have excluded First Nations governments, relying on non-Aboriginal governments to resolve issues over what should be taxed, how a tax should be applied/collected, and how much tax should be levied (e.g., governmental negotiations over federal vs. provincial tax jurisdiction). And yet, the issue over *who gets to tax* underscores a symbolic aspect of democracy: it is the people who bestow upon representative government the power of taxation secured by the rule of law and legitimacy (e.g., public trust and legitimate public institutions). Tax policy should question its own ties with Canada’s colonial history and look to situate First Nations governments as distinct and autonomous political bodies equally entitled to the aspirations of the four fundamental objectives.

In this regard, developing new and culturally relevant First Nations tax policies can close the gap further by accounting for the acquisition of territory and resources by the Crown - a story that directly involves First Nations peoples, their governments, and treaties. Without the support, assistance, and peace of First Nations governments the founding story of Canadian Confederation would be quite different.<sup>4</sup> Indeed, the federal government recognizes that treaties are on going partnerships in need of reconciliation

having stated that the, “vision of the future should build on recognition of the rights of Aboriginal peoples and on the treaty relationship”, as the treaties themselves “are the basic building blocks in the creation of our country.”<sup>5</sup> These historic partnerships are enshrined in the express recognition of Aboriginal rights under s. 35 of the *Constitution Act, 1982*.<sup>6</sup>

The goal of closing the gap in Canadian tax policy is both healthy and necessary. On the one hand, it will challenge dominant society’s acquiescence over jurisdiction with respect to federal, provincial, territorial, and local governments. On the other hand, the discussion is inevitable as First Nations communities reconcile and reclaim their collective governing capacity in a post-Confederation Canada. As well, it is a necessary discussion in light of the approach taken by Canadian courts with respect to First Nations tax policy – as illustrated by the tax-exemption provisions under the *Indian Act*, which I discuss later. Finally, the ideas presented in this paper will help inform the contemporary comprehensive land claim settlement process. Indeed, it is only recently that Canada’s tax policy landscape has witnessed a revitalized emergence of a new form of government: First Nations governments.

This paper is divided into two parts. Part I describes the challenges facing First Nations governments as they struggle to assert greater control and autonomy from a tax policy perspective. The analysis will discuss an important historical context for the reader and describes First Nations home rule prior to Confederation; a period in the history of First Nations governance when communities managed their environment using collective action with customary systems. It will be demonstrated, however, that home rule conflicted with burgeoning provincial and municipal interests in Indian lands and a desire to extend their tax base over First Nations communities. Further, a discussion of the federal income tax rules demonstrates how restoring home rule is fraught with political and legal obstacles. While current self-government models are promising developments they reflect over two hundred years of struggle by First Nations communities to revitalize their rightful status as legitimate actors within the tax policy discussion. This struggle includes recognition by all governments in Canada of

legitimate self-governance (sovereignty) and control (power) over First Nations resources (including finances) for First Nations communities.

Part II of this paper will consider several tax planning and public finance options for First Nations governments with a focus on how tax policy can allow governments to control certain aspects of the economy and change behavior. The behavioral aspect underscores the connection between tax policy and sovereignty since taxes involve individuals and or organizations giving up something (i.e., income) in exchange for governance (i.e., public services and protection). Taxes leave individuals out of pocket, but with an expectation that governments will properly use their money for legitimate purposes. Because governments rely on this expectation for legitimacy in their actions, inherent jurisdictional adversity exists on the part of non-Aboriginal governments towards First Nations governments. The historic marginalization of First Nations communities overlooks the territorial problem of a congested commons where a third government could flex its sovereign powers, including taxation. This third taxing authority – an Aboriginal taxing authority – would shift the balance of power, raising concerns over whose jurisdiction prevails and risks taxing the same thing twice (double taxation). And yet, non-Aboriginal governments at all levels are able resolve their jurisdictional issues and co-exist alongside one another in a truly multi-jurisdictional world. In this regard, I will also discuss how over time these adversarial situations can lead to agreements for First Nations governments where resources, including tax revenues can be shared.

## **I. First Nations Home Rule: Gaps in History - Gaps in Tax Policy**

Recall that Canadian tax policy has four fundamental objectives: (1) maximizing output of desired goods and services; (2) ensuring an equitable distribution of goods and services among individuals or groups; (3) protecting individual liberties and rights through representative and responsible government and the maintenance of the rule of law; and (4) strengthening the Canadian federation. These objectives reflect an enduring

political and social compact between various groups and deeply held expectations by individuals with regards to their membership/citizenship in Canadian society.

With respect to First Nations communities, the gap in tax policy fails to account for the unique political compact that exists between the Crown and First Nations governments prior to Confederation. To be sure, the colonial era reflected a set of cultural values that had a unique historical context. In 1867, the Dominion had little dialogue on representation and taxation for First Nations communities because they were viewed as (a) pre-existing self-governing political bodies; and (b) home rule by First Nations communities allowed the Crown to better utilize its own scarce resources. During the Confederation era there existed a widely held view by European scholars that governments should remain *laissez-faire* in civic matters - limiting their role to defense and the maintenance free markets.<sup>7</sup> British economist Adam Smith<sup>8</sup> and French philosopher Jean-Jacques Rousseau<sup>9</sup> both observed that a sovereign's role was to provide security and order in its realm so as to legitimately govern and tax its citizenry. Social compacts like this involved a degree of mutual preservation: the Crown governed so long as it could secure its sovereign domain. In this regard, the Crown's ability to enter into treaties with First Nations became a central "building block" to Canada's growth and expansion.<sup>10</sup>

In light of the Confederation era, the modern taxpayer - government relationship is relatively new: Canada's direct tax on personal and corporate income was the result of the federal *War Profit Act, 1916* followed by a general tax on income in 1917.<sup>11</sup> Prior to this, federal taxing authority depended on customs, or duties levied on imported and exported goods, as well as excise taxes – typically inland traded and produced commodities like tobacco.<sup>12</sup> Strategically, the *British North America Act, 1867* sought to politically unite the remaining British North American colonies by establishing a central government to levy tariffs and create a common BNA market, which largely benefited the central regions of Ontario and Quebec.<sup>13</sup> Prior to Confederation, customs and excise taxes were the single largest sources of tax revenue for all colonial governments in the BNA region.<sup>14</sup>

Accordingly, the *B.N.A. Act 1867* created a strategic shift in tax policy. Conferring superior *federal* fiscal and taxing powers in exchange for subsidies that favoured provincial governments – thus subsuming provincial authority over the lucrative customs revenues – provincial focus on property taxes became a cornerstone for deepening the tax base. Jurisdictional conflicts between provincial/municipal governments and First Nations governments were imminent in consideration of these additional factors: a substantial rate of private property ownership in the eastern provinces, the need for additional municipal governments, and a *laissez-faire* approach by the Crown with respect to First Nations home rule. As G.V. La Forest observes, “The increased expenditure for municipal services was financed almost exclusively, as it is largely today, by a tax on realty.”<sup>15</sup>

(a) **Home Rule: Redistribution Under First Nations Governments**

It is against this historical backdrop that First Nations governments experienced tremendous challenges in asserting their own control and autonomy. Confederation did not alter Aboriginal perspectives over their capacity to self-govern themselves - the *B.N.A. Act 1867* did not extend citizenship to status Indians and was in keeping with Crown assurances that First Nations communities were separate and apart from provincial and municipal jurisdiction. Contrary to the stereotype of the Indian as a noble and self-sufficient savage, Aboriginal Canada; that multicultural world that existed before European settlers, was fully engaged in a diverse range of governance that recognized the exchanges an individual made to her respective collective. Moreover, Aboriginal governments sought culturally relevant measures to ensure the redistribution of wealth and goods. These mechanisms were customary, or unwritten, and relied on the complex fusion of powerful cultural and social systems – being equal to an unwritten constitution. Fundamentally different from the European system was the absence of a feedback loop between the individual giving up something (e.g., being out of pocket) in return for an entitled service (e.g., in the *laissez-faire* tradition of taxation for security).

Culturally relevant mechanisms in Aboriginal Canada were equally flexible when dealing with non-Aboriginals. Ironically, less than one hundred miles Northwest of Ottawa, Canada's Capital City, the narrowing section of the Ottawa River caused by Allumette Island was the site of a toll tax levied upon Samuel de Champlain and subsequent French traders throughout the early part of the 15<sup>th</sup> Century. Accounts of the toll into Algonquin territory further illustrate the venue through which Europeans and Algonquins exchanged valuable information and deepened trading relationships.<sup>16</sup> As Ronald White observes, these exchanges included gift giving and were a central feature to Aboriginal relations in the Eastern Woodlands and the Great Lakes regions.<sup>17</sup>

The redistributive effect of customary law was to place the individual in greater contact and in greater sensitivity with the needs of the collective. For example, the well documented practice of potlaching on the Pacific Coast effectively redistributed goods within the community at the same time it reinforced vital social relations. It is also noted for its criminalization - in 1953, those found guilty of potlaching could face two years less a day in a B.C. correctional facility. Criminalizing this important ceremony illustrates the deep underlying tensions between western versus Aboriginal value systems over the meaning of wealth redistribution, sharing, and allocating resources.<sup>18</sup>

Aboriginal Canada's customary system redistributed goods along community systems with a focus on (a) community well being; and (b) the maintenance of community needs in the short and long-term. Aboriginal Canada's social compact held a specific cultural context that reflected the choices and aspirations of hundreds of First Nation communities. Home rule by First Nations governments – autonomous governance within a distinct territorial boundary - is well documented throughout early colonial history. In 1857, the Parliament of United Canada made the first attempt to prescribe the assimilation of Indians; under the guise of “civilizing” them with *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*.<sup>19</sup> The enactment of this law reflected a burgeoning non-Aboriginal population in certain parts of the country who desired access to First Nations lands.

And yet, First Nations autonomy was affirmed by the Crown and the newly Confederated government of the Dominion continued to deal with First Nations as autonomous governing bodies. In 1868, the *Indian Lands Act* stated in section 8 that no surrender of lands reserved for the use of “any tribe, band or body of Indians” is valid unless assented to by the “Chiefs or Chiefs of the group assembled ... at a meeting or council of the tribe, band, or body summoned for the purpose *according to their rules ...*” (emphasis added).<sup>20</sup> More importantly, the *B.N.A. Act 1867* left open a host of questions over Indian affairs that were determined by reference to custom and administration. As Professor Peter Hogg observed, the *B.N.A. Act 1867* “did not mark a break with the colonial past” and did no more “than was necessary to accomplish confederation.”<sup>21</sup>

**(b) Early Petitions Against Municipal Jurisdiction and Taxation**

The new governments that emerged from Confederation continued to rely on First Nations communities for protection and peace. This was a cornerstone to the compact between the Crown and First Nations peoples, creating an interdependent relationship between two autonomous political organizations. Changes in their relationship required consultation and First Nations governments relied on the honour of the Crown to act accordingly if any changes were to take place. The boundary of their changing world was a multicultural one – not one of assimilation - with interdependent linkages based on respect and mutual undertakings.

This informs many of the early petitions by First Nations governments when confronted with provincial/municipal taxing authority. In 1840, Lower Canada began to create municipal governments with local taxing powers (i.e., property taxes for public schools).<sup>22</sup> Soon after, the Abenakis of Saint-Francois began a series of petitions to the Colonial Governor in protest over municipal taxes that were being levied upon them. A petition filed in September, 1841, clearly rejects the municipality’s property tax citing that “at all times” they (the Abenakis) maintained ferries, roads, bridges, and other public works “out of our

own private funds according to the Lands which we possess in our said Village.”<sup>23</sup> The Abenakis were clearly engaged in home rule and readily asserted their autonomy against the abutting municipality. Again, this is consistent with the First Nations understanding and perspective of Crown relations: First Nations communities would enjoy autonomy separate and apart from colonial governments. As well, the petition makes an important reference to this undertaking by noting the separate status of the Abenaki militia from the local non-Aboriginal militia – stating that they “have always been apart from the Parishioners of St. Francis and Separate in our village in like manner as to the Militia never enlisting in the Militia, but forming a Separate Corps. in ourselves.”<sup>24</sup>

Similarly, in 1849, Grand Chief Louis Watso issued a petition seeking an express exemption from a school tax in Lower Canada’s Durham Township and also requested an Indian School to be built on the reserve with urgency: “as soon as possible as we are daily threatened to be prosecuted for not being able to pay the School Tax like the white people, ...”.<sup>25</sup> The sting of the Crown’s acquiescence to provincial claims over taxing First Nations communities would clearly breach the original undertaking of peace and friendship, mutual protection from harms, and recognition of autonomy. Likewise, it would draw into question the exclusion of First Nations peoples living on reserve from provincial voting rolls and the status of First Nations militias.

The autonomy of First Nations communities was further illustrated in 1847 when the municipality of Saint-Francois attempted to forcibly appoint an Abenaki Chief to oversee their office of roads under threat of fines. In response, P.P. Osumkherkine wrote to the colonial government on behalf of the Chiefs citing several principles to the Crown-First Nation compact that justified an exemption from municipal jurisdiction. He wrote:

The Chiefs are willing, and do keep all the roads within the Indian Land in good order, as they always have done, without having taken any oath.

It is a question with us whether the Indians are subject to the regulations of the municipality of St. Francis, according to our understanding it appears we are not subject to the municipality of St. Francis for the following reasons:

1<sup>st</sup> The Indians are not subject to Tax as Canadians and other people are.

2<sup>d</sup> The Indians are not included in the census of the inhabitants of Lower Canada, in which all nations are mentioned and not a word about Indians; They are not in the census, unless they be called Canadians of French origins.

...

5<sup>th</sup> The Indians always have been kept distinct by themselves and considered as other inhabitants, not required to attend the Parochial Meetings that have taken place in the parish of St. Francis, from time to time, to the present; They never had any voice in any such meeting and no right to vote.<sup>26</sup>

In each instance, the petitioners specify their on going loyalty to the Crown and further, that they have governed themselves peacefully and effectively (i.e., they maintain their own public works). Moreover, their exclusion from Canadian democracy reflected their separate status as a distinct political government. The absence of an interdependent relationship with their neighbouring non-Aboriginal governments struck at the cornerstone of their compact with the Crown: these undertakings compact could not be relinquished unilaterally and third party interests would have required mediation. First Nations communities were keenly aware, however, that the Canadian landscape was changing dramatically and sought assurances from the Crown on this basis.

With the emergence of municipal governments between 1840-1850, in what is now Ontario and Quebec, the governing status of First Nations remained unclear to these fledgling governments: were they municipalities?; Crown wards with limited overlapping jurisdiction favouring local governments?; or special cantons? The answer to this issue is subsumed in the federal income tax rules that emerge in the latter part of the 1900's when Indians living on reserve began to seek employment off reserve. In this next section, I will focus on the limits of the federal income tax rules and how they affect First Nations governance.

(c) **Income Tax Exemption: Disconnecting the Factors**

Tax policy reflects the social, political, and cultural aspirations of a society. When these aspirations change, the common law and its institutions respond at a much slower pace and quite often do so without completely reconciling existing laws and customs. This is true with the enactment of the *Indian Act* and the inclusion of a limited tax exemption provision in what is now section 87.<sup>27</sup> Simply put, this section initially responded to the Crown's concern over severance with respect to Indian lands and their personal property in the hands of non-Indians. Prior to 1951, nothing suggests that the Crown envisioned Aboriginal economic self-sufficiency, viable First Nations economies, and readily available investment capital for First Nations governments. Indeed, status Indians on reserve had yet to gain the right of citizenship when the tax exemption provision was first introduced.

The result has been a series of court decisions as well as Customs Canada and Revenue Agency ('CCRA') guidelines and advance rulings that combine to create a formalistic and uncertain model of tax exemption for individual status Indians who can effectively connect and situate their employment income on reserve. In 1992, the Supreme Court of Canada developed the connecting factors test in *Williams v. Canada* as means to determine whether employment income is located on reserve and tax exempt.<sup>28</sup> The connecting factors test was a judge-made interpretative device - intended to be used on a case by case basis - and not specifically crafted with reference to the constitutional rights of Aboriginal peoples. In regards to tax exemptions from customs, however, the Court has affirmed unanimously that First Nations are not exempt.<sup>29</sup> The connecting factors are used to identify the location of property – typically employment income – and includes (a) an assessment of type of property in question; (b) the nature of the taxation of the particular kind of property (i.e., income tax); and (c) the purpose of the exemption under the *Indian Act*.<sup>30</sup> Subsequent court cases have established additional factors including whether or not the income was “integral” to reserve life and whether the income was “intimately connected” to that aspect of reserve life, “and whether it should be protected to prevent the erosion” of property on reserve.<sup>31</sup>

The issue under s. 87 is not merely whether or not tax exemption applies, but whether or not the Crown will respect the jurisdiction of the First Nation as enshrined under the *Constitution*. In this respect, Canadian tax policy would benefit by avoiding a formalistic discourse and exploring the deeper context behind First Nations communities that lack infrastructure, access to capital, and viable economies. Because s. 87 is heavily dependent on judicial interpretation and because these interpretations emerge on a case by case basis, the landscape of the connecting factors is constantly in flux.<sup>32</sup>

More pressing still is the absence of any coherent tax – finance policy for First Nation governments under the *Indian Act*. At best, s. 87 leaves individual band members to structure their own affairs against a host of socio-economic obstacles. The *Indian Act*, save for the provisions that concern management of trust settlement monies, is generally silent on the capacity of First Nations governments to create their own Band enterprises for governmental purposes. Aside from the business risks inherent in setting up off reserve privately held corporations – and readily apparent conflict of interest issues stemming from the dual role of a Band Council and a corporate steward – the *Indian Act* leaves First Nations governments at their peril for the purposes of community planning and economic development.<sup>33</sup> There are, however, limited opportunities for First Nations to push the envelope with respect to taxation in relation to a Band Council’s by-law making power under the *Indian Act* – directly connected to amendments in 1988 that grant Band Councils taxation authority (the “Kamloops Amendment”). Other opportunities include federal memorandum of understandings to build capacity through Band collected improvement fees (e.g., fuel sold at retail on the reserve). As well, there are several advisory bodies that continue to advocate for greater taxation authority including the federally mandated First Nations Tax Commission.<sup>34</sup> Finally, taxation is a significant feature to several recent comprehensive land claims settlement agreements including the *Tlicho Land Claims and Self-Government Act*.<sup>35</sup>

## **II: Closing the Gap: Financing First Nations Governance**

In this final section, I will explore several opportunities that are designed to generate discussion as well as hope in bridging the gap between Canadian tax policy and First Nations governance. In my view, having regard to the lack of capital and resources on reserve the core focus of a First Nations tax policy should include the following tenants: (1) redistributing essential goods between families – namely, the people you love and the people you care for; (2) ensuring that the people in your community are healthy; and (3) that your community has a degree of certainty and stability in the future. This approach focuses on the needs of the collective and shifts the governing policy accordingly. While individuals can develop expectations over government services, its core focus is not a consumer, or customer service orientated model. These tenants reflect an appreciation for the economic scale, poverty (e.g., a lack of money and resources), and distinct culture and practices of First Nations governments. Moreover, a salient feature of First Nations people is their ability to adapt in the face of harsh and daunting circumstances – these basic tenants can grow with the capacity of a community. If you look closely at many First Nations communities you will find informal systems of redistribution at work followed by the second and third tenants – wellness and stability.

For my own part, I confess to have enjoyed my childhood rifling through the land fill and relished the butcher knife that I found; later helping my family eat, or the spool of wire; later helping to keep a fence in place. Perhaps these kinship customs are not deemed “fashionable” by today’s standards, however, this informal system of redistributing goods nonetheless met the demand for consumption and created new capital where it had previously not been. Moreover, it was all tax-free! Tax authorities have an immediate disdain for any informal system of wealth generation because it is extremely difficult to value and self-report. Barter exchanges – where no money changes hand - is a good example. I point this out because separate and apart from the Crown’s fiduciary duty to First Nations communities, there is a sound tax policy argument that supports the recognition of informal systems in the hands and authority of First Nations governments.

The tax domain of First Nations governance is difficult to generalize with only limited comparisons made to the difficulties facing municipal governments – those bodies that initially challenged the jurisdiction of First Nations home rule. With the exception of certain business taxes, the largest source of revenue for local governments in Canada is the property tax. In many respects, local governments share similar constraints with First Nations governments from a tax power perspective: neither is engaged in the levying of an individual or corporate income tax. The reliance on property tax by local governments has been described in the following way:

Local taxation is relatively restricted; for example, municipalities are not allowed to levy corporate or personal income taxes. As a result, the municipality's major source of tax revenue comes from real property taxes with significantly less amounts arising from local taxes on businesses and special assessments.<sup>36</sup>

And yet, the comparison is limited because the supply of land is fixed and reserve economies are typically situated on small land bases. The scale of economy necessary to finance governance through property taxes is simply not a viable option for many First Nations communities – separate and apart from its cultural match with a given community. New avenues, however, are available through the original compact with the Crown. Given the political need to reconcile past injustices that have attributed to the marginalization of First Nations communities and their economies (e.g., residential school), a model that seeks to bring in outside resources would make sense. Moreover, if we explore the political choices that Canada's tax policy landscape has already made there may be some institutional dynamism close at hand. In this regard, I can summarize a number of proposals that would bridge the gap between First Nations governance and Canada's tax policy objectives:

- An Aboriginal pension;
- A per capita distribution between First Nations governments that have, and those that do not;
- An Aboriginal RRSP with greater incentives for non-Aboriginal investors (i.e., increased income tax credits);

- First Nations issued savings bonds with federal tax-exemption – similar to Native American tribal government tax-exempt bonds and the larger tax-exempt state and “muni” bond market.<sup>37</sup> This provides access to capital for First Nations communities – the stuff needed to build infrastructure that is in dire supply and could be uniquely tailored to the investor (i.e., First Nations Tax Exempt Housing Bonds);
- Intergovernmental agreements on avoiding double taxation, as illustrated between the State of New Mexico, the State of Arizona, and the Navajo Nation;<sup>38</sup>
- Venture funds that are eligible for tax credits at the federal and or provincial level;
- Amendments to the *Indian Act* to provide for Band owned corporations that fulfill public functions integral to the community and are expressly tax exempt (i.e., Band incorporated health care clinics);
- A series of socially responsible mutual funds that invest directly into Aboriginal owned “small cap” businesses; and
- Enacting a federal income trust statute that would allow Aboriginal owned co-operatives to raise additional capital by selling federally tax exempt units/securities;

This list is by no means exhaustive and it recognizes that political choices shape government tax policy in deciding what kinds of taxes are applied and who pays. The federal and provincial governments have long engaged in directing capital to scarce regions using public funds and encouraging investment institutions to pursue a myriad of public policy objectives – and identifying a distinct class or group to benefit with the help of taxpayer funding. This includes aspiring retirees and the self-direct retirement savings plan (‘RRSP’s’), a mechanism to effectively defer tax on income into the future; labor sponsored investment funds with the front runner being the Quebec Solidarity Fund and several Ontario labour sponsored funds – these funds have also been used to confer tax credits to investors as a means to promote regional research and development<sup>39</sup> – and standard deductions for charitable donations. Political choices aside, there is certainly no

legal precedent to prevent the establishment of a large publicly funded investment institution that would allow non-Aboriginals the opportunity to invest in Aboriginal Canada with similar incentives (i.e., to build a greater RRSP, or to receive a tax credit). Alternatively, the federal government issues debt instruments annually in the way of savings bonds. Here too is an area of further debate that should be considered (i.e., allocating bonds for First Nations governance, or similar to the United States, issued by the First Nations governments with limited assurance by the federal government). While these various models are beyond the scope of this paper, collaborative finance models in the public sphere exists and should be seriously considered.

### **Conclusion**

The goal of this paper is to begin a discussion that includes First Nations governance in a new dialogue with Canadian tax policy's fundamental objectives. More than simply enlivening the tax debate, this paper situates First Nations governments as legitimate representative bodies that no longer viewed as public expenditures within dominant tax policy theory. Rather, First Nations governments are viewed on an equal footing with non-Aboriginal governments ready to revitalize tax policy debates on issues that include the cost of governance, controlling important aspects of the economy, changing our behavior, and diversifying revenue sources to meet expenditure needs (i.e., legislating different kinds of taxes).<sup>40</sup>

This dialogue is consistent with the rights of Aboriginal peoples enshrined by the *Constitution Act, 1982*, as well as recent land claim settlement agreements that allow for limited taxing authority. This paper has attempted to invigorate the tax policy discussion by suggesting a more expansive approach to First Nations governance through the creation of public finance vehicles, many of which already exist for distinct classes of taxpayers and various groups. Creating sustainable First Nations governments and economies in this way avoids the pitfalls of formalistic tax interpretations that are at odds with the reality of First Nations communities, conflicting agendas between federal civil services (i.e. CCRA vs. DIAND), and a judiciary that has to yet embrace a truly

contextual approach over the constitutionally recognized rights of Aboriginal peoples including First Nations governance. Finally, designing finance systems that allow the larger population and private institutions to invest in First Nations economies is consistent with strengthening the overall health of Confederation and recognizes that First Nations communities and Aboriginal peoples continue to play a role in building the country. This unifying aspect would also inform a process of reconciliation by allowing First Nations governments to develop their own culturally relevant tax policies. As John Borrows observes, “When Aboriginal peoples no longer feel that the survival of their languages, cultures, and distinctive practices is threatened, they may become more willing to embrace their relationship with others in the country.”<sup>41</sup>

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<sup>1</sup> See John Borrows, *Aboriginal Legal Issues: Cases, Materials, & Commentary* (Toronto: Butterworths, 1998), Chapter 11. See generally Philip D. Oliver, *Tax Policy*, 2<sup>nd</sup> ed. (New York: Thomson West, 2004), Introduction (the author outlines the most common objectives to government tax policy).

<sup>2</sup> R.S., 1985, c. C-29 as amended.

<sup>3</sup> Jean Barman, “At the Edge of Law’s Empire: Aboriginal Interraciality, Citizenship, and the Law in British Columbia” (2006) 24 Windsor Y.B. Access Just. 3 at 11.

<sup>4</sup> See Office of the Treaty Commissioner, *Statement of Treaty Issues: Treaties as a Bridge to the Future*, October, 1998.

<sup>5</sup> “Gathering Strength – Canada’s Aboriginal Action Plan”, Minister of Indian Affairs and Northern Development, Ottawa, 1997, catalogue no. R32-189-1997E, p. 4.

<sup>6</sup> The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. It reads: 35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

<sup>7</sup> G. V. LaForest, *Canadian Tax Paper No. 63: The Allocation of Taxing Power Under the Canadian Constitution*, 2<sup>nd</sup> ed. (Toronto: Canadian Tax Foundation, 1981) at 1 (the author states that laissez-faire philosophy was at its zenith in the period around 1867) [*The Allocation of Taxing Power Under the Canadian Constitution*].

<sup>8</sup> Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (1776), ed. by Edwin Cannan (Chicago, IL: University of Chicago Press, 1977).

<sup>9</sup> Jean-Jacques Rousseau, *The Social Contract* (1762), reprinted in *The Social Contract and Discourses* (New York: G.D.H Cole trans., 1973).

<sup>10</sup> “Gathering Strength – Canada’s Aboriginal Action Plan”, *supra* note 5.

<sup>11</sup> *The Allocation of Taxing Power Under the Canadian Constitution*, *supra* note 7 at 22-23.

<sup>12</sup> *Ibid.* at pp. 1-17.

<sup>13</sup> *Ibid.* See also, Chapter 1, “Historical Introduction”.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 22.

<sup>16</sup> See James C. Hopkins, “Therapeutic Lending in a Post-Colonial World”, (2006) 14 Mich. St. J. Int’l L. 439 (I discuss the historical background to Algonquin customary law including jurisdiction over taxation and criminal law and early encounters with French explorers and traders).

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<sup>17</sup> See Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region 1650-1815* (Cambridge: Cambridge University Press, 1991).

<sup>18</sup> Douglas Cole, *An Iron Hand Upon the People: the Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

<sup>19</sup> S.C. 1857, c. 26.

<sup>20</sup> Royal Commission on Aboriginal Peoples, “Partners in Confederation” (Ottawa: Min. of Supply and Services, 1993), at 34.

<sup>21</sup> Peter Hogg, *Constitutional Law in Canada*, (Toronto: Carswell, looseleaf ed., 2003) at 1-3.

<sup>22</sup> Revenue Canada, *Indians and Taxation: A Historical Study of the Provisions of the Indian Act Report* by Alain Beaulieu, trans. by Linda Blythe (Ottawa: July 1999) [*Indians and Taxation*] (on file with the author) at 11.

<sup>23</sup> *Ibid.* at 12.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 15.

<sup>26</sup> Letter by P.P. Osumkherkine a Duncan C. Napier. Saint-Francois, 29 janvier 1847. Source: ANC, RG 10, bob. C-13381, vol. 603, pp. 49212-49214, as cited from the appendices in *Indians and Taxation*.

<sup>27</sup> R.S.C. 1985, c. I-5. Section 87 provides:

87.(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,  
(a) the interest of an Indian or a band in reserve lands or surrendered lands; and  
(b) the personal property of an Indian or a band situated on a reserve.  
(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

<sup>28</sup> [1992] 3 C.N.L.R. 181.

<sup>29</sup> See *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

<sup>30</sup> *Ibid.* at 191.

<sup>31</sup> *Recalma v. R.* [1998] 3 C.N.L.R. 279 at 282 (Fed. C.A.).

<sup>32</sup> See Merle Alexander, *Income Tax Rules for Aboriginal People* (Vancouver: The Scow Institute, 2003).

<sup>33</sup> As Band Councils have experienced, the Department of Indian Affairs and Northern Development along with the Department of Justice have encouraged the establishment of provincially registered private corporations managed by Band members for the purposes of running Band owned operation (e.g., leasing cottages on reserve lands). This can cause numerous control problems given the governance and community aspect of the private enterprise. See e.g., *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810; 2004 ON.C. LEXIS 898 (Ont. C.A.).

<sup>34</sup> See online: < <http://www.fntc.ca/> > The FNTC is mandated pursuant to *The First Nations Fiscal and Statistical Management Act*, (S.C. 2005, c. 9).

<sup>35</sup> *Tlicho Land Claims and Self-Government Act* (S.C. 2005, C.1) [assented to February 15, 2005].

<sup>36</sup> Robin W. Boadway and Harry M. Kitchen, *Canadian Tax Paper No. 63: Canadian Tax Policy* (Toronto: Canadian Tax Foundation, 1980) at p. 161.

<sup>37</sup> See Gavin Clarkson “Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development” (2006) *Michigan Law and Economics Research Paper No. 06-006*, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931486)> (the author critiques the current regulatory environment and accounts for the relatively low market capitalization of tribally issued bonds).

<sup>38</sup> See Judy Zelio, “Piecing Together the State-Tribal Tax Puzzle” (2005) National Conference of State Legislatures, April 2005, online: <[http://www.ncsl.org/programs/fiscal/sttribe\\_tax.htm](http://www.ncsl.org/programs/fiscal/sttribe_tax.htm)>. See also The Navajo Nation Office of the Tax Commission online: Tribal Tax Statutes [http://www.navajotax.org/new\\_page\\_5.htm](http://www.navajotax.org/new_page_5.htm).

<sup>39</sup> Anthony J. Van Duzer, “Tax Aspects of Investing in Labor-Sponsored Investment Funds”, (1995) Vol. 6 No. 2, *Canadian Current Tax* 15.

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<sup>40</sup> See also, Vern Krishna, *The Fundamentals of Canadian Income Tax*, 9<sup>th</sup> ed. (Toronto: Carswell, 2006).

<sup>41</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 157.