

CONSTITUTIONAL ASPECTS OF ABORIGINAL
ECONOMIC DEVELOPMENT:
TAXATION AND ABORIGINAL GOVERNANCE IN CANADA

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This land is ours; ours by right of possession; ours as a heritage, given to us as a sacred legacy. It is the spot where our fathers lie; beneath those trees our mothers sang our lullaby, and you would tear it from us and leave us wanderers at the mercy of fate.

Joseph ONASKAKENARAT¹

[T]he extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.

Chief Justice MARSHALL²

SUMMARY: I. *Introduction*. II. *Constitutional aboriginal rights as the basis for taxation and self-government*. III. *The project of innovative institutional design amidst first world poverty*. IV. *Conclusion*. V. *Appendix*. VI. *Bibliography*.

I. INTRODUCTION

Prior to European contact, conquest, and colonization, Aboriginal peoples lived as self-governing political communities, exercising sovereign authority over their distinct individual and collective identities.³ Central to

1 MacLaine, Craig y Baxendale, Micheal, *This Land is Our Land: the Mohawk Revolt at Oka*, Toronto, Optimum Publishing, 1990, p. 3.

2 *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 at 543 (1832) [hereinafter “*Worcester*”].

3 I use “Aboriginal”, “First Nation”, “Indian”, “indigenous,” and “Native” interchangeably and with equal respect to refer to the indigenous peoples, including the Eskimo, Inuit, and Metis peoples

Aboriginal identity was an inter-dependence with the land and all of nature's inhabitants. Following the Supreme Court of Canada's decision in *Delgamuukw v. British Columbia*, this special bond with the land is an aspect of contemporary Aboriginal title that has been given a broad interpretive scope in Canadian constitutional law.⁴ It represents a dynamic approach to the traditional justification of Aboriginal government that includes claims of prior occupancy and cultural relativism.⁵

Recognizing an inter-dependence with the land carries with it a much deeper theoretical claim for Aboriginal government—one of prior sovereignty. This deeper claim posits that the key to the normative legitimacy of Aboriginal government is not the mere fact that indigenous people were prior occupants of the continent, but that they were prior sovereigns. To be sure, this has been the Aboriginal perspective in identifying the source of Aboriginal government.⁶ The Royal Commission on Aboriginal Peoples for example, explained that occupancy is a mere proxy to sovereignty that is tied to the deep cultural bond with the land.⁷

This is an important time for Aboriginal people in Canada as they seek to cast off the domestic shackles wrought by centuries of socio-economic upheaval and attempts at assimilation. Contemporary Aboriginal law offers a hope to begin the process of reasserting sovereignty, but increasingly the Aboriginal community has expressed resentment with respect to non-Aboriginal definitions that are transposed onto this essential

of North America. I also capitalize Aboriginal in reference to their distinct identity as a people, which by all accounts is capitalized for other cultural and racial groups.

4 [1997] 3 S. C. R. 1010, 153 D. L. R. (4th) 193, [1998] 1 C. N. L. R. 14, 37 I. L. M. 268 [hereinafter *Delgamuukw*].

5 See generally Macklem, Patrick, "Distributing Sovereignty: Indian Nations and Equality of Peoples", 45 *Stan. L.* (1993).

6 Canadian Aboriginal people viewed the Royal Proclamation not as a recognition of occupancy, but rather as recognition of sovereignty. It provided Britain with an exclusive right to treaty with the Aboriginal peoples in those territories claimed by it; it did not provide a right of sovereignty.

See generally *The Royal Proclamation of 7 October, 1763*, R. S. C. 1985, App. II núm. 1 (hereinafter the "*Royal Proclamation*").

7 See Canada. Royal Commission on Aboriginal Peoples (RCAP). Report of the Royal Commission on Aboriginal Peoples, vols. 1 to 5. Ottawa: The Commission, 1996 hereinafter the RCAP. In considering the scope of the *The Royal Proclamation* the Royal Commission on Aboriginal Peoples explains:

"The Proclamation portrays Aboriginal nations as autonomous political units living under the Crown's protection on lands that are already part of the Crown's dominions. Aboriginal nations hold inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement. In a word, its portrays the link between Aboriginal peoples and the Crown as broadly confederal".

process of reclamation.⁸ Aboriginal people aspire to live their individual and collective identities under their own governments with their own programmatic vision of design and yearn to be respected, in part as the first peoples who allowed Canada to grow and prosper as a nation.⁹

This paper examines the role of taxation against the background of a continuing demand by Aboriginal communities for greater autonomy in relation to self-government. The aim will be to determine the extent to which a new conceptualization of taxation can be considered to represent a shift away from the culturally inappropriate non-Aboriginal tax regime which attempted to assimilate on reserve Aboriginal people through a cunning franchise program. In Part I of this paper I will examine the scope of Aboriginal constitutional rights in Canada and argue for a formal and substantive interpretation that will offer a clear and more immediate justification with respect to claims for a proximate degree of sovereignty. Traditionally justified by the undeniable fact of prior occupancy and historic cultural relativism, Aboriginal government can shield itself against a renewed antagonism by reference to dynamic institutional arrangements that can restore the human condition and well being of the community.¹⁰ In

8 See Borrows, John, "With or Without You: First Nations Law (in Canada)", 41 *McGill L. J.* 629 at 634 (1996). John Borrows is a member of the Anishinabe First Nation, Cape Croker, Ontario. Borrows observes that dispute resolution is the primary function of many First Nation's stories and have operated effectively for thousands of years. Incorporating traditional Aboriginal law into the common law must overcome many obstacles including the latter's historical underpinnings that "denies Native differences where its acceptance would result in the question of basic premises concerning the nature of property, contract, sovereignty or constitutional right. Native difference is acknowledged where it would achieve a similar result".

9 By programmatic vision I simply mean an understanding with respect to the institutional arrangements that reflect the hopes and aspirations of the community for a better future. My grandfather, Algonquin First Nation from Fort Coulonge, Quebec, shared stories of our early contact with French explorers beginning with Jacques Cartier in 1535. Along the St. Lawrence when freeze up arrived the Algonquin and Mohawk gave food and shelter to the French who were suffering from scurvy. We also shared the cure to scurvy-birch bark strips molded along the gum line much the same way one uses chewing tobacco.

10 There has been a sharp and noticeable antagonism against Aboriginal people asserting their rights. The Mi'kmaq of Canada's East Coast have recently suffered at the hands of non-Aboriginal fishermen in exercising their fishing rights. This has led to violent mobs burning Aboriginal fishing boats, cutting their lobster nets, and numerous physical assaults. See Morris, Chris, "Native women defy ruling on lobster fishing Sail out to set traps", *The National Post*, Monday, May 08, 2000 at A1, See also Hamilton, Graeme, "PEI fishing dispute threatens tourism: official Image at risk: Natives refuse to use special lobster licences after boats threatened", *The National Post*, Tuesday, May 09, 2000 at A1. Hamilton reports: "Leaders of the Abegweit band and the PEI. Native Council would not attempt to fish new lobster licences because their boats had been threatened. The licences to fish were provided by the federal government as part of its response to the Supreme Court's decision in the case of Donald Marshall Jr."

Part II of this paper I will deconstruct the normative basis for current tax law regarding on reserve Aboriginal people. Prompted by a desire to unpack the apparent paradox of Aboriginal tax exemption —an exemption developed for the purposes of marginalization— the analysis will concern itself with expanding the horizons of Aboriginal self-government with the use of new financial instruments and innovative tax design. This process occurs against a backdrop where the current locus of decision-making is shifted away from the bureaucratic regime under the *Indian Act* and back into the community.

II. CONSTITUTIONAL ABORIGINAL RIGHTS AS THE BASIS FOR TAXATION AND SELF-GOVERNMENT

1. *Beyond Delgamuukw—An argument for invigorating “the work in progress”*¹¹

In this section I will discuss the contemporary sources of Aboriginal rights in Canada and argue that the scope of constitutional Aboriginal rights must extend further still to a deepened normative legitimacy of Aboriginal government. The premise of recognition is not the historical right of occupancy and the historical placement of Aboriginal people in colonization of North America. Instead, I will argue that these serve as mere proxies to the true essence of constitutional Aboriginal rights; that our rights are recognized on the basis of sovereign nationhood. Applying this view as the interpretative centerpiece will provide further insight in to the court’s dilemma in conferring formal recognition and will explain the court’s inability to form an interpretative nexus on Aboriginal rights.¹² A review

11 Joffe, Paul, “Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec”, 45 *McGill L.J.* 155 at 159 (2000). The author describes the legal landscape post-Delgamuukw as follows:

“In reflecting upon the significance and implications of the Delgamuukw decision, it is prudent to view the decision as a ”work in progress”. First, like courts in other countries, Canadian courts are still in the process of coming to terms with the fundamental rights of Aboriginal peoples. Therefore, an evolution of the judicial analysis of land-related Aboriginal rights is likely to continue to progress. Second, certain key aspects such as the status of Aboriginal peoples and their rights of self-determination and self-government have yet to be fairly considered in any context. These additional elements could eventually have a profound effect on the approach of, and analysis by, courts in Canada”.

12 The Aboriginal perspective views the legal discourse as one of catching up by non-Aboriginal institutions with respect to the normative basis that shapes the institutional arrangements between government and Aboriginal peoples. As a legal discourse, it is one that involves the judiciary’s embrace of legal formalism that is slowly weakening in the face of a logic that speaks to context and a

of the recent court cases will demonstrate that the posits of a more dynamic sovereign-based interpretation is emerging and the need for reasserting this right by Aboriginal people is pressing. The gradual development of a purposive approach to Aboriginal constitutional rights is the first step in converging what I view to be an oppressive constellation of federal and provincial jurisprudence that has fragmented contemporary notions of Aboriginal government. This analysis will lay the foundation for innovative tax and finance systems in the second part of the paper.

There are two contemporary sources of Aboriginal law in Canada and both are enshrined in the *Canadian Constitution Act*.¹³ The first source is contained in the *Canadian Charter of Rights and Freedoms*, which generally protects various individual rights and freedoms (i. e. the protection against unreasonable search and seizure under s. 8).¹⁴ *Section 25 of the Charter* guarantees that it the will not derogate from *any* Aboriginal rights, treaty rights or freedoms that pertain to Aboriginal people and states:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including,

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.¹⁵

The second source of contemporary Aboriginal rights is the constitutional guarantee contained in 35(1) of *Constitution* that covers existing Aboriginal and treaty rights and states in its entirety:

35 (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

more liberal view of common law doctrines within the sphere of Aboriginal law. Thus, in *Delgamuukw*, *supra* note 4, the Court made an exception to the hearsay rule and allowed oral evidence to be introduced by qualified witnesses, traditional elders, to establish Aboriginal territorial boundaries.

13 The *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (U. K.) 1982, c. 11. In 1982, the federal Parliament of Canada repatriated the Constitution of 1867 from England to allow true independent status and resolution of Canada's constitutional issues *see generally*, Hogg, Peter W., *Constitutional Law of Canada*, 3a. ed., Toronto, Carswell, 1992.

14 The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U. K.), 1982, c. 11, s. 25.

15 *Ibidem*, S. 25.

(2) In this Act, “aboriginal peoples of Canada” includes the Indians, Inuit, and Metis peoples of Canada.

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

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.¹⁶

This is the most commonly used constitutional provision to assert pre-existing Aboriginal rights and has been given a purposive interpretation by the Supreme Court of Canada in the landmark *Delgamuukw* decision.¹⁷ The importance of entrenching Aboriginal rights in the *Constitution* cannot be understated. First, these constitutional provisions are binding and unalterable by the central (federal) and regional (provincial) authorities. Amendments require the assent of the two Houses of federal Parliament; the House of Commons and the Senate, and two-thirds of the provincial legislative assemblies representing 50 percent of the population of all the provinces.¹⁸ The rigid nature of the *Constitution* is further demonstrated by the express affirmation that it has supremacy over all other laws as provided in section 52, which states:

52. 1 *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*¹⁹

The legal doctrines arising prior to the 1982 amendments were plagued with formalistic doctrines and demonstrated an absence of purposive interpretation.²⁰ Falling short of the dramatic 1982 constitutional

16 *Constitution Act*, 1982. See Schedule B, Part II.

17 *Supra* note 4.

18 For constitutional amendment procedures see generally, *Constitution Act*, 1982, Schedule B, Part V. See also, Hogg, Peter, *Constitutional Law of Canada*, *supra* note 13, p. 116.

19 *Constitution Act*, 1982. *Supra* note 13. See, Schedule B, part VII, s. 52. Emphasis added.

20 The formalist constitutional approach of the pre-*Delgamuukw* period necessitated resort to international tribunals. In *Ominayak v. Canada* for example, the U. N. Human Rights Committee in assessing treaty obligations under the International Covenant on Civil Rights and Political Rights held that Canada violated its obligations under Article 27 by facilitating oil and timber leases to the detriment of the Lubicon Cree and their traditional land base. See *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication núm. 267/1984, *Report of the Human Rights Committee*, U. N. GOAR, 45o. Sess., Supp. núm. 40, vol. 2 at 1, U. N. Doc. A/45/40, Annex 9(A) (1990) (views adopted March 26, 1990). See generally, International Covenant on Civil and Political Rights, Dec. 16, 1966, G. A. Res. 2200 (XXI), Artículo 27, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976). Article 27 affirms the right of persons belonging to “ethnic, linguistic, or religious minorities... to enjoy their own culture, profess and practice their own religion [and] to use their own language”.

reform one could not have expected the courts to have otherwise obtained the necessary direction from Parliament.²¹ The challenge of making meaningful precedent that breaks away from the normative confines is virtually insurmountable given the Anglo predisposition for protecting concepts of personal property rights. The B. C. trial decision in *Delgamuukw* for example, was over 400 pages long and contained 100 pages as attached schedules and lasted four years with a total of 374 days held in court.²² The trial judge, Chief Justice McEachern of the B. C. Supreme Court, also traveled by bush plane to view the lands under dispute. After one of the most extensive trials in Aboriginal law, the trial judge dismissed the plaintiffs claim and stated, "It is the law that aboriginal rights exist at the pleasure of the Crown and they may be extinguished whenever the intention of the Crown to do so is plain and clear", and he believed that the Crown in the case at bar had clearly exercised that pleasure and dismissed the claim accordingly.²³

In this respect, common law doctrines such as fee simple, rights of possession, easements and laches are completely removed from the traditional Aboriginal perspective on property rights. Recognizing the strength of formalism along with the enactment of express Aboriginal constitutional rights is a reminder of the past approach. Further, it advances the legal doctrine to embrace an Aboriginal perspective that gives the right an inherent meaning. This is a process of social change inasmuch as it is legal and institutional resistance demonstrates the Crown's self-imposed amnesia with respect to the relationships between the first Europeans and Canadian Aboriginal groups. Whether it be the experience of a demand to

21 In fact, final appeal in Canada rested in the Privy Council up until 1948. Aboriginal law was placed in a tremendously difficult situation because of this. The most significant Privy Council decision on Aboriginal rights was the landmark case of *St. Catherine's Milling & Lumber Co. c. R.* (1888), 14 App. Cas. 46 (P. C.) where in the Council held that under federal provincial division of powers, the federal Crown may create a reserve, but it cannot use provincial Crown lands (such as those obtained by First Nations by surrender under treaty) for that purpose without the cooperation of the province. In effect, the decision resulted in separating the power to enter into treaties and the power to fulfill those treaties once they are executed. Thus, once surrender of title is made under treaty the province holds exclusive proprietary and administrative rights over the surrendered lands. For an excellent review of this decision, see Rotman, Leonard L., "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility", 32 *Osgoode Hall L. J.* 735 (1994).

22 *Delgamuukw v. British Columbia*, 1991 3 W. W. R. 97 (B. C. S. C.). *Reversed Delgamuukw*, *supra* note 4, (SCC).

23 See Persky, Stan, *Delgamuukw, The Supreme Court of Canada Decision on Aboriginal Title*, Vancouver, Greystone Books, 1998, p. 8. Citing to the trial court decision.

leave a restaurant over visibly Aboriginal features, or racially derogatory names, the cool comfort to the process of reasserting an Aboriginal norm is had by way of reference to Professor Unger's critical observation that tensions are apart of breaking the confines of the dominant discourse:

The defense of received forms of doctrine has always rested on an implicit challenge: either accept the ruling style, with its aggressive contrast to controversy over the basic terms of social life, as the true form of doctrine, or find yourself reduced to the inconclusive contest of political visions. *This dilemma is merely one of the many specific conceptual counterparts to the general choice: either resign yourself to some established version of social order, or face the war of all against all.*²⁴

To be sure, outside of the theoretical is a politically charged atmosphere that has witnessed non-Aboriginals in the wake of *Delgamuukw* express urgency over the need to preserve the existing property regime in British Columbia. Recent attempts by federal Parliament to recognize treaty rights for example, are being challenged by the B. C. provincial opposition party and a former Supreme Court Judge who are seeking relief by way of motion and a declaration of unconstitutionality with respect to the Nisga'a Treaty.²⁵ Ironically, the Supreme Court of Canada's prior decision began the modern treaty making process between the Nisga'a Nation and the federal and provincial government and more importantly, it recognized that Aboriginal title was unique and separate from the common law norms of fee simple. In *Guerin v. R.*, Dickson J. (as he then was) described the "*sui generis* interest" of Aboriginal title as giving rise to a distinctive fiduciary duty of the Crown to deal with surrendered lands for the benefit of the particular Aboriginal group.²⁶ Dickson J. characterized the basis for Aboriginal title's *sui generis* nature as going to its inseparable attachment between Aboriginal people and their land, save an express extinguishment to the Crown, and further was:

[b] est characterized by its general inalienability (other than by surrender of the Crown), coupled with the fact that the Crown is under obligation to

²⁴ Unger, Roberto M., *The Critical legal Studies Movement*, 96 *Harv. L. Rev.* 561 at 563 (1983). Emphasis added.

²⁵ Seeman, Neil, "Former high court judge to Challenge Nisga'a treaty", *The National Post*, Monday, March 20, 2000. See also, *Bill C-9: Nisga'a Final Agreement Act*, currently before the House of Commons awaiting final Senate approval.

²⁶ [1984] 2 S. C. R. 325 (hereinafter "*Guerin*"), p. 335.

deal with the land on the Indians' behalf when the interest is surrendered. Any description which goes beyond these two features is both unnecessary and potentially misleading.²⁷

The decision in *Guerin* gave the federal and provincial governments the necessary incentive to negotiate the unsettled land claim of the Na'a nation in B. C. However, despite establishing the *sui generis* nature of Aboriginal title as a distinct proprietary interest the scope and content of the right guaranteed by s. 35(1) of the *Constitution* remained uncertain. The issue was again revisited in *Delgamuukw* when the Supreme Court heard the appeal by the Gitskan and Wet'suwet'en nations who claimed ownership and jurisdiction over 58,000 square kilometers of Northwestern British Columbia.²⁸ In the landmark *Delgamuukw* decision Court expressly acknowledged for the first time that the sources of Aboriginal title include pre-existing systems of Aboriginal law such as oral history to allow the delineation territorial boundaries in establishing claims.²⁹ Having previously determined that Aboriginal title is *sui generis*, the Court concluded that Aboriginal title gives rise to an interest in land that is not the equivalent to a fee simple estate. Instead, the Court found that Aboriginal title gives rise only to limited rights to develop and use the land, which prohibits any use that is "irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to the land".³⁰ Chief Justice Lamer added that Aboriginal title is "*sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems".³¹ Instead, as with "other Aboriginal rights, it must be understood by reference to both common law and Aboriginal perspectives".³² In short, the Supreme Court found that Aboriginal

27 *Ibidem*, pp. 381 y 382.

28 *Delgamuukw*, *supra* note 4. The *Royal Proclamation of 1763* did not confer British recognition of Aboriginal title west of the Canadian Rocky Mountains onto what is not the Province of British Columbia. Accordingly, few treaties were entered into and the cloud of title over the land remained in doubt until the Supreme Court recognized Aboriginal title in this decision. Further, the Court recognized the pre-existing title of Aboriginal people prior to European contact.

29 The introduction of oral evidence from elders was previously held to violate the evidentiary rule against the admission of hearsay and was inadmissible at trial. The Supreme Court upheld the use of the "kungax", a spiritual song that provides the territorial boundaries of the respective First Nations.

30 *Ibidem*, p. 1088.

31 *Ibidem*, At p. 1081.

32 *Idem*.

title is *sui generis* for at least three reasons: a) it is inalienable to all but the Crown; b) its source lies in possession of the land and in pre-existing systems of Aboriginal law; and c) it is held communally.

In *Delgamuukw*, the Court did not actually rule on the substance of the claim itself. Nonetheless, Lamer C. J. C., for the majority, proceeded to discuss the content of Aboriginal title “in order to give guidance to the judge at the new trial”.³³ Chief Justice Lamer stated that the content of Aboriginal title “has not been authoritatively determined by this Court”, and thus took the opportunity to explore this matter in some detail. The Aboriginal claimants argued that Aboriginal title was “tantamount to an inalienable fee simple, which confers on Aboriginal peoples the right to use those lands as they choose and which has been constitutionalized by s. 35(1)” of the *Constitution Act*, 1982.³⁴ Given that their claims were never extinguished by treaty, the Aboriginal peoples of British Columbia are continuing to pursue their land claims through the courts, seeking the recognition and enforcement of their pre-existing and continuing Aboriginal title.

Central to this dispute was the question of the content of Aboriginal title. The relevant questions included the following: Was it an interest in land that is tantamount to a fee simple estate, giving to Aboriginal communities broad rights to occupy, develop and exploit their lands? Or is it something less, perhaps a right to exclusively occupy Aboriginal lands only for a limited range of traditional Aboriginal activities, in some respects similar to a licence at common law or a conditional fee simple? If so, what is the legal basis for imposing such limits on Aboriginal title and Aboriginal lands?

In a prior decision, *R. v. Van der Peet*, the Court indicated that Aboriginal rights found their source in a “form of intersocietal law”, bridging Aboriginal and non-Aboriginal legal systems.³⁵ Building on this point in *Delgamuukw*, Lamer C. J. C. also found that Aboriginal title likewise stems, at least in part from pre-existing systems of Aboriginal law, per-

33 *Ibidem*, p. 1079.

34 *Idem*.

35 [1996] 2 S. C. R. 507, p. 547 the Chief Justice cited with approval Professor Slattery's view that Aboriginal rights are “neither English nor Aboriginal in origin, but are instead a form of intersocietal law that evolved from long-standing practices linking the various communities”. Aboriginal rights stem from alternative sources of law, namely Aboriginal practices, customs and traditions that existed prior to contact. See Slattery, Brian, “The Legal Basis of Aboriginal Title”, in Cassidy, F. (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. the Queen*, Lantzvill, Oolichan Books, 1992, pp. 120 y 121.

haps a similar form of “intersocietal” law. Lamer C. J. C. did not attempt to articulate what the pre-existing systems of Aboriginal law might have been or any effort to establish what laws and customs were in place that entitled Aboriginals to use and occupy their lands. However, there is considerable support in jurisprudence from other jurisdictions that courts should in fact consider whether or not, based admissible oral history as evidence, pre-existing systems of Aboriginal law permitted the use in question. The High Court of Australia in 1992 came to a similar conclusion in *Mabo v. Queensland (No. 2)*, where the Court noted that native title “its incidents and the persons entitled there to are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land”.³⁶ The High Court of Australia acknowledged that the content and meaning of Aboriginal title is derived, at least in part, from pre-existing systems of Aboriginal law.

In my view, this is a proper approach as it recognizes the inherent sovereignty of Aboriginal people before contact and further recognizes that ahistorical interpretations on the contemporary use of Aboriginal rights imposes a perspective of dependency that undermines the cause of achieving an enriched Aboriginal community. The emphasis on starting with pre-existing Aboriginal sovereignty, exemplified in our pre-existing gives substantive meant to Aboriginal title, Aboriginal right and accounts for the Aboriginal understanding of the treaty making process. I suggest that to do otherwise is merely to continue a formalistic contradictory approach which views Aboriginal people as separate and distinct people insofar as their sovereignty does no conflict with their status as dependent wards of the federal Crown.³⁷

36 (1992), 175 C. L. R. 1, p. 3.

37 In fact, Aboriginal people in both Canada and the United States have had this formalistic twist visited upon their rights of sovereignty. A lesson from the U. S. experience is that Aboriginal rights must be hard won and to not reassert sovereignty is to risk placing the scope of Canadian Aboriginal rights in a narrow confine. Federal Indian law in the United States has demonstrated this formalist disposition in the U. S. Supreme Court decision, *Oliphant v. Squamish Indian Tribe*, 435 U. S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d. 209. Mr. Justice Rehnquist citing in part to the Court’s early decision in *Cherokee Nation v. Georgia*, 5 Peters 1, 15 (1831) stated:

“But the tribes” retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers “inconsistent with their status”.

Both decisions cited from Getches, David H. *et al.*, *Cases and Materials on Federal Indian Law*, St. Paul, American Case Book Series, 1998, p. 537.

The concepts of Aboriginal property are not beyond the scope of identification. Leroy Little Bear, former Director of the Harvard University Native American Program and Aboriginal scholar, describes the Aboriginal concept of property as “holistic,” where land is “communally owned,” belonging to the “tribe as a whole”.³⁸ The land belongs “not only to people presently living, but also to past generations and future generations, who are considered to be as much a part of the tribal entity as the present generation”.³⁹ The land also belongs “not only to human beings, but also to other living things (the plants and animals and sometimes even the rocks)”.⁴⁰ The Creator originally granted the land to Aboriginals with the condition that it would remain “Indian land ‘so long as there are Indians’”.⁴¹ He adds that an Aboriginal concept of property is not equivalent to fee simple title and is somewhat less than unencumbered ownership because of the various parties (plants, animals and members of the tribe) that have an interest in it and because of the above-noted conditions attached to the ownership. He writes that an Aboriginal concept of property does not include broad rights of alienation. For example, Aboriginal peoples could not convey a fee simple interest in the land because “they did not themselves have fee simple ownership”.⁴² Alienation of the land would also break the condition under which the Creator granted the land, that is, that Aboriginals hold the land. Moreover, the current Aboriginal occupants of the land lack the authority to alienate the land because they are not “the sole owners under the original grant from the Creator; the land belongs to past generations, to the yet-to-be-born and to the plants and animals”.⁴³ He thus argues that any purported surrender of Aboriginal title to the Crown did not in fact convey much, if any, interest in land to the Crown. In short, Leroy Little Bear characterizes this Aboriginal concept of property as less than a fee simple estate in land because it is a conditional interest only and an interest in land that does not contain any broad rights of alienation.

38 Bear, L. Little, “Aboriginal Rights and the Canadian ‘Grundnorm’”, in Ponting, J. R. (ed.), *Arduous Journey: Canadian Indians and Decolonization*, Toronto, McClelland and Stewart, 1986, 243, pp. 244-247; excerpts also reproduced in Mossman & Flanagan, *Property Law: Cases and Commentary*, Toronto, Edmond Montgomery, 1998, pp. 78-80.

39 Bear, L. Little, “Aboriginal...”, in Mossman & Flanagan, *op. cit.*, nota anterior, p. 79.

40 *Idem.*

41 *Idem.*

42 *Ibidem.*, p. 80.

43 *Idem.*

To some extent the relationship of land to Aboriginal culture was identified in *Delgamuukw*. Lamer C. J. C. found that the “special bond” between Aboriginal communities and their land being part of the group’s “distinctive culture”.⁴⁴ He also wrote that Aboriginal title encompasses the “right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples”.⁴⁵ In short, Lamer C. J. C. seems to suggest that if the land is used in a manner that interferes with its traditional use, the link with the land that gave rise to Aboriginal title will be broken. In my view the Court, however, was not attempting to prevent a contemporary use of the land. Rather they were attempting balance and ensure that traditional land use would not be extinguished by the wholesale development on Aboriginal lands whose original source of title derived from the unique historical and cultural trust given to Aboriginal people with their interconnectedness with the earth. There is a range of overlap between Lamer C. J. C.’s conclusions and those of Leroy Little Bear’s description of Aboriginal concepts of property. For example, Leroy Little Bear writes that Aboriginal lands belongs to past and future generations. This characterization suggests that the present generation is prohibited from using or alienating the land in a manner that might injure the interests of past and future generations, a use of the land that might break what Lamer C. J. C. referred to as this “special bond”. Lamer C. J. C. also noted that Aboriginal title is subject to the limit that it cannot be used in a manner that would threaten the ability of the land to sustain future generations of Aboriginal peoples.⁴⁶ Likewise, Leroy Little Bear’s description suggests that it would be inconsistent with the inherent nature of Aboriginal concepts of ownership to develop or alienate the land in a manner that would disrupt the rights of future and past generations, or disrupt the rights of other living things on the land. Leroy Little Bear also describes the Aboriginal interest in the land as less than a fee simple estate and conditional upon the continued use of the land by Aboriginals.⁴⁷

The Court’s commitment to a purposive constitutional interpretation of Aboriginal rights in *Delgamuukw* has been followed in the decision, *R.*

44 *Delgamuukw*, *supra* note 4, p. 1089.

45 *Ibidem*, p. 1087.

46 *Idem*.

47 In this regard, the limitation on new use is a cause for reflection on traditional cultural and belief a selfimposed environmental and cultural regulator that would manifest itself in laws that mandate some form of consensus or referendum on the course of Aboriginal economic development.

v. Marshall.⁴⁸ In *Marshall*, the plaintiff, a Mi'kmaq from Cape Breton, Nova Scotia purposely fished eel out of season in order to be charged under local fishing regulations and thereby create a test case on Aboriginal fishing rights.⁴⁹ The majority of the Court acquitted him and provided a purposive approach to interpreting the terms of the treaty at issue.⁵⁰ On the one hand, the analysis of the treaty right to fish provides a fascinating insight into the Court's attempt at delineating the precise scope of the Aboriginal right. On the other, it demonstrates judicial reluctance to address the source of the right apart from recognizing the treaty right as being guaranteed under the scope of s. 35(1) of the *Constitution Act, 1982*.⁵¹ With respect to the scope of the treaty right, the Court characterized it as going only to the necessity of living, however, the majority acknowledged that the restrictive treaty provision no longer applied since the practice of truck-house fish trading had disappeared.⁵² Further, the restriction's removal did not diminish the continued right of access that the Mi'kmaq enjoyed since the Treaties merely fettered the right—they did not extinguish it. Alternations in the pattern of trade, therefore, simply meant that the right to fish became fully activated in the absence of subsequent treaty negotiations. This reasoning is subtle given the Court's inability to come to terms with the basis of the Aboriginal right: the *Mi'kmaq Treaties of 1760-1761* were made between two sovereign nations that continue to exist. Lamer C. J. C. in paragraph 17 emphasized the nation-to-nation dealings between the British and the Mi'kmaq:

It should be pointed out that the Mi'kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of “the Maritime coastal adaptation of the Micmac”: They are fishing people who live along the coastline who encounter countless fishermen, traders, on a regular basis off their coastline. The Mi'kmaq, according

48 File Núm. 26014, September 17, 1999 (SCC), cited to Can. Sup. Ct. LEXIS 77 (1999) (hereinafter “*Marshall*”).

49 As a side note, the plaintiff, Donald Marshall Jr. was the subject of a Royal Commission for his wrongful conviction in the murder of a Cape Breton man and his subsequent 12 year sentence in Dorchester federal penitentiary. Sadly, in overturning his conviction 12 years later the Nova Scotia Court of Appeal assigned partial blame on the accused which in turn, resulted in his inability to receive proper compensation in any way. See, *Summary of the Findings of the Royal Commission on the Donald Marshall Jr. Prosecution*, Nova Scotia Judgments, (1990) N. S. J. núm. 18.

50 Mi'kmaq Treaties of 1760-1761.

51 *Ibidem*, paragraph 67.

52 *Ibidem*, paragraph 70.

to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with. *However, by 1760, the British and Mi'kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.*⁵³

In my view, this demonstrates a reluctance by the Court to converge the federal and provincial jurisprudence that seeks to regulate Aboriginal law given the supremacy of Aboriginal constitutional rights under s.52 of the *Constitution*.⁵⁴ The decision also demonstrates more generally the problems that arise when Parliament refuses to honor its fiduciary duty and is subsequently required to dramatically alter its Aboriginal policy after losing a court decision of significant importance. To be sure, the federal government was not prepared to deal with the consequences of the Marshall decision as Aboriginal groups in the East Coast viewed the right as unfettered in relation all dormant and non-existent trade clauses.

53 *Emphasis added. Marshall, supra* note 48, Lamer C. J. C. at paragraph 15 observed the following historical background:

"In 1749, following one of the continuing wars between Britain and France, the British Governor at Halifax had issued what was apparently the first of the Proclamations 'authorizing the military and all British subjects to kill or capture any Mi'kmaq found, and offering a reward'. This prompted what the Crown's expert witness at trial referred to as a 'British-Mi'kmaq war'. By 1751 relations had eased to the point where the 1749 Proclamation was revoked, and in November 1752 the Shubenacadie Mi'kmaq entered into the 1752 Treaty which was the subject of this Court's decision in *Simon, supra...*"

At paragraph 16, Lamer C. J. C. added that:

"It will be noted that unlike the March 10, 1760 document, the earlier 1752 Treaty contains both a treaty right to hunt and fish 'as usual' as well as a more elaborate trade clause. The appellant here initially relied on the 1752 Treaty as the source of his treaty entitlement. In *Simon*, Dickson C. J., at p. 404, concluded that on the basis of the evidence adduced in that case, '[t]he Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities' and left the termination issue open (at pp. 406 y 407). The Crown led more detailed evidence of hostilities in this case. It appears that while the British had hoped that by entering the 1752 Treaty other Mi'kmaq communities would come forward to make peace, skirmishing commenced again in 1753 with the Mi'kmaq. France and Britain themselves went to war in 1754 in North America. In 1756, as stated, another Proclamation was issued by the British authorizing the killing and capturing of Mi'kmaq throughout Nova Scotia. According to the trial judge, at para. 63, during the 1750's the 'French were relying on Mi'kmaq assistance in almost every aspect of their military plans including scouting and reconnaissance, and guarding the Cape Breton coast line'. This evidence apparently persuaded the appellant at trial to abandon his reliance on the 1752 Peace and Friendship Treaty. The Court is thus not called upon to consider the 1752 Treaty in the present appeal".

54 However, the prospect of a judge performing this task through constitutional remedies brings to bear the issue of a judge's proper role on one hand, and the jurisdictional and administrative locus for law reform on the other (i. e. Parliament and/or provincial governments).

Thus, the New Brunswick Aboriginal groups began to exercise their timber and fishing rights that had not been extinguished and without regard to federal and provincial regulations. The backlash from non-Aboriginal peoples was swift and assaults, the burning of fishing boats and equipment, and protest directed at the minority Aboriginal population was the source of national attention along the East Coast.⁵⁵ A fishing union that acted as an intervenor before the Supreme Court subsequently filed a motion to retry the case, which the Court dismissed. However, in *obiter dictum* the Court indicated that the Aboriginal right to fish would have to be balanced with existing regulatory schemes, but did not provide any direction on how to accomplish this.⁵⁶

In conclusion, the goal of the Aboriginal law should be to restore to Aboriginal communities a broad spectrum of property rights over Aboriginal lands, in order to permit these communities to develop and use these lands to their full potential, consistent with the operation of a modern society and a modern economy.⁵⁷ Aboriginal communities should not be locked in time, with undue restrictions on the extent to which they can develop and enjoy their lands. The courts should not deny Aboriginal communities the right to change and modify their relationship to their lands in order to adapt to the challenges and opportunities of modern society. If restrictions are to be placed on Aboriginal title, these restrictions should find their source in clearly articulated pre-existing Aboriginal systems of law, taking into account how these systems may have evolved in response to European colonization. They should not be ad hoc restrictions arising out of poorly understood impressions of Aboriginal concepts of property and the relationship between Aboriginals and their lands. Such restrictions risk an ongoing paternal approach to the concept of Aborigi-

55 See articles at *supra*, note 10. See also, "Of fish, Trees and Natives", *The Economist*, 13 November 1999, U. S. edition and *First Nations Summit supportive of Douglas Treaty Bands decision to proceed with test fishery*, Canada, Newswire, 5 December 1999. I was fortunate to have met with Donald Marshall Jr. shortly after his release from prison and in 1992, he spoke actively of his desire to continue what he saw as the struggle of Aboriginal sovereignty. This, despite a 12 year sentence for a wrongful conviction. The public outcry for what the media portrayed as belligerent Aboriginal people abusing the Canadian system was at the forefront of the Nation's news agenda.

56 *R. v. Marshall*, 1999, Can. S. C. R. LEXIS 371; 3 Can. S. C. R. 533 (1999).

57 See also Flanagan, William, *Piercing the Veil of Property Law: Delgamuukw v. British Columbia*, 24 *Queen's L. J.* 279 (Fall 1998). The author supports this position, but does not comment on its use as a regulator between contemporary and traditional uses. It is beyond the scope of this paper to discuss how the institutional arrangements should be developed to allow a balance between the use of traditional and contemporary Aboriginal rights.

nal title, imposing on Aboriginal communities a romantic and outdated view of this relationship.

III. THE PROJECT OF INNOVATIVE INSTITUTIONAL DESIGN AMIDST FIRST WORLD POVERTY

In this part of the paper I will examine the current intersection between tax and Aboriginal law. I will argue that it contains within it the leftover vestige of assimilation and should no longer be used as the source for Aboriginal taxation. I will take issue with the case law as it endangers the true scope of Aboriginal rights and is based on the dependency of Aboriginal people. The more dynamic and expressive method is to view the power of taxation as an Aboriginal constitutional right framed on the recognition inherent to Aboriginal sovereignty. This approach is a better suited to provide certainty in order to begin institutional innovation, economic growth and prosperity. In the second half of this section I will argue that current socio-economic conditions for Aboriginal present a challenge to the leadership that can be addressed through the interpretative perspective of inherent Aboriginal sovereignty.

1. *The taxation of colonization: tax exemption under the Indian Act and other cross-cultural misconceptions*

In this section I will argue that the existing jurisdictional source of Aboriginal taxation as prescribed under the *Indian Act*⁵⁸ is obsolete and carries with the vestiges of through the cunning franchise programs that existed until the early 1960s. I will argue that the power of taxation should be viewed instead as an inherent right of Aboriginal people within the context of the right to self-determination over Aboriginal lands as guaranteed by s. 35(1) of the *Constitution*.

The *Indian Act* originally possessed two goals. Firstly, “civilizing” the Indian population and achieving assimilation and integration as soon as possible”, and secondly, “[p]rotection of Indians and their land from abuse and imposition” until they had advanced to a level of sophistication that warranted taxation.⁵⁹ The protection aspect gave rise to the doc-

58 R. S. C. 1985, c. I-5 (hereinafter the “*Indian Act*”), The *Indian Act* is the primary legislative device for administering the federal reserve systems throughout Canada.

59 Bartlett, Richard H., “The Indian Act of Canada” (1978), 27 *Buffalo Law Review* 581, p. 583.

trine of wardship that implied a surrender of Aboriginal governance to the care and control of the federal Crown. The Crown's policy viewed the protection from "abuse and imposition" as necessitating a tax exemption as a means of buffering the advance of Aboriginal people along the spectrum of civilization and to recognize that they were not ready to participate and benefit in the growth of Canada.⁶⁰ In 1850 the Province of Canada, as it then was, passed an *Act for the protection of the Indians in Upper Canada for the Protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass or injury* which provided the tax exemption for Aboriginals on designated Aboriginal lands.⁶¹ This was followed in 1857 by an *Act to Encourage the Gradual Civilization of Indian Tribes*, which explicitly afforded the assimilation policy by conferring taxation upon Indians who enfranchised their status as Indian people, or achieved a "sufficiently advanced education" with "sufficient intelligence of managing their own affairs".⁶² Upon Confederation in 1867, the *Indian Act* was consolidated and the exemption continued to apply on reserve property, a Band and its members on reserve, and the personal property of Band members situated on reserve.⁶³ It also exempted estate taxes in respect of personal property on reserve since a certificate of possession and not fee simple executes property ownership on reserve land.⁶⁴ The current tax exemption provisions are in sections 87 and 90. The tax status of Indians is determined largely by section 87 of the *Indian Act*, which provides:

Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province... the following property is exempt from taxation, namely:

- (a) the interest of an Indian or a band in reserve or surrendered lands; and
- (b) the personal property of an Indian or band situated on a reserve; and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of such property...⁶⁵

60 See generally, Bartlett, Richard H., *Indians and Taxation in Canada* (3a. ed.), Saskatoon, Native Law Center, University of Saskatchewan, 1992.

61 S. C. 1850, c. 74, s. 4.

62 *Ibidem*, p. 2.

63 See section 87 and 90 of the *Indian Act* that continue to operate in this manner today.

64 See section 87 (3) of the *Indian Act*.

65 *Idem*.

Assimilation by tax exemption arose cunningly from the early reliance of provincial governments on real property taxation. The level of property tax was based on an assessment that when reported was subsequently transferred by operation statute to form the voter's list.⁶⁶ In other words, without property ownership that was subject to taxation it was not possible to vote or have citizenship. For on reserve Aboriginal people to be endowed with the primary right of citizenship, the right to vote, they had to disenfranchise their membership with their Band and permanently waive their status as Aboriginal people.⁶⁷ The vote was one of several enfranchise programs that sought Aboriginal assimilation and the federal *Dominion Elections Act* was amended in 1950 to extend a quick waiver process for on reserve Aboriginal people.⁶⁸ The hope was that access to the waivers would quicken the process of assimilation and permit Aboriginal people to enjoy the privileges of Canadian society while at the same time removing themselves off reserve and off the Band membership, for those Aboriginals who: "[E]xecuted a waiver, in a form prescribed by the Minister of Citizenship and Immigration, of exemptions under the *Indian Act* from taxation on and in respect of personal property, and subsequent to the execution of such waiver a writ has issued ordering an election in any electoral district".⁶⁹

The franchise was also required for those who joined the Canadian Armed Forces and subsequently went on to fight in the Second World War and the Korean War. To not accept the franchise and hold onto an

66 Section 4 of the *Election Act*, S. O. 1875-76, c. 10, for the Province of Ontario provided that "all Indians, ...who have been duly enfranchised, and all Indians, ...who do not reside among Indians, ...shall be entitled to vote... See Bartlett, Richard H., *Indians and Taxation in Canada* (3a. ed.), *supra* note 60, p. 10.

67 Thus, the assimilation is apparent as on reserve Aboriginal people faced two choices: either you suppress and deny your identity for the mold of the larger society, or remain a dependent ward of the federal government with no privileges of citizenry. The doctrine of wardship was a justification for extending the tax exemption during the period in which on reserve Aboriginals were not citizens of Canada. The Supreme Court of Canada in *Francis v. R.* [1956] S. C. R. 618, at p. 783, traced the doctrine to the conquering of North America and the expulsion of Aboriginals sympathetic to the British from the newly independent United States, resulting in "only fragmentary reminders of that past". The Court observed that "ancient hunting grounds and their fruits, ...were divided between two powers, but that life in its original mode and scope has long since disappeared". The circumstances give rise to an "exclusive code of new and special rights and privileges" that appreciates fully the obligation of "good faith toward these wards of the states". The Court concluded assimilation was the natural destiny given that "there can be no doubt that the conditions constituting the *raison d'être* of the clause were and have been considered as would in foreseeable time disappear".

68 Bartlett, Richard H., *Indians and Taxation in Canada* (3a. ed.), *supra* note 60, pp. 11 y 12.

69 *Ibidem*, p. 12, *Dominion Elections Act*, R. S. C. 1950, c. 35, s. 1.

Aboriginal membership disentitled veterans from their statutory benefits of disability, housing and health care. In addition high on reserve unemployment meant that the military service was viewed by many Aboriginal men as a means of gaining citizenship and employment. Those Aboriginals who did not enfranchise at the outset were often coerced into signing a waiver on their return from service in order to obtain veteran benefit packages.⁷⁰

In 1960 the federal government became sensitive to the international perception of Canada as an assimilative state and the Minister for Citizenship and Immigration extended the franchise to all Aboriginal people without a requirement of any kind that they waive their claim to as Aboriginal people. The Minister stated before the House of Commons:

The proposal now before the house is that the restriction which applies to Indians living on reserves be abolished so that all Indians will have the right to vote on the same basis as other citizens. Many reasons can be forwarded in support of this proposal.

Finally, there is the reason mentioned by the Prime Minister (Mr. Diefenbaker) in his speech to this house on January 18, namely that it will remove in the eyes of the world any suggestion that in Canada colour or race place any citizen in an inferior category to other citizens of the country.⁷¹

The tax exemption provisions, however, still remain under the *Indian Act*. Prior to the decision in *Delgamuukw* and the shift to a purposive interpretation of Aboriginal rights the issue of Aboriginal tax exemption was believed to be available where the following circumstances exist:

1. The taxpayer claiming the exemption qualifies as an "Indian or a band";
2. The property is either an interest in reserve or surrendered lands or personal property; and
3. The property is *situated* on reserve.⁷²

The doctrine of *situs* has necessitated a case by case analysis before the courts and has resulted in a complicated and unruly test to determine whether or not a property and the activity generated by it are connected to

⁷⁰ RCAP, *supra* note 7, vol. 1, "Looking Forward, Looking Back", p. 580.

⁷¹ *House of Commons Debates*, vol. II, 3a. Sess., 24o. Parl., 8-9 Eliz. II 1960, 1912-1913, *per* E. Fairclough, M. P., cited from Bartlett, Richard H., *Indians and Taxation in Canada* (3 ed.), *supra* note 60, p. 14.

⁷² Krishna, Vern, *Fundamental of Canadian Income Tax* (5a. ed.), Toronto, Carswell, 1995, pp. 137-139.

the reserve. The problem stems from the formalistic approach that is applied to a reality that contradicts the notion of an established source of economic activity. As a matter of practical arrangement, many reserves are too small or lack the infrastructure to build hospitals and other essential services. Often they will contract with a nearby institution and transplant their own service providers as a means of delivering a community-based service at a lower cost.

This was similar to the fact situation in the recent decision by the Federal Court Trial Division, *Shilling v. M. N. R.*⁷³ The plaintiff successfully appealed a tax assessment claiming exemption under the *Indian Act* while working in Toronto for an Aboriginal health service center funded that provided health care to homeless Aboriginal people. The plaintiff's Ojibway Band membership was based outside of Toronto on the Rama First Nation and her employment contract was through an on reserve Aboriginal employment agency that leased her services to the health center. The Trial Court held that following the Supreme Court of Canada decision in *Williams v. Canada*, the situs of income should be determined by balancing all the connecting factors on a case-by-case basis in light of three considerations: the purpose of the exemption under the *Indian Act*; the type of property in question; the nature of the taxation of that property.⁷⁴

Despite the favorable outcome for the plaintiff, the problem of rendering the right of taxation to the vagaries of the *Indian Act* will only result in continued litigation and uncertainty over the scope and purpose of taxation in relation to Aboriginal rights. The constitutional argument for tax exemption has not been brought forward and in part is due to the socio-economic conditions that have resulted in a minimal on reserve tax base. However, it is clear Parliament's intention in granting tax exemption was to import a radical theory of convergence, or best efficient market practices. Firstly, there is a tradition of taxation in Canada. Secondly, the focus of tax exemption as a competitive market advantage for on reserve Aboriginal businesses misses the institutional choices that are part of the project in reasserting sovereignty and establishing new institutions of Aboriginal government.⁷⁵ As a new generation of Aboriginal people reas-

⁷³ 4 Can. F. C. 178 [June 9, 1999], núm. T-222-97 (F. C. T. D.), Sharlow J. (hereinafter "*Shilling*").

⁷⁴ (1992) 1 S. C. R. 877.

⁷⁵ Convergence thesis entails supplanting the supposed best practices of free market economies into underdeveloped ones. See Unger, Roberto, *What Should Legal Analysis Become?*, *supra* note 6, pp. 8 y 9.

sert their constitutional rights the *situs* test will continue to provide uncertainty, missing the pith and substance of taxation in Aboriginal Canada; that it is an aspect of the rights bundle surrounding self-government and the ability of a sovereign people to determine their future.

This approach also sheds the historical baggage associated with the franchise program and views taxation as a dynamic component to mobilizing Aboriginal productivity. This position finds support in the recommendation by the RCAP which advised that Aboriginal governments exact a personal income tax on those living within its territorial jurisdiction while maintaining a right of exemption within its territorial boundaries from both provincial and federal taxation until further negotiation. Recommendation 2.3.20 reads:

Aboriginal citizens living on their territory pay personal income tax to their Aboriginal governments; for Aboriginal citizens living off the territory, taxes continue to be paid to the federal and relevant provincial government; for non-Aboriginal residents on Aboriginal lands, several options exist:

(a) all personal income taxes could be paid to the Aboriginal government, provided that the level of taxation applied does not create a tax haven for non-Aboriginal people;

(b) all personal incomes all personal income taxes could be paid to the Aboriginal government, with any difference between the Aboriginal personal income tax and the combined federal and provincial personal income tax going to the federal government (in effect, providing tax abatements for taxes paid to Aboriginal governments); or

(c) provincial personal income tax could go to the Aboriginal government and the federal personal income tax to the federal government in circumstances where the Aboriginal government decides to adopt the existing federal/provincial tax rate.⁷⁶

With respect to the practical models of governance over which the power of taxation may be imposed, the RCAP recognized the need for flexibility and recommended a broad coverage on the scope of inherent rights of self-determination. The RCAP recommendation 2.3.2 reads:

All governments in Canada recognize that Aboriginal peoples are nations vested with the right of self-determination. Our definition of nation is a flexible one that can apply to a wide range of cases. These include:

76 RCAP, *supra* note 7, vol. 2, Pt 1, "Economic Development", p. 292.

A First Nation people with a common historical heritage living on a single territorial base....⁷⁷

With respect to the economic aspects of reasserting sovereignty, the experiences of Native American tribes in the United States supports the principle that tribes experience the greatest prosperity when their governance is held together by a sophisticated, diverse, and manageable infrastructure.⁷⁸ Professor Joseph Kalt has compiled extensive research on micro-projects over the last 20 years and in his submissions to the RCAP Round Table Discussions, striking similarities emerged regarding the problems, conditions, and elements of success between Canada and U. S. Aboriginal groups. Kalt described the U. S. tribal experience as follows:

When we look around reservations, we find key ingredients to economic development. The first is sovereignty itself. One of the interesting phenomena we see in the United States is that those tribes who broken out economically and really begun to sustain economic development are uniformly marked an assertion of sovereignty that pushes the Bureau of Indian Affairs into a pure advisory rule rather than a decision-making role.

One of things we find with American Indian reservations is that tribal sovereignty is sufficient to screw things up... if the central government of the tribe cannot set in place an economic and social and cultural environment in which inside and outside economic actors, investors and others feel safe and secure in making investments in tribal development, the tribal government has the ability to destroy those [economic] opportunities.⁷⁹

The economic and cultural research was conducted among 15 tribes and Kalt extracted and then divided the ingredients of successful economic development into three categories: external opportunity, internal assets, and developing strategy. With respect to external opportunity, Kalt

⁷⁷ RCAP, *supra* note 7, vol. 2, Pt. 2, Recommendation, p. 180.

⁷⁸ Kalt, Joseph P. y Cornell, Stephen, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, Los Angeles, American Indian Studies Center, 1995. See also Kalt, Joseph P. y Cornell, Stephen, "Where's the Glue? Institutional Bases of American Indian Economic Development", in the *Malcolm Wiener Center Working Papers*, 1995. See also Kalt, Joseph P., "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," as chapter 10 of Merilee S., Grindle, *Getting Good Government: Capacity Building in the Public Sector of Developing Countries*, Harvard Institute for International Development, 1997.

⁷⁹ RCAP, *supra* note 7, vol. 2 Pt. 2, p. 834. Submissions to the RCAP Roundtable Discussions on economic development.

defines this category as the political, economic and geographical situation that the reserve finds itself in and includes the following factors:

- (1) political sovereignty;
- (2) market opportunity;
- (3) access to financial capital; and
- (4) distance from markets.⁸⁰

Internal assets refer to the resources under tribal control and that can be committed to development. The critical factors are:

- (1) natural resources;
- (2) human capital;
- (3) institutions of governance; and
- (4) culture.⁸¹

According to the research, three elements emerge as crucial pieces to tribal economic growth. The first is sovereignty —the power of tribes to make decisions about their own futures—. In this respect the analysis of the constitutional Aboriginal rights and its guarantee of pre-existing unextinguished rights bodes well for Aboriginal Canada. Second, the ability to successfully exercise this sovereignty through institutions that effectively manage the transition and expansion of governance. In the U. S. tribal experience, economic development was most successful amongst those Nations that had already installed an infrastructure of governance.⁸² For example, the Navajo Nation has a highly developed judiciary, customary law, and police force.⁸³ Third, Kalt cites the choice of development strategy. This factor emphasizes the need for close study of a tribes external opportunities and internal assets.⁸⁴

With this functional approach in mind, the current model for Aboriginal government that supports taxation to redistribute wealth and fund programs is a tripartite format between the Aboriginal, provincial and federal government. This model has been developed with small northern commu-

80 Kalt, Joseph, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, *supra* note 78, At p. 8.

81 *Ibidem*, p. 9.

82 *Ibidem*, p. 53.

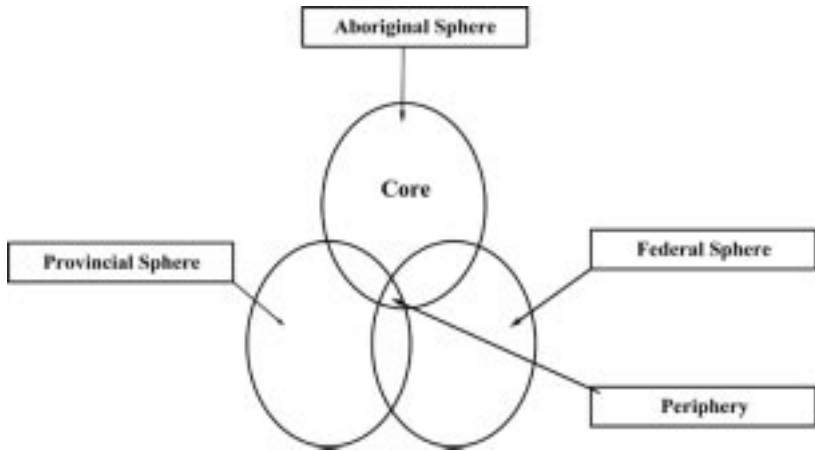
83 *Idem*.

84 *Ibidem*, p. 10.

nities in mind as well as sparsely populated communities that have a large land base. The Nisga'a Nation will be adopting a similar model once the parties have formalized the Treaty. Figure 1 represents a conceptual overview:⁸⁵

Figure 1

Aboriginal, Federal and provincial Spheres of Jurisdiction



The illustrative model requires that Aboriginal governments identify their core areas of jurisdiction. A decision must then be made as to the terms of agreement at the periphery where the jurisdictional issues will functionally overlap. The *sui generis* nature of Aboriginal title for example, requires careful consideration of practical problems such as road allowances and easements. In the U. S., this issue has come back to haunt several tribes that allowed state road allowances on their lands. In 1991, in *Strate v. A-1 Contractors*, the U. S. Supreme Court held that a state road allowance created easement tantamount to fee simple for the purposes of alienating tribal sovereignty.⁸⁶ The effect this decision was that tribes across the U. S. had to re-examine their arrangements over jurisdic-

⁸⁵ RCAP, *supra* note 7, vol. 2, Pt. 1, "Restructuring the Relationship", p. 218. This model reflects the jurisdictional and administrative partnering of federal and provincial governments.

⁸⁶ *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 137 L. Ed. 2d 661. The Court held that the right of way was land alienated to non-Indians. Cited to from Getches, David H., *et al.*, *Cases and Materials on Federal Indian Law*, St. Paul, American Case Book Series, 1998, pp. 547-551.

tion and services on reserve. Nonetheless, in the wake of the Nisga'a Treaty the model has gained general acceptance in relation to reserve based governments seeking to resolve the limitations of capital and finance. The core powers identified by the RCAP hearings are as follows, but are not exhaustive:

- (a) to establish and draft constitutions;
- (b) set up institutions of government;
- (c) establish courts, impose a system of taxation;
- (d) establish membership and residence criteria;
- (e) jurisdiction over education, health and social services, future economic development and on going existing commerce; and
- (f) any treaty rights protected under s. 35(1) of the Constitution.⁸⁷

For the West Coast, the process of reasserting sovereignty through innovative institutional design is also a process of healing. The healing stems from exploitation and colonization that occurred through the imposition of band councils over hereditary governments; the criminalization of social, economic, and spiritual relations through the enactment of the laws against potlach;⁸⁸ the fragmentation of their territorial integrity through the denial and/or infringement of land rights and the creation of small, inadequate reserves; the century-long denial of the right to vote in federal and provincial elections; the traumatic removal of whole generations of children through residential schools and insensitive child welfare laws; and the restricted access to their traditional food sources through the imposition of discriminatory fishing and hunting licences.⁸⁹

87 RCAP, *supra* note 7, vol. 2 Pt. 1, "Restructuring the Relationship", pp. 218 y 219.

88 The potlach was a complex system that ensured, as one of its many aspects, a process of redistribution through *inter vivos* transfers. Apart from redistributing wealth, potlatching fulfilled the maintenance of government, the sharing of ideas, and the re-affirmation of territorial boundaries. In 1880, section 3 of *Indian Act* made the potlach illegal and was punishable by a maximum term of jail one year less a day. It would remain unchanged until its repeal in 1951. For an excellent account of the anti-potlach period *See*, Cole, Douglas y Chaikan, Ira, *An Iron Hand Upon the People: the law against the Potlach on the Northwest Coast*, Vancouver, Douglas & McIntyre, 1990, Ch. 2.

89 *See* Borrows, John, "Fall, Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*", 37 *Osgoode Hall L. J.* 537, 1999.

2. *A pressing need to reassert sovereignty to create viable economies*

The immediate goal is to address the intensive unemployment on and off reserve. The national unemployment of Aboriginal people is 28.6 percent, but remains higher in fact because social assistance recipients and those who are ineligible for unemployment insurance do not count.⁹⁰ In 1991, unemployed ineligible Aboriginal people comprised 46 percent for both on and off reserve people with the on reserve social assistance rate at 41.5 percent.⁹¹ Investment, therefore, requires a new approach that links savings to production. To close the employment gap on the basis of 1991 census figures 48,900 new jobs must be created, yet many on reserve economies are geographically removed from the larger urban economies that would provide off reserve employment.⁹² The RCAP recommended a combination of leadership between Aboriginal and Non-Aboriginal peoples to consider mutually beneficially relationships and the establishment of a research and development institute to further consider the issue.⁹³ In the next section I will discuss two investment systems that will enable the transition from savings to production.

A. *Public goals-public means: the Aboriginal retirement savings plan*

The current governing bodies for on reserve Aboriginal people in Canada are able to readily accommodate the first tax and finance system that I wish to propose. This system, a registered Aboriginal savings plan would borrow from the existing national self-help savings program-the individual registered retirement savings plan (RRSP).⁹⁴ The RRSP is a comprehensive savings vehicle that allows tax-deferred investments by individual taxpayers until the age of 65. The Canadian RRSP model is an extensive system designed to fulfill two goals: (a) To allow individuals

90 RCAP, *supra* note 7, vol. 2. Pt. 2, "Restructuring the Relationship", p. 803, *see* commentary on employment and social assistance figures.

91 *Idem.*

92 *Idem.*

93 It follows that Aboriginal people on reserve remain the most marginalized in Canada and experience socio-economic conditions that are contradictory to the social welfare traditions of the redistributive state. High suicide rates, over-representation and incarceration, and HIV rates are all disproportionate to the national averages, *see generally* the RCAP, *supra* note 7, vol. 4 "Perspectives and Realities".

94 Krishna, Vern, *Fundamental of Canadian Tax Law*, 5a. ed., *supra* note 72, pp. 242-244.

the ability to adequately save and invest for their retirement; and (b) To promote investment into the Canadian domestic market.⁹⁵ The RRSP system is buttressed by the state funded Canada Pension Plan and both become eligible to taxpayers 65 and over.⁹⁶ Under the RRSP plan, a maximum of \$13,500 per year can be deposited into an RRSP account. The plan is self-directed and account holders can invest in a variety of financial products. There is a restriction of 20 percent foreign investment that acts to further promote domestic economic growth and comply with the two public policy objectives, however, the RRSP offers a straight deduction off of gross earnings.⁹⁷ *The accounts are designed for access with amounts of \$10.00 to \$25.00 being the minimum deposit. The program is very successful particularly in light of Canada's small population.*

Revenue Canada has indicated that taxpayers contributed the following amounts between 1996 and 1999:

<i>Year</i>	<i>Amount Contributed</i>
1996	\$ 26.6 billion
1997	\$ 28.7 billion
1998	\$ 29 billion
1999	\$ 30 billion ⁹⁸

Transposing this system at allow on reserve capital investment is easily obtained by amendments to the federal income tax legislation and could provide an eligible self-direct fund for both Aboriginal and non-Aboriginal investors. In Figure 2, I provide a conceptual overview of the structure with respect to a registered Aboriginal retirement saving plan (*see infra* Appendix, fig. 2).

B. Public goals-private means: the Aboriginal venture capital fund

The choice of investment vehicle is a pressing issue given the expectations and reliance on its ability to generate wealth through productive investment. Economist Zhiyuan Chi observes that in relation to the secu-

⁹⁵ *Idem.*

⁹⁶ *Idem.*

⁹⁷ *Idem.*

⁹⁸ Government of Canada, Statistics Canada, "RRSP Contributions in Review", 1999, Source, Statistics Canada, CANSIM, Matrix 11519.

rity of the stock market, “[t]he equation of saving with investments obscures a problem of great practical interest: the way in which particular institutional arrangements can either squander or tap the productive potential of saving”.⁹⁹ The use of venture capital funds has been an on going experiment in Canada that has gained considerable acceptance by mainstream investors. In this section I will provide a brief outline of the mechanics of labor venture funds and propose a similar model for Aboriginal ventures.

The establishment of the Quebec Solidarity Fund in 1983¹⁰⁰ marked the beginning of a movement by the federal and most provincial governments, including Ontario,¹⁰¹ to facilitate the creation of labor-sponsored investment funds through the use of tax credits.¹⁰² Under the federal *Income Tax Act*, additional tax credits are available for investments which qualify under the provincial regimes.¹⁰³ Fundamentally, investment in LSIF’s is encouraged in order to provide a source of stable long-term capital for small and medium businesses which will facilitate economic restructuring and stimulate job creation. With a combined tax credit of up to 40% of the value of investments LSIF’s programs are increasingly popular. Working Ventures Canadian Fund Inc. is the first national fund and is also the largest in Canada with approximately \$500 million in assets. The Canadian Federation of Labor established it in 1990.¹⁰⁴ In Ontario, an investor may claim a credit equal to 20% of the lesser of (a) the net cost of the LSIF shares; and (b) \$5,000.¹⁰⁵ The maximum annual tax credit is \$1,000 based on a \$5,000 investment.¹⁰⁶ The federal *ITA* provides a form of matching credit for LSIF’s registered under these provincial statutes equal to 20% of the net cost of shares which brings the combined federal and provincial credits up to 40 percent.¹⁰⁷ As a result, the tax benefits of investing in LSIFs are substantial. The credit for non-

99 Chi, Zhiyuan, “An Appendix on Savings and Investment”, in Unger, Roberto, *Democracy Realized*, New York, Verso, 1999, p. 284.

100 *An Act to establish the fonds de solidarite des travailleurs du Quebec*, S. Q. 1993, c. 58.

101 *Labor Sponsored Venture Capital Corporations Act*, S. O. 1992, c. 18, Pt. III.

102 Hereinafter “LSIF’s”.

103 *Income Tax Act*, R. S. C. 1985, c. 1 (5a. Supp) as amended (hereinafter the “*ITA*”).

104 See Working Ventures Canadian Fund Inc. (visited March 24, 2000), <<http://www.workingventures.ca/>>

105 Van Duzer, Anthony J., *Tax Aspects of Investing in Labor-Sponsored Investment Funds*, vol. 6, núm. 2, Canadian Current Tax 15 (1995).

106 *Idem*.

107 *Idem*.

RRSP holdings is allowed up to \$5,000 for a maximum credit of \$2,000 per year.¹⁰⁸

LSIF's are tightly regulated over their terms of investment and what constitutes an eligible investment by the fund. The advantage from the perspective of management is that investors are unlikely to liquidate their shares given the restrictive terms. Recently there has been a proliferation of funds in Ontario; ten new funds were set up in Ontario in 1994 alone.¹⁰⁹ In Ontario, to be eligible for investment, at least 50% of the full-time employees of a business must be employed in eligible business activities carried on in Ontario and the business must pay at least 50% of its wages and salaries to employees employed in a permanent establishment in Ontario.¹¹⁰

Developing a hybrid venture fund for Aboriginal Canada by offering shares, or income trust units to the public could be facilitated by legislation that is similar to the comprehensive regulatory scheme that ensure the LSIF's fulfill their important public policy objectives. The Aboriginal fund would require a new lexicon that speaks to the culture and ethics of investing in a project of this nature. As well, it would require a commitment in the very least of the federal regulatory authorities to amend the *ITA* and permit the same credits available to the LSIF funds. Figure 3 offers a conceptual overview of the fund's structure (*see infra* Appendix, figure 3).

C. Private Goals-private means: financial instruments in Aboriginal Canada

In this final section I will discuss the use of new financial instruments as a means of raising capital for development projects. Given the control and constraints of the *Indian Act*, everything associated with housing development on reserve traditionally fell under the jurisdiction of the Deputy Minister for Indian Affairs. A provincial law on debtor-creditor, landlord and tenant, and personal property security registration does not apply to on reserve property.¹¹¹ Since 1983, the Department's budget on housing development has been frozen as part of a larger downsizing trend.¹¹²

108 Matthew Elder, "Labor Fund Basics", *The Financial Post*, 7 January 1998.

109 Van Duzer, Anthony J., *Tax Aspects...*, *supra* note 105.

110 *Idem*.

111 RCAP, *supra* note 7, vol. 3. "Gathering Strength", p. 389.

112 *Ibidem*, p. 384.

Coupled with this are regulations that restrict land tenure of reserve lands. As a result, private capital cannot be accessed to meet the demands of housing for a growing Aboriginal population. The Royal Commission on Aboriginal Peoples recommended the use of debt financing, however, the Commission recognized that the existing legal structure made the likelihood of accessing outside capital impossible.¹¹³ To get around the issues of securitization and mortgaging the RCAP suggested that a system of property insurance be installed as security to mortgagees and secured lenders. The issue was raised in a broader recommendation to the government of Canada and reads:

The government of Canada should complement the resources supplied by the First Nations people in a two-to-one ratio or as necessary to achieve adequate housing in 10 years by

- (a) providing capital subsidies and committing to loan subsidies...
- (b) providing funds for property insurance...
- (c) paying rental subsidies for those receiving social assistance.¹¹⁴

The legal ambiguity and the need for Aboriginal Band Councils to assert sovereign jurisdiction over housing can benefit by creative and innovative methods of raising capital. First, Band Councils could consider the issuance of debentures to other Aboriginal organizations that are fixed to a long-term yield. This mirrors the basic bond issuance approach, however, the Aboriginal stakeholders would be committed to a long-term housing development bond. Second, Band Councils could consider the issuance of income trust units that are tied to the income derived from on and off reserve housing projects for Aboriginal and non-Aboriginal tenants. Again, these units would be subject to holding and transfer restrictions. Ideally, the federal government could offer further incentive by permitting the units to be RRSP eligible and or, that income received be subject to a credit similar to the corporate dividend tax credit that softens the impact of double taxation. This would provide Aboriginal-housing companies with a viable means to market the unit shares. Diagram 4 conceptualizes the format I have proposed (*see infra* Appendix, figure 4).

113 *Ibidem*, p. 402.

114 *Idem*.

IV. CONCLUSION

Contact and interaction among the diverse peoples of the world are inevitable. Even the most isolated communities require some level of contact with other segments of humanity if only to secure their continued isolation. A look back in history reveals patterns of encounter that are, however, no longer acceptable: patterns associated with empire building, conquest or colonization. Indigenous peoples were at the raw end of such encounters and have continued to suffer inequities as a result.

James ANAYA¹¹⁵

In this paper I have examined the scope of Aboriginal constitutional rights with a view to its recognition as going to nationhood-not occupancy. This is a deeper claim that recognizes the inherent legitimacy of Aboriginal nations. Further, in relation to Aboriginal title it recognizes Aboriginal concepts of property and provides the court with a useful interpretative mechanism that prevents the square peg—round hole dilemma in transposing the common law over Aboriginal law. I recognize that my approach is optimistic—that the Supreme Court’s interpretation of s. 35(1) is on a course of getting it right, however, my approach is also one of advocacy as it requires Aboriginal people to actively reassert their rights to government.¹¹⁶ Following *Delgamuukw*, the Court’s doctrinal drift, such as considerations of oral history is significant but other factors are also relevant. Most fundamentally, the Court is unlikely to take a more favorable view of Aboriginal sovereignty in the contemporary context without being presented salient arguments for recognizing the continued existence of a particular right that was fettered but not extinguished by treaty. In *Marshall*, the Court demonstrated that it could break away from the formalist constructs, however, a salient argument must be made to converge Aboriginal rights under the *Constitution* with the basis going to prior sovereignty that early relations recognized as absolute.¹¹⁷ The Su-

¹¹⁵ Anaya, S. James, *Indigenous Peoples in International Law*, New York, Oxford University Press, 1996, p. 183.

¹¹⁶ See for example, Elliot, David, “Delgamuukw: Back to Court?” 26 *Man, L. J.*, 97 (1998).

¹¹⁷ For an excellent analysis of formalism and constitutionalism in the U. S. federal Indian law see Frickey, Philip P., “A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers”, 109 *Yale L. J.* 1 (1999). Frickey captures the legal tension of the U. S. tribal experience when he states, “When Congress opened a reservation area to nonmember entry, that action had the legal effect of preemptively immunizing nonmembers from

preme Court needs a contemporary comfort level with the proposition that Aboriginal people are sovereign to avoid the contradictory role between moderator of colonialism and defender of constitutional rights.

In the second part of this paper I attempted to use the dynamic interpretation of Aboriginal sovereignty and apply it to new forms of institutional innovation. Specifically, I examined the role of taxation as a means of providing wealth redistribution on reserve. I dispelled the myth of tax exemption and argued that tax exemption should be viewed as a constitutional right that forms a strategic component to the project reasserting Aboriginal identity. I discussed the U. S. research on Aboriginal economic development and concluded that it works best when practical factors, such as leadership and autonomous institutional sovereignty, are tied to Aboriginal constitutional rights that are exercised on the basis of prior sovereignty. Finally, I attempted to develop three models of innovative taxation and finance that blended public goals and private means. The practical manifestation and exercise of Aboriginal rights in Canada is an area of further research and the U. S. tribal experience offers valuable and strategic insights. The issue of off reserve, specifically urban Aboriginal rights has not been addressed in this paper and should be an area of continued research.

tribal authority... Similarly, although the plenary power doctrine in federal Indian law authorizes Congress to regulate even the most local of tribal affairs on the reservation, the backdrop of unexercised congressional power is not understood to preempt tribal authority automatically, for otherwise tribal sovereignty would have vanished completely...".

V. APPENDIX
INNOVATIVE SYSTEMS OF ABORIGINAL
TAXATION AND FINANCE

Figure 2
Pilot Project for Aboriginal retirement savings plan

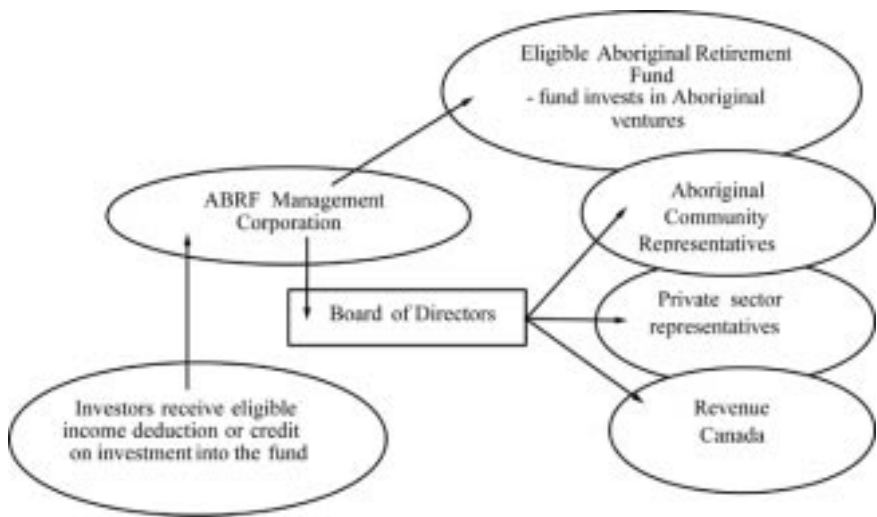


Figure 3
 Public Goals-Private Means
 Pilot Project on Hybrid Labor Venture Fund in Aboriginal Canada

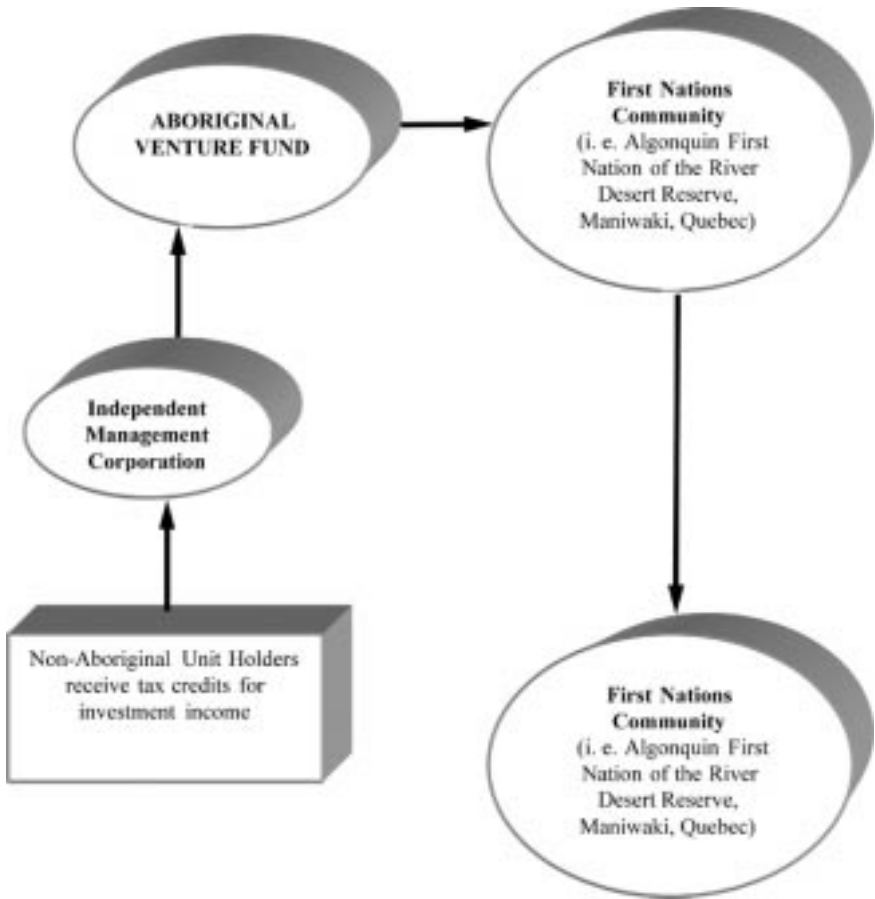
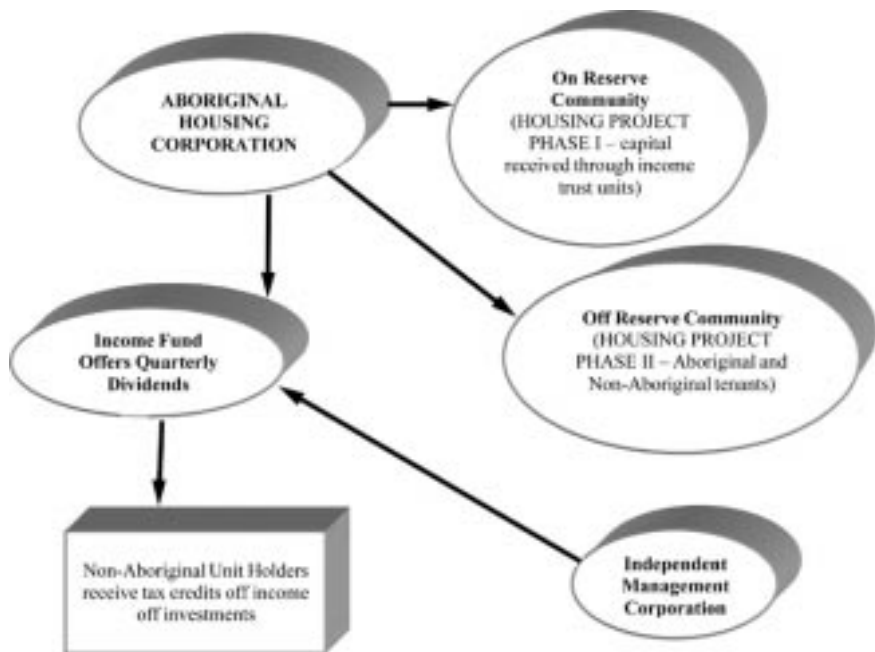


Figure 4

Private Goals-Private Means-New financial Instruments & the Aboriginal Income Trust Units for Housing Development



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