

# HISTORICAL DEVELOPMENT OF THE TAX REGIMES OF MAORI AUTHORITIES IN AOTEAROA NEW ZEALAND AND FIRST NATIONS IN CANADA

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## INTRODUCTION

In colonial-based state democracies, taxation reflects the relationship between citizens and the government responsible for raising and spending public revenue. Politicians must persuade the voting public that they can impose fair taxes and wisely spend public funds. Aotearoa New Zealand and Canada are two English-settled states with significant indigenous populations. The indigenous peoples in both of these countries already had their own systems for sharing resources and ensuring accountability of their leaders in a manner that is loosely comparable to taxation.<sup>1</sup> The new tax regimes imposed upon the indigenous peoples of Canada and Aotearoa New Zealand since colonisation have had a major effect upon their ability to be self-determining<sup>2</sup> as First Nations<sup>3</sup> and as Maori hapu and iwi.

This article compares the post-colonial development of the Maori Authority<sup>4</sup> tax regime in Aotearoa New Zealand and the taxation of Indian Bands<sup>5</sup> as First Nations on reserve lands<sup>6</sup> in Canada. While differences in circumstances and taxation regimes makes direct comparison difficult, the measures adopted in each country can be assessed according to whether they encourage or restrict the self-determination aspirations of each indigenous group as set out in the Declaration on the Rights of Indigenous Peoples.

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<sup>1</sup> “Potlatch” refers to the “giving” ceremonies of First Nations in which gifts are bestowed upon guests and personal property is destroyed by the giver, in a show of wealth and generosity. Discussed in C Bracken, *The Potlatch Papers: a colonial case history*, University of Chicago Press, Chicago, 1997; and D Cole and I Chaikin, *An iron hand against the people: the law against the potlatch on the Northwest coast*, Douglas and McIntyre, Vancouver, 1990. Similarly, the traditional Maori practice of large-scale reciprocal giving between groups at tangihanga (funeral) and other group gatherings was also based on the need to uphold the mana (prestige) of the group by engaging in utu (reciprocal practices).

<sup>2</sup> This article adopts the meaning of “self-determination” set out in the Declaration on the Rights of Indigenous Peoples 2007, which supports greater recognition of indigenous cultural, economic and political rights and autonomy in colonised countries. The Declaration was adopted by the United Nations General Assembly during its 61<sup>st</sup> session in New York on 13 September 2007.

<sup>3</sup> The term “First Nations” in this article refers to “Indians” as defined in the Indian Act 1876 and subsequent amending legislation. An “Indian” is defined as a person who “is registered as an Indian or is entitled to be registered as an Indian” under section 2 of the Indian Act, RSC 1985. By way of contrast, section 35(1) of the Constitution Act 1982, contains a broader definition of the “Aboriginal Peoples” of Canada which includes Indians, Inuit and Metis.

<sup>4</sup> “Maori Authority” refers to any body, authority or person administering or controlling property in trust for the benefit of Maori. Other entities, including the Board of Maori Affairs, the Maori Trustee, Maori land boards, special statutory trusts (such as the East Coast Commissioner) and land trusts established under the Native Land Act 1931, were also included in the definition after 1939.

<sup>5</sup> A “band” is a legally recognised body of Indians for whose collective benefit lands have been set apart or for whom money is held by the Canadian Crown, under the Indian Act.

<sup>6</sup> A “reserve” is a tract of land vested in the Crown but set apart for the use and benefit of a band under the Indian Act. It also includes “designated lands” created as the result of the Kamloops Amendments in 1988, which are discussed later in this paper.

These aspirations can be briefly stated as being the desire to achieve greater political, economic and cultural autonomy.

The article begins with statistical information on the Maori contribution to the national economy in Aotearoa New Zealand, as a baseline for Maori self-determination. Next, it outlines the development of the Maori Authority tax regime from 1939 up to and including the passage of the Income Tax Act 2007. This is followed by statistical data on First Nations, and an analysis of the taxation policies in Canada from the passing of the Canadian Constitution Act 1867 to the present day. In both countries “self-determination” is a means of indigenous communities improving their socio-economic conditions after colonisation.<sup>7</sup> While the main thrust of the article is taxation, it concludes by assessing the extent to which the taxation measures that have been introduced in Aotearoa New Zealand and Canada encourage or thwart the self-determination aspirations of Maori and First Nations.

## MAORI STATISTICAL OVERVIEW IN AOTEAROA NEW ZEALAND

In 1840 Maori constituted 95 percent of the population: in 2006 they were 14.6 percent of Aotearoa New Zealand’s total population.<sup>8</sup> In 1840 Maori claimed 98 percent of the territory of Aotearoa under the Maori customary law principles of *ahi kaa*<sup>9</sup> (occupation and use) and *take tupuna*<sup>10</sup> (ancestral connections): in 2006 Maori collectively owned only 5.6 percent of the total available land under *Te Ture Whenua Maori Act 1993* and its predecessors, special legislation introduced to superimpose English property law principles on to customary Maori land tenure.<sup>11</sup>

Today, Maori are statistically over-represented in negative statistics for unemployment,<sup>12</sup> child health<sup>13</sup> and low educational achievement.<sup>14</sup> Despite this, in 2005/2006 total Maori-owned commercial assets were estimated at nearly \$16.5 billion.<sup>15</sup> \$5.9 billion, or 36 percent of this asset-base, is in collective ownership.<sup>16</sup> The

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<sup>7</sup> This is the view taken by the Harvard Project on American Indian Economic Development, which researched the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. Many of the Project’s research findings can be generalised to indigenous groups outside of the United States, including Maori and First Nations.

<sup>8</sup> QuickStats About Maori, Revised 27 March 2007, available from Statistics New Zealand on <[www.stats.govt.nz/census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/maori/maori-ethnic-population-e-momo-iwi-maori.aspx](http://www.stats.govt.nz/census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/maori/maori-ethnic-population-e-momo-iwi-maori.aspx)>.

<sup>9</sup> See Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report, Wai-788, Wai-800*, Ministry of Justice, 2001.

<sup>10</sup> Ibid.

<sup>11</sup> *Te Ture Whenua Maori Act 1993* and its predecessors. The Native Land Act 1862 established a Native Land Court to change customary land tenure into a system of collective ownership held in individual shares that could be more easily acquired by the Crown. See, T Kingi, “Maori Land Ownership and Land Management in NZ”, *Case studies on customary land and development in the Pacific*, Vol 2, Institute of Natural Resources, Massey University, New Zealand, 2008, found on [http://www.ausaid.gov.au/publications/documents/mlw\\_volumetwo\\_casestudy\\_7.pdf](http://www.ausaid.gov.au/publications/documents/mlw_volumetwo_casestudy_7.pdf)<[www.ausaid.gov.au/publications/pdf/MLW\\_VolumeTwo\\_Casestudy-7.pdf](http://www.ausaid.gov.au/publications/pdf/MLW_VolumeTwo_Casestudy-7.pdf)>.

<sup>12</sup> QuickStats About Maori, n8.

<sup>13</sup> [http://www.stats.govt.nz/browse\\_for\\_stats/people\\_and\\_communities/housing/ethnicity-crowding-1986-2006.aspx](http://www.stats.govt.nz/browse_for_stats/people_and_communities/housing/ethnicity-crowding-1986-2006.aspx)

<sup>14</sup> <http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>.

<sup>15</sup> “The Maori Asset Base”, *Fact sheet Te Puni Kokiri, Te hua Ohanga Maori-A-Motu*, <[www.tpk.govt.nz](http://www.tpk.govt.nz)>.

2006 Census records 14,007 self-employed Maori and 7,062 Maori business employers. 52 percent of all Maori commercial assets are invested in primary industries, 8 percent in secondary industries and 40 percent in tertiary industries, providing a total asset worth of \$16,450 million.<sup>17</sup> Maori also hold 37 percent of all available fishing quota and own some of Aotearoa New Zealand's most successful tourist operations.<sup>18</sup>

Maori economic development has benefited from compensation paid through Treaty of Waitangi settlements, with a total value of \$1.018 billion in negotiated settlements being allocated to iwi and Maori organisations by October 2008.<sup>19</sup> Maori have seven seats in Parliament, as well as being eligible to stand in general electorate seats or be appointed as a Party list member to Parliament.

This brief overview shows that Maori are a significant sector of Aotearoa New Zealand's national social and economic statistics. As such, successive governments have always needed to develop policies appropriate to meeting Maori needs and concerns, including the Maori drive toward greater self-determination. Taxation is one of several policies that can assist in making this aspiration a reality.

## **TAXATION OF MAORI AUTHORITIES IN AOTEAROA NEW ZEALAND**

### **Taxation before 1939**

After the Treaty of Waitangi was signed in 1840, customs duty was the first tax imposed, followed by direct taxation on property and then on income. Taxation in this form was a new concept for Maori, who contributed most of the early taxation imposed. In 1856, an official report estimated that Maori paid around 60 percent of the North Island's customs dues.<sup>20</sup>

Before 1939 there were two separate taxes levied on income, namely, income tax and a social security charge.<sup>21</sup> Income tax was imposed at a graduated rate, while the social security charge was set at a flat rate. Maori were subject to these taxes, in the same way as other resident taxpayers. However, section 550 of the Native Land Act 1931 contained provisions that prevented income derived by some Maori organisations, on behalf of their members, from being used to pay tax. The vast number of reserves, funds and lands administered by Maori organisations and subject to section 550, made it

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<sup>16</sup> "Tribal Assets: Nga Rewa a Iwi", *Information Sheet Maori economic Summit*, Te Puni Kokiri, 2009. [Tribal Assets] <[www.tpk.govt.nz](http://www.tpk.govt.nz)>.

<sup>17</sup> Ibid.

<sup>18</sup> According to Te Puni Kokiri <[www.tpk.govt.nz](http://www.tpk.govt.nz)> one in five (455,000) of all adult international tourists to Aotearoa New Zealand visited a Maori cultural tourism site in 2006. There are more than one hundred Maori tourism operators. In 2001, thirteen Maori regional tourism organisations were formed and in 2004 they combined into a national tourism body that is headed by the New Zealand Maori Tourism Council.

<sup>19</sup> Tribal Assets, n16.

<sup>20</sup> See P Goldsmith, *We Won, You Lost. Eat That! A political history of tax in New Zealand since 1840*, David Ling Publishing, Auckland, 2008, which focuses on the development of the Maori Authority Concessionary Tax Regime that operates under Part HF of the Income Tax Act 2007.

<sup>21</sup> For a full discussion on the 1939 reforms see A Sharp, "New Zealand's Income Tax Law as it applies to Maori Authorities and its impact on Maori economic sustainable development within Tai Tokerau", Dissertation for the degree of Master of Taxation Studies, University of Auckland, 2000, 26-33.

difficult for individual Maori to work out and fulfil their income tax obligations. The problem persisted from 1929, when farming profits became subject to income tax for the first time, until 1939, when the Land and Income Tax Act 1923 was amended to include specific rules for “Maori Authorities”.<sup>22</sup>

### **1939 Reforms**

The Income Tax Amendment Act 1939 imposed income tax on organisations that administered large blocks of farmland owned in common by Maori. Organisations affected by the taxation rules included the Board of Maori Affairs, the Maori Trustee, Maori land boards and various land trusts incorporated under Maori land legislation.<sup>23</sup> The amendment fixed a Maori Authority’s liability on the individual owner’s share of any income from Maori land, or on any income earned by an organisation that administered property, income or reserves in trust for the benefit of Maori. Effectively, it removed the restrictions imposed by section 550 of the Native Land Act 1931, allowing income tax liability to be taken directly from income earned, by the Maori Authority. The common feature of the organisations covered by the new term “Maori Authority” was that they acted as agents for, or as a trustee on behalf of, individual owners.

The 1939 Amendment Act made it clear that taxation was to be paid by the Maori Authority on behalf of its owners, on an assessment of their respective shares of the whole net profit earned by the Authority, and not only on the part that was distributed by way of dividend. Maori Authorities generally ignored the Amendment.<sup>24</sup>

### **1952 Commission of Inquiry**

The legislation remained unchanged until 1952, when the Luxford Commission’s<sup>25</sup> recommendation for a new taxation framework for Maori Authorities was incorporated into law. The Commission had been established to investigate the non-compliance of many Maori Authorities with the 1939 Amendment Act and to suggest how the law could be made clearer. The Commission noted that although Maori land was derived through the iwi and held in co-ownership, the law nevertheless followed the rationale that each individual Maori was entitled to a share in land that could be measured in terms of acres, roods, and perches, and, therefore, to a corresponding share of the profits derived from that land.<sup>26</sup>

Two important factors were considered by the Commission. First, much of the land

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<sup>22</sup> *The Working of the Law relating to the Taxation of Maori Authorities, Report of Commission of Inquiry appointed to inquire into and report upon the working of the law relating to the taxation of Maori authorities*, Government Printer, Wellington, 1952 [*Luxford Report*].

<sup>23</sup> The history of Maori land legislation from the signing of the Treaty of Waitangi to the present day is discussed by the Waitangi Tribunal in several of its reports. See for example: *Muriwhenua Land Report, Wai-45*, March 1997; *The Ngai Tahu Report, Wai-27*, 1991; *The Hauraki Report, Wai-86*, 2006.

<sup>24</sup> *Luxford Report*, n22.

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

<sup>26</sup> This reveals the conflict between European notions of individual land ownership and Maori notions of collective land ownership. The Crown attempt to impose European concepts of individual ownership into its system of land taxation for multiply owned Maori land was doomed to fail because the two are inherently different in the values they attribute to land.

owned collectively by Maori required large-scale farm management, so that multiple ownership made delegation of control to a corporate structure necessary. It was illegal at this time for more than twenty persons to carry on any form of joint business enterprise unless they were incorporated as a company or other legal entity.<sup>27</sup> For reasons of organisation and control, the “Maori Incorporation”<sup>28</sup> became the structure authorised by statute to administer corporate Maori land assets. Second, a Maori incorporation differed from an ordinary registered company. A company is a legal entity that is separate from its shareholders. A Maori incorporation has most of the functions of a company, but the beneficial ownership of the incorporation's assets, and the income it derives from this ownership, vests in the individual owners in accordance with their respective shares in the land. Under the system of statutory succession that operates for Maori land, the number of owners in each block increases exponentially over the years while their relative shares decrease. Blocks existed where the shares of owners were now infinitesimal.<sup>29</sup> The Commission saw these factors as being significant. It was apparent that the complex character and circumstances of Maori Authorities and their large collective ownership groups made them different from other commercial entities. Maori Authorities had hundreds, perhaps thousands of owners. Furthermore, at the time of the Inquiry, many incorporations were transforming themselves from being mere landlords into active owner-farmers. They needed to withhold a large portion of their income from distribution in order to raise the necessary capital for the new venture. In some cases the undistributed income was considerable. Section 29(3) of the Land and Income Tax Amendment Act 1939 had been introduced to exclude taxation of such sums.<sup>30</sup>

The Commission found that the 1939 legislation intended to avoid charging Maori Authorities as companies, as liability would have imposed graduated income tax rates, although not quite as high as the maximum rates applicable to non-Maori trustees income. The most viable practical alternative was to provide for the whole of the income for each year to be apportioned to each individual Maori owner as if the trust or incorporation was a partnership. The beneficiary would then be assessed for income tax on his or her share at the graduated rates applicable after all exemptions and allowances had been taken into account. The effect was to confer a benefit on Maori Authorities that was not available to other trusts.<sup>31</sup>

The Commission found that while the purpose of section 29 was to minimise the tax burden of Maori owners by treating them as partners, the section was ineffective for the following reasons:<sup>32</sup>

- The large numbers of owners involved in property run by a Maori Authority;
- The need for owners to accumulate capital for property development now that

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<sup>27</sup> Section 372(1) Companies Act 1933. This was increased to 25 persons by section 456(1) Companies Act 1955. Section 456 was repealed by the Companies Act 1993.

<sup>28</sup> This structure is similar to a company established to facilitate and promote the use and administration of Maori freehold land on behalf of its owners. Maori incorporations were designed as land management structures specifically to administer whole blocks of communally owned land as commercial enterprises.

<sup>29</sup> Fractionation and fragmentation of title are discussed in G Asher and D Naulls, *Maori Land*, New Zealand Planning Council, Wellington, 1987.

<sup>30</sup> C Edward and A Sharp, “The Taxation of Maori Authorities” (2003) 9, *NZJTL*, 287, 294-295.

<sup>31</sup> *Ibid*, 295.

<sup>32</sup> *Luxford Report*, n22.

they were working their properties rather than simply being landlords collecting rent. This required withholding a large part of the income rather than paying it out to the owners;

- Maori Authorities had to pay income tax on behalf of some, but not all, owners. There was lack of uniformity because of the graduated rates of taxation applicable at the time and Authorities had difficulty relating unequal tax payments to an equality of distribution; and
- staffing shortages in the Maori Affairs Department meant that initially it was unable to administer the section. Despite the passing of section 4 of the Land and Income Tax Amendment Act 1946, which simplified the tax procedure, most Maori Authorities ignored it and the Commissioner of Taxes did not enforce compliance.<sup>33</sup>

The Commission recommended treating Maori Authorities as a separate class to be assessed for income tax purposes on undistributed income at an appropriate flat rate. There were several reasons for this. First, the Authority was, in most cases, tangible evidence of the unity of the iwi and should be treated as an entity separate from its owners for taxation purposes.<sup>34</sup> Second, a block of Maori land held in common ownership had to be worked as a whole and could not be partitioned among several owners so that each could be viewed as an economic unit. The Commission contended that a small owner bore an undue proportion of income tax when a flat rate was levied on undistributed profits and may not be liable for income tax at all on their share of the net profits. At the same time an owner gained by the whole area being worked as a unit.<sup>35</sup>

The Commission wanted to ensure that Maori lands made an adequate contribution to government revenue, while at the same time recognising that Maori Authority land structures required a special system of taxation. Maori Incorporations were seen as unique hybrid entities that possessed aspects of a partnership, trust, and a company. The Commission also noted the practical difficulty of collecting taxation from individual Maori owners unless deductions were made at the source of the income. It was, therefore, decided to be in the best interest of the Maori taxpayer and the government, to tax Maori owners' income at source.<sup>36</sup>

The Commission's findings led to the introduction of a specific legislative regime for Maori Authorities and the imposition of a flat tax rate on distributed beneficiary income. These early legislative provisions were incorporated into the Income Tax Act 1994 and the government reviewed the rates in 2001.<sup>37</sup> Other than an increase in the base flat rate from 20 percent to 25 percent and the introduction of resident withholding tax on distributions made by Maori Authorities, no other changes were made between 1954 and 2001.

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<sup>33</sup> Ibid.

<sup>34</sup> The essential character of a "Maori Authority" was that it was a legal body that administered property, income and reserves in trust for the benefit of individual Maori owners.

<sup>35</sup> Sharp, n21.

<sup>36</sup> Ibid.

<sup>37</sup> M Cullen, P Horomi, P Swain and J Wright, "Taxation of Maori Organisations, Government discussion document", *Tax Simplification 2*, Inland Revenue Department, Wellington, August 2001.

## 2001 Review of Taxation of Maori Authorities

In 2001, the government published a discussion document, *Taxation of Maori Organisations*,<sup>38</sup> noting that tax rules relating to Maori Authorities had not been included in any major tax policy reforms for almost 50 years.<sup>39</sup>

The main objective of the review was to determine whether the income tax laws that applied to Maori organisations and businesses acted as a barrier to Maori economic and social development. If a barrier was found to exist then changes had to be made thereby allowing these groups to meet their tax obligations. The review was also part of the overall programme by the government to simplify tax requirements for individuals and businesses as part of its commitment to improve equity.

Under the Treaty of Waitangi the government is required to actively protect Maori interests.<sup>40</sup> The political and cultural aspects of tax law reform requires the government to identify relevant Maori interests and gather Maori views on its tax proposals as part of the government's decision-making process. Public consultation elicited the need for cultural and political differences between Maori and non-Maori organisations to be incorporated into the framework of future tax policy development.

The review<sup>41</sup> examined the "charitable" aspects of Maori Authorities and proposed relaxation of the "public benefit" test.<sup>42</sup> Maori Authorities often provide benefits of a charitable nature to iwi<sup>43</sup> and hapu,<sup>44</sup> but may not qualify for a tax exemption because the benefit extends to a group of people connected by blood rather than to the general public. The government believed that if an organisation met the legal requirement for "charitable purpose" then it should not automatically be excluded from receiving a tax exemption simply because the individuals concerned had blood ties. It accepted that the cultural difference between Maori Authorities and other non-Maori organisations was relevant when imposing taxation.<sup>45</sup>

The various proposals outlined in the review were intended to improve the way Maori authorities are taxed. Under the old rules applying to Maori authorities, there existed the potential for double taxation. The proposals removed this issue, addressed other technical problems and minimised the extent to which individual members of a Maori

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<sup>38</sup> Ibid.

<sup>39</sup> Edward and Sharp, n30 at 299.

<sup>40</sup> That the Treaty of Waitangi signifies a "partnership" between the Crown and Maori is a principle firmly established by the Court of Appeal in several cases, including *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 667, in which Cooke P reiterated that "the principles require Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost faith. The duty is not a light one. It is infinitely more than a formality. If a breach of duty is demonstrated ... the duty of the court will be to insist that it be honoured".

<sup>41</sup> Cullen et al, n37.

<sup>42</sup> The public benefit requirement indicates a purpose that adds to or advantages a section of the community rather than an individual. For a detailed discussion on the "public benefit test" and the result of the enactment of section OB 3B into the ITA 94, see A Sharp and F Martin, "Charitable Purpose and the Need for a Public Benefit: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples", *Australian Tax Forum*, (2009) 24, 2.

<sup>43</sup> The word "iwi" means "peoples" or "nations".

<sup>44</sup> "Hapu" is the Maori word for a descent group or clan.

<sup>45</sup> Sharp and Martin, n42. The article discusses the implications for Maori of the relaxing of the public benefit test for marae in particular.

authority must interact with the tax system.<sup>46</sup>

Three options<sup>47</sup> were presented for discussion and consideration. They reflected the existing tax models used in income tax law but were adapted to acknowledge the specific characteristics of Maori Authorities. A new definition of “Maori Authority”<sup>48</sup> was proposed listing the types of organisations eligible under the new rules and ensuring that private organisations with Maori members were excluded. Maori organisations and businesses that met the definition of “Maori Authority” were able to opt out of the proposed rules in favour of general tax rules if they met the general rules criteria.<sup>49</sup>

## The Legislative Outcome

The Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003 completely replaced the rules applying to Maori Authorities, from the beginning of the 2005 income tax year. The Act recognises the need for a special tax framework for Maori organisations that manage Maori assets held in communal ownership. In doing so it reflects most of the public submissions and the government policy of ensuring that Maori organisations are not disadvantaged in their economic development.<sup>50</sup> The legislation contains the following key features:

- A new definition of Maori Authority that lists entities eligible to apply the new rules.<sup>51</sup>
- Maori Authorities may opt out of the Maori Authority Rules and apply general tax rules if they meet the requirements of the general rules.<sup>52</sup> Maori Authorities may re-enter the Maori Authority Rules subject to the winding up tax consequences that apply to entities.<sup>53</sup>
- A Maori Authority has a tax rate of 19.5 percent,<sup>54</sup> reflecting the tax rate of the majority of individuals deriving benefits from Maori Authorities.<sup>55</sup>
- A credit attribution system, called a Maori Authority Credit Account [MACA] similar to the company imputation model is part of the new rules. This means that tax paid by or on behalf of the Maori Authority gives rise to a tax credit that can be attached to the distributions to members of tax-paid income. Recipient

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<sup>46</sup> Edward and Sharp, n30 at 299.

<sup>47</sup> Cullen et al, n37 at chapter 5.

<sup>48</sup> The definition includes organisations established in accordance with: Te Ture Whenua Maori Act 1993; the Maori Trustee Act 1953; the Maori Trust Boards Act 1955; and organisations established for the benefit of all Maori or for the benefit of iwi or hapu (if such groups are large enough to constitute a significant section of the public) and marae. See s HF 2 of ITA 2007.

<sup>49</sup> Cullen et al, n37 at chapter 5.

<sup>50</sup> Thirty-three submissions were received from a variety of organisations including the Maori Council, the Federation of Maori Authorities [FOMA], the Maori Trustee, and various accounting organisations.

<sup>51</sup> See HF 2 ITA 07.

<sup>52</sup> Rules governing trusts, companies and incorporated societies that are applicable to all New Zealand taxpayers under the relevant parts of the ITA 2007 and other legislation pertinent to the particular entity structure. For example the Companies Act 1993 regulates New Zealand companies.

<sup>53</sup> See HF 11 ITA 07, which outlines when a Maori Authority election is no longer effective. If an entity meets the definition of a Maori Authority it will need to satisfy all its tax obligations in the other entity before entering the Maori Authority regime with a clean slate.

<sup>54</sup> The 19.5 percent flat rate introduced in 2005 was dropped to 17.5% in 2011, reflecting decreases in the marginal tax rates applying to all New Zealand taxpayers on lower income levels.

<sup>55</sup> The tax rate for a Maori Authority is provided in Schedule 1, ITA 07.



members are then able to use these tax credits to satisfy their tax liabilities. Unused tax credits are refundable to the recipient member.<sup>56</sup>

- Maori Authorities are able to distribute non-taxable amounts, such as treaty settlement assets, to their members tax-free.<sup>57</sup>
- The Act removes the agent tax rules from the Maori Trustee. The Maori Authority rules will apply in all situations, creating a standardisation in approach.<sup>58</sup>
- A Maori organisation that meets the “charitable purposes” requirement is no longer automatically excluded from the “charitable” income tax exemption because its members are connected by blood. Other factors such as the nature of the entity, the activities it undertakes, the potential beneficiary class, their relationship and numbers, are also considered. This provides greater certainty for Maori and non-Maori organisations about how the “charitable” income tax exemption applies when beneficiaries are kin.<sup>59</sup>
- Any marae situated on a Maori reservation that solely applies its funds to the administration and maintenance of the physical structures of the marae will qualify for a charitable tax exemption. This places marae in the same category as churches and public halls that carry out similar functions.<sup>60</sup>
- Maori Authorities who donate to Maori associations are able to receive a deduction for gifts of money to organisations with “approved donee status”.<sup>61</sup> The deduction is limited to the amount of the Maori Authority’s net income in the corresponding tax year.

The relaxation of the “public benefit” requirement applied from the beginning of the 2003-04 income year. The other amendments came into force at the beginning of the 2004-05 income year.

### **Does the new Regime enhance Maori Self-Determination?**

The Treaty of Waitangi established obligations between the Crown and Maori and requires policymakers to consider political and cultural criteria when reviewing

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<sup>56</sup> The rules relating to the Maori Authority Credit Account [MACA] are set out in Subpart OK ITA 07. They operate in a similar way to the imputation rules that apply to companies in New Zealand. This means that the receiver of the distribution from a Maori Authority can receive a credit (called a Maori Authority Credit) for tax paid by the Maori Authority on the income it has received. This credit can be offset against the receiver’s tax liability. Subpart OK sets out the way the Maori Authority records tax paid and distributions made through MACA.

<sup>57</sup> The rules applying to Maori Authority distributions are found in sections HF 4, HF 5, HF 6, HF 7 and HF 8, ITA 07.

<sup>58</sup> The Maori Trustee is specifically included as an eligible Maori Authority in section HF 2(4) ITA 07.

<sup>59</sup> The definition of “charitable purpose” in YA 1 ITA 07 has been widened to include beneficiaries of a trust or members of a society or institution who meet the public benefit requirement even if they are related by blood. The definition also specifically refers to marae having a charitable purpose when the funds are used for the administration and maintenance of the land and the physical structure of the marae. The same definition has also been included in the Charities Act 2005. The IRD released two government discussion documents *Tax and Charities* and *Taxation of Maori organisations* in 2001, looking at the definition of “charitable purpose” and seeking public submissions. The discussion seeks to improve the way organisations are able to meet the public benefit test requirement when they are clearly performing a charitable purpose. See discussion in Sharp and Martin, n42.

<sup>60</sup> See A Sharp, “The Taxation Treatment of Charities in New Zealand with specific reference to Maori authorities including marae”, (June 2010) 16(2) *NZJTL* 177.

<sup>61</sup> Rules to donations by a Maori Authority are outlined in section DV 12 ITA 07.

taxation laws applying to Maori. Maori bore the brunt of taxation during the establishment of the colony, and the paternalistic attitude apparent in much of the older legislation still rankles with Maori. Reviews of legislation such as the Maori Trustee Act 1921 and the Maori Trust Boards Act 1955 have criticised the paternalistic framework of European concepts and controls it imposed upon Maori. During a recent review of these statutes in 2007, Maori Party co-leader, Tariana Turia, stated: "We are tired of the Government's paternalistic wish-list approach to Maori".<sup>62</sup> In speaking during the third reading of the Amendment Bill, Maori Party member of Parliament, Hone Harawira, stated:<sup>63</sup>

Mister Speaker, throughout the debate on this bill, many speakers have referred to the influence of "paternalistic bureaucracy"; a concern raised time and time again by the beneficial owners about the independence of the Maori Trustee from the Crown, and we congratulate the Minister for recognising the desire of those beneficial owners of Maori land, that they be consulted on how the Maori Trustee can best meet their needs, and we recognise in this bill, the foundation to ensure that the Maori Trustee can meet its obligations to those beneficial owners.

Uncritical acceptance of this attitude within wider society has led to Maori affairs continuing to be viewed in terms of a dependant, welfare model.

Does the new regime change this? The concessionary taxation of Maori Authorities recognises that if Maori are to significantly contribute to the country's economy, taxation rules need to ensure that Maori Authorities are encouraged to do so. Maori Authorities have been recognised as having unique features that make them very different from a company or trust. The Waitangi Treaty settlement process also saw the creation of the "mandated Maori organisation",<sup>64</sup> an entity that has been vetted and accepted by the Crown as being competent to hold assets on behalf of an iwi. According to Selwyn Hayes, this is positive because:<sup>65</sup>

Iwi have the opportunity to build an effective organisational structure that has a sound economic base ... The Maori authority tax regime has been specifically designed to suit the needs of Maori organisations. As such, it can offer benefits not available elsewhere in the tax system.

The specific taxation regime with its concessionary tax rate applicable to a Maori Authority is an acknowledgement by the government that there are unique features

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<sup>62</sup> Tariana Turia, "New Zealand joins the 'Coalition of the Willing' against Indigenous Rights", Friday, 14 September 2007, available at <http://www.scoop.co.nz/stories/PA0709/S00256.htm>.

<sup>63</sup> Amendment Bill, Third Reading, Thursday, 7 May 2009, available at <http://maoriparty.net/index.php?pag=nw&id=310&p=speech-maori-trustee-hone-harawira8207.html>

<sup>64</sup> Section HF 2 ITA 07 defines who is eligible to be a Maori Authority and includes: mandated asset holding iwi organisations (either companies or trusts) established under the Maori Fisheries Act 2004 or recognised by Te Ohu Kai Moana Trustee Limited as a Mandated Iwi Organisation. (The difference between the two is that a company or trust can be a mandated iwi asset holding structure under Te Ohu Kai Moana Trustee Ltd but not hold fisheries assets. Also a Mandated Iwi Organisation must meet governance criteria set out in section 12 of the Maori Fisheries Act 2004); those receiving and managing assets under the Treaty of Waitangi; Trusts established or owning land under Te Ture Whenua Maori Act 1993; the Maori Trustee; Maori Trust Boards; the Crown Forestry Rental Trust; Te Ohu Kai Moana Trustee Limited; and Aotearoa Fisheries Limited.

<sup>65</sup> S Hayes, "Tax Structuring for Iwi Organisations: Challenges and Principles of Tax Structuring for Tribal Development", *Governing and Running Maori Entities, Tribal development and the law in the 21<sup>st</sup> century*, New Zealand Law Society Intensive, (21 August 2009) 55 available at <[www.lawyerseducation.co.nz](http://www.lawyerseducation.co.nz)>

applicable to Maori land ownership and the holding of communal assets by Maori.

However, the regime itself offers little to enhance either Maori self-governance or self-determination as set out under the Declaration on the Rights of Indigenous Peoples. It is arguable that it continues the paternalism that has been apparent from the outset of the colony. The entities that qualify as Maori Authorities are still imposed structures under which Maori are required to adapt their cultural values and governance norms to fit imposed legislatively pre-determined guidelines. Under the present regime, the best support for Maori self-determination is found in the concessions around “public benefit”, which give Maori Authorities greater choice about how they structure their affairs under Pakeha taxation models.

### **“ABORIGINAL/FIRST NATIONS/ INDIAN” STATISTICAL OVERVIEW IN CANADA**

Over 1.3 million Canadians reported having Aboriginal ancestry in the 2006 Census, representing 3.8 percent of the total population.<sup>66</sup> However, not all individuals with Aboriginal ancestry are active members of an Aboriginal community, people or nation. Further, as with Maori, prior to colonisation by Europeans, Aboriginal peoples were the original land occupiers and inhabitants of Canada’s immense geographical landmass. The population statistic reflects that those individuals with Aboriginal ancestry are still a significant cultural grouping and an important part of modern Canada.<sup>67</sup> In 2006, 50,485 individuals identified as Inuit, 389,785 as Metis and 698,025 as First Nations.<sup>68</sup> Of these, 623,780 or 81 percent were Registered Indians.<sup>69</sup> 68 percent of Registered Indians were living “off reserve” while 32 percent did not have Registered Indian status. 98 percent of the Aboriginals living on reserves were Registered Indians.<sup>70</sup> The highest concentrations of these people lived in the Northwest territories (31 percent), Yukon (21 percent) and Saskatchewan (10 percent).<sup>71</sup>

In 2006, 45 percent of “First Nations”<sup>72</sup> lived in urban areas and numbered approximately 698,025. There are 615 First Nations,<sup>73</sup> and 11 distinct First Nations language families throughout Canada.<sup>74</sup> First Nations are disproportionately represented

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<sup>66</sup> Canadian Statistical information from the 2006 Census retrieved from <http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm>. [2006 Census]

<sup>67</sup> Section 35 Constitution Act 1982, n3.

<sup>68</sup> 2006 Census, n66.

<sup>69</sup> Ibid. “Registered Indians” is a term used to describe an “Indian” who is registered as such, or entitled to be registered, under the Indian Act. See n3 above.

<sup>70</sup> 2006 Census, n66.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid. The information in the census is unclear because “First Nations” sometimes includes both “Band/Reserve Indians” who qualify under the Act and those Aboriginals who have lost their status under the Act and are therefore not entitled to live on the Reserve or be a Band member. It is also juxtaposed with “Aboriginal” as an all-inclusive term used to describe all the pre-colonial groups who still occupy Canada. In this article the taxation regime of “First Nations” refers only to Band/on Reserve Indians as defined under the Indian Act. See notes 3, 5 and 6 above.

<sup>73</sup> The 50 languages of Canada's indigenous peoples belong to 11 major language families - 10 First Nations and Inuktitut.

<http://atlas.nrcan.gc.ca/auth/english/maps/peopleandsociety/lang/aboriginallanguages/1>

<sup>74</sup> <http://www.statcan.gc.ca/daily-quotidien/080115/dq080115a-eng.htm>.

in Canada's negative statistics. In 2006, 44.4 percent of First Nations living on reserves lived in dwellings requiring major repairs, compared to 7.0 percent of the non-Aboriginal population.<sup>75</sup> Over one quarter (25.6 percent) of First Nations living on reserves lived in houses with more than one person per room, compared to 2.9 percent for the non-Aboriginal population.<sup>76</sup> According to the *First Nations Regional Health Survey*, 21 percent reported having no access to a rubbish collection and 9 percent reported that they lacked either a septic tank or sewage service.<sup>77</sup>

In 2006, the median income in Canada for Registered Indians living on reserves was less than half that of the non-Aboriginal population (\$11,229 compared to \$25,955).<sup>78</sup> In 2006, the unemployment rate for Registered Indians living on reserves was almost one in four (24.9 percent). This compares to 6.3 percent for the non-Aboriginal population. About 65 percent of Aboriginal children living on reserves lived with two parents compared with only 50 percent in census metropolitan areas. In contrast, almost 83 percent of non-Aboriginal children lived with two parents.<sup>79</sup>

In 2008-2009, 35 percent of women and 23 percent of men in custody identified as "Aboriginal" despite only being 3 percent of the total Canadian population.<sup>80</sup> There is a higher prevalence of chronic health conditions among First Nations people compared to other Canadians. For example 19.7 percent, or one in five adults, was diagnosed with diabetes compared to 3.2 percent in Canada generally.<sup>81</sup>

Unlike Maori, significant numbers of First Nations still live in distinct territorial areas, on reserves that are smaller than the territories they traditionally held, and in regions where climatic conditions exist which few Europeans can endure all year round. However, like Maori, First Nations peoples increasingly live in cities with almost half the number now living in urban areas. At a governing level, the small percentage of First Nations people in the overall population is a barrier to their representation in government on a "one person one vote" basis. If representation was according to "nations" formed by those with Indian ancestry at the time of colonisation they would form the majority in Canada's Federal parliament. However, unless one travels to areas in Canada where First Nations people live on reserve lands, their existence as part of wider Canada is not obvious. Conversely, in the smaller geographical space of Aotearoa New Zealand, Maori live as part of an integrated society, are formally represented in central government, and are highly visible in the political arena. However, in both contexts, despite there being some quite significant differences, providing a system of taxation that upholds the integrity of indigenous community values will enhance the self-determination of the group.

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<sup>75</sup> 2006 Census, n66.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

## TAXATION OF FIRST NATIONS IN CANADA

### Prior to the Canadian Constitution of 1867

Indigenous peoples made Canada their home centuries before Europeans arrived in the 15th Century.<sup>82</sup> Consequently, the ancestors of the groups now referred to as First Nations began their relationship with the colonisers as independent peoples with authority over independent territories.<sup>83</sup> The desire of the English and French to gain territory occupied and held by these groups led to the negotiation of treaties.<sup>84</sup> Because First Nations saw themselves as independent and not subject to the imposition of colonial law<sup>85</sup> they also did not see themselves as being subject to colonial government taxation and, consequently, it was not referred to in any of the treaty texts.<sup>86</sup> In 1850, the Province of Canada passed an Act which provided in section 4:<sup>87</sup>

That no taxes shall be levied or assessed upon any Indian or any person intermarried with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person intermarried with any Indian so long as he or she shall reside on Indian land 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.

According to John Borrows, although the exemption remained unchanged until the Indian Act of 1876,<sup>88</sup> under “the pretext of protecting Indians, the British systematically usurped Indian authority”<sup>89</sup> thereby diminishing the independence of First Nations and their capacity to govern themselves.

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<sup>82</sup> I Shin, *Aboriginal Law Handbook*, 2<sup>nd</sup> ed, Carswell Thomson, Canada, 1999, 3, states that “Europeans regarded it as a vacant continent since there were probably no more than 220,000 Indians” living there. Other estimates are that there were over 7-18 million Indians in all of North America at the time of colonisation. The latter estimate is stated by H Dobyns, *Their Number Became Thinned*, University of Tennessee Press, Knoxville, 1983, 42.

<sup>83</sup> “Authority over territory” is a problematic expression since it assumes European ideas of “sovereignty” and “state”. Also boundaries and land title have little meaning in a place where people have plenty of space and can move between territories according to climate and seasonal demands.

<sup>84</sup> Promises made in the Treaties signed with First Nations by the British and French and later confirmed in s35(1) Constitution Act, recognise that Treaty rights, based on nation-to-nation relationships, predate the Constitution.

<sup>85</sup> When Europeans made first contact, Aboriginal peoples existed as self-governing nations exercising effective control over geographical areas, trading and making war with other nations. According to various Indian leaders nationhood and self-government was never surrendered or taken by conquest. See Little Bear, M Boldt, J Long (eds), *Pathways to Self-Determination, Canadian Indians and the Canadian State*, University of Toronto Press, Canada, 1984, xv.

<sup>86</sup> J Borrows and L Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2<sup>nd</sup> ed, LexisNexis, 2003, 113.

<sup>87</sup> R Bartlett, “Taxation”, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, B Morse (ed), Carleton University Press, Canada, 1985, 584.

<sup>88</sup> Borrows and Rotman, n86 at 746. Through this Act the tax exemption for Indians was codified.

<sup>89</sup> *Pathways to Self-Determination*, n85 at xi.

## The Indian Act 1876

Parliament's legislative authority over "Indians, and Land reserved for the Indians"<sup>90</sup> began with the Canadian Constitution Act of 1867 and then the Indian Act of 1876. First Nations peoples were recognised by various treaties as occupying certain territories<sup>91</sup> and being separate nations in their own right.<sup>92</sup> Canadian Indian policy at the time has been described by Richard Bartlett as:<sup>93</sup>

'civilizing' the Indian population and achieving assimilation and integration as soon as possible, and ... protection of the Indians and their land from abuse and imposition ... until such time as being 'civilized', such protection was superfluous.<sup>94</sup>

Subsequently, in 1876, Parliament enacted the Indian Act with the intention of turning what were essentially "sovereign nations"<sup>95</sup> into small communities" and making Canadian Indians legal wards of the state.<sup>96</sup>

The Act set out the conditions that needed to be met in order for individuals to be recognized legally as 'Indians' and to empower the Crown to control the management of reserve land.

According to Imai Shin, the Indian Act had "two sometimes contradictory purposes – paternalism and assimilation – although both end up taking away control from First Nations".<sup>97</sup>

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<sup>90</sup> Constitution Act, 1867 (UK) 30 & 31 Vict.,c.3, reprinted in RSC 1867, App II, No. 5, s.91(24).

<sup>91</sup> These territorial lands were quickly eroded and the Aboriginal peoples occupying them forced to accept elective systems which replaced traditional tribal governance. See *Pathways to Self-Determination*, n85.

<sup>92</sup> Pre-confederation and post-confederation treaties are discussed in Borrows and Rotman, n86 and Bartlett, n87. The authors noted that written agreements between First Nations and the Crown created nation-to-nation relationships and treaty federalism. The treaties were concerned with the protection of inherent Aboriginal rights; the distribution of shared jurisdictions; territorial management; human liberties and rights; and treaty delegations. The authors further note that each of the parties believed they had secured their respective objectives; the Crown gained access to Indian lands and resources and First Nations secured the guarantee of the survival and protection of their Nationhood. This picture is skewed by First Nations having to fight for recognition of all of the above in the courts, parliaments (both provincial and federal), and sometimes physically with the government on their own lands. The relationship illustrates the paternalistic exploitation that indigenous peoples have complained of around the world rather than protection of First Nations and their territories. The Indian Act allowed the colonisers to eliminate traditional Indigenous political institutions by transforming self-governance into administrative structures for implementing policies and regulations aimed at "civilising", "integrating" and "assimilating". Ironically in recent years the very existence of the treaties, confirms in terms of international law, the standing of the Aboriginals as "peoples" having a distinct collective political character and rights.

<sup>93</sup> R Bartlett, *Indians and Taxation in Canada*, (3<sup>rd</sup> ed), 1 Saskatoon Native Law Centre, Saskatchewan, 1992, as cited in Borrows n86, 754.

<sup>94</sup> This attitude of "protecting the Indians from abuse and imposition" is what has been stated by Bartlett, n87, as leading to the taxation exemption for Indians and their lands. We can compare this approach to the New Zealand government policy towards Maori, which only gives a taxation exemption to Maori if a "charitable purpose" is present. It indicates a paternalistic approach towards Aboriginal peoples in both Canada and Aotearoa New Zealand.

<sup>95</sup> "Sovereign" as it is used here describes the native peoples' sense of their own Nationhood derived from having their own language, culture, shared tribal achievements and use of a particular territory. It is not the European notion of sovereign power emanating from the concept of ultimate state and Crown authority.

<sup>96</sup> See n3.

Under this Act the basic governmental unit is the “Band”,<sup>98</sup> which is governed by an elected Chief and Council and which has jurisdiction over an “Indian reserve”.<sup>99</sup> A First Nation is a “Band” under the Indian Act if it meets one of the following three criteria: it has a reserve; it has government trust funds for its use; or it has been declared to be a band by the federal government. Whether or not a person is an “Indian”<sup>100</sup> is also defined in the Indian Act along with a requirement under the Act for the keeping of a register of Indians.<sup>101</sup> The Indian Act also contains restrictions on the alienation of reserve lands and individual real property interests.<sup>102</sup> According to Richard Bird<sup>103</sup> across Canada there are more than 2,300 reserves held for 640 recognised First Nations. The Indian Act contains no provisions on how to create reserves<sup>104</sup> and federal policy has been developed in recent years on how to do this.<sup>105</sup>

### **Tax Exemption on Indian Income Earned on Reserve**

Section 87 of the Indian Act<sup>106</sup> “exempts real and personal property situated on reserve land from taxation where the owners of the property are either individual Indians or the collective First Nation”.<sup>107</sup> Since the section refers to an “Indian” and a “Band” it cannot apply to Aboriginal people who are not “Registered Indians”.<sup>108</sup>

Section 90 of the Indian Act deems personal property acquired “with Indian moneys” or “given to Indians or to a band under a treaty or agreement” to be “always situated on a reserve” if the tax exemption given in section 87 is to apply. Because the Indian Act

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<sup>97</sup> Shin, n82, 132.

<sup>98</sup> See n5.

<sup>99</sup> See n6.

<sup>100</sup> See n3.

<sup>101</sup> Section 5 of the Indian Act.

<sup>102</sup> Note the Maori equivalent. Te Ture Whenua Maori Act 1993 restricts the sale of Maori Land and establishes various types of trusts to hold and manage land. Part HF of the Income Tax Act defines a Maori Authority for tax purposes as including Maori Incorporations and Trusts established under the Act.

<sup>103</sup> R Bird, “The GST in Canada: plus Ça Change, Plus C’est La Meme Chose?” *Bulletin for International Taxation*, International Bureau of Fiscal Documentation, Amsterdam, (2009) 63, 414 at 415.

<sup>104</sup> In the past Reserves were established by Proclamation or under specific Treaties.

<sup>105</sup> Department of Indian and Northern Affairs Canada, Additions to Reserves Policy, <http://www.ainc-inac.gc.ca/ai/mr/is/urs-eng.asp>.

<sup>106</sup> Section 87 states: “(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 and Statistical 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. (2) No Indian or band is subject to taxation in respect of 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. (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.”

<sup>107</sup> See F Martin, B Morse and B Hocking, “The Taxation Exemption of Canadian Indians as Governments and Individuals: How does this compare with Australia and New Zealand”, (2011) *Common Law World Review*, 40, 119-143.

<sup>108</sup> “Registered” and “Status” Indians indicates Aboriginals who are registered or given status as Indians under the Indian Act 1876. See n3.

predated the imposition of the first federal income tax of 1917,<sup>109</sup> “personal property” was interpreted in *Nowegijick v The Queen*<sup>110</sup> to include “income”. Further, as a result of *Williams v. Canada*,<sup>111</sup> a case that dealt with the tax exemption of unemployment insurance benefits, Revenue Canada not only interpreted the decision as determining income tax exemption but went on to develop guidelines as to when the exemption from income tax applied.<sup>112</sup>

Numerous Canadian cases have looked at tax exemptions on Indian income earned on reserve.<sup>113</sup> The right is narrowly defined<sup>114</sup> so that the exemption applies only to individual Indians and bands and excludes corporations or trusts.<sup>115</sup>

In June 1994, the Canada Revenue Agency [CRA] established guidelines to create certainty around the section 87 Indian Act taxation exemption.<sup>116</sup>

Recent case law, namely *Bastien Estate v Canada*<sup>117</sup> and *Dube v Canada*<sup>118</sup> has seen an alteration in the requirement of a connection to a recognised Indian reserve in order to obtain the preferential income tax exemption. In *Bastien* the Supreme Court of Canada held that property does not have to support a so-called “traditional way of life” to be tax exempt. Bastien’s residence was on the reserve as was the source of the capital which was then invested to earn interest for him. The fact that the interest revenue was produced in the “commercial mainstream” off the reserve was seen as a factor given too much weighting by lower courts and the Supreme Court decided that the investment income should benefit from the section 87 Indian Act exemption.

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<sup>109</sup> The Income Tax War Act 1917 (Ca) 7 & 8 Geo, c28.

<sup>110</sup> *Nowegijick v The Queen* [1983] 1 SCR 29; 83 DTC 5041.

<sup>111</sup> *Williams v Canada* [1992] 1 SCR 877.

<sup>112</sup> In December 1992 Revenue Canada announced that employment income would be assessed for taxation purposes unless 90% of the duties of employment are performed on the reserve; the employer is resident on a reserve and the Indian lives on the reserve; more than 50% of employment duties are performed on the reserve, and, the employer is an Indian band, tribal council or organisation dedicated exclusively to the social, cultural, educational or economic development of Indians.

<sup>113</sup> Cases include *Nowegijick v The Queen* [1983] 1 SCR 29; 83 DTC 5041; *Williams v Canada* [1992] 1 SCR 877; 92 DTC 6320; *Shilling* 2001 DTC 5420 ; and *Bouvard v Canada* [2009] 2 CNLR 23, FCA; 2008 DTC 3015. More recent landmark cases are referred to in the paper below.

<sup>114</sup> Under paragraph 81(1)(a) of the Income Tax Act and section 87 of the Indian Act, an individual Indian’s personal property situated on the reserve is exempt from tax. Employment income is exempt also if the employment services can be classified as being integral to the life of the reserve. The cases cited above demonstrate these principles.

<sup>115</sup> For the exemption to apply to employment income until recently required a high degree of “connecting factors” to a reserve. As an example see *Nowegijick*, above n113, where the location of the employer on the reserve meant that the income paid to a status Indian employee was tax exempt regardless of where the service was performed. This has altered with the recent cases of *Bastien* and *Dube* referred to in n117 and n118.

<sup>116</sup> The international accounting firm BDO makes this point in a publication on First Nations and the Canadian Tax Environment in which they quote a statement by the CRA: “It is important to note that the Guidelines were developed only as an administrative tool to assist taxpayers and CRA employees in working with a very broadly worded tax exemption ... they do not necessarily constitute a definitive test ... there may be situations where income may be taxable even though it appears to fall within one of the Guidelines.” [www.bdo.ca/en/.../first-nations-and-the-canadian-tax-environment.pdf.4](http://www.bdo.ca/en/.../first-nations-and-the-canadian-tax-environment.pdf.4)  
[www.bdo.ca/aboriginal](http://www.bdo.ca/aboriginal).

<sup>117</sup> *Bastien Estate v Canada* (2011) SCC 38.

<sup>118</sup> *Dube v Canada* (2011) SCC 39.



Under the Indian Act there are limitations on the legal entitlement of individual non-Indians to live on, “use” or “occupy”<sup>119</sup> reserve lands.<sup>120</sup> In 1988, the “Kamloops Amendments”,<sup>121</sup> to the Indian Act created a distinction between reserve lands available for leasing, “designated lands”,<sup>122</sup> and those surrendered absolutely for sale. As a result of the Kamloops Amendment to the Indian Act the land becomes “designated land” which the Crown then leases to the non-Indian entity. Because “designated lands continue to hold the status of reserve lands”,<sup>123</sup> income from these lands remains tax exempt under section 87 of the Indian Act.

As a separate legal entity, corporations cannot rely on this exemption even if all of its shareholders are Indians and the corporation is located on a reserve.<sup>124</sup> However the exemption will apply to money from either a land claim settlement or a reserve development received by a band that has established a trust.<sup>125</sup> According to Martin et al,<sup>126</sup> First Nations are entering into Impact Benefit Agreements [IBAs] with resource companies for major development projects in order to achieve greater self-determination and economic development, with the contracting company providing or funding training, education, employment and business opportunities in return for First Nation support of the project. The trust that is established receives the compensation and monetary assistance provided by the IBA and because it is considered income of the First Nation it will be exempt from tax.<sup>127</sup>

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<sup>119</sup> “Occupy” is used here to describe an individual or corporation moving onto Indian reserve land for business purposes, often to exploit natural resources that are located there. Such reserve land is also referred to as “surrendered lands” under a lease agreement between the individual business or corporation and the band council with authority over the reserve land.

<sup>120</sup> Martin et al, n107 at 133.

<sup>121</sup> It was the action of Chief Manny Jules of the Kamloops Indian Band that led to the legislative change made to section 83 of the Indian Act to clarify First Nation jurisdiction. The Kamloops Band had lost a court case challenging municipal taxation of their tenants even though the City of Kamloops provided no services to designated lands, which were held to be in any event outside the jurisdiction of the Band Council. The distinction gave Band Councils regulatory and taxing jurisdiction over their leased lands. By the same amendment, leasehold interests in designated lands were made mortgageable as an exception to the statutory rule that reserve lands cannot be mortgaged (section 89).

<sup>122</sup> “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;”

<sup>123</sup> Martin et al, n107 at 134.

<sup>124</sup> Ibid. According to the authors it is proposed by the Canadian Federal government that s149 (1)(d.5) of the Income Tax Act will be amended to make corporation income exempt where at least 90 percent of its shares are owned by a municipal or public body performing government functions. Where a First Nation is treated as a public governmental body they also will be entitled to the tax exemption. The case of *The Queen v Kinookimaw Beach Association* (1979) 102 DLR (3d) 333, held that the definition of “Indian” does not extend to corporations, even where the shareholders are Indians.

<sup>125</sup> Canadian tax law provides that income from trust property is beneficiary income and it is the beneficiaries who are liable for tax. If the beneficiaries are living on reserve any income they receive from the trust will be tax exempt.

<sup>126</sup> Martin et al, n107 at 135.

<sup>127</sup> Section 87 of the Indian Act and section 5 of the First Nations Fiscal and Statistical Management Act operate to exempt from taxation income derived by an Indian or a Band on reserve land.

## Property Tax

First Nations have developed property taxation powers through the Kamloops Amendments made to the Indian Act and the First Nations Fiscal and Statistical Management Act in 2005 [FNFSMA].

Property tax<sup>128</sup> is a major revenue source for provincial and local government within Canada, raising annually almost \$40 billion<sup>129</sup> and generating about 10 percent of all government revenue. In 2008, property taxation accounted for 39 percent of local government revenue.<sup>130</sup> In Canada, this taxation covers the cost of local services that are not met by the federal or provincial governments, such as water and sewerage systems, police and fire protection, rubbish collection, road and lighting improvements, and parks, recreation and cultural facilities.<sup>131</sup>

Interestingly, First Nations taxation can be traced back to before the appearance of Europeans, when paying tribute for occupying or using another's territorial lands was normal practice. This form of tax was a concession given in exchange for a privilege. Another type of taxation occurred through wealth distribution ceremonies performed amongst bands such as potlatch and giveaway dances.<sup>132</sup>

In 1884 the Indian Advancement Act was passed seeking to replace government by chiefs-in-council with government-by-council and allowing the new statutory "Indian Band Governments" the Federal power to raise internal funds.<sup>133</sup> However, as previously stated, it was not until the Kamloops amendment to section 83 of the Indian Act and then the passage of Bill C-115 that First Nations were given broader tax powers within their reserve lands.<sup>134</sup> The amendment allowed First Nations to establish their own taxing jurisdictions, create economic development opportunities, and provided a

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<sup>128</sup> This tax is on real property such as land and improvements on the land. "First Nations On Reserve" taxable properties include residential leases, buildings, commercial leases, farming permits, pipelines, transmission lines, production facilities, towers and railways.

<sup>129</sup> Statistical Information from the First Nations Tax Commission website retrieved on 18 May 2012 from [http://www.fntc.ca/index.php?option=com\\_content&view=article&id=39&Itemid=39](http://www.fntc.ca/index.php?option=com_content&view=article&id=39&Itemid=39)

<sup>130</sup> *First Nations Real Property Taxation Guide*, 2<sup>nd</sup> edn, 2011, 7, [http://www.fntc.ca/dmdocuments/General/property\\_taxation\\_guide\\_2011.pdf](http://www.fntc.ca/dmdocuments/General/property_taxation_guide_2011.pdf) [FN Taxation Guide].

<sup>131</sup> Ibid.

<sup>132</sup> Traditionally at potlatch gatherings, a family or hereditary leader hosts guests in their family's house and holds a feast for their guests. By using the ceremony to redistribute and receive gifts, hierarchical relations within and between clans, villages, and nations, are observed and reinforced. The status of any given family is raised not by who has the most resources, but by who distributes the most resources. The hosts demonstrate their wealth and prominence through giving away goods. Each nation or tribal grouping has its own way of practicing the potlatch with diverse presentations and meaning but the main purpose is still the redistribution of wealth. See <http://en.wikipedia.org/wiki/Potlatch> and <http://www.thefreedictionary.com/potlatch>.

<sup>133</sup> According to Bartlett, n87, the federal government had to consider whether the Band was "advanced" and therefore "fit" to assess and tax lands of enfranchised Indians. No Indian Band was considered fit to exercise this power until 1951 when it was reintroduced alongside the power to license businesses.

<sup>134</sup> As the Supreme Court of Canada noted in *Canadian Pacific Ltd v Matsqui Indian Band* [1995] 1 SCR 3, para 18, the objective in creating the Indian taxation powers was "to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves".

basic tool for governance.<sup>135</sup> At the time, in the House of Commons, the then Minister of Indian Affairs and Northern Development stated:<sup>136</sup>

One of the most important by-law powers that bands need is their power to tax use of their land. That brings me to the second purpose of these amendments, which is to establish clearly that band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. Such taxation power is obviously indispensable to any form of modern government. Some bands may not wish to use this power, but it must be there for bands which wish to exercise it.

The Kamloops Amendments modified the definition of “reserve” to include “designated lands”.<sup>137</sup> The Amendments led to litigation to determine what lands came within the definition of a reserve as “designated lands”. In 1997, the Court in *St Mary’s Indian Band v Cranbrook*<sup>138</sup> determined that only lands surrendered for lease came within the definition and not land surrendered for sale. The position was clarified in *Osoyoos Indian Band v Oliver (Town)*.<sup>139</sup> The facts of the case were that in 1925 an irrigation canal was constructed in British Columbia on a strip of land that bisected the reserve concerned. In 1957, a federal Order-in-Council enacted pursuant to section 35 of the Indian Act was adopted allowing the taking of the lands by the province, which subsequently registered a certificate of indefeasible title in its name. The Supreme Court concluded that the lands where the irrigation canal was built were still in the reserve as “designated lands” and therefore subject to band taxation under section 83 (1)(a) of the Indian Act. The Court took the view that the interpretation which least impaired the Indian interests was to be preferred.<sup>140</sup>

### **First Nations Fiscal and Statistical Management Act**

The First Nations Governance Act (Bill C-7),<sup>141</sup> and the First Nations Fiscal and Statistical Management Act (Bill C-19),<sup>142</sup> were tabled as a package of band governance provisions.<sup>143</sup> Both Bills received strong opposition from the Assembly of First Nations<sup>144</sup> and led to a modified Bill C-19, which became the First Nations Fiscal and Statistical Management Act 2006 [FNFSMA].<sup>145</sup>

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<sup>135</sup> *FN Taxation Guide*, n130 at 10.

<sup>136</sup> House of Commons Debaters, vol. XIII, 2<sup>nd</sup> session, 33<sup>rd</sup> Parliament (2 June 1988) at 16047 as cited in B Crane, A Brian, R Mainville, M Mason, *First Nations Governance Law*, LexisNexis, 2008, 99.

<sup>137</sup> See note 122, Indian Act definition.

<sup>138</sup> [1997] SCJ No. 19, [1997] 2 SCR 657.

<sup>139</sup> [2001] SCJ No. 82, [2001] 3 SCR 746.

<sup>140</sup> Crane et al, n136 at 103.

<sup>141</sup> Bill C-7 is an Act respecting leadership selection, administration and accountability of Indian bands and with the purpose of making related amendments to other parliamentary Acts. 2<sup>nd</sup> Sess., 37<sup>th</sup> Parl., 2002.

<sup>142</sup> Bill C-19 is an Act providing for real property taxation powers of First Nations. It creates a First Nations Tax Commission, First Nations Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute and makes various amendments to other Acts, 2<sup>d</sup> Session, 37<sup>th</sup> Parliament, 2002.

<sup>143</sup> Crane et al, n136 at 104.

<sup>144</sup> In November 2002 the Assembly of First Nations passed a resolution (AFN Resolution 30/2002) rejecting Bill C-19 as a violation of Treaty and Aboriginal rights. Bill C-7 lapsed after failing to get adequate support in Parliament.

<sup>145</sup> First Nations Fiscal and Statistical Management Act, SC 2005.

The FNFSMA set out a new comprehensive taxation regime in regard to property taxation.<sup>146</sup> Indian bands were also given the option of levying consumption taxes on their reserves through the Budget Implementation Act 2000<sup>147</sup> and the First Nations Goods and Services Tax Act 2003.<sup>148</sup>

The Budget Implementation Act 2000 allows bands to make by-laws imposing a direct tax on supplies of alcoholic beverages, fuel, and tobacco products made on reserves. The rate imposed is the same as that imposed by the Excise Tax Act 1985.<sup>149</sup> The imposition of this tax prevails over the tax exemption allowed under section 87 of the Indian Act and ensures that all sales of the above products on reserve, to both Indians and non-Indians, are taxed. The tax is collected by the government in agreement with the Band Council.<sup>150</sup>

The First Nations Goods and Services Tax Act 2003 [FNGST] is very similar to the Budget Implementation Act 2000. It transfers to Bands that choose to participate in this form of taxation, the “authority to levy for their own purposes a tax equivalent to the GST on sales made on their reserve lands”.<sup>151</sup> As with the Budget Implementation Act 2000 this tax also overrides the tax exemption found in section 87 of the Indian Act, so that both Indians and non-Indians are taxed by the participating Band.<sup>152</sup>

The FNFSMA provides a new opt-in property tax regime without repealing the property tax provisions contained in section 83 of the Indian Act.<sup>153</sup> This gives First Nation bands the option, subject to approval from the Minister,<sup>154</sup> to develop a property taxation regime under this legislation rather than under section 83 of the Indian Act.<sup>155</sup> While section 83 is an older provision containing basic property tax tools for a First Nation band to use, the FNFSMA provides additional powers and access to debenture financing.<sup>156</sup> A Council wanting to make taxation laws under the FNFSMA “must first make a law respecting the financial administration of the band and have that law approved by the First Nations Financial Management Board”.<sup>157</sup> There is also a requirement for the law to be approved by the First Nations Taxation Commission [FN Tax Commission].<sup>158</sup>

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<sup>146</sup> Ibid, c9.

<sup>147</sup> Budget Implementation Act, SC 2000, c14.

<sup>148</sup> First Nations Goods and Services Tax Act, SC 2003, c15, Part 9.

<sup>149</sup> Excise Tax Act, RSC 1985, cE-15.

<sup>150</sup> Crane et al, n136 at 110.

<sup>151</sup> Ibid, 111.

<sup>152</sup> As of November 2011, 23 Aboriginal governments have implemented the FNGST and are receiving group remittances of approximately \$12 million per year.

<sup>153</sup> Crane et al, n136 at 104.

<sup>154</sup> The Minister of Indian Affairs and Northern Development.

<sup>155</sup> Crane et al, n136 at 104.

<sup>156</sup> The establishment of the First Nations Financial Management Board [FNFMB] is to assist First Nations with all aspects of financial management. Previously, in 1995, a federally incorporated non-profit corporation called the First Nations Finance Authority [FNFA] was established to assist First Nations with financing for capital infrastructure development and capital assets for the provision of services on reserve land. The FNFMB provides an overseeing role and ensures that financial standards are met when First Nations borrow money through the FNFA.

<sup>157</sup> Crane et al, n136 at 104.

<sup>158</sup> Ibid.

Prior to the establishment of the FN Tax Commission it was the Indian Taxation Advisory Board [ITAB] created in 1989 that made recommendations regarding the approval of Band real property taxation bylaws as authorised under section 83 of the Indian Act.<sup>159</sup> The ITAB had the mandate to promote the development and implementation of First Nation local property tax and ensure its overall national integrity. ITAB assisted First Nations to achieve “a measure of jurisdictional equality with adjacent municipal and regional governments”.<sup>160</sup>

Once the tax model under section 83 of the Indian Act had been approved, the ITAB began advocating a new regulatory framework in order to strengthen the tax powers of First Nations. This led to the development of the FNFSMA and the creation of the FN Tax Commission. The FN Tax Commission acts as:<sup>161</sup>

an independent agency ... with the power to approve local taxation and expenditure laws made pursuant to the First Nations Fiscal and Statistical Management Act, to maintain a registry of such laws and of financial administration laws of participating bands, to approve band laws respecting the borrowing of money from the First nations Finance Authority and to provide mechanisms for dispute resolution.

Once approval is given by the FN Tax Commission to a local taxation or expenditure law made by a First Nations Band, the law will come into force without Ministerial approval. The FN Tax Commission is required to report annually to the Minister of Aboriginal Affairs and Northern Development.

It is also possible for an Aboriginal group that is not a Band defined under the Indian Act, but which is party to a Treaty, Land Claim or Self-Government Agreement, to come under the FNFSMA.<sup>162</sup> The FNFSMA provides First Nations with the necessary legislative tools to raise revenue so they can meet the increasing demand from their communities for government infrastructure and services.<sup>163</sup>

According to the FN Tax Commission there are 194 First Nations exercising property tax powers, with revenue that ranges from a few thousand dollars per year to millions of dollars per year.<sup>164</sup> In 2011, First Nations raised \$70 million annually and used the income generated to provide local public services on reserve lands.<sup>165</sup> The ability to impose the above taxes on First Nation Reserves gives Band Councils that choose to

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<sup>159</sup> Ibid, 105.

<sup>160</sup> *FN Taxation Guide*, n130. This may be something for Maori to think about in developing the post treaty settlement governmental models further. See N Tomas, “Coming Ready or Not, Emergence of Maori Hapu and Iwi as a Third Order of Governance in Aotearoa New Zealand”, *Te Tai Haruru Maori Journal of Legal Writing*, Vol 3, Nga Pae o te Maramatanga, Auckland, 2011, 14-57, which discusses how legislation and Maori cultural principles and practices are being combined to achieve more equitable outcomes for hapu and iwi within their traditional territories.

<sup>161</sup> Crane et al, n136 at 106. Note that c9, sections 31-34 of the First Nations Fiscal and Statistical Management Act, SC 2005, outlines the role of the Tax Commission.

<sup>162</sup> Section 141.

<sup>163</sup> There is a great deal more to discuss about the role of the FN Tax Commission, including how property taxes are levied and collected, and the role of the First Nations Tax Administrator and Assessor.

<sup>164</sup> In 2011, a total of 134 First Nations had enacted bylaws under section 83 of the *Indian Act* and another 60 Bands under the FSMA. *Fact Sheet-Taxation by Aboriginal Governments* produced by the Aboriginal Affairs and Northern Development Canada at <http://www.aadnc-aandc.gc.ca/eng/1100100016434/1100100016435>.

<sup>165</sup> *FN Taxation Guide*, n130.

participate, an economic, and, potentially, autonomous future. By First Nation Bands raising their own tax revenues on “all-on reserve” economic activities and then using this revenue on their land reserves, there is the possibility of true economic independence and the ability to move away from dependence on the federal government.<sup>166</sup>

## SELF-DETERMINATION OF INDIGENOUS PEOPLES

### What is self-determination?

Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 confirms the fundamental right of indigenous peoples to self-determination.<sup>167</sup> Article 3 states:

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.

Nin Tomas<sup>168</sup> describes self-determination as “a fundamental principle of international human rights law that is rooted in changing conceptions of human experience”.<sup>169</sup> She states:<sup>170</sup>

that self-determination is at heart an open-ended enabling principle of an emancipatory kind whose modern application is two-fold. While it is still used in its historical sense to justify secessionist movements before and after they occur – that is, whenever old states disintegrate and new ones emerge to replace them – its more common modern usage now is as an external constraint that has been placed on state action vis-a-vis certain internationally recognized self-determining groups.

At a “popular” level, self-determination has been loosely defined as the individual right to the “free choice of one’s own acts without external compulsion”.<sup>171</sup> However, when relating the term to indigenous peoples it is more appropriate to apply self-determination to them as groups rather than individuals, because it is a collective group right from which individuals can benefit.<sup>172</sup>

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<sup>166</sup> M Boldt argues that the Indian benefit system creates a significant inequity between on-reserve and off-reserve employment and therefore greater dependency. He believes that there is a problem in a “grant economy” and that a strategy based on massive Canadian government support will not liberate Indians from their state of economic dependence. He argues that the surrender by the Canadian government of its proprietary claim to Indian income-tax revenues and the passing over of this right to First Nation Bands, as long as all income earned by their members both on and off reserve is taxed by the band, would create a tax-neutral status for Indians and have the positive effects of preventing Indians seeking employment off-reserve, creating income-tax parity between Indians and other Canadians with regard to federal rates of income tax, encouraging reserve-based economic development and allowing a movement back to economic self-sufficiency and independence of Indians in the wider provincial and federal economies. See M Boldt, *Surviving as Indians The Challenge of Self-Government*, University of Toronto Press, Canada, 1993.

<sup>167</sup> Taken from [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>168</sup> N Tomas, *Indigenous Peoples and the Maori: The Right to Self-Determination in International Law – From Woe to Go*, [2008] *NZ L Rev*, 639-683.

<sup>169</sup> *Ibid*, 639.

<sup>170</sup> *Ibid*, 640.

<sup>171</sup> <http://en.wikipedia.org/wiki/Self-determination>.

<sup>172</sup> Tomas, n168 at 657.

There are sound reasons for promoting self-determination in the narrower sense of enhancing group “self government” for limited economic and social reasons as well as in the broader “indigenous sense” outlined as a complete framework under the United Nations Declaration on the Rights of Indigenous Peoples. This article, and the work undertaken by Stephen Cornell and others as part of the Harvard Project on American Indian Economic Development studies, deals with the former and largely accepts the status quo within which it is occurring. It does demonstrate, though, that self-determination and economic prosperity are inextricably linked and provide for better indigenous governance because leaders are more accountable to members of the community and their decisions are more likely to be in tune with the cultural values of the community.<sup>173</sup> This achievement is self-determination with a small “s”; that is, one that is constrained by legislatively imposed external factors such as the Indian Act in Canada and Te Ture Whenua Maori Act in Aotearoa New Zealand.

The Harvard Project research shows that self-government cannot be achieved without an economic base. Access to sources of revenue is essential if a group is to be self-governing and have the ability to self-determine its economic future. This is where taxation measures can have either a negative or positive effect, and why tax policy should strive to achieve equality of outcome, while also providing cultural recognition and certainty.<sup>174</sup> It provides a small window into the bigger framework of Self-Determination that is the aspiration set out in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. Clearly under the Declaration, and in the view of many indigenous peoples,<sup>175</sup> self-determination is a fundamental principle and right of international law. Within Aotearoa New Zealand, the Maori Authority concessionary taxation regime has allowed Maori to take greater control of their asset base and to develop it on behalf of their collective owners.<sup>176</sup> However there are often difficulties in balancing the cultural dynamics of an iwi and governing a major corporate

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<sup>173</sup> S Cornell et al, *The state of the Native nations: conditions under U.S. policies of self-determination: the Harvard Project on American Indian Economic Development*, Oxford University Press, New York, 2008, 121-127.

<sup>174</sup> A good tax policy framework is discussed in, Tax Working Group, *A Tax System for New Zealand's future*, Victoria University, Wellington, January 2010, and concludes that a good tax system should be equitable, neutral and provide certainty. Cultural attunement however does not fit with principles of neutrality unless one accepts that the playing field is not neutral and acknowledges that to achieve true neutrality within tax for all cultural groups within a society will require different tax policies to ensure culture is recognised and enhanced. There is justification for governments to leave aside “neutrality” because such a policy stance works against the developmental strategies that the government may be attempting to implement within the developing economy. See J Horne, “The Role of Tax Reform in the Development of Pacific Island Economies”, 1993, 10 *Australian Tax Forum*, 347 and J Sneed, “The Criteria of Federal Income Tax Policy”, *Stanford Law Review*, Vol 17, April 1965, 572.

<sup>175</sup> Little Bear et al, n85 at 159-160. Del Riley states, “The other thing that I tell Canadians, when they ask me what Indians want, is that we seek basic human rights ... sometimes it is termed ‘self-determination’. Our quest for self-determination includes controlling those institutions that affect our lives. That is what Indian people are saying.”

<sup>176</sup> *FN Taxation Guide*, n130; The total 2005/2006 Maori-owned commercial assets have been estimated at nearly \$16.5 billion.

entity.<sup>177</sup> Such balancing can be made more difficult when the iwi group is compelled to adopt a particular legislative entity structure.<sup>178</sup>

Greater self-government for Maori is thwarted when the government requires an iwi or Maori organisation to adopt corporate structures that the government understands but which do not meet the cultural needs of the iwi as a group.<sup>179</sup> Part HF of the ITA 07 clearly defines what constitutes a Maori Authority in established Western terms and sets strict criteria that must be met before any structure can be implemented by an Authority.

The Maori Authority taxation regime is a response by government to the needs of Maori groups running land-based businesses for the benefit of a select group of collective owners who are still fortunate enough to hold Maori land.<sup>180</sup> This has been expanded to include hapu and iwi who are beneficiaries of Treaty fisheries and other settlements.<sup>181</sup> These concessions are allowing Maori greater control over an expanding economic resource base, particularly when the Maori Authority structure is combined with other business structures. However Maori Authority governance responsibilities can clash with the demands of the collective owners for greater accountability to them for safeguarding cultural aspects and retaining resources for future generations, which causes difficulties for the governors of the Maori Authority, particularly when trying to raise external finances.<sup>182</sup>

By way of comparison, the taxation measures applying to First Nations in Canada also reflect a difficult history of government policies of assimilation and alienation of territory through legislation such as the Indian Act. It can be argued that as Nations in their own right, with defined territories over which they still have notional control, Bands on Reserves should be able to impose their own taxes and have that right respected externally by the provincial, territorial and federal governments. However, many Reserves have been diminished significantly from the large territorial areas they were at the time of colonisation to much smaller territories, by those governments. Thus the political aspect of unconstrained “Self-Determination” under Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples has already been significantly undermined.

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<sup>177</sup> J Gardiner, “Getting Past Post-Settlement, Governing and Running Maori Entities”, 21 August 2009, New Zealand Law Society Intensive, Wellington, at 26-28, available at [www.lawyerseducation.co.nz](http://www.lawyerseducation.co.nz).

<sup>178</sup> Ibid. Gardiner states that when Ngati Awa attempted to retain the basic form of Maori Trust Board but replace accountability to the Minister of Maori Affairs with accountability to Iwi members, the Crown refused to accept the change.

<sup>179</sup> Ibid. Another example of the patriarchal control of the Crown over Iwi is that owners of Maori freehold land are restricted to using the land administration structures contained within Te Ture Whenua Maori Act 1993.

<sup>180</sup> A Sharp, “The History of the Taxation of Maori Authorities in New Zealand: A unique reflection of law and public policy working together?”, *Taxation issues*, A Maples and A Sawyer (eds), Existing and Emerging, Centre for Commercial and Corporate Law, Christchurch, 2011.

<sup>181</sup> Since 1992 under the Treaty of Waitangi settlement process, historic claims have been negotiated and settled. Settlements usually include an historical account, acknowledgment of Crown breaches of the Treaty of Waitangi and a Crown apology. Cultural, financial and commercial redress are negotiated and legislation is passed by parliament as settlement of the historic claim. Since 1992, settlements include the return of, or a share in, or shared management of, lands, fisheries, forestry, lakes, rivers and other culturally important assets or rights.

<sup>182</sup> The same concerns are true for the leaders of First Nation Bands in Canada. See Borrows, n86.



The reduced asset base, like the land holdings for iwi groups in Aotearoa New Zealand, makes it impossible for both groups to achieve self-determination without first building up their economic resources. The fact that both groups' membership is based on selective membership that is legislatively defined, is further exacerbated in Aotearoa New Zealand by the fact that some groups are recognised as large traditional iwi, while others are not, and in both countries by the fact that large numbers of their members live out of territory and in poor urban social conditions. These individuals have not only lost links to their tribal base through past land legislation which predates Te Ture Whenua Maori Act and the Indian Act, but also constitute a significant portion of the negative statistics outlined earlier in this article.<sup>183</sup>

The ability to impose property taxes on their Reserves is a taxation measure for First Nations, which increases their ability to self-govern.<sup>184</sup> Controlling one's economic base is the way to also control one's destiny and measures introduced by legislation such as the FNFSMA, the Budget Implementation Act and the Goods and Services Tax Act will provide First Nations with the ability to increase their ability to govern in a way that suits their community members, albeit still within the constraints of the Indian Act.

## CONCLUSION

This article set out to investigate whether taxation systems adapted by the government for use by Indigenous peoples in Aotearoa New Zealand and Canada restricted or encouraged Maori and First Nations aspirations for self-determination. "Self-determination" was defined as creating circumstances that enabled an indigenous community to achieve greater economic, political and cultural autonomy and to improve their socio-economic conditions. In comparing Maori with First Nations, some things are obvious. The membership of both groups is determined by legislation: we are not looking at Maori generally, but only at those covered by specific legislation or recorded as being members of specific hapu and iwi who hold particular resources; and in Canada although we are looking at a wider resource base, the beneficiaries are a relatively small group of Band Indians who are registered as Status Indians and who live on designated reserve lands. Both of these factors take the examination out of the Article 3 type, unconstrained, Self-Determination aspirations of the United Nations Declaration on the Rights of Indigenous Peoples, which deals with the broad aspirations of indigenous peoples as a generic group who are distinct from those who colonised them, and presumes the existence of a clear territory within which this can be achieved. This article is more humble in approach: it looks at how improving self-government

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<sup>183</sup> Stephen Cornell states, "if central governments wish to perpetuate Indigenous poverty, its abundant ills and bitterness, and its high costs, the best way to do so is to undermine tribal sovereignty and self-determination. But if they want to overcome Indigenous poverty and all that goes with it, then they should support tribal sovereignty and self-determination, and they should invest in helping Indigenous peoples build the governing capacity to back up sovereign powers with effective governments of their own design." S Cornell, "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States", Native Nations Institute for Leadership, Management and Policy, *Harvard Project on American Indian Economic Development*, Arizona, 2006, 28. Clearly poverty is expensive with costs not only through social service provision but also in lost resources where people are trapped in dependency instead of contributing to their own and other societies.

<sup>184</sup> Boldt, n166, and Cornell, n183.

practices within the narrow confines set up by each government to provide concessions that do not challenge the political and legal status quo of each country, is being achieved. While this can be viewed as “divide and rule”, it can also be argued, as this article does, that it improves the economic control that a number of indigenous groups have over their resource-bases in both countries, irrespective of the size of that base.

The taxation rules relating to Maori Authorities have undergone various changes since 1939 when a new framework for the taxation of Maori Authorities was instigated to enable Authorities to make a full contribution to the national economy. The increasing number of organisations and businesses managing collectively-held Maori assets has necessitated the creation of special Maori Trusts for both business and charitable purposes operating on collectively owned lands. The settlement of Maori claims under the Treaty of Waitangi and the creation of Mandated Iwi Organisations has expanded the iwi resource base and necessitated legislation to bring them within the ambit of Maori Authorities who are administering newly acquired economic resources. MACA eliminates double taxation. The 17.5 percent tax rate currently imposed on Maori Authorities aligns with the marginal tax rates of the majority of Maori Authority members. And finally, the decision to both relax and broaden the “public benefit” rule to include marae whose activities meet “charitable purpose” requirements, not only recognises that these organisations make a charitable contribution to Aotearoa New Zealand society, but also demonstrates that cultural considerations are a factor to be considered in any tax policy approach. These concessions encourage Maori self-determination, in the sense that they include a degree of cultural, economic, and political recognition that earlier assimilationist approaches actively denied.

The negative aspect of the Maori Authority regime is that all the measures taken to date can be argued as amounting to little more than giving Maori the fair deal that they always should have had. As such they are not concessions at all but the undoing of past injustices that has taken a very long period of time to achieve. The new taxation regime is a very small window in the framework of a house whose overall design is determined and controlled by the government, to whom Maori are always answerable. All approved Maori Authority entities must be based on western legal company or trust structures, rather than structures that represent the good governance cultural practices of the people they represent. This control makes them “Crown agents” rather truly self-governing entities who are implementing their own cultural values and practices. Crown oversight conflicts with, and overrides, the duty Maori Authorities owe to their Maori membership. As the people who are directly impacted, Maori beneficiaries require Maori Authorities to protect their resources for future generations in accordance with Maori traditional principles, and hold them accountable to a different set of expectations.

In Canada, First Nations were initially recognised as having autonomy over their reserve lands through negotiated treaties. Although this autonomy has been heavily affected by legislation, the recent introduction of the FNFSMA, the creation of the FNTC and the consequential participation by First Nations in the property tax system, has increased the self-government capacity of First Nations. 194 First Nations currently participate in the property tax system and more will enter the process in order to benefit from the economic returns that it now offers. These advantages include giving First Nations greater economic parity in the wider society because the gathering of taxation demonstrates not only a commitment to self-government but also avenues for increased

personal responsibility through self-financing.<sup>185</sup> It can also enhance the legitimacy of a government within its own community,<sup>186</sup> and the collection of even modest taxes and fees facilitates a greater political consciousness among community members, encouraging citizens to take a greater interest in the decisions and trade-offs their governments make, and allowing greater appreciation of the cost of providing services within their own communities. Self-reliance promotes a culture of accountability to the community that is qualitatively different from the accountability that exists when all funds are provided from sources external to the community.<sup>187</sup> Finally, by taking control of decision-making, establishing effective and legitimate governing institutions, strategically using natural resources, education, location and other assets, indigenous groups are able to achieve successful and sustainable economic development.<sup>188</sup>

On the negative side, government policies of assimilation and integration, along with loss of territory and the imposition of the Indian Act still exists. The tax exemption applying through section 87 of the Indian Act is limited by the exclusion of those who are not “status” or “registered” Indians and the way “status” is inherited. The small size of many reserves makes it difficult to accommodate new members. In Aotearoa New Zealand, hapu and iwi membership is not restricted and iwi groups determine an individual’s links through whakapapa (ancestry). However, no taxation exemption provisions apply unless one is a member of a “Maori Authority” as discussed earlier in this article.

The taxation measures operating in both Aotearoa New Zealand and Canada, for Maori and First Nations respectively, are only a first step in the process of achieving greater self-governance for these peoples. Both governments accept that differential taxation measures can assist indigenous groups to develop their resource asset base for the benefit of the whole of society, and are willing to recognise cultural differences which enable that to occur.

Is this self-determination? The Canadian approach permits First Nations to administer a taxation regime on reserved lands that are ultimately owned and controlled by the Federal government. It provides the opportunity to raise revenue and determine how it is spent until the rules are changed externally by the Federal government. Is something that is so circumscribed by legislation really free choice without external compulsion? Economic independence leading to full self-determination is difficult to achieve on reserves that have been diminished in size from the large territorial areas that existed at the time of colonisation, especially when 45 percent of the population lives off the reserve.

For Maori, the ability to impose taxation is frustrated by the lack of reserve lands as exists in Canada, with all the members of the indigenous community living and working on them to achieve economic sustainability. However, Maori have divided up the whole of Aotearoa New Zealand into territories over which hapu and iwi claim exclusive areas of territorial authority or “mana whenua”. This provides other opportunities for

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<sup>185</sup> A Maslove and C Dittburner, “The Financing of Aboriginal Self-Government”, *Aboriginal Self-Government in Canada*, J H Hylton (ed), Purich Publishing Ltd, Saskatchewan, 1999, 399.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid, 400.

<sup>188</sup> Cornell et al, n173 at 121.

revenue generation by hapu and iwi who hold resources such as fishing quota, thermal energy, mineral waters, petroleum and coal reserves on their lands. The positive contribution to the economy of Aotearoa New Zealand that is being made by Maori indicates that the settlement of Treaty claims and the concessionary Maori Authority taxation regime have strengthened the economic independence of some groups. It is one small, but nevertheless important, step towards achieving economic self-determination within a governance structure that is imposed by the dominant culture.

Thus, in my view, taxation is a useful tool that can assist indigenous peoples not only to build their own economic and governing capacity, but also to become effective contributors to the whole society. These benefits should not be discounted, even though the current taxation regimes that exist in both Aotearoa New Zealand and Canada do not provide for the full, group-held article 3, Self-Determination aspirations of indigenous peoples that are contained in the United Nations Declaration on the Rights of Indigenous Peoples.