Indigenous Peoples, Legal Bodies, and Personhood: Navigating the "Public Body" Exemption with Private Law Hybrid Entities

Bradley Bryan*

Over the past 40 years, the Canada Revenue Agency's application of the 'public body exemption' in paragraph 149(1)(c) to First Nation governments has evolved to include all 'Indian bands' and what are called 'Modern Treaty Nations'. Paragraph 149(1)(c) – the so-called 'public body exemption' – exempts public bodies performing a function of government from taxation on income received regardless of the geographic origin of the income-generating activity. To this day, this exemption is referred to as the 'Municipal Exemption' in the Income Tax Act, *RSC 1985, c 1 (5th Supp). The story of the emerging application of the exemption to 'Indian bands' and First Nations, however, is not to be gleaned from a study of the jurisprudence, nor of a legislative history of successive amendments to the* Income Tax Act. *Instead, the story of this evolution lies in the interactions of the various First Nations across Canada with the Canada Revenue Agency by way of applications for Advance Tax Rulings, or through audits and reassessments. This article explores some of the legal categories at play in this evolution, along with some of the corporate law issues that were also arising for First Nations as they pursued economic self-determination from the early 1980s to the present.*

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* Assistant Professor, University of Victoria Faculty of Law. The author wishes to thank Kathryn Chan, Patricia Cochran, Caroline Grady, Freya Kodar, Rebecca Johnson, Tamara Larre, Johnny Mack, Shiri Pasternak, Samuel Singer, Mark Wedge, and David Wright for commentary and discussion on the ideas and argument in this paper. Thanks is also owed and offered to my generous colleagues at the Faculty of Law at the University of Victoria, and to Howard Kislowicz and the Faculty of Law at the University of Calgary for inviting me to give this paper at the Junior Scholars Workshop in June of 2019.

I. Introduction

Over the past 40 years, the Canada Revenue Agency's ("CRA") application of the 'public body exemption' in paragraph 149(1)(c) of the *Income Tax Act*[1] ("*ITA*") to First Nation governments has evolved to include all 'Indian bands' and what are called 'Modern Treaty Nations'. Paragraph 149(1)(c) – the so-called 'public body exemption' – exempts public bodies performing a function of government from taxation on income received regardless of the geographic origin of the income-generating activity.[2] To this day, this exemption is referred to as the 'Municipal Exemption' in the *ITA*.[3] The story of the emerging application of the exemption to 'Indian bands' and First Nations, however, is not to be gleaned from a study of the jurisprudence, nor of a legislative history of successive amendments to the *ITA*. Instead, the story of this evolution lies in the interactions of the various First Nations across Canada with the CRA by way of applications for advance tax rulings ("ATR") or through audits and reassessments. This article explores some of the legal categories at play in this evolution, along with some of the corporate law issues that were also arising for First Nations as they pursued economic self-determination from the early 1980s to the present.

First Nations today are caught between legal notions of public and private, and their status as legal subjects rests precariously on different forms of legal personhood and as recognized 'bodies'. Since the inception

of both the *British North America Act*[4] and the *Indian Act*,[5] 'Indian bands' and First Nations have been essentially wards of the state as existing under the jurisdiction of the federal government under subsection 91(24) of the former.[6] Indeed, First Nations in Canada largely still exist in something akin to a wardship relationship, notwithstanding the inconsistent applications of subsection 91(24) and section 35.[7]

'Indian bands', First Nations, the Métis, the Inuit, Aboriginal groups, tribes and tribal councils, clans, and houses are all various ways that Indigenous peoples are described as legal bodies, and the various rights they hold under the common law of Canada are said to be inalienable and to be held collectively. A note on terminology may be helpful at the outset: it should go without saying that there are deep differences between and among the Indigenous peoples in Canada, not only in their colonial experiences but also in their linguistic and cultural heritage and territories. This deep diversity is not reflected in the handful of referents for Indigenous peoples; sadly, this paper is attendant only to the colonial side of the legal situation, and as such will work with the set of referents used to distinguish various political and legal subjects. The way certain terms are used in referring to Indigenous peoples in Canada has changed over the past number of years, largely in recognition of the nuance that colonial systems of law have missed. The words "Indian" and Indian "band" are still legal definitions in the *Indian Act*,[8] and notwithstanding its legal provenance, I place those terms in quotes given the generally pejorative sense they carry. The word 'Aboriginal' refers to the overall and generalized reference by the common law to Indigenous people, and thus 'Aboriginal law' refers to the common law expression of the rights, obligations and place of Indigenous peoples in Canada, and it extends to those aspects of corporate law that deal with Aboriginal rights. 'Indigenous' is the broad term that contemplates peoples who have occupied what came to be called the Americas prior to contact with European settler societies, and includes those peoples tied to the

4. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*BNA Act*].
5. *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

land that came to be post-contact (*i.e.* Métis peoples); Indigenous law refers to those customs and traditions grounded in the relationships of a specific people to territorial practices and reflected in Indigenous legal traditions. First Nations are simply the particular political entities of specific Indigenous peoples, and while there ought to be some debate about this, I use the term consistent with section 35 jurisprudence (*i.e.* to include both Inuit and Métis peoples).[9]

In what follows, I do not aim to provide a normative assessment of the development of the changing rhetoric accompanying and defining the emergence of notions of legal personhood under contemporary colonial law, but simply to pick up some of the disparate and seemingly unrelated strands of legal identity that are tied in with the appearance of economic development in Indigenous territories and communities across Canada. I aim to show how colonialism exists in these different legal notions, and how we must work to make them visible so that we can understand them better and begin to counteract them.

II. The Straitjacket of Section 87 of the *Indian Act*

Over the past 40 years, First Nations in Canada have organized their affairs so as to shift their exposure to tax, moving from the quasi-private tax exemption under section 87 of the *Indian Act*[10] to the 'public body' exemption under paragraph 149(1)(c) of the *ITA*.[11] But the aim of 'structuring for the exemption' comes after a more fundamental shift in the way First Nations ostensibly became subject to tax.[12] The difference between tax immunity and tax exemption has not had much judicial consideration, and when it has, it has simply assumed that tax immunity

9. *Constitution Act, 1982*, *supra* note 7, s 35.
10. *Indian Act*, *supra* note 5, s 87.
11. *ITA*, *supra* note 1, s 149(1)(c).
12. Merrill Shepard, *Structuring for the Tax Exemption* (Vancouver: Continuing Legal Education, 2002).

is a question of sovereignty and consent.[13] Indeed the lack of clarity regarding the question of Indigenous tax immunity is emblematic of the blurry subjects that Indigenous people have come to be under Canadian colonial law.[14]

In general, section 87 of the *Indian Act*[15] exempts 'Indians' and 'bands' from taxation by exempting property that is an interest in "reserve lands or surrendered lands" or is the "personal property" of an Indian or band on a reserve.[16] The exemption is extended in subsection (2) by noting that no Indian or band is subject to tax "in respect of the ownership, occupation, possession or use of any property" in subsection (1) and is not "otherwise subject to taxation in respect of any such property".[17] In tax parlance, the words 'in respect of' and 'otherwise' connote a very broad exemption. However, there is very little legislative guidance in the *Indian Act*[18] or the *ITA*[19] as to how to apply this exemption. While it seems like a blanket exemption, one wonders whether it was meant simply to be an

13. See "Chapter One" of Merle C Alexander et al, *The Taxation and Financing of Aboriginal Businesses in Canada* (Scarborough: Carswell, 1998). An exception to this quick movement to exemption is considered with depth and a nuanced understanding of the factual issues involved in consent and sovereignty in the trial decision in *Benoit v Canada*, 2002 FCT 243. A consideration of the way that a consideration of First Nation entities become enmeshed in Administrative Law by virtue of their discrete identities is well-canvassed in the recent decision of *McCargar v Métis Nation of Alberta Association*, 2019 ABCA 172.
14. This holds for 'Indian bands' under the early, numbered treaties as well as for modern treaty First Nations (such as the Maa-nulth, or the Yukon First Nations under the Umbrella agreement).
15. *Indian Act*, *supra* note 5, s 87.
16. The fact that may be most striking to the tax lawyer is the territoriality of the exemption, and certainly invites speculation as to whether international tax concepts and norms might be more suitable. In this regard see the important observations about 'international law' as a possible source for 'legal transplants': Martha O'Brien, "Getting Back on Track: Income Tax, Investment Income, and the Indian Act" (2002) 50:5 Canadian Tax Journal 1570.
17. *Indian Act*, *supra* note 5, ss 87(1)-(2).
18. *Ibid*.
19. *ITA*, *supra* note 1.

exemption for any Indigenous person.[20] While there is plenty of caselaw and interpretation on the application of section 87,[21] it is interesting that the contemporary period in which section 87 judicial interpretation is said to begin is with the Supreme Court of Canada's (SCC) decision in *Nowegijick v The Queen*.[22] One must remember that the distance in time from the Trudeau government's White Paper of 1969[23] (recommending the assimilation of 'Aboriginal' peoples) to 1982 is but 13 years, during which section 35[24] came into being; it is at this moment that the SCC's decision appears, after a contested trial and appeal. Given the context of 1983, the decision in *Nowegijick* can be seen as remarkably progressive insofar as it provided a guide for interpreting Aboriginal tax cases. The case stands for a number of inaugural propositions of Aboriginal taxation, but the three most important are that: (1) taxing statutes are to be construed as liberally as possible, and where there is doubt they are to be interpreted in favour of the 'Indian(s)';[25] (2) the property of an 'Indian' or band includes intangible property such as income;[26] and (3) the place or location of that property (*i.e*. the 'debtor *situs*' test) is a crucial factual determination in establishing any exemption.[27]

Seven years later, in *Mitchell v Peguis Indian Band*, Justice La Forest described the way for a trier of fact to locate the personal property of

20. An ambiguity that has only recently been (somewhat) clarified in *Daniels v Canada,* 2016 SCC 12; however, the CRA has interpreted the ruling to not apply to the section 87 exemption in the *Indian Act*: see CRA Views 2016-0656851E5.
21. *Indian Act, supra* note 5, s 87.
22. *Nowegijick v The Queen*, [1983] 1 SCR 29 [*Nowegijick*].
23. Canada, Indian and Northern Affairs, "Statement of the Government of Canada on Indian Policy, 1969" (Ottawa: Department of Indian and Northern Affairs, 1969), online (pdf): <epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf> [White Paper of 1969].
24. *Constitution Act, 1982*, *supra* note 7, s 35.
25. *Nowegijick*, *supra* note 23 at para 25.
26. *Ibid* at para 29. The Crown's main argument in the case was that income could not be property that could have a physical location, like a reserve, and hence could not be the kind of property referred to in section 87 of the *Indian Act*.
27. *Ibid* at para 17.

an 'Indian' on a reserve by looking to factors that would connect it to the 'life of the reserve'[28] as opposed to the 'commercial mainstream',[29] as follows:

> [t]hese provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.[30]

This approach was solidified in *Williams v The Queen*, where the court both expanded upon *Nowegijick* by partially acknowledging the Crown's argument in that case (*i.e.* that the site of the debtor is not important)[31] and, following *Mitchell*, the court shifted the analysis away from the debtor to the factors that connect the property to the reserve by laying out the "connecting factors" test.[32] While the 'commercial mainstream' factor has been softened, if not jettisoned, by the SCC's decision in *Bastien Estate v Canada*, the 'connecting factors' test remains the current way to interpret section 87,[33] and the exemption remains very narrow.[34]

III. Other Tax Exemption: Paragraph 149(1)(c) of the *Income Tax Act*

There is another way that First Nations enjoy an exemption from taxation, and that is under paragraph 149(1)(c) of the *ITA*, called the 'Municipal Exemption' but commonly referred to as the exemption for "public bodies performing a function of government".[35] Because the *ITA* exemption under paragraph 149(1)(c) is much broader, many First Nations (and 'Indian bands') are able to use corporate structures that are not limited to the geographical location of their income. The provision

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28. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at para 98 [*Mitchell*].
29. *Ibid* at para 88.
30. *Ibid* at para 131.
31. *Williams v Canada*, [1992] 1 SCR 877 at para 26 [*Williams*].
32. *Ibid* at para 34.
33. *Indian Act*, *supra* note 5, s 87.
34. *Bastien Estate v Canada*, [2011] 2 SCR 710.
35. *ITA*, *supra* note 1, s 149(1)(c).

reads as follows:

> **Municipal exemption**
>
> **149(1)** No tax is payable under this Part on the taxable income of a person for a period when that person was …
>
> **(c)** a municipality in Canada, or a municipal or public body performing a function of government in Canada; … .[36]

It is listed in Division H of Part 1 of the *ITA*,[37] which deals with various exemptions and houses the specific exemption for charities, non-profit organizations, and qualified donees among a host of other specialized entities, rights, relationships, and transactions. In short, insofar as a taxpayer is a public body performing a function of government, it will be exempt from tax on income earned in the year from any source in Canada.

Subsection 248(1) of the *ITA* contains a definition of "person" that helps us see that an 'Indian band' or First Nation would be a person for the purposes of the *ITA*, and thus for paragraph 149(1)(c):

> ***person*** … includes any corporation, and any entity exempt, because of subsection 149(1), from tax under Part I on all or part of the entity's taxable income … , according to the law of that part of Canada to which the context extends; … .[38]

While subsection 149(11) stipulates a geographic limit, it does not have the effect of limiting the earning of income to the boundaries of a reserve, settlement land, or territory.[39] As noted above, however, the corporate entities owned and controlled by First Nations in Canada are not 'Indians' or 'Indian bands', and are separate taxpayers. Paragraph 149(1)(d.5) provides an exemption for corporate entities wholly owned by public bodies performing a function of government.[40] Note that paragraph 149(1)(d.5) exempts corporations wholly owned by a public body, but only the income that is earned within the geographic boundaries of the

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36. *Ibid*.
37. *Ibid*.
38. *Ibid*, s 248(1).
39. *Ibid*, s 149(11).
40. *Ibid*, s 149(1)(d.5).

First Nation at all times in the year (be it a reserve, settlement land, or other form of federally sanctioned territorial limit).[41]

While this form of exemption would seem to present an interesting possibility for recognizing First Nations as self-determining polities, one must remember that this 'municipal exemption' has been conferred on various non-governmental organizations, non-profits, and community associations. And yet, unlike charitable organizations or qualified donees, there is no process by which an entity can 'apply' to become registered or otherwise known as a public body, which has led to uncertainty for First Nations. Because there is no administrative process for ascertaining whether a First Nation fits within the rule, coupled with an aversion to the risk involved with simply assuming that a First Nation has the 'status' of a public body so as to enjoy the exemption, First Nations must apply for an ATR with respect to a specific transaction so as to ascertain whether, in a specific instance, the First Nation would be considered to be within the purview of paragraphs 149(1)(c), (d.5), and subsection 149(11).[42]

IV. Legal Personhood and Public Versus Private Bodies

This alternative form of exemption may seem to set up an adequate regime for fiscal self-determination among the First Nations and Indigenous peoples of Canada. However, First Nations that remain subject to the *Indian Act* are not recognized as 'legal persons' for the purposes of many provincial statutes, including owning land. While it is the case that an 'Indian band' can sue and be sued in its name, can bind itself in contract, and can be liable for debts, under many provincial statutes a band is not a person for the purposes of 'owning' or 'holding' title to various forms of property. This limitation of the legal personhood of 'Indian bands', tribal councils, and other Indigenous groups and organizations means that First Nations must use some of the most elaborate and complicated corporate structures to achieve their economic goals, which

41. *Ibid.*
42. *Ibid*, ss 149(1)(c), (d.5), (11).

often include tiers of limited partnerships, corporate entities, and trusts. This over-determination of corporate structures flows from the position of 'Indians' and 'Indian bands' as very particular kinds of legal subjects specifically defined under the *Indian Act* and extends to other forms of association. 'Indian bands' are not corporations,[43] and First Nations are not a legal "entity known to the law".[44] Strictly speaking, a "band" is only defined as a body of Indians in subsection 2(1) of the *Indian Act*,[45] and nowhere else.[46] The legal capacity that flows from this definition has been and remains unclear: 'Indian bands' can sue and be sued,[47] exist separately from their members,[48] but cannot hold land in fee simple.[49] It also remains unclear whether 'Indian bands' can hold shares or otherwise be 'persons' under provincial law.[50] Thus, in order to become secure in their use of discrete arrangements, structures, or transactions, many First Nations seek ATR from the CRA to ensure that the income they draw from their ventures will be exempt from tax.

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43. *Afton Band of Indians v Nova Scotia (AG)*, [1978] 29 NSR (2d) 226 (NSSC (TD)) at para 19.
44. *Lac des Mille Lacs First Nation v Canada (AG)*, [2002] OJ No 1977 (QL) (Ont Sup Ct) at para 6.
45. *Indian Act*, *supra* note 5, s 2(1).
46. See Huddart JA's comments in this regard in *Gitga'at Development Corp v Hill*, 2007 BCCA 158.
47. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 75.
48. *Kelly v Canada (AG)*, 2013 ONSC 1220 at para 112, citing *Commandant v Wahta Mohawks,* [2006] OJ No 22 (QL) (Ont Sup Ct); *Wilson v British Columbia*, 2007 BCSC 1324.
49. *Land Titles Act*, RSBC 1996, c 250, s 1; *Interpretation Act,* RSBC 1996, c 238, s 29; *Land Titles Act*, RSO 1990, c L-5, s 1.
50. Compare the *Business Corporations Act*, RSBC 2002, c 57, s 1(1) and the *Interpretation Act,* RSBC 1996, c 238, s 29. For case law considering legal capacity, see *Telecom Leasing Canada (TLC) Ltd v Enoch Indian Band of Stony Plain Indian Reserves No 135*, [1994] 133 AR 355 (Alta QB), *Martin v BC*, [1986] 3 BCLR (2d) 60 (BCSC). See also Robert Yalden et al, "First Nation Business Structures", *Business Organizations: Practice, Theory and Emerging Challenges* (Toronto: Emond, 2017), at 240-44.

For example, a First Nation may have decided to enter into a limited partnership with an industry partner in pursuit of a local industrial project, and may also wish to have the income from the limited partnership directed into a trust, with the First Nation as both a settlor and beneficiary.[51] The First Nation would be relying on paragraph 149(1)(c)[52] to receive exempt income from the limited partnership or the trust, but would want to know if their 'entity' satisfies the criteria of being a public body performing a function of government. To this end, First Nations submit requests to the CRA for ATR, as there is no formal way to 'register' as or be deemed to be a public body under the *ITA* or the *Income Tax Regulations.*[53] When a First Nation receives a ruling, the CRA is always careful to note that the ruling applies to the transactions as listed and not to any future or past transactions.

The unclear and regimented classifications of the legal personhood of First Nations in Canada under the common law thus drive Indigenous peoples to utilize some of the most complicated corporate structures, instruments, and transactions to complete ordinary economic goals. In light of the arrays of corporate tiers and structures used by First Nations in pursuit of economic development, there are many questions that arise from the combination of paragraphs 149(1)(c) and (d.5).[54] While there may have been a shift towards what was considered a more liberal interpretation of how 'Indians' and 'Indian bands' were to be taxed around 1982-1983, the use of paragraphs 149(1)(c) and (d.5)[55] before this time and through the 1980s shows a less harmonious picture, as many attempts for public body status with respect to a transaction were turned down in ATR by the CRA simply because the First Nation did not demonstrate that it was in fact a public body, or could not show that it was performing a function of government. More on the reasoning in these ATR below.

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51. This would be a very ordinary sort of transaction: see *e.g.* CRA Doc Views 2012-0473041R3E; CRA Doc Views 2013-0476871E5.
52. *ITA*, *supra* note 1, s 149(1)(c).
53. CRC, c 945.
54. *ITA*, *supra* note 1, ss 149(1)(c), (d.5).
55. *Ibid*.

Legal personhood is an aspect of most modern treaties (*i.e.* comprehensive land claims agreements that begin with the *James Bay and Northern Quebec Agreement* signed in 1975[56]), and a permanent feature of all agreements after the Yukon Umbrella Agreement of 1993:[57] it is conferred in the treaty by stating that the First Nation (1) is a legal person, and (2) is a public body for the purposes of paragraph 149(1)(c) of the *ITA*.[58] But this conferral of personhood does not alter the application of paragraphs 149(1)(c) and (d.5) or subsection 149(11)[59] with respect to First Nation owned and controlled corporations. That is, modern treaty First Nations can *receive* income but may not be actively engaged in the businesses that create it — be they development corporations, limited partnerships, or other kinds of ventures. Thus, the identity of these legal persons is at once neither really public nor completely private, but rather 'quasi-private to quasi-public'.

V. The Administrative and Legislative Context of the Use of the Public Body Exemption

By the mid-1980s, the *Kamloops Amendment*[60] to the *Indian Act* was being drafted, which provided for 'Indian bands' to be able to pass property taxation bylaws on their reserve lands. As reserve lands cannot be held in fee simple, the tax is levied upon holders of certificates of

56. Canada, Royal Commission on Aboriginal Peoples, *The James Bay and Northern Quebec Agreement: Natural Resources, Public Lands, and the Implementation of a Native Land Claim Settlement*, by Alan Penn (Montreal: 1975), online (pdf): <publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-128-eng.pdf> [*James Bay North Quebec Agreement*].
57. Canada, Council for Yukon Indians, *Umbrella Final Agreement* (Whitehorse, Yukon: 1993), online (pdf): <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf>.
58. *ITA*, *supra* note 1, s 149(1)(c).
59. *Ibid*, ss 149(1)(c), (d.5), (11).
60. Bill C-115, *An Act to Amend the Indian Act (Designated Lands)*, SC 1988, c 23, amending the *Indian Act*, RSC 1985, c I-5, as amended [*Kamloops Amendment*].

possession, often with the provincial assessment authority. Passed in 1988, these new powers arose within a new federal legislative framework designed to allow 'Indian bands' the opportunity to leverage sources of capital revenue. Simultaneous to the enactment of these powers, the *First Nations Statistical and Financial Management Act*[61] was passed, and the First Nations Tax Commission ("FNTC") and the First Nations Finance Authority ("FNFA") were established. The FNTC was tasked with overseeing the drafting and implementation of a suite of local taxation and financial administration laws. So long as these bylaws or laws (it is unclear how they differ in the legislation) fit a rather standardized model, a First Nation could apply to the FNFA to borrow funds, and the said funds were used by the FNFA to issue bonds in a manner much like the municipal finance authorities of many provinces while the First Nation would have access to capital for capital projects on reserve or other lands. Within a few years of its inauguration, the FNFA became exceedingly successful, with a AAA bond rating equaled only by London (and then shortly thereafter it surpassed even this).[62] It is important to recognize that this conferral of power was not about creating a revenue source for First Nations, nor for making 'tax room', but for encouraging the mimicry of a certain style of governance: a revenue authority that cannot raise funds by engaging in active business, and that uses its revenues not as funds to spend but as capital to leverage for borrowings. In this way, the federal government understood that it was satisfying its obligations under subsection 91(24)[63] without having to actually spend any money, and by encouraging the taxation of holders of certificates of possession by 'Indian bands'. In short, the regime created taxing authorities and

61. SC 2005, c 9. The *First Nations Fiscal and Statistical Management Act* was later renamed the *First Nations Fiscal Management Act*.
62. There are a handful of theories about the successfulness of the FNFA, the most compelling of which is the perverse effect of holding the FNFA to a higher standard of fiscal accountability than any other finance authority has been in the history of Canada. See Shiri Pasternak, "The Fiscal Body of Sovereignty: To 'Make Live' in Indian Country" (2015) 6:4 Settler Colonial Studies 1.
63. *BNA Act*, *supra* note 4, s 91(24).

taxpayers, and a public body with a mandate to leverage and spend on capital projects.[64]

A key feature of the 'Financial Administration Law' (pursuant to the *First Nations Fiscal Management Act*[65]) that a First Nation may pass is the requirement that the First Nation not be involved in running any active businesses, or engage in any ventures that would otherwise expose it to liability. In short, First Nations come to face their economic development as passive public bodies that leverage capital, but then cannot carry out the projects without engaging external parties. Alternatively, should a First Nation decide to create a 'development corporation' (under provincial, territorial, or federal laws), these must operate at arm's length, and in practice often simply result in the forging of limited partnerships with industrial partners that are specialized in the area of the capital project. If the capital project has a revenue stream, for something like a garbage dump, then the First Nation receives a portion of it as a limited partner.[66] The subsequent passage of the *First Nations Land Management Act*[67] in 1999 added to this array of powers for bands to make their lands accessible to certain kinds of developments.

This new capital era for First Nations matched thinking that was happening in the United States, notably by Stephen Cornell and Joseph Kalt, the originators of the Harvard Project on American Indian

64. This regime has had very mixed results, as can be imagined, depending on the relative land-use values that various parcels have.

65. SC 2005, c 9.

66. There are more garbage dumps on reserve lands than on non-reserve lands in Canada. See J Berry Hykin, "Contaminated Sites on First Nation Lands" *Conference Proceedings: Site Remediation in BC* (Vancouver: MOE, 2016). See also Margo McDiarmid, "Native reserves polluted due to gaps in rules: AG" *CBC News* (3 November 2009), online: <www.cbc.ca/news/canada/native-reserves-polluted-due-to-gaps-in-rules-ag-1.785136>; and Chapter 6 of the Auditor General's report for 2009, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_200911_06_e_33207.html>.

67. *First Nations Land Management Act*, SC 1999, c 24.

Economic Development.[68] Their much-travelled and influential thesis has been that economic development for Indigenous peoples can happen only if there is a 'separation of business from politics'. Notwithstanding the tone-deaf and glib manner of this slogan, Cornell and Kalt have been widely successful in propagating this model, and it girds the deployment of the institutional arrangements set out in the *Kamloops Amendment*. But First Nation governments in Canada are not allowed to be 'governments' in the way they are regulated precisely because they employ private law entities to pursue various specific ventures as a means to economic development. By requiring Indigenous peoples in the body of their Nations to use private entities to pursue private ventures, and to enter the market as private actors, the call to separate business from politics becomes confusing: how are the *political* units of First Nations to develop economically if they are required to act through private bodies on specific ventures?

This conundrum is further complicated by the exceedingly bureaucratic way that Indigenous peoples are financed in Canada by the federal government. Any revenue that a First Nation generates on its own is not simply revenue that can be kept 'in addition' to any monies it may receive by virtue of federal transfers, or because of other contribution agreements it may have with the federal government, but instead becomes classified as 'own-source revenue' ("OSR"). OSR arose in the federal-provincial fiscal harmonization era as a specific term for identifying what sorts of provincial sources of revenue ought to be taken account of when calculating amounts for inter-provincial and federal-to-provincial transfers. With respect to First Nations in Canada, OSR describes a similar set of calculations regarding amounts that can be

68. Stephen Cornell & Joseph P Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22:3 American Indian Culture and Research Journal 187 [Cornell and Kalt]; Stephen Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States*, JOPNA No. 2006-02 (Tucson, AZ: Native Nations Institute for Leadership, Management, 2006) [Cornell, *Indigenous Peoples*]. This project is housed at Harvard University, online at <https://hpaied.org>.

clawed back (sometimes on a dollar-for-dollar basis) if a source of revenue is of the kind to be included in the calculation, or if otherwise excluded revenue sources are spent on areas of federal responsibility under those agreements.[69] While OSR continues to be the bugbear for First Nations, it is becoming widely recognized as presenting an austere handicap to any economic development in Indigenous communities.[70] That is, when attempting to access and use other sources of capital, federal administrative practices and policies operate to negate the use of such sources by clawing back funding that the First Nation may have otherwise received from Canada by applying what is known as its policy regarding the OSR of First Nations. The effect of these complicated federal policies is to push First Nations to use exceedingly complex and costly corporate structures simply to engage in ordinary economic activities that are supposed to generate economic activity for their communities. While pursuing their own economic development, First Nations in British Columbia often find that any finances they are able to secure and use to participate in processes like cooperative watershed governance are effectively clawed back under the federal government's funding formula, resulting in a net loss to the First Nation. While many First Nations and their staff understand the conundrum of Canada's fiscal policy with respect to Indigenous people, most non-Indigenous Canadians remain unaware of the mechanics and

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69. This formula-based practice is true under the federal financing agreements between Canada and modern Treaty First Nations, as well as for 'Indian bands': for bands, the OSR calculation is not subject to agreement *per se* but is found in the administrative policy of federal agencies or identified in contribution agreements. See Indigenous Services Canada, "Manual for the Administration of Band Moneys, Chapter 7: National Expenditure Request Procedure Guidelines -— Process Overview — Part 2" (2012), online (pdf): *Aboriginal Affairs and Northern Development Canada* <https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-INSTS/STAGING/textetext/bm_pubs_mon_pol_man_pdf_1358868879487_eng.pdf>.

70. Which may be why the federal government declared a moratorium on certain aspects of OSR in 2014. These are summarized in a report on federal financing in Bradley Bryan, "The Fiscal Structure of First Nation Governance in Canada" (BC: University of Victoria, 2019).

policy frameworks that create barriers for First Nations to exercise fiscal, government-like powers. This claw back is effectively a notional tax, which works against the fiscal self-determination of Indigenous peoples. Unlike other levels of government, the financial and taxation institutions, policies, and administrative frameworks that govern the financial options available to the different forms of Indigenous governments are at the same time both opaque and restrictive.

It is in the context of these administrative straits that First Nations had to manage some form of economic development in their communities, and through which the public body exemption became actively sought. In the early 1980s, the CRA routinely provided ATRs that denied that a First Nation was a public body performing a function of government on the basis that it "had not reached a sufficient level of advancement".[71] After the *Kamloops Amendment*, the rhetoric of 'stages of economic development' continued to be used in ATRs, but with an explanation that such 'a sufficient level of advancement' could be demonstrated by the passage of taxation bylaws and evidence of elections.[72] It was only in the late 1990s on the eve of the release of the Royal Commission on Aboriginal Peoples ("RCAP") in 1997 that this vocabulary of stages of economic development was dropped from CRA's ATRs for First

71. This rhetoric can be seen by canvassing hundreds of CRA rulings from 1978 to the 1990s.

72. Again, this trend in the vocabulary continued well into the 1990s. For an example, see CRA, Internal T.I. (3 August 1995) 1995- 9514567. Note that these elections were not in reference to the hereditary, traditional, or customary modes of governance. It is thus particularly puzzling that evidence of elections would be required given that the *Indian Act* and modern treaties, as enactments of federal law, all set out election policies and procedures.

Nations.[73]

The extinguishment of the tax exemption under section 87[74] enjoyed by 'Indians' and 'Indian bands' has been the most consistent objective of all modern treaties since the *James Bay and Northern Quebec Agreement,*[75] arguably even more so than any extinguishment of Aboriginal title. The recognition of legal personhood, by contrast, did not confer any more straightforward manner for holding lands or other forms of property, and modern treaty First Nations continue to employ the retinue of complex corporate structures as their *Indian Act* counterparts – largely because of the ideal made popular by Cornell and Kalt, *viz.* the separation of business and politics. Notwithstanding that the rise of bureaucracy has been a force for removing politics from statecraft for most Western forms of governance, both Canadian law and the view of Cornell and Kalt seem to imagine two very strict spheres of life resolvable by way of the public-private distinction, which maps onto politics and business.[76] Even while First Nations in Canada continue to have forms of legal and political authority in Canada, it is important to recognize that the use of the exemption for "public bodies performing a function of government"[77] has not (and likely will not) clarify the status of Indigenous peoples' self-determination.

VI. Conclusion: Contemporary Realignments?

There remain serious challenges for First Nations attempting to carry out economic development, however, and the absence of specific bureaucracies of finance (which exists within the residual jurisdiction of the federal government), has produced a situation for First Nation governments where they must outsource their own bureaucracy to

73. Library and Archives Canada, "Report of the Royal Commission on Aboriginal Peoples" (4 October 2016), online: <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>. See, specifically, Report of the Royal Commission on Aboriginal Peoples, *Volume 5: Renewal: A Twenty-Year Commitment*, (Ottawa: Canada Communication Group, 1996), online (pdf): <data2.archives.ca/e/e448/e011188230-05.pdf>.

74. *Indian Act*, *supra* note 5, s 87.

corporate entities while not having any jurisdiction over them. That is, any set of corporate entities deployed by a First Nation is necessarily created under the jurisdiction of the province, territory, or federal laws by which they were created. As Justice of Appeal Huddart noted in *Gitga'at Development Corporation v Hill*:

> … when the Gitga'at set up the [Gitga'at Development Corporation] to assist them with their economic development, they chose to use a vehicle provided under provincial legislation… By choosing to use existing commercial and legal structures, the Gitga'at chose to be governed by existing commercial laws of general application, *to the extent that Canadian law permits them to make those choices*.[78]

Because First Nations cannot create their own entities, the entities that they do employ inevitably become subject to private law, and engage as private entities, which reinforces the way that First Nations emerge as private actors in the economy, as passive interest holders or beneficiaries, as shareholders, but also as self-determining nations (and presumably 'entities') with rights under section 35 of the *Constitution Act, 1982*.[79]

More recently, there have been isolated and discrete attempts to provide authority, if not jurisdiction, to First Nations. Prior to 2014, a First Nation, tribal council, or 'Indian band' would need to request an ATR with respect to any series of transactions in order to be certain that they enjoyed paragraph 149(1)(c)[80] status. In 2014, the CRA conducted a pilot project regarding entity classification of First Nations and 'Indian bands' in Canada, and concluded, in 2016, that all 'Indian bands' in Canada were "public bodies performing a function of government" within the meaning of paragraph 149(1)(c).[81] Note that this widespread acknowledgement, however, is only that First Nations are public bodies for the purposes of paragraph 149(1)(c), notwithstanding the fact that the exemption remains titled the "Municipal Exemption" in the *ITA*.

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78. *Gitga'at Development Corp v Hill*, 2007 BCCA 158 at para 14 [emphasis added].
79. *Constitution Act, 1982, supra* note 7, s 35.
80. *ITA*, *supra* note 1, s 149(1)(c).
81. CRA, Internal T.I. (27 July 2016) 2016-0645031I7.

One aspect of the rhetorical force of colonialism thus lies in the variegated and particular strands of law that position First Nations as historically separate, as political entities with particular claims, as private actors in the market, and as bodies with *sui generis* rights. These often contradictory legal signifiers combine to create a significant barrier for First Nations' economic development in Canada. The historical force of the various legal claims that Indigenous peoples have with respect to self-determination and forms of sovereignty in Canada are undercut by the weight of the fact that private law structures remain required for First Nations, while their status as "public bodies performing a function of government" positions them somewhere in between. And even though the ideal of being "masters in their own houses" proposed by RCAP in 1997 can be seen as an important turning point, the ambiguous situation of First Nation legal personhood does not show signs of being resolved.