No. T - 2288 - 92

FEDERAL COURT OF CANADA
TRIAL DIVISION

Between:

CHARLES JOHN GORDON BENOIT,
ATHABASCA TRIBAL CORPORATION,
THE LESSER SLAVE LAKE REGIONAL COUNCIL
and KEE TAS KEE NOW TRIBAL COUNCIL

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Pursuant to s. 57 of the *Federal Court Act*

- and -

CANADIAN TAXPAYERS FEDERATION

Intervener

MEMORANDUM OF FACT AND LAW

OF THE CANADIAN TAXPAYERS FEDERATION

[Note: unless otherwise stated, all emphases are by Counsel]

PART I

STATEMENT OF FACTS

1. On September 22, 1899, Commissioners appointed by the Government of Canada and representing Her Majesty the Queen in right of Canada (the "Crown") and some Chiefs and Headmen representing Cree, Beaver, Chipewyan and other Indians, inhabitants of certain lands in Alberta, the Northwest Territories and British Columbia, signed a Treaty ("Treaty No. 8" or "Treaty 8") which included the following:

> (a) And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever size, of the families represented at the time and place of payment, twelve dollars.
>
> (b) And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, Do Hereby Solemnly Promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.
>
> (c) THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory;...

2. There is no express or implied reference to taxation or exemption therefrom in Treaty 8.

3. On the same date, the Commissioners prepared their Report to the Superintendent General of Indian Affairs which included the following:

> (a) There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service.

(b) We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin;...

4. Subsequently, Treaty 8 was adhered to by Chiefs and Headmen representing other Indians within defined areas.

5. The Amended Statement of Claim includes the following allegations:

1. The Plaintiffs ... are Indians, as defined by the Indian Act (Canada); and are entitled to claim the benefits of Treaty No. 8....

2. On or about July 1, 1899, ... the Queen, ..., entered into a solemn engagement, known as Treaty No. 8, with representatives of the First Nations....

4. The promises made, and the rights given, under Treaty No. 8, were both written and oral.

7. The Treaty Commissioners promised the First Nations that, inter alia, Treaty No. 8 did not open the way to the imposition of any tax.... The subject promise is a term of Treaty No. 8 and provided a corresponding right to the members of First Nations who are entitled to the benefits of Treaty No. 8, not to have to pay any tax imposed upon them at any time for any reason....

8. The subject promise and subject right were not extinguished by Her Majesty the Queen or by Canada or by any other party prior to April 17, 1982, and are now protected from extinguishment by the Constitution Act, 1982.

9. Despite the subject promised, the Plaintiffs have been subjected to payment of tax pursuant to the requirements of various acts and regulations enacted by Canada, and by the Province of Alberta, including, but not limited to, the Income Tax Act (Canada) and the Excise Tax (Canada).

6. The prayer in the Amended Statement of Claim includes the following claim for relief:

1. A Declaration that:

(d) the subject promise and the subject right ... are now protected from extinguishment by the Constitution Act, 1982 and are binding on Canada to honour and uphold.

(e) the imposition of any tax by Canada on the Plaintiffs is an unjustified breach of the subject promise and an unjustified infringement of the subject right."

7. In response to a Demand for Particulars by the Crown, the Plaintiffs stated the following:

1. The term of Treaty No. 8 upon which the Plaintiffs rely refers to 'any tax'. Accordingly, the taxes to which the Plaintiffs refer in paragraph 9 of the Statement of Claim are any and all taxes levied by the Defendant as against the Plaintiffs, or any of them, and paid by the Plaintiffs, or any of them.

8. The Amended Defence of the Crown denies the allegations of the Plaintiffs and, in the alternative, pleads

11. ... if the Plaintiffs were exempt from all taxation, and if that exemption was not extinguished prior to April 17, 1982, ..., the limitation of the Plaintiffs' alleged exemption is justified by the valid legislative objective of providing public funding to finance the many and diverse needs of people in Canada, who include the Plaintiffs, and by public objectives including economic fairness and regional fairness.

9. It is unclear from the pleadings whether the Plaintiffs now seek a similar declaration in respect of provincial and territorial tax legislation in the provinces and territories encompassed within Treaty 8 (including, specifically, Alberta).

10. The Attorney General of Alberta is participating in the action pursuant to a Notice of Constitutional Question dated June 30, 1999, given by the Plaintiffs, which includes the following:

The legal basis for this constitutional question is as follows:

The application of Federal taxation provisions to Indian beneficiaries of Treaty 8 is inconsistent with section 35 of the *Constitution Act, 1982*, Schedule B to *Canada Act 1982* (U.K.), and is therefore, to the extent of the inconsistency, of no force and effect.

11. By Order of the Federal Court of Appeal pronounced March 15, 2001, The Canadian Taxpayers Federation was granted leave to intervene in this action on the following conditions:

1) The Appellant shall be served with all materials of the other parties.

2) The Appellant will not itself lead evidence but will rely on the evidence adduced by the parties and on the documents referred to in these reasons as well as any other documents of which the Court may take judicial notice.

3) The Appellant will be allowed to be present at trial and to make such written and oral argument as the Trial Judge permits.

4) The Appellant will not seek costs.

5) The Appellant will not itself seek to appeal any judgment, but will be allowed to participate in any appeal.

PART II

POINTS IN ISSUE

A. PARLIAMENT HAD AND HAS NO JURISDICTION UNDER THE ***CONSTITUTION ACT, 1867***, TO EXEMPT INDIANS FROM TAXATION BY LEGISLATION UNRELATED TO THE PROTECTION OR ADVANCEMENT OF INDIANS *QUA* INDIANS.

B. AS OF SEPTEMBER 22, 1899, NO ACT OF PARLIAMENT AUTHORIZED THE COMMISSIONERS TO MAKE AN AGREEMENT EXEMPTING TREATY 8 INDIANS FROM TAXATION.

C. THE COURT SHOULD REFUSE THE DECLARATION SOUGHT BECAUSE AFFIRMATION OF AN AGREEMENT TO EXEMPT TREATY 8 INDIANS FROM TAXATION WOULD CREATE A LEGISLATIVE SCHEME OF RACIAL DISCRIMINATION CONTRARY TO HISTORIC, INTERNATIONAL AND DOMESTIC SOCIAL AND LEGISLATIVE PRINCIPLES SUPPORTING RACIAL EQUALITY.

D. ON THEIR PROPER INTERPRETATION, THE WORDS OF TREATY 8 AND THE DISCUSSIONS BETWEEN THE INDIANS AND THE COMMISSIONERS COULD NOT CREATE A TAX EXEMPTION BASED ON RACIAL DISCRIMINATION BECAUSE SUCH AN INTERPRETATION WOULD CAUSE A BREACH BY CANADA OF TREATIES, COVENANTS, CHARTERS, CONVENTIONS AND DECLARATIONS ENTERED INTO OR ADHERED TO BY CANADA.

E. THE COURT OUGHT TO REFUSE THE DECLARATION SOUGHT BECAUSE A TAX EXEMPTION BASED ON RACIAL DISCRIMINATION WOULD VIOLATE THE ***CANADIAN CHARTER OF RIGHTS AND FREEDOM***.

PART III

SUBMISSIONS

A. PARLIAMENT HAD AND HAS NO JURISDICTION UNDER THE ***CONSTITUTION ACT, 1867***, TO EXEMPT INDIANS FROM TAXATION BY LEGISLATION UNRELATED TO THE PROTECTION OR ADVANCEMENT OF INDIANS *QUA* INDIANS.

12. Granting the declaration sought by the Plaintiffs would have the effect of amending or forcing the amendment, retroactively and currently, and barring in the future, every Act of Parliament and subordinate legislation thereunder which imposed any tax, fee, cost, assessment or other charge in the nature of a tax otherwise payable by Treaty 8 Indians. Paradoxically, such amendments would be of no benefit whatever to Indians not covered by Treaty 8.

13. What constitutes a tax was discussed by Duff, J. in ***Lawson v. Interior Tree Fruit and Vegetable Committee of Direction***, [1931] S.C.R. 357 [**TAB 6**], at p. 363:

> That they are taxes, I have no doubt. In the first place they are enforceable by law. ....Then they are imposed under the authority of the legislature. They are imposed by a public body. ....The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the legislature, the purposes for which they are given are conclusively presumed to be public purposes.

14. In ***Four B Manufacturing Ltd. v. U.G.W.***, [1980] 1 S.C.R. 1031 [**TAB 4**], the issue was whether provincial labour legislation could apply to Indians working on a reserve for an Indian owned company. The majority of the Supreme Court held as follows:

> 35 I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of

which the Band has expressly refused to assume and from which it has elected to withdraw its name.

> 36 But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. ....

15. In ***Nowegijick v. The Queen***, [1983] 1 S.C.R. 29 [**TAB 11**], the constitutional basis for exemption of Indians generally from taxation was explained:

> 24 Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.
>
> 37 I conclude by saying that nothing in these reasons should be taken as implying that no Indian shall ever pay tax of any kind. Counsel for the appellant and counsel for the intervenants do not take that position. Nor do I. We are concerned here with personal property situated on a reserve and only with property situated on a reserve.

16. In ***Mitchell v. Peguis Indian Band***, [1990] 2 S.C.R. 85 [**TAB 9**], the distinction between exemption of Indians from taxation in respect of their reserve properties and interests and off-reserve assets and income was discussed. Per Dickson C.J.C.:

> 36 One can overemphasize the extent to which aboriginal peoples are affected only by the decisions and actions of the federal Crown. Part and parcel of the division of powers is the incidental effects doctrine according to which a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other; ... As long as Indians are not affected qua Indians, a provincial law may affect Indians, and significantly so in terms of everyday life. Section 88 of the Indian Act greatly increases the extent to which the provinces can affect Indians by acknowledging the validity of laws of general application, unless they are supplanted by treaties or federal law. ....

La Forest J. (Sopinka and Gonthier JJ. concurring):

79 Section 87, we saw, confers a tax exemption on Indians with respect to their interest in reserve lands or surrendered lands, and their personal property situated on reserves. It is instructive to note that such exemptions from taxation predate Confederation. Professor Bartlett in his monograph, Indians and Taxation in Canada, 2nd ed. (1987), traces the origins of statutory tax exemptions for natives to an Act of the province of Canada passed in 1850. Section 4 of this statute, entitled An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, S.C. 1850, c. 74, provides:

> IV. That no taxes shall be levied or assessed upon any Indian or any person inter-married with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person inter-married with any Indian so long as he, she or they shall reside on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians.

80 As Professor Bartlett notes, this exemption from taxation remained unchanged until the passage of Canada's first Indian Act, S.C. 1876, c. 18. In that Act, which effected a comprehensive consolidation of laws respecting Indians, Parliament, in terms that presage the wording of the present-day s. 87, provided in ss. 64 and 65:

> 64. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

81 Section 89 weaves another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process. In terms that call to mind the present-day section, Parliament in 1876 stated in s. 66 of the first Indian Act:

> 66. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise upon real or personal property of any Indian or non-treaty Indian within Canada, *except on real or personal property subject to taxation under section sixty-four of this Act*: Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid. [emphasis added]

I draw attention to the fact that s. 64, reproduced above, provides that Indians holding lands or personal property in their own right outside the reserve hold that property on the same basis as all other similarly situated property holders.

84 As is clear from the comments of the Chief Justice in *Guerin v. R.*, [1984] 2 S.C.R. 335 at 383, [1984] 6 W.W.R. 487, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 (sub nom *Guerin v. Can.*), these legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use; ....

85 I take it to be obvious that the protections afforded against taxation and attachment by ss. 87 and 89 of the Indian Act go hand-in-hand with these restraints on the alienability of land. I noted above that the Crown, as part of the consideration for the cession of Indian lands, often committed itself to giving goods and services to the natives concerned. Taking but one example, by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfilment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like; ....

86 In summary, the historical record makes it clear that ss. 87 and 89 of the Indian Act, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.

87 It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use deal with it on the same basis as all other Canadians.

91 I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. ....

92 If any additional evidence is needed to confirm this conclusion, it may be found in an examination of s. 89(2). By the terms of this provision, personal property sold to an Indian may still be subject to attachment, even when situated on a reserve, in that a person who sells to an Indian purchaser under a conditional sales agreement retains his right to the property pending completion of the agreement. There could be no clearer illustration of the fact that s. 89 is not meant to arm Indians with privileges they can exercise in acquiring and dealing with property in the general marketplace, but, rather, is simply limited in its purpose to preventing non-natives from interfering with the ability of Indians to enjoy such duly acquired property as they hold on their reserve lands. That, of course, is why s. 89 places no constraints on the ability of Indians to charge, pledge or mortgage property among themselves.

102 My conclusion rests on the fact that such a result cannot be reconciled with the scope of the protections that the Crown has traditionally extended to the property of natives. As I stated earlier, a review of the obligations that the Crown has assumed in this area shows that it has done no more than seek to shield the property of Indians that has an immediate and discernible nexus to the occupancy of reserve lands from interference at the hands of non-natives. The legislation has always distinguished between property situated on reserves and property Indians hold outside reserves. There is simply no evidence that the Crown has ever taken the position that it must protect property simply because that property is held by an Indian as opposed to a non-native.

103 Indeed, unless one were to take the view that there exist two laws of contract, one applying to Indians and one to non-Indians, it would be difficult to rationalize a result that saw exemptions against taxation and distraint apply in respect of property simply because the person acquiring it happened to be an Indian. ....

104 When Indian bands enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements

with the provincial Crowns in the same way as with private interests. The provincial Crowns are, after all, important players in the marketplace. If, then, an Indian band enters into a normal business transaction, be it with a provincial Crown or a private corporation, and acquires personal property, be it in the form of chattels or debt obligations, how is one to characterize the property concerned? To my mind, it makes no sense to compare it with the property that enures to Indians pursuant to treaties and their ancillary agreements. Indians have a plenary entitlement to their treaty property; it is owed to them qua Indians. Personal property acquired by Indians in normal business dealings is clearly different; it is simply property anyone else might have acquired, and I can see no reason why in those circumstances Indians should not be treated in the same way as other people.

105 There can be no doubt, on a reading of s. 90(1)(*b*), that it would not apply to any personal property that an Indian band might acquire in connection with an ordinary commercial agreement with a private concern. Property of that nature will only be protected once it can be established that it is situated on a reserve. Accordingly, any dealings in the commercial mainstream in property acquired in this manner will fall to be regulated by the laws of general application. **Indians will enjoy no exemptions from taxation in respect of this property**, and will be free to deal with it in the same manner as any other citizen. In addition, provided the property is not situated on reserve lands, third parties will be free to issue execution on this property. I think it would be truly paradoxical if it were to be otherwise. ....

17. To like effect is the decision of the Federal Court of Appeal in ***Southwind v. The Queen***, 1998 CarswellNat 2; 156 D.L.R. (4^{th}) 87, [**TAB 14**].

18. In ***Van der Peet v. The Queen***, [1996] 2 S.C.R. 507 [**TAB 16**], the Supreme Court dealt with a claim by Indians to an aboriginal right to a commercial fishery. Lamer, C.J.C., for the majority, commented as follows [Court's emphases]:

18 In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 336.

19 Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. ....

> 20 The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.
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> 46 In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Counsel emphasis]
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> 55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
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> 59 A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

19. It is not pleaded or proved that total exemption from taxation is "a practice, custom or tradition integral to the distinctive culture" of the Treaty 8 Indians, a "defining feature" of their culture or that it made their society what it was. If this was true, their distinctive culture has nonetheless survived more than 100 years of paying taxes since the Treaty was first signed.

20. The Federal Court of Appeal in an unanimous decision in ***Folster v. The Queen***, (1997) 3 F.C. 269 [**TAB 3**], commented as follows:

> If an Indian chooses to work for an employer off a reserve, then income earned in the general commercial mainstream, in the day-to-day "affairs of life" off the reserved lands,

is not personal property exempt from taxation pursuant to section 87 of the *Indian Act*. To allow the appellant an exemption from taxation of this income would be an attempt to remedy the economically disadvantaged position of Indians who cannot find employment on the reserve. This is not the purpose of the exemption from taxation provided by section 87 of the *Indian Act*.

21. In ***Union of New Brunswick Indians v. New Brunswick***, [1998] 1 S.C.R. 1161 [**TAB 15**], the Court dealt with a claim that Indians were exempt from paying sales taxes on purchases of goods off reserve for use and consumption on the reserve. McLaughlin, C.J.C. (for the majority) commented as follows:

> 38 The first difficulty with this argument is that it takes the purpose of s. 87 far beyond that articulated by this Court in *Williams* – to prevent Indian property on Indian reserves from being eroded by taxation or claimed by creditors. No support has been offered for the proposed extension, except that this would economically benefit Indians. But that, this Court has stated, is not the purpose ofs. 87: see *Mitchell*, and *Williams*, supra. La Forest I. in *Mitchell* (at p. 133) specifically cautioned against attributing an expansive scope to the s. 87 exemption:
>
> > ...one must guard against ascribing an overly broad purpose to ss. 87 and 89. These 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 intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. [(Court) Emphasis added.]
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> 39 The second difficulty with this argument is that it flies in the face of the wording of s. 87[(1)](b), which confines the protection from taxation to property situated on a reserve. The respondents attempt to overcome this difficulty by relying on s. 87(2) which provides that "[n]o Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (l)(a) or (b) or is otherwise subject to taxation in respect of any such property". But this section does not extend the ambit of s. 87[(1)](a) and (b). Section 87(1) states what property is protected from taxation. Section 87(2) states that tax cannot be levied in respect of the ownership, occupation, possession or use of this property. It does not enlarge the class of property subject to the exemption, but merely states the types of tax that are prohibited on a particular type of property. It does not change the rule that for property to be exempt from taxation under s. 87, it must be situated on a reserve. Courts have consistently held that s. 87[(1)](b) is confined to property physically situated on a reserve or whose paramount location is on a reserve: see *Francis*, *Mitchell, Williams, Lewis*, and *Leighton, supra*.

> 40 A third difficulty with this argument is that the history of s. 87 belies the conclusion that Parliament intended it to provide general tax protection for off-reserve property. The tax exemption began in 1850 as a prohibition against taxes on Indians residing on Indian lands. It was amended in 1876 to prevent taxes on Indian property unless it was held outside the reserve. It now prohibits taxation in respect of Indian property that is situated on the reserve: see Richard H. Bartlett. Indians and Taxation in Canada (3rd ed. 1992). Over the years Parliament has explicitly limited and narrowed the scope of what is now s. 87 to protect from taxation only property that is situated on the reserve.
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> 41 A fourth difficulty with this argument is that it rests on the assumption that providing a tax exemption to Indians for property purchased off-reserve will benefit Indians uniformly. The argument is that Parliament must have intended the tax to apply to off-reserve purchases because this is required to protect and enhance the position of Indians. Yet it is far from clear that Indians across Canada would benefit from such an interpretation.

22. In ***Mitchell v. Minister of National Revenue***, 2001 SCC 33 [**TAB 8**], the Supreme Court dealt with a claim to a treaty right to exemption by Mohawk Indians from customs duties for goods brought into Canada from the United States. McLaughlin, C.J.C. (for the majority) considered the meaning and effect of S. 35 of the Charter:

> 12 In the seminal cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw, supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it.
>
> It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was". .... This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

> 60 Certainly it cannot be said that the Mohawk culture would have been "fundamentally altered" (para. 59) without this trade, in the language of *Van der Peet*. It was not vital to the Mohawks' collective identity. It was not something that "truly made the society what it was" (*Van der Peet, supra*, at para. 55).

23. In a separate opinion, Binnie, J., commented as follows:

> 133 In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the Constitution Act, 1867 ("Indians, and Lands reserved for the Indians") was plenary. Indians were said to be federal people whose lives were wholly subject to federal "regulation". This was rejected by the courts, which ruled that. while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. <u>For other purposes he or she must be recognized and treated as an ordinary member of Canadian society.</u>

24. In ***Shilling v. Minister of National Revenue***, 2001, CarswellNat 1264; 2001 FCA 178 [**TAB 12**], the Federal Court of Appeal distinguished taxation of income of an Indian earned as an integral part of being an Indian from income earned in the commercial mainstream:

> 48 The reason is that it is the services provided by the employee that create an entitlement to the receipt of employment income. That an Indian is employed on a reserve is an indication that he or she is acquiring employment income as an Indian *qua* Indian, in employment integral to the life of the reserve: *Folster, supra*, at paragraph 14. The opposite would also be true, that is, employment off-reserve is an indication that the Indian is acquiring employment income in the commercial mainstream.
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> 65 However, in the context of determining the location of intangible property for the purpose of section 87, "commercial mainstream" is to be contrasted with "integral to the life of a reserve": *Folster, supra*, at paragraph 14. There is no doubt that, if Ms. Shilling had been an employee of AHT, her employment income would not have been exempt from income tax. The purpose of the tax exemption in paragraph 87(1)(*b*) is not to address the general economically disadvantaged position of Indians in Canada.
>
> 66 Hence, Ms. Shilling's work must be characterised as being in the "commercial mainstream", unless the fact that she is employed by a business with its head office and bank account on reserves is in itself sufficient to make her employment "integral to the life of the reserve". For the reasons that we have given, we think not.

25. Treaty 8 must be interpreted consistently with the legislative jurisdiction of Parliament under the Constitution, viz., as preserving or advancing the culture of the Indians *qua* Indians.

Since the claim by the Plaintiffs for universal tax exemption is not based on aboriginal attributes or the protection of native lands or property or reserve-based income, the declaration sought cannot be granted.

B. AS OF SEPTEMBER 22, 1899, NO ACT OF PARLIAMENT AUTHORIZED THE COMMISSIONERS TO MAKE AN AGREEMENT EXEMPTING TREATY 8 INDIANS FROM TAXATION.

26. Reinforcing *Magna Carta*, the ***Bill of Rights*** maintained the principle that no tax could be imposed without an Act of Parliament:

> "**487. Taxation.** The Crown or its ministers may not impose direct or indirect taxes without parliamentary sanction. It is enacted that no man shall be compelled to make or yield any gift, loan, benevolence, or tax without common consent by Act of Parliament;... In fact no exercise of the prerogative which involves the imposition of a charge upon the people can take full effect without parliamentary sanction."
>
> 7 ***Halsbury*** (3rd ed.) 231.

27. The ***Constitution Act, 1867***, includes the following comparable provisions:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

28. The ***Constitution Act, 1867***, gives Parliament and the Provinces exclusive legislative jurisdiction over all forms of taxation and makes no provision by which treaties could delegate to Indians authority to legislate in respect of the imposition of or exemption from, taxes:

91. ... [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

1A. The Public Debt and Property.

3. The raising of Money by any Mode or System of Taxation.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

2. Direct taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."

29. This issue was considered by the Supreme Court of Canada in **Re Eurig Estate**, [1998] 2 S.C.R. 565 [**TAB 2**]. Per Major, J. (for the majority):

30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

31 In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."

32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the

> Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

30. On this constitutional principle, there being no Act of Parliament authorizing the Crown's Commissioners to agree to exempt Treaty 8 Indians from taxation or, conversely, to impose the entire burden of taxation on all non-Treaty 8 Indian people of Canada, the words of the Treaty and concurrent discussions cannot be construed as creating such tax exemption or tax burden.

C. THE COURT SHOULD REFUSE THE DECLARATION SOUGHT BECAUSE AFFIRMATION OF AN AGREEMENT TO EXEMPT TREATY 8 INDIANS FROM TAXATION INDIANS WOULD CREATE A LEGISLATIVE SCHEME OF RACIAL DISCRIMINATION CONTRARY TO HISTORIC, INTERNATIONAL AND DOMESTIC SOCIAL AND LEGISLATIVE PRINCIPLES SUPPORTING RACIAL EQUALITY.

31. Granting the declaration sought would operate so as to exempt a class of Canadians, namely Treaty 8 Indians, solely on the basis of their race, national or ethnic origin, viz., as Indians, or, conversely, to discriminate against all persons other than Treaty 8 Indians because of their race, national or ethnic origin, viz., as non-Indians.

32. The history of mankind has been advancement from slavery, the principal attributes of which were inequality and discrimination based on race or ethnic origin, to freedom and equality.

33. Extracted from ***Bartlett's Familiar Quotations***, Fifteenth and 125th Anniversary edition:

> ***Bartlett*** 422:12 - The history of the world is none other than the progress of the consciousness of freedom.

George Wilhelm Friedrich Hegel, 1770-1831

Bartlett 80:17 - Our constitution is named a democracy, because it is in the hands not of the few but of the many. But our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honours talent in every branch of achievement, not for any sectional reason but on the grounds of excellence alone.

Thucydides, c. 460-400 B.C.

Bartlett 88:6 - If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost.

Aristotle, c. 384-322 B.C.

Bartlett 88:8 - Democracy arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal.

Aristotle, c. 384-322 B.C.

Bartlett 387:9 - We hold these truths to be self-evident; that all men are created equal....

United States Declaration of Independence, July 4, 1776

34. On August 26, 1789, the National Assembly of France approved the ***Declaration of the Rights of Man and of the Citizen***, which included the following:

1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good."

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

35. Compare this comment with Canada's ***Citizenship Act***, *infra*, paragraph 75.

36. Slavery in England was rejected in principle by Lord Mansfield, C.J. in ***Somerset v. Stewart***, (1772) Lofft 1, at 19.

37. The British Parliament abolished slavery within its jurisdiction by enacting the ***Abolition of the Slave Trade Act***, (U.K.) 1807, the ***Slavery Abolition Act***, 1833 (3 & 4 Will. 4), c. 73, the ***Slave Trade Act***, 1824 (5 Geo. 4), c.113, the ***Slave Trade Act***, 1843 (6 & 7 Vict.), c.98, and the ***Slave Trade Act***, 1873 (36 & 37 Vict.), c. 88.

38 ***Halsbury*** (3rd ed.) paragraphs 353 to 362.

38. Robert Maynard Hutchins, 1899-1977, summarized the principles as follows:

> ***Bartlett*** 845:15 - Equality and justice, the two great distinguishing characteristics of democracy, follow inevitably from the conception of men, all men, as rational and spiritual beings.
>
> ***Bartlett*** 845: 16 - The death of democracy is not likely to be assassination from ambush. It will be a slow extinction from apathy, indifference, and undernourishment.

39. President Abraham Lincoln, under his executive powers, promulgated the *Emancipation Proclamation*, which included the following:

> That on the 1st day of January, A.D. 1863, all persons held as slaves within any State or designated part of a State the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.
>
> And by virtue of the power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are, and henceforward shall be, free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

40. In the 1893 version of his ***Autobiographies***, Frederick Douglass, the renowned slave who escaped to freedom and provided world-wide inspiration for the elimination of slavery, musing on the changes effected by the Emancipation Proclamation, commented as follows, at 819:

> The ballot in the hands of the negro was necessary to open the door of the school-house and to unlock to him the treasures of its knowledge. Granting all that was said of his ignorance, I used to say, "if the negro knows enough to fight for his country he knows enough to vote; if he knows enough to pay taxes for the support of the government, he knows enough to vote;...
>
> At 980:
>
> Social equality does not necessarily follow from civil equality, and yet for the purpose of a hell-black and damning prejudice, our papers still insist that the Civil Rights Bill is a bill to establish social equality.
>
> If it is a bill for social equality , so is the Declaration of Independence, which declares that all men have equal rights; so is the Sermon on the Mount; so is the golden rule that commands us to do to others as we would that others should do to us; so is the teaching of the Apostle that of one blood God has made all nations to dwell on the face of the earth; so is the Constitution of the United States, and so are the laws and customs of every civilized country in the world; for nowhere, outside of the United States, is any man denied civil rights on account of his color.
>
> ***Frederick Douglass Autobiographies,*** The Library of America, 1966.

Speaking on August 1, 1880, at a meeting to celebrate West Indian emancipation, Douglass saw paying taxes as a fundamental attribute of freedom as follows:

‘Today the negro, starting from nothing, pays taxes upon six millions in Georgia, and forty millions in Louisiana."

Autobiographies*, supra*.

42. Another great historical figure in the liberation of the black people of America was

Booker T. Washington, who, in an article in 1899 Atlantic Monthly 84, entitled "The Case of the

Negro", commented as follows:

> The Negro in the South has it within his power, if he properly utilizes the forces at hand, to make of himself such a valuable factor in the life of the South that for the most part he need not seek privileges, but they will be conferred upon him. To bring this about, the Negro must begin at the bottom and lay a sure foundation, and not be lured by any temptation into trying to rise on a false footing. While the Negro is laying this foundation, he will need help and sympathy and justice from the law. Progress by any

other method will be but temporary and superficial, and the end of it will be worse than the beginning. American slavery was a great curse to both races, and I should be the last to apologize for it; but in the providence of God I believe that slavery laid the foundation for the solution of the problem that is now before us in the South. Under slavery, the Negro was taught every trade, every industry, that furnishes the means of earning a living. Now if on this foundation, laid in a rather crude way, it is true, but a foundation nevertheless, we can gradually grow and improve, the future for us is bright. Let me be more specific. Agriculture is or has been the basic industry of nearly every race or nation that has succeeded. The Negro got a knowledge of this under slavery: hence in a large measure he is in possession of this industry in the South to-day. Taking the whole South, I should say that eighty per cent of the Negroes live by agriculture in some form, though it is often a very primitive and crude form. The Negro can buy land in the South, as a rule, wherever the white man can buy it, and at very low prices. Now, since the bulk of our people already have a foundation in agriculture, are at their best when living in the country engaged in agricultural pursuits, plainly, the best thing, the logical thing, is to turn the larger part of our strength in a direction that will put the Negroes among the most skilled agricultural people in the world. ....The Negro who can make himself so conspicuous as a successful farmer, a large taxpayer, a wise helper of his fellow men, as to be placed in a position of trust and honor by natural selection, whether the position be political or not, is a hundredfold more secure in that position than one placed there by mere outside force or pressure.

.... Once a number of Negroes rise to the point where they own and operate the most successful farms, are among the largest taxpayers in their county, are moral and intelligent, I do not believe that in many portions of the South such men need long be denied the right of saying by their votes how they prefer their property to be taxed, and who are to make and administer the laws.

.... As I have already said, it is not to the best interests of the white race of the South that the Negro be deprived of any privilege guaranteed him by the Constitution of the United States. This would put upon the South a burden under which no government could stand and prosper. Every article in our Federal Constitution was placed there with a view of stimulating and encouraging the highest type of citizenship. To continue to tax the Negro without giving him the right to vote, as fast as he qualifies himself in education and property for voting, would insure the alienation of the affections of the Negro from the state in which he lives, and would be the reversal of the fundamental principles of government for which our states have stood. In other ways than this the injury would be as great to the white man as to the Negro. Taxation without the hope of becoming voters would take away from one third of the citizens of the Gulf states their interest in government, and a stimulus to become taxpayers or to secure education, and thus be able and willing to bear their share of the cost of education and government, which now rests so heavily upon the white taxpayers of the South. The more the Negro is stimulated and encouraged, the sooner will he be able to bear a larger share of the burdens of the South.

43. U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., in ***Compania de Tabacos v. Collector***, [1904] 1 U.S. 87 at 100, said, "Taxes are what we pay for civilized society."

44. U.S. Supreme Court Justice John Marshall Harlan in his famous dissenting opinion in ***Plessy v. Ferguson*** [1896]163 U.S. 537 at 559, said,

> In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.

45. Mary McLeod Bethune (1875-1955), American freedom activist, raised and answered the cogent issue:

> ***Bartlett*** 753:6 - What does the Negro want? His answer is very simple. He wants only what all other Americans want. He wants opportunity to make real what the Declaration of Independence and the Constitution and the Bill of Rights say, what the Four Freedoms establish. While he knows these ideals are open to no man completely, he wants only his equal chance to obtain them.

46. Shortly before his assassination, the revered American black leader and Nobel Peace Prize recipient Martin Luther King (1929-1968) summed up his vision of the future in his well known remarks:

> ***Bartlett*** 909:10 - I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character.

47. Nelson Mandela, the greatest living exponent of freedom and equality for all mankind, in his auto-biography, ***Long Walk to Freedom***, Little, Brown & Company (Canada) Limited, 1994, discussed the meeting in June, 1955, of the Congress of People who proclaimed the Freedom Charter as follows at 174:

> Though the Congress of the People had been broken up, the charter itself became a great beacon for the liberation struggle. Like other enduring political documents, such as the

American Declaration of Independence, the French Declaration of the Rights of Man, and the Communist Manifesto, the Freedom Charter is a mixture of practical goals and poetic language. It extols the abolition of racial discrimination and the achievement of equal rights for all. It welcomes all who embrace freedom to participate in the making of a democratic, nonracial South Africa. It captured the hopes and dreams of the people and acted as a blueprint for the liberation struggle and the future of the nation. The preamble reads:

'We, the people of South Africa, declare for all our country and the world to know: -

'That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people;
'That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

'That our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;

'That only a democratic state, based on the will of the people, can secure to all their birthright without distinction of colour, race, sex or belief;

'And therefore, we, the people of South Africa, black and white, together- equals, countrymen and brothers -adopt this FREEDOM CHARTER. ....'

. . . . . .

'That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people;'

At 175:

'The rights of the people shall be the same regardless of race, colour or sex.

'ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!

'There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

. . . . . .

'The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;

'All apartheid laws and practices shall be set aside.'

48. On October, 1962, at his trial on charges of inciting African workers to strike and leaving the country without valid travel documents, Mandela's closing argument on sentence included the following at 332:

> Whatever sentence Your Worship sees fit to impose upon me for the crime for which I have been convicted before this court, may it rest assured that when my sentence has been completed I will still be moved, as men are always moved, by their conscience; I will still be moved by my dislike of the race discrimination against my people when I come out from serving my sentence, to take up again, as best I can, the struggle for the removal of those injustices until they are finally abolished once and for all.

49. He was sentenced to 5 years imprisonment with no parole.

50. Subsequently, Mandela and others were charged with sabotage and conspiracy to overthrow the government (the Rivonia Trial). In February, 1964, Mandela addressed the Court as follows at 367:

> From my reading of Marxist literature and from conversations with Marxists, I have gained the impression that Communists regard the parliamentary system of the West as undemocratic and reactionary. But, on the contrary, I am an admirer of such a system.
>
> The Magna Carta, the Petition of Rights and the Bill of Rights, are documents which are held in veneration by democrats throughout the world. I have great respect for British political institutions, and for the country's system of justice. I regard the British Parliament as the most democratic institution in the world, and the independence and impartiality of its judiciary never fail to arouse my admiration. The American Congress, the country's doctrine of separation of powers, as well as the independence of its judiciary, arouse in me similar sentiments."
>
> At 368:
>
> Africans want a just share in the whole of South Africa; they want security and a stake in society. Above all, we want equal political rights, because without them our disabilities will be permanent. I know this sounds revolutionary to the whites in this country, because the majority of voters will be Africans.This makes the white man fear democracy....
>
> During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which al1persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to

achieve. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

51. In June, 1964, Mandela was found guilty and sentenced to life imprisonment.

52. On February 10, 1990, Mandela, after his release from prison at the age of 71, proclaimed, "My ten thousand days of imprisonment were over."

53. Upon his return to society, Mandela was unchanged in his determination to establish freedom and equality for all people of South Africa. At 565:

> Friends, comrades and fellow South Africans. I greet you all in the name of peace, democracy and freedom for all! I stand here before you not as a prophet but as a humble servant of you, the people. Your tireless and heroic sacrifices have made it possible for me to be here today. I therefore place the remaining years of my life in your hands.

At 566:

> I told the crowd in no uncertain terms that apartheid had no future in South Africa, and that the people must not let up their campaign of mass action.

At 569, to the press:

> Any man or woman who abandons apartheid will be embraced in our struggle for a democratic, non-r

54. In 1991, of a Convention for a Democratic South Africa he reported, at 596:

> On the convention's first day, the lion's share of the participating parties, including the National Party and the ANC, endorsed a Declaration of Intent, which committed all parties to support an undivided South Africa whose supreme law would be a constitution safeguarded by an independent judiciary. The country's legal system would guarantee equality before the law, and a bill of rights would be drawn up to protect civil liberties. In short, there would be a multiparty democracy based on universal adult suffrage on a common voters' roll. As far as we were concerned, this was the minimum acceptable constitutional threshold for a new South Africa.

55. In 1993, Mandela and President de Klerk were awarded the Nobel Peace Prize.

56. On April 27, 1994, the first national, non-racial, one-person-one-vote election was held in South Africa, and Mandela's party, the African National Congress took power. This was 218

years after the U.S. *Declaration of Independence,* 127 years after Canada's *Constitution Act, 1867,* 46 years after the U.N.'s *Universal Declaration of Human Rights* and 12 years after enactment of the *Canadian Charter of Rights and Freedoms.*

57. On May 10, 1994, Mandela was inaugurated as President of South Africa.

58. Mandela summarized his view of racial discrimination at 622:

> No one is born hating another person because of the color of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite. Even in the grimmest times in prison, when my comrades and I were pushed to our limits, I would see a glimmer of humanity in one of the guards, perhaps just for a second, but it was enough to reassure me and keep me going. Man's goodness is a flame that can be hidden but never extinguished.

59. Mandela reviewed his history and aspirations at 624:

> But then I slowly saw that not only was I not free, but my brothers and sisters were not free. I saw that it was not just my freedom that was curtailed, but the freedom of everyone who looked like I did. That is when I joined the African National Congress, and that is when the hunger for my own freedom became the greater hunger for the freedom of my people. It was this desire for the freedom of my people to live their lives with dignity and self-respect that animated my life, that transformed a frightened young man into a bold one, that drove a law-abiding attorney to become a criminal, that turned a family-loving husband into a man without a home, that forced a life-loving man to live like a monk. I am no more virtuous or self-sacrificing than the next man, but I found that I could not even enjoy the poor and limited freedoms I was allowed when I knew my people were not free. Freedom is indivisible; <u>the chains on anyone of my people were the chains on all of them, the chains on all of my people were the chains on me.</u>
>
> It was during those long and lonely years that my hunger for the freedom of my own people became a hunger for the <u>freedom of all people, white and black</u>. ....

60. On November 19, 2001, Mandela was made an honourary citizen of Canada. It would do him even greater honour if Canada gave full and effective recognition to the anti-racist principles to which Nelson Mandela devoted his life and energies.

61. Historical and world views on freedom and democracy have deep roots in Canada.

62. The Preamble to the ***Constitution Act, 1867***, imports British Constitutional principles:

> WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom.

63. Although largely unwritten, the Constitution of the United Kingdom includes guarantees of the liberty of the subject:

> The so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute. Where public authorities are not authorised to interfere with the subject, he has liberties. It follows that, apart from the general provisions ensuring the peaceful enjoyment of rights of property, and the freedom of the subject from illegal detention, duress, punishment, or taxation, contained in the four great charters or statutes which regulate the relations between the Crown and people, the liberties of the subject are not defined in any law or code.
>
> 7 ***Halsbury*** (3rd ed.) 195, para.416.

64. The four great charters referred to above are *Magna Carta*, 1297 (25 Edw. 1), the *Petition of Right Act*, 1627 (3 Car. 1), c. 1, the *Bill of Rights*, 1688 (1 Will. & Mar. sess. 2), c. 2 and the *Act of Settlement*, 1700 (12 & 13 Will. 3), c. 2.

> 7 ***Halsbury*** (3rd ed.), para. 417.

65. In ***R. v. Cobbett***, (1804) 29 State Tr. 1 [**TAB 1**], at p. 49, Lord Ellenborough, C.J., said

> Upon the subject of libel, it may be as well for me to observe, before I enter upon the question, that, by the law of England, there is no impunity to any person publishing anything that is injurious to the feelings and happiness of an individual, or prejudicial to the general interests of the state. Gentlemen, the law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary.

66. These fundamental principles, expounded upon from the earliest of times and throughout

the world, are no less engrained in the minds of Canadians than anywhere else. Canada has engaged in World Wars, the Korean War and peacekeeping activities in many European, Asian and African regions. It has made many sacrifices in lives lost and property expended to restore, advance and protect freedom and democracy. It would be against all such principles and sacrifices to revert to an overt scheme of racial discrimination no matter how much Treaty 8 Indians hope to gain financially in the declaration they seek.

D. ON THEIR PROPER INTERPRETATION, THE WORDS OF TREATY 8 AND THE DISCUSSIONS BETWEEN THE INDIANS AND THE COMMISSIONERS, COULD NOT CREATE A TAX EXEMPTION BASED ON RACIAL DISCRIMINATION BECAUSE SUCH AN INTERPRETATION WOULD CAUSE A BREACH BY CANADA OF TREATIES, COVENANTS, CHARTERS, CONVENTIONS AND DECLARATIONS ENTERED INTO OR ADHERED TO BY CANADA.

67. Canada has joined in international commitments to respect, protect and advance racial equality and to repeal, amend or enact legislation to prevent discrimination on the basis of race, colour, religion or ethnic or national origin. In both legislation and constitutional reform it has demonstrated its recognition and performance of the obligations it assumed by such solemn undertakings.

68. The intent and meaning of existing or proposed legislation by Parliament must be construed consistently with these international commitments.

> ***Driedger on the Construction of Statutes***, 3d ed. at 330:
>
> ***Governing principle***. Although international law is not binding on Canadian legislatures, it is presumed that legislation is meant to comply with international law and with Canada's international law obligations.

> These authorities make it clear that there are two aspects to the presumption. First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing among possible interpretations, therefore, the courts avoid interpretations that would put Canada in breach of any of its international obligations. Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

69. In respect of extradition matters the Supreme Court in ***Zingre v. The Queen***, [1981] 2 S.C.R. 392 [**TAB 17**], held, per Dickson J., as follows:

> 40 .... It is the duty of the Court, in interpreting the 1880 Treaty and s. 43 of the Canada Evidence Act to give them a fair and liberal interpretation with a view to fulfilling Canada's international obligations. Canada forced Switzerland to undertake criminal proceedings because Canada was unable to extradite the appellants from Switzerland. Now, Switzerland is asking Canada for assistance in those proceedings. The Treaty of 1880 places Canada under a specific obligation to comply with the Swiss request. If Canada denies the Swiss request it will be in breach of its international obligations. ....

70. Where international commitments made by Canada are implemented by domestic legislation, the international agreements govern or at least aid the interpretation of the laws of Canada.

Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038 [**TAB 13**], per Dickson, C.J.C., at 1056*c*:

> .... There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the Charter. The underlying values of a free and democratic society both guarantee the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes*, supra, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6

of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.)*, supra, I had occasion to say at p. 349:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in Oakes, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society."

71. In ***National Corn Growers Assn. v. Canada (import tribunal)***, [1990] 2 S.C.R.1324 [**TAB 10**], the Supreme Court dealt with interpretation of federal labour legislation. The majority decision held as follows at 1371*a*:

> a) Using the GATT to Interpret the Canadian Legislation
>
> The first issue to be decided is whether it was patently unreasonable for the Tribunal to make reference to the GATT for the purpose of interpreting SIMA. In turning to that issue, I note that it was not disputed in either of the courts below that the Canadian legislation was designed to implement Canada's GATT obligations. Since I am prepared to accept that such is the case, the only issue that really needs to be discussed concerns the exact use which may be made of the GATT in interpreting s. 42. ....
>
> The first comment I wish to make is that I share the appellants' view that in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends

itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.

Second, and more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected. As I. Brownlie has stated at p. 51 of *Principles of Public International Law* (3rd ed. 1979):

> If the convention may be used on the correct principle that the statute is intended to implement the convention then, it follows, the latter becomes a proper aid to interpretation, and, more especially, may reveal a latent ambiguity in the text of the statute even if this was 'clear in itself'. Moreover, the principle or presumption that the Crown does not intend to break an international treaty must have the corollary that the text of the international instrument is a primary source of meaning or `interpretation'. The courts have lately accepted the need to refer to the relevant treaty even in the absence of ambiguity in the legislative text when taken in isolation.

72. Considering that the ***Constitution Act, 1982***, is a British statute, the principle of interpretation of statutes of the United Kingdom appears to be the same:

Craies on Statutes, 7th ed, Sweet & Maxwell, 1971, at 132:

International conventions

In *Burns Philp & Co. v. Nelson & Robertson Pty.*,[49] it was held by the High Court of Australia that, where a particular enactment [58] was ambiguous, it was permissible to refer to an international convention, and, nearer home, in *Salomon v. Customs and Excise Commrs.*[51] the Court of Appeal held that where there is clear evidence of an enactment being the indirect offspring of a Convention, the Convention might be resorted to in interpretation of the enactment, even where the Convention is not specifically mentioned in the enactment.

73. The ***Charter of the United Nations*** [**TAB 18**], approved by Canada and the other members on June 26, 1945, includes the following:

"**PREAMBLE**

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Article 1

The Purposes of the United Nations are:

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

74. Canada can justifiably take pride in the fact that a Canadian lawyer and professor of law is credited with having drafted the ***Universal Declaration of Human Rights*** [**TAB 19**] which Canada and most other members of the United Nations adopted on December 10, 1948, and which includes:

PREAMBLE

Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore,

THE GENERAL ASSEMBLY

proclaims

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

75. Note that S. 15(1) of Canada's ***Charter of Rights and Freedoms*** provides, "Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination...".

76. Consistently with Canada's international commitments, in 1974, Parliament enacted the ***Citizenship Act***, now cited as R.S.C. 1985, Chap. C-29, which includes:

Rights and obligations

6. A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(a) is entitled or subject and has a like status to that of such person.

77. The ***Universal Declaration*** principles, adhered to by Canada, were implemented in the ***Canadian Bill of Rights***, R.S.C. 1985, Appendix III (assented to August 10, 1960):

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(b) the right of the individual to equality before the law and the protection of the law.

2. Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared,...

78. Canada joined in the ***United Nations Declaration on the Elimination of All Forms of Racial Discrimination***, November 20, 1963 [**TAB 20**], which includes:

The General Assembly

. . . . . .

Considering that the Charter of the United Nations is based on the principles of the dignity and equality of all human beings and seeks, among other basic objectives, to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out in the Declaration, without distinction of any kind, in particular as to race, colour or national origin,

Considering that the Universal Declaration of Human Rights proclaims further that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination and against any incitement to such discrimination,

Considering that any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination either in theory or in practice,

Taking into account the fact that, although international action and efforts in a number of countries have made it possible to achieve progress in that field, discrimination based on race, colour or ethnic origin in certain areas of the world continues none the less to give cause for serious concern,

Alarmed by the manifestations of racial discrimination still in evidence in some areas of the world, some of which are imposed by certain Governments by means of legislative, administrative or other measures, in the form, inter alia, of apartheid, segregation and separation, as well as by the promotion and dissemination of doctrines of racial superiority and expansionism in certain areas,

Convinced that all forms of racial discrimination and, still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, besides constituting a violation of fundamental human rights, tend to jeopardize friendly relations among peoples, co-operation between nations and international peace and security,

Convinced also that racial discrimination harms not only those who are its objects but also those who practise it,

Convinced further that the building of a world society free from all forms of racial segregation and discrimination, factors which create hatred and division among men, is one of the fundamental objectives of the United Nations,

1. Solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person;

2. Solemnly affirms the necessity of adopting national and international measures to that end, including teaching, education and information, in order to secure the universal and effective recognition and observance of the principles set forth below;

3. Proclaims this Declaration:

Article 1

Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.

Article 2

1. No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.

2. No State shall encourage, advocate or lend its support, through police action or otherwise, to any discrimination based on race, colour or ethnic origin by any group, institution or individual.

3. Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.

Article 3

1. Particular efforts shall be made to prevent discrimination based on race, colour or ethnic origin, especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing.

Article 4

All States shall take effective measures to revise governmental and other public policies and to rescind laws and regulations which have the effect of creating and perpetuating

racial discrimination wherever it still exists. They should pass legislation for prohibiting such discrimination and should take all appropriate measures to combat those prejudices which lead to racial discrimination.

Article 7

1. Everyone has the right to equality before the law and to equal justice under the law. ....

Article 10

The United Nations, the specialized agencies, States and non-governmental organizations shall do all in their power to promote energetic action which, by combining legal and other practical measures, will make possible the abolition of all forms of racial discrimination. They shall, in particular, study the causes of such discrimination with a view to recommending appropriate and effective measures to combat and eliminate it.

Article 11

Every State shall promote respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and shall fully and faithfully observe the provisions of the present Declaration, the Universal Declaration of

Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

79. Canada also joined in the ***International Convention on the Elimination of All Forms of Racial Discrimination,*** 1965 [**TAB 21**], which includes:

"The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint action and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without discrimination of any kind, in particular as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights

and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist....

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 ... solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

. . . . . .

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

80. **Note** that this Article expressly includes in the definition of "racial discrimination" any

preference based on race. Tax exemption for Treaty 8 Indians would clearly be contrary to this Article.

> 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

81. There is nothing in the pleadings or the evidence to indicate that tax exemption of Treaty 8 Indians was or is needed to ensure their equal enjoyment of fundamental freedoms.

Article 2

> 1. States Parties condemn racial discrimination and undertake to pursue all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
>
> 2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(e) Economic, social and cultural rights...."

82. Canada became a party to the ***International Covenant on Civil and Political Rights***, December 16, 1966 [**TAB 22**], which includes:

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

83. To affirm a regime of tax exemption for Treaty 8 Indians on the basis of their race or ethnic origin would effect exactly the opposite of the undertaking adhered to in this Article.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

84. **Note** again the use of terminology now found in Canada's ***Charter of Rights and Freedoms***.

85. The principle of equality which is the foundation stone of freedom and democracy is not only one of long and historic recognition but one which Canada has consistently proposed, supported and adopted. The Court ought to construe Treaty 8 and the related discussions in accordance and compliance with the principles of racial equality as repeatedly affirmed by the great nations of the world including Canada.

E. THE COURT OUGHT NOT TO MAKE A DECLARATION THAT THE WORDS OF TREATY 8 AND THE DISCUSSIONS BETWEEN THE INDIANS AND THE COMMISSIONERS CREATED A TAX EXEMPTION BASED ON RACIAL DISCRIMINATION BECAUSE SUCH AN INTERPRETATION WOULD BE CONTRARY TO THE RIGHTS AND FREEDOMS GUARANTEED BY THE ***CONSTITUTION ACT, 1982***.

86. Further recognizing its international obligations, Canada sought and obtained enactment of the ***Constitution Act, 1982***, by the *Canada Act, 1982* (U.K.), Chap. 11, proclaimed in force April 17, 1982, which includes:

> PART I
>
> CANADIAN CHARTER OF RIGHTS AND FREEDOMS
>
> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

25. 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.

32. (1) This Charter applies

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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

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

PRIMACY OF CONSTITUTION OF CANADA

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.

87. The equality provisions of the ***Charter*** were discussed in ***Law v. The Queen***, [1999] 1 S.C.R. 497 [**TAB 5**], in the context of age discrimination in respect of Canada Pension Plan benefits:

> 2 Section 15 of the *Charter* guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the *Charter*'s most conceptually difficult provision. In this Court's first s. 15 case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143, at p. 164, McIntyre J. noted that, as embodied in s. 15(1) of the *Charter*, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition". Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.
>
> 30 In summary, then, the *Andrews* decision established that there are three key elements to a discrimination claim under s. 15(1) of the *Charter*: differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping, and disadvantage. Of fundamental importance, as stressed repeatedly by all of the judges who wrote, the determination of whether each of these elements exists in a particular case is always to be undertaken in a purposive manner, taking into account the full social, political, and legal context of the claim.
>
> 39 In my view , the proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter* involves a synthesis of these various articulations. Following upon the analysis in Andrews, *supra*, and the two-step framework set out in *Egan*, *supra*, and

> *Miron, supra*, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).
>
> 51 All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote
>
> a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

88. A perpetual tax exemption for Treaty 8 Indians on the basis of their distinctive race would clearly have the effect of promoting the view that they are somehow less capable than or less worthy of value as members of Canadian society and ought to be rejected for that reason.

> 53 What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal

autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

73 At the same time, I would not wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others, requiring the court to consider justification under s. 1, or the operation of s. 15(2). The possibility of new forms of discrimination denying essential human worth cannot be foreclosed. This said, the ameliorative aim and effect of the law is a factor to be considered in determining whether discrimination is present. Conversely, where the impugned legislation does not have a purpose or effect which is ameliorative in s. 15(1) terms, this factor may be of some assistance, depending upon the circumstances, in establishing a s. 15(1) infringement.

89. **Note** that there is no pleading or evidence that perpetual tax exemption based on race is necessary to ameliorate the circumstances of Treaty 8 Indians.

77 First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1). It is well established that a court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy: see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at p. 976. There will frequently be instances in which a court may appropriately take judicial notice of some or all of the facts necessary to underpin a discrimination claim, and in which the court should engage in a process of logical reasoning from those facts to arrive at a finding that s. 15(1) has been infringed as a matter of law.

88 (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:

(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;

(B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

(C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

89 (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or whichotherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

90. In ***Miron v. Trudeau***, [1995] 2 S.C.R. 418 [**TAB 7**], a case involving discrimination in insurance affecting same sex couples, the majority of the Court commented as follows:

138 The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection or equal benefit of the law", as compared with some other

person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

139 This shift of the burden through the use of s. 15 and s. 1 is appropriate. It places the duty of adducing proof upon the parties who are in the best position to adduce it. It is for the claimant to show that he or she has been denied a benefit or suffers a disadvantage compared with another person. It is also for the claimant to show the basis for imposing the burden or withholding the benefit. These matters are within the knowledge of the claimant. Once these have been made out the burden shifts to the state. It is the state's law that has violated the individual's equality on suspect grounds, and it is the state that most appropriately defends the violation. To require the claimant to prove that the unequal treatment suffered is irrational or unreasonable or founded on irrelevant considerations would be to require the claimant to lead evidence on state goals, and often to put proof of discrimination beyond the reach of the ordinary person. Nor is the resultant burden unjust to the state: while it is open to the state to attempt to differentiate on suspect stereotypical grounds, it must be prepared to justify such suspect differentiation if it wishes its law to stand. In cases such as the present, where the party upholding the law is a non-state actor, it is always open to the state to defend its law as an intervenor in the proceedings. (If still in doubt as to the law's purpose and rationale, the court may also appoint an amicus curiae to assist the court by providing an impartial assessment, as was done in this appeal.)

140 This division of the analysis between s. 15(1) and s. 1 accords with the injunction to which this court has adhered from the earliest *Charter* cases: courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the prima facie protection thus granted to conform to conflicting social and legislative interests to s. 1. .... It is significant that where the *Charter* seeks to narrow rights by concepts like reasonableness, it does so expressly, as in s. 8 and s. 11(*b*). Section 15(1) does not contain this sort of limitation.

141 At the same time, this approach does not trivialize s. 15(1) by calling all distinctions discrimination. Unequal treatment alone -- the mere fact of making a distinction -- does not establish a breach of s. 15(1) of the *Charter*. The s. 15(1) guarantee relied on is "... equal benefit of the law *without discrimination*". To prove discrimination, the claimant must show that the unequal treatment is based on one of the grounds expressly mentioned in s. 15(1) -- race, national or ethnic origin, colour, religion, sex, age or mental or physical disability -- or some analogous ground. These grounds serve as a filter to

separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the *Charter* -- to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.

143 My colleague Gonthier J. asserts that discrimination under s. 15(1) is conclusively rebutted by a finding that the ground on which the equal treatment is denied is relevant to the legislative goal or the functional values underlying the impugned law. With respect, I cannot agree. Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics. However, relevance is only one factor in determining whether a distinction on an enumerated or analogous ground is discriminatory in the social and political context of each case. A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The inquiry cannot stop there; it is always necessary to bear in mind that the purpose of s. 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics. If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim, that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches.

149 Finally, the analysis I propose does not preclude the state from making distinctions between people on grounds like race, sex, age and citizenship. The state may do so, provided it can justify its use of the suspect criterion. Citizenship, recognized as an analogous ground in *Andrews*, provides a ready example. The state may be justified in confining certain privileges, like carrying a passport or serving in high government office, to citizens. If it can establish that justification, it may deny the privileges to non-citizens. *McKinney v. University of Guelph*, supra, provides another example. While the court found that the university's policy of mandatory retirement at age 65 constituted discrimination on the basis of age, the policy was held to be reasonable and demonstrably justified in a free and democratic society. In short, the *Charter* does not forbid all distinctions on the basis of the enumerated or analogous grounds; it forbids stereotypical distinctions which the state cannot justify.

150 To recapitulate, the analysis under s. 15(1) involves two steps: examination of whether there has been a denial of "equal protection or equal benefit of the law", and a finding that the denial constitutes discrimination. To establish discrimination, the claimant must bring the distinction within an enumerated or analogous ground. In most cases, this suffices to establish discrimination. However, exceptionally it may be concluded that the denial of equality on the enumerated or analogous ground does not violate the purpose of s. 15(1) -- to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance. While irrelevance of the ground of distinction may indicate discrimination, the converse is not true. Proof of relevance does not negate the possibility of discrimination. We must look beyond relevance to ascertain whether the impact of the impugned legislation is to disadvantage the group or individual in a manner which perpetuates the injustice which s. 15(1) is aimed at preventing.

151 If a violation of s. 15(1) is established, the burden shifts to the party upholding the denial of equality to justify it under s. 1 of the *Charter*. Section 15(1) and s. 1 of the *Charter* must be read together. Neither, in itself, is complete. Together, they provide a comprehensive equality analysis that provides effective remedies against discrimination while preserving the power of the state to deny protections and benefits to individuals where differences between them justify it.

158 The theme of violation of human dignity and freedom by imposing limitations and disadvantages on the basis of a stereotypical attribution of group characteristics rather than on the basis of individual capacity, worth or circumstance is reflected in qualities which judges have found to be associated with analogous grounds. One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews*, supra, at p. 152 per Wilson J.; *Turpin*, supra, at pp. 1331-1332. Another may be the fact that the group constitutes a "discrete and insular minority": *Andrews*, supra, at p. 152 per Wilson J. and at p. 183 per McIntyre J.; *Turpin*, supra, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" (at pp. 174 -175). By extension, it has been suggested that distinctions based on personal and *immutable* characteristics must be discriminatory within s. 15(1): *Andrews*, supra, at p. 195 per LaForestJ. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada*, supra, per Cory J.

159 All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition -- that any or all of them

must be present to find an analogous ground -- is invalid. As Wilson J. recognized in *Turpin* (at p. 1333), they are but "analytical tools" which may be "of assistance". For example, analogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so. Religion, an enumerated ground, is not immutable. Nor is citizenship, recognized in *Andrews*; nor province of residence, considered in *Turpin*. All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.

173 Determining whether it has been demonstrated that the impugned distinction is "demonstrably justified in a free and democratic society" involves two inquiries. First, the goal of the legislation is ascertained and examined to see if it is of pressing and substantial importance. Then the court must carry out a proportionality analysis to balance the interests of society with those of individuals and groups. The proportionality analysis comprises three branches. First, the connection between the goal and the discriminatory distinction is examined to ascertain if it is rational. Second, the law must impair the right no more than is reasonably necessary to accomplish the objective. Finally, if these two conditions are met, the court must weigh whether the effect of the discrimination is proportionate to the benefit thereby achieved. See *R. v. Oakes*, [1986] 1 S.C.R. 103.

174 Examination of the goal of the legislation is vital in discrimination cases as elsewhere. Sometimes the legislative goal is apparent on the face of the legislation. Other times it may not be. Legislation aimed at effecting a less than worthy goal may be cloaked in the rhetoric of justice and reason. The task of the court in every case is to identify the functional values underlying the law.

91. To like effect see ***Egan v. The Queen***, [1995] 2 S.C.R. 513, relating to same sex relationships decided concurrently with ***Miron v. The Queen***, *supra.*

92. Parliament has enacted the ***Canadian Multiculturalism Act***, R.S.C. 1985, Chap. 24 (4th Supp.) which makes express reference to the ***International Convention on the Elimination of All Forms of Racial Discrimination*** and includes:

Preamble

WHEREAS the Constitution of Canada provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and that everyone has the freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association and guarantees those rights and freedoms equally to male and female persons;

AND WHEREAS the Citizenship Act provides that all Canadians, whether by birth or by choice, enjoy equal status, are entitled to the same rights, powers and privileges and are subject to the same obligations, duties and liabilities;

AND WHEREAS the Canadian Human Rights Act provides that every individual should have an equal opportunity with other individuals to make the life that the individual is able and wishes to have, consistent with the duties and obligations of that individual as a member of society, and, in order to secure that opportunity, establishes the Canadian Human Rights Commission to redress any proscribed discrimination, including discrimination on the basis of race, national or ethnic origin or colour;

AND WHEREAS Canada is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, which Convention recognizes that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination, and to the International Covenant on Civil and Political Rights, which Covenant provides that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language;

AND WHEREAS the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada;

3. (1) It is hereby declared to be the policy of the Government of Canada to

> (c) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation;
>
> (e) ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity."

SUMMARY

93. Rational and reasonable Canadians abhor racial discrimination. To affirm a scheme of exemption from taxation on the basis of race with financial benefits to Indians and consequential economic disadvantages to non-Indians would merely shackle the Indians in golden chains of segregation and instil or perpetuate inevitable conflicting attitudes of superiority and inferiority between Indians and. Such a consequence would be unconstitutional, illegal and, of greater importance, destructive of the principles of democracy and freedom so revered by the people of Canada.

PART IV

ORDER SOUGHT

94. The Canadian Taxpayers Federation asks that the action be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 23rd day of November, 2001.

COUNSEL FOR INTERVENER

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Norman D. Mullins, Q.C.

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John V. Carpay

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