Exploring the Constitutional Sources of a First Nation’s Right To Tax

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PRÉCIS
Théoriquement, les lois fiscales adoptées par les Premières nations relativement aux droits sur des biens situés sur leur territoire peuvent être rattachées à deux sources : le paragraphe 91(3) de la Loi constitutionnelle de 1867 ou le paragraphe 35(1) de la Loi constitutionnelle de 1982. L’auteur fait valoir que l’étendue de ce pouvoir peut varier selon la source constitutionnelle. C’est ce qu’il démontre dans la première partie de l’article en analysant les divers arguments qui peuvent être soulevés relativement à l’imposition de biens de la Couronne sur le territoire d’une Première nation. Dans l’arrêt Westbank First Nation v. BC Hydro and Power Authority, le tribunal a conclu que les règlements en matière de taxation adoptés en vertu de la Loi sur les Indiens (et donc rattachés au paragraphe 91(3) de la Constitution) ne lient pas les sociétés d’État parce que ces entités, en leur qualité de mandataires de la Couronne, sont exonérées en vertu de l’article 125 de la Loi constitutionnelle de 1867. Certaines déclarations de la Cour suprême du Canada dans cette cause pourraient être interprétées comme signifiant que si les lois fiscales relevaient du paragraphe 35(1) de la Constitution, elles pourraient viser les biens immobiliers des sociétés d’État sur le territoire de la Première nation. Cependant, l’auteur conclut qu’il est peu probable que ces déclarations soient interprétées de façon restrictive. Par conséquent, les lois fiscales relevant du paragraphe 35(1) ne devraient pas non plus viser les biens de la Couronne.

Dans la deuxième partie de l’article, l’auteur met l’accent sur l’incidence de la source constitutionnelle pour les contestations en vertu de la Charte, plus précisément à l’égard d’une loi fiscale qui accorde un traitement préférentiel aux membres d’une Première nation. Il semble que si la loi fiscale relève du paragraphe 35(1), elle devrait être à l’abri d’une contestation en vertu de la Charte, au motif que la Charte ne peut rendre inconstitutionnelles des distinctions expressément permises en vertu de la Constitution. Par ailleurs, si la même loi fiscale relevait du paragraphe 91(3), on présume qu’elle ne serait pas à l’abri d’une telle contestation. Cependant, une loi fiscale pourrait toujours être à l’abri d’une telle contestation sur la base de l’article 25 de la Loi constitutionnelle de 1982.

La conclusion générale est que la source constitutionnelle d’un pouvoir de taxation pourrait influer sur l’étendue du droit lui-même. Bien qu’en surface, les deux lois peuvent paraître identiques, si elles relèvent de deux sources constitutionnelles différentes, les pouvoirs qu’elles accordent peuvent varier de façon significative.

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ABSTRACT
Taxation laws passed by First Nations pertaining to levies on property interests within their territory can theoretically be anchored in one of two sources: section 91(3) of the Constitution Act, 1867 or section 35(1) of the Constitution Act, 1982. The author of this article argues that the scope of the power may vary depending on the constitutional source. In the first part of the article, he demonstrates this by analyzing the various arguments that may be made with respect to the taxation of property interests of the Crown within the territory of a First Nation. In Westbank First Nation v. BC Hydro and Power Authority, the court held that taxation bylaws passed pursuant to the Indian Act (and thus grounded in section 91(3) of the constitution) do not attach to Crown corporations because these entities, as agents of the Crown, are exempt from taxation pursuant to section 125 of the Constitution Act, 1867. Some statements made by the Supreme Court of Canada in that case could be interpreted to imply that if the taxation laws were grounded in section 35(1) of the constitution, arguably they could attach to the real property interests of Crown corporations within the First Nation's territory. However, the author concludes that it is unlikely that those statements would be interpreted strictly. Thus, taxation laws grounded in section 35(1) also should not attach to Crown interests.

In the second part of the article, the author focuses on the impact of the constitutional source in addressing Charter challenges, specifically in respect of a taxation law that gives preferential treatment to members of a First Nation. It appears that if the taxation law is grounded in section 35(1), it should be exempt from Charter intrusion, on the basis that the Charter cannot render unconstitutional distinctions that are expressly permitted under the constitution. If, on the other hand, the same taxation law were grounded in section 91(3), presumably it would not be exempt on this basis. However, such a taxation law may still be immune from Charter intrusion on the basis of section 25 of the Constitution Act, 1982.

The overall conclusion is that the constitutional source of a taxation power could affect the scope of the right itself. Although on the surface two laws may look identical, if they are grounded in different constitutional sources, the powers they bestow may vary significantly.

KEYWORDS: JURISDICTION ■ CONSTITUTIONAL LAW ■ INDIANS (CANADIAN) ■ DISCRIMINATION ■ TAXATION ■ PROPERTY TAXES

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INTRODUCTION

When the British Parliament passed the Constitution Act, 1867, it created a federal state in Canada by conferring powers on both federal and provincial governments. Among the many powers conferred on the federal government was jurisdiction over “Indians, and Lands reserved for the Indians.” This head of power allowed the federal government to enter into agreements with Indians and pass laws regulating their conduct both on and off reserves. The Indian Act, enacted in 1869, was one such piece of legislation. The Indian Act has gone through various amendments from its inception to its present formulation and has conferred on band councils certain powers of self-determination; but within the confines of the Act, the opportunity for self-determination has been severely limited. For many years, First Nations tried, without success, to assert the right to self-government, unable to overcome the constitutional constraints on legal recognition of their claim. It appeared that Canada’s constitution allowed no room for another order of government.

In 1982, the amendment of the constitution breathed new life into First Nation claims to self-government. A new provision was introduced—section 35(1) of the Constitution Act, 1982—specifically recognizing and affirming “existing aboriginal
and treaty rights.” Although, to date, no court has established that self-government is an existing aboriginal right within the purview of section 35(1), the Supreme Court of Canada has not closed the door on this issue,10 and it has given constitutional status to certain other aboriginal rights claimed under this section.11 Meanwhile, the introduction of this constitutional provision has generated much interest in the negotiation of agreements recognizing various self-government rights. As a result, modern-day treaties have been signed between a number of First Nations and the federal and provincial or territorial governments, devolving various types of self-government powers to those First Nations.12

This article focuses on one type of power that some may consider an aspect of self-government, namely, the power of taxation. It examines the sources of that power in the 1867 and the 1982 constitution acts, and the legal implications that arise from grounding the right in each source. In the first part of the article, I consider the application of section 125 of the Constitution Act, 1867 to First Nation taxation laws grounded in either section 91(3) of that Act or section 35(1) of the Constitution Act, 1982. Section 91(3) establishes the federal taxation power; however, section 125 constrains that power in respect of property (including land) owned by the Crown. As we shall see, the restriction of a First Nation’s right to tax real property interests of another level of government, pursuant to section 125, may depend on whether the right is grounded in section 91(3) or, alternatively, in section 35(1).

In the second part of the article, I turn to an analysis of whether a First Nation’s right to tax is limited by section 15(1), the equality provision, of the Canadian Charter

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10 In Pamajewon v. The Queen, [1996] 2 SCR 821, the court held that, assuming that self-government claims could be included under section 35(1), the applicable legal standard would be that laid out in Van der Peet v. The Queen, [1996] 2 SCR 307, at paragraph 24. The court was not required to address this issue in Pamajewon because, as the court noted at paragraph 27, the appellants characterized the aboriginal rights claim as “a broad right to manage the use of their reserve lands” and thus “cast the Court’s inquiry at a level of excessive generality.”

11 In Sparrow v. The Queen, [1990] 1 SCR 1075, the court held that the accused had an aboriginal right to fish for food. In Gladstone v. The Queen, [1996] 2 SCR 723, the court held that the accused had an aboriginal right to sell herring spawn on kelp.

12 See, for example, the Nisga’a Final Agreement, signed on April 27, 1999 (online: http://www.ainc-inac.gc.ca/pr/AGR/nsga/nsidex_e.html). The agreement was given effect by federal and provincial settlement legislation: see the Nisga’a Final Agreement Act, SBC 1999, c. 2; and the Nisga’a Final Agreement Act, SC 2000, c. 7. See also the Westbank First Nation Self-Government Agreement, signed on October 3, 2003 (online: http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst_e.pdf); the Lheidli T’enneh Final Agreement, signed October 29, 2006 (online: http://www.gov.bc.ca/arr/firstnation/lheidli/down/final/lheidli_final_agreement.pdf); and the T’ouwussen First Nation Final Agreement, signed December 8, 2006 (online: http://www.gov.bc.ca/arr/firstnation/touwussen/down/final/tfn_fa.pdf). See also various Yukon First Nation self-government agreements, such as the Kluane First Nation Self-Government Agreement, signed October 18, 2003 (online: http://www.ainc-inac.gc.ca/pr/AGR/klu/sga_e.pdf). The Yukon self-government agreements are implemented pursuant to the First Nation Self-Government Agreement, which was brought into effect by the Yukon First Nations Self-Government Act, SC 1994, c. 35 and by the First Nations (Yukon) Self-Government Act, SY 1993, c. 5.
of Rights and Freedoms. Specifi
cally, I examine whether a law enacted by a First Nation that grants preferential treatment to band members, by exempting them from property taxes levied on non-members on reserve, may be subject to Charter review. I argue that although it is probable that the Charter would not apply to laws passed by a First Nation government (on the basis of section 32(1)), even if it did, section 25 of the Charter would afford extensive protection to laws granting preferential treatment to First Nation members. I also argue that section 35(1) rights, given their constitutional status, are afforded greater protection from Charter intrusion.

My analysis suggests that the constitutional source of a taxation power may affect the scope of the right itself. Although on the surface two laws may look identical, if they are grounded in different constitutional sources, the powers they bestow may vary significantly.

**Sources of the Right to Tax**

There are two sources to which a First Nation may turn in seeking the right to tax real property interests under the Canadian constitution: legislation passed by the federal government pursuant to section 91(3) of the Constitution Act, 1867, the head of power concerned with “the raising of Money by any Mode or System of Taxation”; or section 35(1) of the Constitution Act, 1982, which assures recognition of “existing aboriginal and treaty rights.” Although no First Nation has yet established an aboriginal right to tax under section 35(1), modern-day treaty agreements do make provision for direct taxation of the interests of members or citizens residing within their jurisdictional territory. However, the existing agreements do not provide for direct taxation of non-members residing within the territory. In this respect, it appears that all First Nations that exercise powers of direct taxation over non-members today do so by way of delegated power pursuant to section 91(3). This occurs through the exercise of their taxation power pursuant to provisions in the Indian Act, or the taxation power provided in the new First Nations Fiscal and Statistical Management Act, which came into force on April 1, 2006, or perhaps pursuant to a self-government agreement negotiated with the federal and provincial governments.

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14 See the Nisga’a Final Agreement, supra note 12, at c. 16, section 1. See also the Tsawwassen First Nation Final Agreement, ibid., at c. 20, section 1; and the Lheidli T’enneh Final Agreement, ibid., at c. 23, section 1.

15 As discussed below, the constitutional basis for the delegation of the taxing power was established by the Supreme Court of Canada in Westbank, infra note 20.

16 SC 2005, c. 9.

17 See, for example, the Nisga’a Final Agreement, supra note 12, at c. 16; the Tsawwassen First Nation Final Agreement, ibid., at c. 20; and the Lheidli T’enneh Final Agreement, ibid., at c. 23. See also various Yukon First Nation self-government agreements, such as the Kluane First Nation Self-Government Agreement, supra note 12, at section 14.1.1.
It is relevant to consider the constitutional basis for asserting a First Nation’s right to tax real property interests because the Constitution Act, 1867 circumscribes the federal taxation power under section 91(3) in respect of property owned by the Crown. Section 125 states:

No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

While, as discussed below, there is clear authority for the application of section 125 where the right to tax is exercised pursuant to section 91(3), it is not so clear whether, or to what extent, section 125 may restrict the First Nation right to tax where that right is grounded in section 35(1) by virtue of a treaty or self-government agreement, or a pre-existing aboriginal right.

Sections 91(3) and 125 of the Constitution Act, 1867

In 1988, Parliament passed Bill C-115, amending the Indian Act, to give Indian bands the ability to pass taxation bylaws affecting non-aboriginal interests in reserve lands.\(^\text{18}\) As the Supreme Court of Canada noted in \textit{Canadian Pacific Ltd. v. Matsqui Indian Band}, the objective in creating the Indian taxation powers was “to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves.”\(^\text{19}\) Given this objective and the fact that the taxation powers thus granted appeared to be in relation to “Indians, and Lands reserved for the Indians,” one would think that the amendment in section 83(1)(a) of the Indian Act would, in pith and substance, fall under that head of power in the Constitution Act, 1867 (section 91(24)). However, the Supreme Court of Canada upheld the ruling of the BC Supreme Court in \textit{Westbank First Nation v. BC Hydro and Power Authority}\(^\text{20}\) that, in pith and substance, section 83 had a double aspect: on the one hand, it was in relation to Indians and lands reserved for Indians; on the other hand, it was in relation to a revenue-raising mechanism. Quoting from the Supreme Court of Canada decision in \textit{Re Exported Natural Gas Tax}, the BC Supreme Court noted:

In most cases, it is enough to place a matter within either s. 91 or s. 92. The concept of a “double aspect” therefore finds currency in cases dealing with a federal power on

\(^{18}\) An Act To Amend the Indian Act (Designated Lands), SC 1988, c. 23, section 10, amending section 83 of the Indian Act. Amended section 83(1)(a) states:

Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve.

\(^{19}\) [1995] 1 SCR 3, at paragraph 18.

\(^{20}\) (1996), 138 DLR (4th) 362 (BCSC); aff’d. (1997), 154 DLR (4th) 93 (BCCA); aff’d. [1999] 3 SCR 134.
one hand, and a provincial power on the other; see for example cases on highway traffic offences: O’Grady v. Sparling, [1960] S.C.R. 804; Mann v. The Queen, [1966] S.C.R. 238. It is seldom necessary to assign a particular head of power if a matter clearly falls within several heads of s. 91 or s. 92. In the present case, however, a specific assignment is necessary. This is because s. 125 is by its terms addressed only to s. 91(3), the power of taxation. It does not attenuate federal power to legislate under other heads in s. 91, such as “trade and commerce.”

The issue being litigated in Westbank was whether the band’s taxation bylaw, enacted pursuant to section 83(1)(a) of the Indian Act, applied to BC Hydro, a provincial Crown corporation, given that section 125 of the Constitution Act, 1867 prohibits the taxation of one government by another and applies with respect to federal taxation provisions falling under section 91(3). The BC Supreme Court held that section 83(1)(a) of the Indian Act was a revenue-raising provision and as such fell under section 91(3). On appeal, the BC Court of Appeal and the Supreme Court of Canada did not disturb this finding. As a result, bylaws passed pursuant to section 83(1)(a) fall under section 91(3), not section 91(24), and will be subject to section 125.

**Section 35(1) of the Constitution Act, 1982 and Section 125 of the Constitution Act, 1867**

A First Nation may assert jurisdiction to tax by virtue of section 35(1) of the Constitution Act, 1982. Section 35(1) states:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

“Existing” evidently refers to rights as they were on April 17, 1982, the date on which the Constitution Act, 1982 was proclaimed in force. However, as Peter Hogg points out, the insertion of the term “existing” does not necessarily exclude rights that have come into existence since that date. The jurisprudence has established that

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21 Ibid. (BCSC), at paragraph 372, quoting from Re Exported Natural Gas Tax, [1982] 1 SCR 1004, at 1074.

22 It is unlikely that there would be any different finding with respect to the new First Nations Fiscal and Statistical Management Act, supra note 16. Section 5(1) of this Act is similar in structure to section 83(1) of the Indian Act, granting the council of a First Nation the power to make laws respecting taxation for “local purposes of reserve lands, interests in reserve lands or rights to occupy, possess or use reserve lands.” Hence, although this provision may look as if, in pith and substance, it relates to “Indians, and Lands reserved for the Indians,” more than likely it would fall under section 91(3) of the Constitution Act, 1867. Hence, any law passed pursuant to this statute would not be applicable to Crown corporations as a result of the operation of section 125 of the Constitution Act, 1867.

23 Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell) (looseleaf), paragraph 27.8(e).
aboriginal rights (as opposed to treaty rights) are rights that existed prior to contact with European settlers; therefore, only treaty rights could come into existence after 1982. This interpretation of the text of section 35(1) is supported by section 35(3), which states:

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

On this basis, it appears that First Nations may claim constitutional recognition of taxation rights under a modern treaty that contains provisions relating to taxation powers as well as provisions relating to the settlement of land claims. It should be noted that many agreements explicitly provide that the final agreement itself is a treaty and land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982. Agreements that do not contain such provisions arguably are also protected by sections 25 and 35, provided that they are land claims agreements within the meaning of section 35(3).

There is a second way for First Nations to assert their right to tax under section 35, and that is to claim it as an aboriginal right. In Van der Peet v. The Queen, Lamer CJ of the Supreme Court of Canada defined an aboriginal right as follows:

[T]o 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.

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24 See Van der Peet, supra note 10.
25 See the Nisga’a Final Agreement, supra note 12, at c. 2, section 1; and the Lheidli T’enneh Final Agreement, ibid., at c. 2, section 1. These agreements further provide for the possibility that the First Nation and the federal and provincial governments could negotiate the direct taxation of non-citizens, but indicate that this would be the subject of a separate taxation agreement: the Nisga’a Final Agreement, c. 16, section 3; and the Lheidli T’enneh Final Agreement, c. 23, section 4(a). However, both agreements note that taxation agreements are separate instruments and do not fall within the meaning of a treaty or land claims agreement in section 25 or 35 of the Constitution Act, 1982: the Nisga’a Final Agreement, c. 16, sections 21 and 22; and the Lheidli T’enneh Final Agreement, c. 23, section 22. Section 25 is reproduced and discussed in detail below, under the heading “Implication of Section 25 of the Constitution Act, 1982.”
26 See, for example, the Kluane First Nation Self-Government Agreement, supra note 17, at section 14.1.1. This agreement allows the First Nation to engage in direct taxation of interests in settlement lands and of occupants and tenants of settlement lands in respect of their interests in those lands. This agreement notes that other modes of direct taxation (for example, income taxation) of citizens within settlement lands to raise revenue for First Nation purposes are granted with the goal of coordinating the existing tax systems (sections 14.1.2 and 14.3.1.). The agreement provides that the extent to which these other modes of direct taxation would apply to other persons and entities besides citizens is to be negotiated separately (sections 14.1.2 and 14.3.2). Whether these separate taxation agreements would themselves constitute treaties protected by section 35 of the Constitution Act, 1982 is not specifically provided for in this agreement.
27 Van der Peet, supra note 10, at paragraph 46.
Aboriginal rights attach to activities that, before contact, were of central significance to the aboriginal society. . . . [The claimant] 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.\(^{28}\)

Further, the claimant must demonstrate that there is continuity between the pre-contact group and the present community.\(^{29}\)

Hence, in order for a First Nation to claim an aboriginal right to collect taxes on certain types of property interests held by members of the community, the First Nation must identify a practice that is integral to the distinctive culture of that particular aboriginal group and also demonstrate that it amounts to a system of taxation. What might constitute such a practice is open for discussion. For example, there is an interesting debate in the academic literature concerning the efficacy of the potlatch as an institution providing for wealth redistribution in some First Nation communities.\(^{30}\) Whether this amounts to a practice that could anchor an aboriginal right to collect taxes on property held by members of the community depends not only on the facts substantiating the conclusion that the potlatch does in effect redistribute wealth, but also on whether a system that redistributes wealth is in essence a system of taxation. Although these evidentiary hurdles are significant and, for practical reasons, may keep many First Nations from pursuing the claim in court, it is important to note this avenue as a potential source of the right to tax, since there does not appear to be any theoretical barrier to establishing such an aboriginal right.

The possibility of grounding the right to tax in section 35(1) is important to consider because of the interesting consequence that appears to flow from this—namely, the inapplicability of section 125 of the Constitution Act, 1867 to any taxation powers so grounded. The reasoning is as follows.

By exempting from taxation all “Lands or Property belonging to Canada or any Province,” section 125 effectively prevents one government from taxing another. As

\(^{28}\) Ibid., at paragraph 55.

\(^{29}\) Ibid., at paragraph 63.

a result of this provision, the federal government cannot levy taxes on a provincial government, and vice versa; nor can provincial governments levy taxes on each other. Crown corporations, being agents of the government, are also exempt from taxation on this basis. However, the question arises as to whether land or property belonging to Canada or a province may be liable to tax levied by a First Nation if that First Nation can establish an aboriginal right to tax under section 35(1). Prima facie, the answer seems to be no. The text of section 125 appears to be explicit enough: land and property belonging to Canada or a province is exempt from taxation, and, given the lack of restriction, is exempt from taxation by any person able to levy taxes. However, the jurisprudence on section 125—notably, the decision of the Supreme Court of Canada in the Westbank case—suggests a more limited interpretation.

In Westbank, the Supreme Court held that taxation bylaws passed by the Westbank First Nation pursuant to section 83(1)(a) of the Indian Act did not attach to the provincial Crown interests in the Westbank reserves. The facts of the case are as follows. The BC Hydro and Power Authority, a provincial Crown corporation, acquired permits from the Crown to occupy and use various lands on the reserves. The Westbank band council later passed taxation bylaws pursuant to its authority under section 83(1)(a) of the Indian Act, and then assessed BC Hydro as owing taxes, penalties, and interest. The power company refused to pay these amounts and did not appeal the assessment notices. Westbank First Nation sued for the amounts owing and BC Hydro counterclaimed for declaratory relief, arguing that it was not subject to taxation under the bylaws. The Supreme Court held that BC Hydro was not subject to taxation under the bylaws because section 125 applied to exempt the provincial Crown corporation. The court noted that “[s]ection 125 applies only to taxes properly enacted under s. 91(3) or 92(2) of the Constitution Act, 1867.” Because Westbank’s authority to enact the taxation bylaws was grounded in federal authority under section 91(3) of the Constitution Act, 1867, Westbank could not do what the federal government was precluded from doing, namely, tax another level of government.

Suppose, however, that the facts were altered such that Westbank could assert an aboriginal right to tax, thereby grounding its authority in section 35(1) of the Constitution Act, 1982 and not section 91(3) of the Constitution Act, 1867 (by way of the delegated power under section 83(1)(a) of the Indian Act). Would the Supreme Court’s reasoning then apply? As noted above, the Supreme Court stated that section 125 applies “only” to taxes properly enacted under section 91(3) or 92(2). If a First Nation could establish an aboriginal right to tax under section 35(1), prima facie, that taxation law would not be properly enacted under section 91(3) or 92(2) of the Constitution Act, 1867, but under section 35(1) of the Constitution Act, 1982. As a result, it appears that section 125 would not apply, and the tax law could then attach to Crown interests within the First Nation’s territory. On a strict interpretation of

31 Westbank, supra note 20 (SCC), at paragraph 31.
the statement quoted above, it seems to follow that First Nations could then do what Canada’s sovereign authorities cannot, namely, levy taxes against another level of government.

There appear to be at least two responses to the above line of reasoning. The first argument that may be made is that the Supreme Court’s comment on the application of section 125 should not be taken to imply that this provision will not apply to taxation laws passed pursuant to section 35(1). In order to interpret the statement, one must note the context in which it was made. The critical distinction in Westbank (as in all cases relating to section 125, which applies only to taxation laws) is whether in pith and substance the primary purpose of the levy was to tax, or whether it was to institute a regulatory charge or user fee. Since sections 91(3) and 92(2) were considered to be the only heads of power relating to taxation under the Canadian constitution, the reference to these heads of power may simply have been another way of drawing the distinction between regulatory charges and user fees on the one hand and taxation levies on the other.

There is further support for this view in the Westbank decision. Gonthier J first quoted the following passage from Re Exported Natural Gas Tax:

> If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the “adjustment levies” considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, then the levy is not in pith and substance “taxation” and s. 125 does not apply.

He then stated:

> By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner which best advances the goals of Canada’s flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

This interpretation suggests that section 125 could apply to taxation laws passed by First Nations even if they were grounded in section 35(1). If the goal of the constitution is to accord a degree of operational space to governments and their agents

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32 Ibid., at paragraph 30.
33 Westbank, supra note 20 (SCC), at paragraph 32, quoting from Re Exported Natural Gas Tax, supra note 21, at 1070.
34 Westbank, supra note 20 (SCC), at paragraph 33.
(such as Crown corporations), allowing First Nations to pass laws that apply to other governments and their agents would circumvent this purpose. Hence, given the purposive approach to the interpretation of constitutional provisions, it is far from clear that the Supreme Court would give a strict interpretation to section 125 and not apply it to taxation laws passed by First Nations pursuant to a right to tax recognized under section 35(1).

There is a second reason why a First Nation, even if successful in establishing a section 35(1) right to tax, may not be able to tax Crown interests within its territory. The jurisprudence on section 35(1) makes it clear that, in certain circumstances, the Crown can infringe aboriginal and treaty rights. On this basis, the Crown could infringe a First Nation's right to pass its own tax laws by enacting legislation disallowing the application of such laws to Crown corporations and other governmental entities. In this event, the question of the applicability of section 125 need not be addressed. The key, though, would be for the Crown to be able to establish a valid federal objective justifying the infringement of the right.

In summary, the constitutional source of the right to tax gives rise to certain legal implications concerning the scope of the right. As Westbank established, a bylaw passed pursuant to section 83(1)(a) of the Indian Act does not attach to Crown interests, including Crown corporations as agents of the provincial government. This results from the fact that the authority for such a bylaw is ultimately grounded in section 91(3) of the Constitution Act, 1867, and thus the bylaw is rendered inapplicable to agents of the Crown pursuant to section 125. On the other hand, there is an argument that section 125 would not apply to a taxation law grounded in section 35(1) of the Constitution Act, 1982. However, when taken in context, the statements used to justify the inapplicability of section 125 to taxation laws grounded in section 35(1) may cause one to question this conclusion. In any event, until this issue is litigated, it is uncertain exactly how it would be decided.

35 See Sparrow, supra note 11, on the infringement of aboriginal rights. In Badger v. The Queen, [1996] 1 SCR 771, at 812-13, the Supreme Court noted that treaty rights can also be infringed, provided that the infringement can be justified.

36 In Sparrow, supra note 11, the Supreme Court of Canada identified two different examples of valid federal objectives. One related to conservation of a resource (ibid., at paragraph 73); the other, to the protection of the public and/or aboriginal peoples from the harmful exercise of treaty or aboriginal rights (ibid., at paragraph 71). Merely asserting that a statute is “in the public interest,” however, was held not to be specific enough to justify infringement of an aboriginal right (ibid., at paragraph 72). In addition to establishing a valid objective, the party relying on the infringement must show that the legislation is as consistent as possible with respecting the right that is being infringed. In the context of Sparrow, the court held that the valid legislative objective of conservation meant that the aboriginal right to fish for food and ceremonial purposes had priority over sport and commercial fishing (ibid., at paragraph 78). As a result of the court’s analysis, it appears that, even if self-government is established as an aboriginal right, that right may be subject to infringement, provided that the legal test set out in Sparrow is met.
DISCRIMINATORY TAXATION BYLAWS AND SECTION 15 OF THE CHARTER

With more and more bands acquiring taxation powers either under section 83(1)(a) of the Indian Act or through negotiated agreements, many First Nations are eager to collect property taxes from persons holding interests in property on reserve, but prefer to exclude their own band members from the obligation to pay such taxes. For example, in 1996 the Musqueam Indian band passed a property taxation bylaw that, in effect, taxed the leasehold property interests of non-band members on reserve and exempted similar property interests of band members from the levy. The question arises as to whether the Charter is applicable to laws of this type that make distinctions on the basis of band membership.

Prima facie, one might expect section 15 of the Charter to operate to prevent such “discrimination.” Section 15(1) states:

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.

However, as I will argue below, even if a law that resulted in unequal treatment of non-members could be considered to contravene section 15(1) of the Charter, it appears that section 25 would nonetheless operate to save it. Further, there is reason to think that if the law were grounded in section 35(1), given its constitutional status, that law would be saved from Charter intrusion without even resorting to section 25.

Does the Charter Apply?

Before one considers whether a piece of legislation violates a particular provision of the Charter, the first question that must be asked is whether the Charter is even applicable. This issue has been the subject of much discussion by academic writers.

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38 Musqueam Indian Band Property Taxation Bylaw, PR-96-02. Section 2(1) of the bylaw states:

Subject to the provisions of the assessment bylaw and this bylaw, and for raising revenue for local purposes:

(a) all property in the reserve is subject to assessment and taxation, and

(b) every interest holder shall be assessed and taxed on the property in respect of which he is an interest holder.

Section 14(2) provides an exemption for certain property held by band members.
Some have concluded that the Charter ought to apply to the exercise of aboriginal self-government powers,\(^{39}\) while others maintain that it should not.\(^{40}\)

The starting point for any discussion as to whether the Charter applies to a particular law is section 32(1) of the Charter, which states:

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.

On a plain language reading of this provision, only matters within the authority of Parliament and the provincial legislatures are subject to Charter scrutiny. The question of the scope of section 32(1) arose in \textit{RWDSU v. Dolphin Delivery Ltd.},\(^{41}\) where the Supreme Court of Canada was asked to decide whether the Charter could apply in a matter arising between private parties. The court held that the Charter did not apply to the actions of private parties because “s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government.”\(^{42}\)

The ruling in \textit{Dolphin Delivery} suggests that the Charter can only apply to the federal and provincial governments, acting through their legislative, executive, and administrative branches. As discussed earlier, band councils that pass taxation by-laws pursuant to the Indian Act ultimately act under federal statutory authority pursuant to section 91(3) of the Constitution Act, 1867. On this basis, it appears that the Charter is applicable to band council by-laws. Peter Hogg notes:

Because s. 32 makes the Charter of Rights applicable to the federal Parliament and the provincial Legislatures, the Parliament and Legislatures have lost the power to enact laws that are inconsistent with the Charter of Rights. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, administrative tribunals and police officers, is also bound by the Charter.\(^{43}\)

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\(^{41}\) [1986] 2 SCR 573.

\(^{42}\) Ibid., at 598.

\(^{43}\) Supra note 23, at paragraph 34.2(c).
Hence, it seems that the Charter would apply to a bylaw, such as the Musqueam property taxation bylaw, passed pursuant to section 83(1)(a) of the Indian Act.

There appears to be some support for this position in the jurisprudence in respect of Charter challenges of band bylaws relating to the prohibition of intoxicants on reserve under section 85.1 of the Indian Act. For example, in *R v. Campbell*, the court was asked to consider the constitutionality of a bylaw that prohibited the possession of intoxicants on reserve and the intoxication of individuals while on reserve. The bylaw was challenged under section 15 of the Charter on the basis that it discriminated against individuals on reserve who engaged in activities that would not be prohibited off reserve. The Manitoba Court of Appeal upheld the validity of the bylaw, holding that it did not violate section 15 of the Charter. Although there is no discussion in the decision concerning section 32(1) and the question of whether the Charter should even apply to the band bylaw, in this case at least, the court evidently operated under the assumption that it did.

Where aboriginal governments act pursuant to their authority under section 35(1), the applicability of the Charter is more difficult to determine, since this authority is not grounded in a federal or provincial head of power. On a plain language reading of section 32(1), there is no suggestion that the Charter may apply to any government other than the government of Canada or of a province, nor is the provision drafted in general language so as to include another level of government at some future time. Nevertheless, according to the Royal Commission on Aboriginal Peoples, the Charter should be applicable to aboriginal governments:

> All people in Canada are entitled to enjoy the protection of the Charter’s general provisions in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved. On this ground alone, the general provisions of the Charter apply to Aboriginal governments, and section 32(1) of the Charter should be read in this light.

In explaining the basis for its conclusion, the royal commission observed that

the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter. The wording of the section is not exhaustive. It allows for the possibility that government bodies not specifically named in the section are subject to the Charter’s provisions. The tacit recognition of an Aboriginal order of government in section 35(1) leads us to take a broad view of the terms of section 32(1).

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44 1996 CanLII 7298 (Man. CA).
45 *Restructuring the Relationship*, supra note 39, at 230.
Kent McNeil takes a different view and concludes that section 32(1) should not be interpreted to apply to aboriginal governments. The main thrust of his argument is that there is no indication in the language of the provision that the legislators intended it to have broad application. Further, he suggests, there are good reasons why section 32(1) should not be interpreted to apply to aboriginal governments as “a kind of afterthought”: “Aboriginal peoples were not directly involved in patriation of the Constitution and inclusion of the Charter in 1981-82; on the contrary, there was strong opposition to patriation among them.” Finally, citing the general interpretive rule that ambiguities in treaties and statutes that affect aboriginal rights ought to be resolved in favour of aboriginal peoples, McNeil argues that a broad reading of section 32(1) would be unfavourable to aboriginal peoples, since the application of the Charter to the actions of their governments would itself entail a limitation of an aboriginal right.

A strict interpretation of section 32(1) seems to favour McNeil’s approach. A plain language reading of the section, coupled with the interpretive principle that ambiguous provisions should be resolved in favour of aboriginal peoples, suggests that the Charter should not be applicable to aboriginal governments. As noted above, the Royal Commission on Aboriginal Peoples preferred a purposive interpretation, arguing that, from a policy perspective, the Charter ought to apply to aboriginal governments in order to ensure that all Canadians are entitled to enjoy its protections in their relations with all levels of government. McNeil’s response appears to be that, from a policy perspective, not only should aboriginals be consulted, but their consent should be a prerequisite to any application of the Charter to their governments. He states:

For the Charter to be unilaterally imposed on [aboriginal] governments today through a questionable interpretation of section 32(1) would turn the clock back to a time when the Aboriginal peoples were often not given the opportunity to participate when important decisions affecting their constitutional rights were made.”

The policy issue that McNeil then identifies is whether the Charter ought to apply to a level of government whose members have not consented to its adoption. Of course, there may be many advantages for members of First Nation communities to have the Charter apply to the actions of their government. This may be why more recent treaties and agreements explicitly state that the Charter applies to the actions

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48 Ibid., at 69-70.
49 This rule was established in Nowegijick v. The Queen, [1983] 1 SCR 29, where the court stated (at 36) that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”
of the First Nation government. However, McNeil’s argument seems to be that this is a question for the aboriginal community as a whole to decide, not a question to be decided for them.

This approach does raise the possibility that there may be pockets within Canada where the Charter does not operate to protect Canadians in their dealings with a level of government, and thus that the Charter may not have universal application. However, this may be a relatively small price to pay in order to uphold the core principle of democratic consent.

In this respect, it is helpful to refer to the Supreme Court of Canada’s decision in Reference re Secession of Quebec, where the court discussed the values underlying the constitution. The court identified democracy as one of four principles on which the constitution is founded, and which aid in its interpretation; the other three are federalism, constitutionalism and the rule of law, and respect for minority rights. With respect to democracy, the court stated:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.

This passage highlights the interaction of the core principles. Democracy is not possible without the rule of law, and law lacks legitimacy without democratic consent.

51 For example, the Nisga’a Final Agreement, supra note 12, at c. 2, section 9, states, “The Canadian Charter of Rights and Freedoms applies to Nisga’a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga’a Government as set out in this Agreement.” The inclusion of such a provision in an agreement seemingly satisfies the policy concern that First Nations consent to the application of the Charter to their level of government. However, as an anonymous reviewer of an earlier version of this article has pointed out, a question still remains as to whether such a provision is even constitutionally binding, given that section 32 appears to limit the Charter’s application to federal and provincial governments. In other words, is such a provision an attempt to amend section 32? While this is a very interesting question, and one worth noting, it is beyond the scope of this article to fully address it.


53 Ibid., at paragraphs 49 and 52.

54 Ibid., at paragraph 67.
of the governed. However, the legitimacy of the law also depends on its recognition of certain moral values, many of which have been woven into the fabric of our constitution. One of those values is respect for minority rights, including aboriginal rights. This is evidenced by the 1982 amendments to the constitution and the introduction of the Charter, which specifically recognize the rights of Canada’s aboriginal peoples.

Since the law is not static but evolving, the integration of the law with underlying principles is sometimes imperfect, and this creates difficulties in interpreting the law. Section 32(1) of the Charter is a case in point. Given the principles underlying the constitution and their role in interpreting particular provisions, and the constitutional recognition of aboriginal rights (for example, in section 35(1)), it is difficult to see how section 32(1) could be interpreted as applying to First Nation governments without first obtaining their consent. To do otherwise would seemingly undermine the Charter’s legitimacy. This is not to elevate democracy over the rule of law, but rather to acknowledge that the constitution itself may sometimes reflect a conflict of values. Such conflict should not be resolved by a questionable interpretation when it could be resolved more appropriately by resorting to another principle—in this case, democracy.

These considerations appear to lend weight to McNeil’s argument that the Charter should not be applied to aboriginal governments without prior consultation and the consent of their communities. Until such consent is obtained, in my view, section 32(1) should not be interpreted so as to bring aboriginal governments within its scope.

**Barriers to a Charter Challenge**

Even if we suppose that aboriginal governments fall within the scope of section 32(1), it is by no means clear that the Charter can be effectively applied to limit the scope of an aboriginal law. There are at least two potential barriers to a Charter challenge of a taxation law passed by an aboriginal government. The first is more limited in scope, applying only to those rights that are grounded in section 35(1). The second may have much broader application—being the protection of aboriginal rights pursuant to section 25 of the Charter—applying not only to laws passed pursuant to rights under section 35(1) but, arguably, also to laws passed pursuant to statutory rights grounded in a federal head of power.

**Implication of the Constitutional Status of Section 35(1) Rights**

One possible obstacle to the application of the Charter to limit aboriginal laws is the constitutional status given to section 35(1) rights. As discussed in the first part of this article, section 35(1) affirms and recognizes aboriginal and treaty rights. Thus, it gives constitutional status to rights that are sourced in the prior occupation of the land by Canada’s aboriginal peoples and in their mode of life. See, for example, the Supreme Court of Canada’s statement in MNR v. Mitchell, [2001] 1 SCR 911, at paragraph 11: “The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status.”
about this fact is that the Charter cannot be used to abrogate another constitutional provision. As a result, it appears that section 35(1) rights would not be subject to limitation by the Charter.

To leave the argument at this level of abstraction would be to do an injustice to the distinctions arising out of the jurisprudence on this issue. In Reference re Prov. Electoral Boundaries (Sask.), the Supreme Court of Canada recognized that there is a distinction between a power and the exercise of that power, such that (as former Chief Justice McEachern of the BC Supreme Court stated) “[i]f the fruit of the constitutional tree does not conform to the Charter . . . then it must to such extent be struck down.” This implies that, although the Charter cannot apply to abrogate the power itself, it can apply to limit the exercise of that power. The question that arises with respect to a section 35(1) right to tax, then, is whether a First Nation law that grants preferential treatment to its members is part of the right itself, which is protected by section 35(1), or whether it is an exercise of that right and can be limited by the Charter.

The reasoning in Reference re Bill 30, An Act To Amend the Education Act (Ont.) is helpful here. The Supreme Court of Canada held that legislation passed pursuant to Ontario’s plenary power under section 93 of the Constitution Act, 1867—a statute providing for full funding of Roman Catholic schools in Ontario, but not to schools of other denominations—was immune from Charter review. The court stated:

Their protection from Charter review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province’s plenary power to enact that legislation. What the province gives pursuant to its plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissident schools.

The court thus concluded that legislation passed by the province that in effect granted preferential treatment to Roman Catholic schools to the exclusion of others was nonetheless protected from Charter review because of the province’s constitutionally recognized power to do so. It is important to note here that it is the exercise of the power, rather than the power itself, that is being protected from Charter review.

56 See Reference re Bill 30, An Act To Amend the Education Act (Ont.), [1987] 1 SCR 1148, at paragraph 63. This decision is discussed further below. See also New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319.
58 Reference re Bill 30, supra note 56.
59 Ibid., at paragraph 63.
The court explained its reasoning as follows:

Once section 93 is examined as a grant of power to the province, similar to the heads of power found in s. 92, it is apparent that the purpose of this grant of power is to provide the province with the jurisdiction to legislate in a prima facie selective and distinguishing manner with respect to education whether or not some segments of the community might consider the result to be discriminatory. In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion vis-à-vis others.60

Although the Charter is intended to constrain the exercise of legislative power conferred under the Constitution Act, 1867 where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867. . . . The Charter would not be available to disallow the implementation of s. 93(1), or legislation for the protection of the rights embedded by s. 93(1), or legislation contemplated in s. 93(3).61

The above passages suggest that section 15 of the Charter will not be available to challenge federal legislation that gives preferential treatment to “Indians” as that term is understood for purposes of section 91(24). As Martland J stated in AG Canada v. Canard, and the court reiterated in Campbell,

[t]he subject-matter defined in s. 91(24) necessarily contemplates legislation respecting the status and rights of a particular class of persons. If the words “equality before the law” in s. 1(b) of the Bill of Rights were to be construed as precluding legislation of this kind, it would prevent Parliament from exercising the power entrusted to it by s. 91(24).62

With respect to using the Charter to challenge the Indian Act generally, the court in Campbell noted:

[T]he Supreme Court of Canada has clearly stated that the Charter cannot be applied so as to abrogate or derogate from other constitutional provisions: see Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] S.C.R. 1148.63

Hence, the mere fact that the Indian Act is legislation that singles out a particular class of persons does not make it susceptible to a challenge pursuant to section 15(1) of the Charter.

60 Ibid., at paragraph 79.
61 Ibid., at paragraphs 80-81.
63 Campbell, supra note 44, at paragraph 13.
The question arises, though, whether a First Nation taxation law, grounded in a section 35(1) right, that makes a distinction based on band membership and accords preferential treatment on this basis is nonetheless subject to the Charter. This is a different distinction than that between Indian and non-Indian since, presumably, some “Indian” non-members of a First Nation may hold leasehold interests within the First Nation’s jurisdictional territory. It thus appears that an “Indian” non-member would be subject to the levy, just as any other non-member would. As a result, the member/non-member distinction that underlies the law is not a distinction between Indian and non-Indian. On the line of reasoning in *Reference re Bill 30*, it is arguable that the Charter should not apply to laws passed by a First Nation pursuant to a treaty or aboriginal right that make distinctions based on membership in a community. Although the distinction authorized by section 91(24) may be the distinction between Indians and non-Indians, it appears that section 35(1) authorizes distinctions between members and non-members of a particular First Nation. This follows directly from the fact that aboriginal rights, being communal rights, are community specific; for example, members of one First Nation community may have an aboriginal right to fish for food, while members of another First Nation community may have an aboriginal right to sell herring spawn on kelp. As a result, the protection available under section 35(1) applies, not to rights based on the distinction between Indians and non-Indians, but to rights based on membership in a community. Hence, it appears that preferential treatment based on the constitutionally recognized distinction between membership and non-membership in a First Nation cannot be challenged by the Charter. As the Supreme Court stated in *Reference re Bill 30*, although the intended effect of the Charter is to constrain the “exercise” of legislative power, the application of the Charter is itself constrained. Specifically, the Charter “cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by [the constitution].”

**Implication of Section 25 of the Constitution Act, 1982**

On the line of reasoning discussed above, although rights under section 35(1) appear to be protected from Charter intrusion, it is not at all clear that the Musqueam Indian Band Property Taxation Bylaw is thereby granted protection, since the bylaw was enacted pursuant to section 83(1)(a) of the Indian Act and is therefore grounded in section 91(3) of the Constitution Act, 1867. The constitutional protection afforded through section 91(24), as noted above, is the Indian/non-Indian distinction, and that is not the distinction that the bylaw draws.

However, there is a second route by which the Musqueam bylaw may receive protection from Charter intrusion, namely, through section 25 of the Constitution Act, 1982. Section 25 states:

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65 *Reference re Bill 30*, supra note 56, at paragraph 80 (quoted in context at note 61 above).
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.

The language of the provision is strong and very broad: the Charter cannot “abrogate” or “derogate from” not only aboriginal and treaty rights, but also “other rights or freedoms that pertain to . . . aboriginal peoples.” This wording, combined with the general interpretive principle that statutory ambiguities should be resolved in favour of aboriginal peoples (which has also been applied in the context of constitutional interpretation),\(^{66}\) suggests that section 25 may be interpreted as being fairly expansive in scope.\(^{67}\)

Although there has not been much judicial discussion of the scope of section 25, there are scattered statements in the case law that seem to support a broad application of this provision. For example, in the decision of the Supreme Court of Canada in Canada (Minister of Indian and Northern Affairs) v. Corbiere, L’Heureux-Dubé J stated in her concurring reasons:

Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a Charter challenge could abrogate or derogate from “other rights or freedoms that pertain to the aboriginal peoples of Canada.” This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the “other rights or freedoms” included in s. 25.\(^{68}\)

Thus, L’Heureux-Dubé J acknowledged that section 25 appeared to protect statutory rights as well as the aboriginal and treaty rights recognized in section 35, though she clearly thought that there were certain constraints on such broad application of the provision.

Williamson J of the BC Supreme Court in Campbell et al. v. AG BC, etc., noted and expanded on L’Heureux-Dubé J’s comments, as follows:

Although there are few cases considering s. 25, what they show is that the section is meant to be a “shield” which protects aboriginal, treaty and other rights from being adversely affected by provisions of the Charter. It does not in itself add any substantive rights. The section is only triggered when aboriginal or treaty rights are challenged on

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\(^{66}\) See Nowegijick, supra note 49, and Van der Peet, supra note 10, at paragraph 24.

\(^{67}\) See the discussion of R v. Kapp, infra note 71, and the accompanying text.

\(^{68}\) [1999] 2 SCR 203, at paragraph 52.

Keeping these authorities in mind, and applying a purposive interpretation to s. 25 in light of the admonition of the Supreme Court of Canada that where there is ambiguity, constitutional or statutory provisions are to be given a large and liberal interpretation in favour of aboriginal peoples, one comes to the conclusion that the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the Charter.

If Williamson J is correct in his interpretation of the purpose of section 25, can we infer that section 25 would apply to protect provisions in bylaws that bestow preferential treatment on members of the First Nation to the exclusion of non-members? Kirkpatrick J’s concurring reasons in R v. Kapp suggest that it should.

In Kapp, non-aboriginal commercial fishermen were charged with fishing for salmon with a gillnet during a period of closure contrary to section 53(1) of Pacific Fishery Regulations, 1993, and therefore committed an offence contrary to section 78 of the Fisheries Act. The accused argued that the Aboriginal Communal Fishing Licences Regulations infringed section 15 of the Charter by allowing members of the Musqueam, Burrard, and Tsawwassen bands to fish during a period not available to non-aboriginal fisherman. Low and McKenzie JJ held that the regulations did not infringe section 15 of the Charter and disposed of the claim on that ground. Further, McKenzie J found that the Musqueam, Burrard, and Tsawwassen communal licences “cannot be properly viewed as an extension of the right to an aboriginal food fishery recognized in Sparrow,” and, therefore, section 25 did not have any application. Kirkpatrick J held, to the contrary, that section 25 “affords a complete answer to the appellants’ s. 15 equality challenge.” In her view, the rights granted under the communal fishing licences issued to the three bands fell within

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69 Campbell et al. v. AG BC, supra note 8, at paragraph 156.
70 Ibid., at paragraph 158.
72 SOR/93-54, as amended.
73 RSC 1985, c. F-14, as amended.
74 SOR/93-332, as amended.
75 Kapp, supra note 71, at paragraph 14.
76 Ibid., at paragraphs 84 and 113.
77 Ibid., at paragraph 114.
78 Ibid., at paragraph 118.
the ordinary meaning of the phrase “other rights or freedoms that pertain to the aboriginal peoples of Canada” in section 25.\textsuperscript{79} In her reasons, Kirkpatrick J gave careful consideration to the purpose of section 25 and the scope of its application in respect of such “other rights or freedoms.”

When considered together, s. 25 of the \textit{Charter} and ss. 35 and 91(24) of the \textit{Constitution Act} illustrate the unique position of aboriginal peoples within the constitutional framework of Canadian society. Section 25 exists to give effect to that unique relationship by allowing the federal government to exercise its s. 91(24) powers in a way that reflects the distinction drawn between aboriginal and non-aboriginal people within the \textit{Constitution}, without the threat of a \textit{Charter} challenge.\textsuperscript{80}

This passage suggests that laws grounded in section 91(24) can grant preferential treatment to one or more aboriginal communities without granting the same rights to all aboriginal peoples.

Kirkpatrick J further stated:

\begin{quote}
It appears that in order for s. 25 to apply, “other rights or freedoms” must relate to a significant aspect of aboriginal life, culture or heritage, and relate to aboriginals as aboriginals. In my view, it is the content of the right and not the manner in which it is acquired that is significant, given the obligation on the Crown to negotiate with aboriginal peoples prior to the signing of treaties or the recognition of aboriginal rights.\textsuperscript{81}
\end{quote}

Finally,

I conclude that the phrase “other rights or freedoms” in s. 25 includes benefits conferred on aboriginals by laws or agreements directed at their special status as aboriginals. In my opinion, the communal fishing licences granted by the government to the Musqueam, Tsawwassen and Burrard bands were a specific right (albeit for a 24-hour period) conferred on them by reason of their special aboriginal status. Furthermore, the licences were issued as part of a policy directed at resolving the long-standing grievances in respect of the salmon fishery by improving aboriginal access to the commercial fishery and including aboriginal communities in the management of the fishery resource. As such, they may form part of the foundation of rights that may be acquired through treaties in the future and which would then have the protection of s. 35.\textsuperscript{82}

In this case, section 25 operated to protect from Charter intrusion a right conferred on three bands under communal fishing licences to the exclusion of all others. The preferential treatment that was thus protected was based, not on an Indian/non-Indian distinction, but on membership in a particular community. Further, the

\textsuperscript{79} Ibid., at paragraph 125.
\textsuperscript{80} Ibid., at paragraph 127.
\textsuperscript{81} Ibid., at paragraph 138.
\textsuperscript{82} Ibid., at paragraph 151.
protected right was not grounded in section 35(1) but in the Constitution Act, 1867, under a federal head of power.\textsuperscript{83}

It is arguable that, on the line of reasoning in \textit{Kapp}, section 25 ought to apply to render preferential taxation bylaws, such as the Musqueam Indian Band Property Taxation Bylaw, free from Charter intrusion. That bylaw was passed pursuant to section 83(1)(a) of the Indian Act and provided an exemption from tax based on membership in the band. The right to pass and enforce the taxation bylaw appears to fall within the category of “other rights or freedoms” in section 25 on two grounds set out by Kirkpatrick J. First, the bylaw appears to “relate to a significant aspect of aboriginal life, culture or heritage.” Section 83(1)(a) of the Indian Act provides that the imposition of tax must be “for local purposes,” implying an expectation that revenue collected under such a bylaw would be used to contribute to the life, culture, or heritage or the aboriginal community. Second, it appears that the bylaw relates to “aboriginals as aboriginals.” As Lamer CJ noted in \textit{Canadian Pacific}, Parliament’s objective in introducing the new taxation powers into the Indian Act in 1988 was to facilitate the development of aboriginal self-government by permitting bands to exercise the inherently governmental power of taxation on their reserves.\textsuperscript{84} This suggests that these taxation powers were introduced in recognition of the special status of aboriginal peoples under the 1982 constitution. Arguably, therefore, a taxation bylaw that granted preferential treatment to its members would be protected by section 25 from Charter intrusion.\textsuperscript{85}

If the foregoing analysis is correct, it appears that, regardless of which provision of the constitution grounds the jurisdiction to tax, taxation laws passed by a First Nation that give preferential treatment to its members are protected from Charter intrusion. This results from the constitutional recognition given to the special status of aboriginal peoples. Thus, preferential treatment based on a distinction between Indian and non-Indian, or between member and non-member of a First Nation, should not constitute a form of discrimination to which section 15 of the Charter would apply.

\textbf{CONCLUSION}

As I have argued above, taxation laws passed by First Nations pertaining to levies on property interests within their jurisdictional territory theoretically can be anchored in one of two sources: section 91(3) of the Constitution Act, 1867 or section 35(1) of the Constitution Act, 1982. The scope of the power may vary depending on the

\begin{itemize}
  \item It appears that the Fisheries Act would, in pith and substance, fall within the scope of section 91(12) of the Constitution Act, 1867, “Sea Coast and Inland Fisheries.”
  \item Supra note 19, at paragraph 22.
  \item By the same reasoning, it follows that a First Nation may also pass bylaws that deny members a benefit provided to non-members. Thus, a bylaw that offered a tax advantage to non-members—for example, as an incentive to locate a business on reserve—would also be free from Charter scrutiny.
\end{itemize}
constitutional source. Taxation bylaws passed pursuant to the Indian Act, and thus grounded in section 91(3), do not attach to Crown interests because these are exempt from taxation pursuant to section 125 of the Constitution Act, 1867. However, it is not so clear whether this restriction would apply to taxation laws grounded in section 35(1). Some statements of the Supreme Court of Canada in Westbank could be interpreted to imply that such a law could attach to property interests of Crown corporations within the First Nation’s territory. However, given a purposive interpretation of section 125, it is unlikely that those statements would be interpreted strictly such that the restriction would not apply. In any event, until this issue is litigated, it is uncertain exactly how the issue would be decided.

Similarly, a taxation law grounded in section 35(1) that gives preferential treatment to First Nation members is seemingly exempt from Charter intrusion on the basis that the Charter cannot render unconstitutional distinctions that are expressly permitted under the constitution. Given that section 35(1) expressly recognizes and affirms certain rights granted to aboriginal peoples to the exclusion of all others, section 15 of the Charter would not apply so as to render the distinction unconstitutional.

A similar law grounded in section 91(3) presumably would not escape a Charter challenge on this basis. However, a defence could succeed based on section 25 of the Constitution Act, 1982. That section protects not only aboriginal and treaty rights but also other rights and freedoms of aboriginal peoples. Applying the reasoning in recent jurisprudence on this point, arguably statutory rights such as Indian band taxation bylaws passed pursuant to section 83(1)(a) may fall into this category and, as a result, be immune from Charter intrusion.

The lesson here is that the constitutional source of a taxation power may affect the scope of the right itself. Hence, although on the surface two laws may look identical, if they are grounded in different constitutional sources, the powers they bestow may vary significantly.