Book Reviews
Comptes rendus

Three Faces of the Law: A Christian Perspective.

By IAN HUNTER.

Mississauga: Work Research Foundation, 1996. Pp. 94. ($7.95 — paper).

Reviewed by Robert E. Hawkins*

There is a danger that the legal community will ignore this book. Its subtitle is not fashionable; its publisher is not mainstream; and the three lectures on which it is based were delivered in a church, not a University. Ian Hunter, Professor of Law at the University of Western Ontario, presented these lectures in July, 1995, to the Ottawa Summer School of Biblical and Theological Studies held at the Dominion-Chalmers United Church.[1]

The Three Faces of the Law are justice, liberty and life. Hunter compares the way in which judges treat these three topics with the way in which they are treated in Judeo-Christian thought. For our courts, "justice" is a product of proper social organization as reflected in progressive laws.[2] For a Christian, justice is found in the love of God, a love that perfectly unites judgment, truth and mercy.[3] For our courts, "liberty" is defined in terms of rights-based personal freedoms. For a Christian, liberty is the freedom to wilfully and joyously submit to the service of God, a submission that neither demands subservience nor condones license.[4] For the Chief Justice of the Supreme Court of Canada, "life" is to be treated "without reference to the philosophical and theological considerations."[5] For a Christian, life comes from God and can only be taken by God. Hunter wonders whether the judges have "forgotten, or ignored" the *Charter's* preamble that acknowledges "the supremacy of God".[6]

Hunter's book makes the case against the secular, relativistic character of Canadian law, a character that he argues admits no right nor wrong, no good nor evil, no guilt nor innocence. The book rejects the notion that every action is an

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[1] I. Hunter, *Three Faces of the Law: A Christian Perspective*, Mississauga: Work Research Foundation, 1996 at 37 [hereinafter *Three Faces*].

[2] *Ibid.* at 22.

[3] *Ibid.* at 33.

[4] *Ibid.* at 53.

[5] *Ibid.* at 73.

[6] *Ibid.* at 73.

excusable product of social conditions. Hunter insists that there are absolute standards, anchored in the Christian faith, by which personal integrity can be judged. The measure of things is the human heart; not the social context.

Hunter sees the *Canadian Charter of Rights and Freedoms*, and its interpretation by the Supreme Court of Canada, as the apogee of relativistic thinking in Canadian law. He makes this clear at the outset of his book:[7]

> A recurrent theme of my lectures will be that Canadian law has become secularized, cut adrift from its moorings in the divine, no longer infused by natural law conceptions, looking for its ultimate validation not in eternal truth, nor even in the 2000 year-old heritage of the Judeo-Christian legal system, but rather in a recently-minted *Charter of Rights*, a Lilliputian statute fit for a nation of pygmies.

Hunter's description of the Christian perspective of law will come as no surprise to the devout. Implicit in his writing, however, is the following, more general question: "By giving the *Charter* a secular, relativistic interpretation, have we failed to recognize in it a natural law foundation based on the enduring values of our national legal, political and historical tradition?" The discussion of that question could be the next step in the already long debate on the legitimacy of *Charter* judicial review.

That debate began with a denial of the legitimacy problem. Justice Lamer, in an early *Charter* case, wrote the following:[8]

> It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of Constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

Professor Hunter has doubts about the legitimacy of *Charter* judicial review. He notes that, "the Supreme Court of Canada leapt at the opportunity to substitute its will for that of Parliament on the most contentious and divisive social issues of the day, ...".[9] To illustrate his point, he discusses four criminal cases in which the effect of judicial interpretation of *Charter* has been to elevate individual rights at the expense of community protection.[10] He argues that

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[7] *Three Faces, supra* footnote 1 at 18.

[8] *Reference Re Motor Vehicle Act (British Columbia) S.94(2)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 at 545 [hereinafter *B.C. Motor Vehicle* cited to D.L.R.].

[9] *Three Faces, supra* footnote 1 at 46. For a similar commentary on the United States Supreme Court see A.M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*, Indianapolis: Bobbs-Merril, 1962 at 200 [hereinafter *Least Dangerous*]. Bickel states: "But it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic Kingdom contrary to the morality of self-government; and in this world at least, it would not work."

[10] *Ibid.* at 47. One case resulted in 47,000 criminal charges in Ontario being dismissed for delay; one held that sniffing the air while doing a "perimeter search" (i.e. on private property) constituted an unreasonable search for illicit marijuana; two others saw a confessed murderer and a rapist guilty beyond any reasonable doubt going free.

fundamental issues of social policy, on which public opinion is sharply divided, were never meant to be resolved by unelected judges.[11]

Recent defenders of the *Charter* acknowledge the legitimacy issue but then try to circumvent it by portraying judicial review as inherently democratic. Public interest advocate Mary Eberts and Dean Marilyn Pilkington of Osgoode Hall Law School have argued that strategic *Charter* litigation on behalf of special interest constituencies is designed to draw public attention so as to "jump-start the political process" and to "inform political debate."[12] Professor Hogg has spoken of a "dialogue" between Courts and legislators.[13] In his view, there is nothing definitive about judicial decisions striking down legislation:[14]

> Where a judicial decision is open to legislative reversal, modification or avoidance, then it is meaningful to regard the relationship between the court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which the Charter values play a more prominent role than they would if there had been no judicial decision.

Hunter's thesis answers these institutional arguments head on:[15]

> Because of the sweeping powers given to judges to decide contentious social issues, issues that once would have been the prerogative of parliament - abortion, euthanasia, mandatory retirement, cruise missile testing, homosexual rights - the judiciary moved from being the least powerful branch of government to, arguably, the most powerful. ...
>
> ... [*the Charter*] forestalls true political debate. The appropriate level of restraint on individual liberties is, or should be, a fundamental political question. But in Canada, such debate cannot occur: it is reduced to one person claiming "I have a right to abortion on demand, assisted suicide, same sex benefits ..." - you fill in the blanks; to which the only response is either acquiescence, or "No, you don't." Ultimately, all such issues are now resolved by the courts.

However, as mentioned above, Professor Hunter goes beyond the counter-majoritarian problem to consider the nature of the *Charter* itself. If the *Charter*

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[11] *Three Faces supra* footnote 1 at 83. For historical support for the view that the *Charter* framers never intended that the Court assume the role of 'super-legislative' see: R.E. Hawkins and R. Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1 at 29-34 and R.E. Hawkins, "Interpretivism and Sections 7 & 15 of the *Canadian Charter of Rights and Freedoms*" (1990) 22 Ottawa L. Rev. 275.

[12] M. Pilkington and M. Eberts, "Don't paint the courts as political interlopers" *The Globe & Mail* (February 1996).

[13] P.W. Hogg, "The Charter Dialogue Between Courts and Legislators" *Law Times* (29 January — 4 February 1996) at 10 For an earlier Canadian statement of the idea of institutional exchange which portrays the communication more as an arm-wrestle than a dialogue, see: G.V. La Forest, "The *Canadian Charter of Rights and Freedoms*: an Overview" (1983) 61 Can. Bar. Rev. 19 at 25-26. The idea may have originated with Bickel who spoke not of a dialogue but of a "colloquy". (*Least Dangerous*, *supra* footnote 9 at 70-71 and at 196).

[14] *Ibid.*

[15] *Three Faces, supra* footnote at 44-45, and 51.

is understood by judges as never having had any reference to an absolute conception of justice, then its moral force starts, and stops, with the personal and ephemeral predilections of individual judges and their sensitivities to the specific details and the particular parties in each case. The law is "cut adrift from its moorings"[16] in the Western legal tradition, in eternal truth, in the divine. If there are no absolutes to give content to *Charter* freedom, liberty or equality, judges will legislate their own content by making relative choices that ought, in a democracy, to be left to elected and accountable parliamentarians.

In the beginning, the Supreme Court of Canada recognized this. Chief Justice Dickson recalled that, "the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts."[17] Justice Lamer held that, "[t]he principles of fundamental justice are to be found in the basic tenets of our legal system".[18] Justice McIntyre stated that the interpretation of all constitutional documents was to be constrained by the language, structure and history of the constitutional text, as well as by the history, traditions and underlying philosophy of our society.[19] The Supreme Court may have said that it was going to interpret the *Charter* having regard to the roots out of which it grew. Hunter's book causes us to question whether it has, in fact, done so.

If Hunter's book obliges us to consider the possibility that the *Charter* has a natural law base, it also obliges us, in its subtitle and throughout, to consider, "What is natural law?". Some things are clear. First, as Hunter argues, there can be no doubt about the place of Judeo-Christian values in our legal system. Nor does recognition of that tradition deny the tradition of tolerance, the civic tradition or the pluralistic tradition of our community. These traditions co-exist and are harmonized by our history.

Second, restraint is the key to the *Charter* enterprise. Apart altogether from democratic concerns, the difficulty of articulating and applying the enduring values of our society in novel social circumstances - in other words, the difficulty in controversial cases of reaching a decision based on neutral principles as opposed to on, what Justice Felix Frankfurter called, "considerations of individual expediency"[20] - should cause the Court to hesitate before cutting legislation down. The judicial review scalpel must be used with surgical precision: when in doubt, do not cut.

Professor Hunter is clear on this. He regrets that our Court has not developed a doctrine of judicial self-restraint.[21] He criticizes Justice McLachlin

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[16] *Ibid.* at 18.

[17] *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 359 (S.C.C.).

[18] *B.C. Motor Vehicle, supra* footnote 10 at 550.

[19] *Re Public Service Employee Relations Act (Alta.)* (1987), 38 D.L.R. (4th) 161 at 217 (S.C.C.).

[20] *Torminiello* v. *Chicago*, 337 U.S. 1, 11 (1949).

[21] *Three Faces, supra* footnote 1 at 46.

who, in *Rodriguez*,[22] would have struck out the section of the *Criminal Code* that makes it an offence to counsel or abet anyone to commit suicide. He observes:[23]

> True, McLachlin J. cites two appeal court judges who appealed for restraint, but she goes on to assert that "as a matter of constitutional obligation, a court faced with a *Charter* breach may not enjoy the luxury of choosing what it will and will not decide." This statement is transparent question-begging. It is precisely on the issue of whether or not the *Charter* has been breached that judicial restraint is called for.

Professor Hunter's argument accords with Bickel's notion of "passive virtues", those devices such as procedure (standing, mootness and ripeness), statutory construction (including vagueness), and improper delegation, that give the court non-constitutional grounds on which to base a decision.[24] The common law requires us to decide cases on the narrowest grounds available. That means that constitutional issues ought not to be reached where non-constitutional grounds exist.

Professor Hunter states that he cannot offer a solution to the present morass in which Canadian courts, "have substituted amorality and relativism for right and wrong, as the guiding stars of judicial interpretation."[25] He might have preferred that there never have been a *Charter*, but he recognizes that there is no going back.[26] Hunter's contribution is to cause the reader to ask whether, in fact, we did abandon all standards of good and evil, right and wrong, guilt and innocence, when we adopted the *Charter*.

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Principles of Canadian Income Tax Law.

By PETER W. HOGG and JOANNE E. MAGEE

Scarborough: Thomson Canada Limited (Carswell). ($42.00).

Reviewed by Warren Grover*

This little jewel, designed initially for law school students, is a remarkably readable and understandable exposition of the basic principles of Canadian

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[22] *Rodriguez* v. *British Columbia* (A.G.), [1993] 3 S.C.R. 519.

[23] *Three Faces, supra* footnote 1 at 75. Hunter is citing McLachlin from *Rodriguez* ibid. at 423. Hunter prefers Justice Hollinrake's approach in the Court of Appeal: "It is my view in areas with public opinion at either extreme, and which involve basically philosophical and not legal considerations, it is proper that the matter be left in the hands of parliament as has historically been the case" (1993), 79 C.C.C. (3d) 1 at 38 (B.C.C.A.).

[24] *Least Dangerous, supra* footnote 9 at 190, where Bickel cautions against the court being drawn into the "political thicket".

[25] *Three Faces, supra* footnote 1 at 19.

[26] *Ibid.* at 87.

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Income Tax It eschews the details which enchant only tax practitioners in favour of a clear, concise and accurate statement of each of the major concepts in our income tax system. Clarity of expression will come as no surprise to anyone familiar with Professor Hogg's other texts,[1] but "concise" is not an adjective a practitioner would anticipate applying to a text on taxation. Nevertheless, Professor Hogg, together with his colleague, Professor Magee, have accomplished the next to impossible.

Income tax is one area of law where is a remarkably good and accessible set of materials for research. All the relevant legal cases are in each of the two sets of tax cases,[2] the two most popular loose-leaf services[3] are excellent and most of the important secondary sources can be found in the publications of the Canadian Tax Foundation.[4] But there has not been a simple analysis of the basic principles to which a lawyer who is not a tax expert can turn for guidance.[5] Hogg and Magee fill that gap.

The first three chapters cover, in only 34 pages, the sources, administration and history of Canadian Income Taxation. The authors then turn to the objectives of income taxation, which is fundamental to the structure of the rest of the book as the "objectives" are used to explain the various statutory provisions and!/hy they do not advance the anticipated objectives. Without those objectives permeating the book, it would be uninteresting to read and more difficult to understand. Instead, these defined objectives make the rest of the book quite entertaining, especially since most of them have become of limited potency given the political reality of taxation in the 1990's. While the raising of revenue for government is an objective we can all agree is fundamental to the imposition of any income tax, the rest of the "objectives" identified in the text seem to be less certain. Take "simplicity", which is defined as a simple and understandable system that makes compliance by taxpayers and administration by government both easy and relatively cheap.[6] To most lawyers, the description of Canada's Income Tax Act as "simple" lacks credibility.

Drawing heavily on the ancient Carter Report,[7] the objectives of "equity" and "neutrality" are seen as very important. "Equity" or "fairness" requires that

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[1] Hogg's *Constitutional Law of Canada* is his best known work with editions in 1977, 1985 and 1992. He has also written a text entitled *Liability of the Crown*, 2d ed. (1989).

[2] *Canada Tax Cases* (C.T.C.) published by Carswell and *Dominion Tax Cases* (D.T.C.) published by CCH.

[3] *Canada Tax Service* (14 volumes) published by Carswell and CCH, *Canadian Tax Reporter* (10 volumes).

[4] As well as the *Canadian Tax Journal* which comes out every two months, the Foundation publishes reports of its Corporate Management Tax Conference and its Conference Report. It also has published about 100 "Tax Papers" on various subjects.

[5] There are many other tax texts that can be consulted, most of which are listed at page 6 of Hogg and Magee. Hogg and Magee has already been used by the Supreme Court of Canada to explain an "historical reality" in *Schwartz* v. *Canada* (1996), 133 D.L.R. (4th) 289 at 300 (S.C.C.).

[6] The objectives are set out on page 37, Table 4-2.

[7] *Report of the Royal Commission on Taxation* (1966).

tax be levied based on ability to pay, with graduated rates that rise as income rises; a so-called "progressive" system. But were are all aware that tax rates for the highest income earners have decreased in Canada as they have in the United States and the United Kingdom. While these reductions may be seen as regressive, inequitable and unfair by some standards, they do comport with reality in the 1990's.

"Neutrality" requires a tax system that does not affect people's behaviour. Tax planning should not drive personal or business decisions. If this is so, why do we have such a substantial number of our brightest professionals deriving their livelihoods exclusively from income tax planning? While it may be unethical to pay cash for services received when one is fairly certain that the cash will not be reported as income for tax purposes, it does happen even in the best of circles.

Accordingly, while simplicity, equity and neutrality are less likely drivers of income taxation in my opinion than rapacity, expediency and political feasibility, it would be difficult to use the latter terms to better explain individual items of the tax structure. It is more effective to use more gracious and acceptable terminology even if inconsistent with reality. It aids understanding without raising emotional responses. And consistency may well be the hobgoblin of small minds.[8]

The text moves on from objectives to rates of tax and notes that the top marginal rate was 53.2% in Ontario in 1995, considerably less than before 1988 and dramatically less than before 1971. To me it would have been helpful to contrast that with the maximum rate of 40% in both the United States and United Kingdom, but one then has to ask whether the inclusions and deductions are comparable, which leads to needless complexity. The hallmark of Hogg and Magee's text is ease of comprehension and clarity of style.

The text proceeds through a short chapter on the taxation year to the taxation unit and the attribution rules. These rules are of particular interest to families where there is a considerable disparity between income earners. It points out[9] that while the attribution rules can nullify certain transfers of income yielding property, some tax effective diversions of income can be easily achieved. By using one simple example, the text encourages the reader to invent several others, particularly since the inventions may lead to increased wealth for either the reader or a client.

Perhaps the most challenging theoretical question in income taxation today is what should be included in the tax base. In a very clear and concise fashion, a short chapter takes the reader from the Haig formulation of a comprehensive

[8] R.W. Emerson said "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."

[9] Hogg and Magee at 103.

base,[10] developed in 1921, to the present Canadian system for inclusions, which shows a remarkable disaffection for the concepts of neutrality or ability to pay.

The chapters on the sources of income follow a more routine format, starting with income from employment; the inclusions and deductions. Of importance to the general practitioner are the areas where the employer can transfer benefits on a non-taxable basis to the employee while still deducting the cost of the benefits. Anytime there is an opportunity for tax saving of that obvious a nature, it is normally utilizable. When treating income from a business or from property, there is a simplified explanation of financial statements and generally accepted accounting principles, that is sufficiently complete for most general practitioners and can be readily understood by the uninitiated within an hour. That is no mean feat.

Sometimes I would like to have seen more use of actual cases as it can be a respite from some pretty compact explanations. A good example is the *Symes* case[11] that is neatly digested in a few paragraphs. That was the case where a lawyer with small children sought to deduct as a business expense the cost of a nanny, which cost, at the time over three times the maximum child care expense allowed by a specific provision in the statute. The trial court allowed the taxpayer's appeal from the Minister's reassessment but he was reversed on appeal to the Federal Court of Appeal. The appeal to the Supreme Court of Canada was dismissed, over a powerful dissent by the female members of the Court who saw the issue largely in terms of a necessary expense for this taxpayer, who was a mother with small children, in order for her to pursue her profession. Hogg and Magee agree with the Supreme Court's decision on the basis of neutrality and equity in the tax system, as employees would not be entitled to an equal deduction and professionals have a greater ability to pay. That may be contrasted with the approach to the deductibility of fines imposed on a taxpayer who is convicted of a criminal offence, a few pages later in the text, where it is said:

> "The overriding principle of tax policy is that tax should be levied in accordance with ability to pay; this entails the consequence that only net income should be subject to tax; and this leads to the conclusion that business-related fines should be deductible."[12]

Fines are fair, nannies unfair.

The provision relating to deductible expenses also has a very helpful analysis of the concepts involved in capital cost allowance and its relationship

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[10] Haig wanted to use a definition that captured the net accretion to one's economic power between two points of time. Haig's formulation is often joined to Simons' elaboration which only occurred in 1938.

[11] (1994) 110 D.L.R. (4th) 470 (S.C.C.). The judgment is almost 100 pages long.

[12] Hogg and Magee at 229.

to depreciation. In less than 20 pages, the authors have set out all the major concepts, including a numerical example which neatly captures each concept. Eligible capital expenditures are then added in the space of only four pages.

The longest chapter in the book is devoted to income from capital gains with over one quarter of the chapter spent on the principal residence exclusion. In any other book on taxation, the treatment would be considered concise and clear. It is only in comparison with the other chapters that one can cavil with its attention to picayune details. Even so, there are some very useful examples that clarify the reserve rules when proceeds of disposition are spread over time and the exemption formula when the residence was only "principal" for part of its ownership.

There is a separate chapter on other income and deductions which contains excellent pithy explanations of the tax treatment of registered pension plans, deferred profit sharing plans, RRSP's, RRIF's, education savings plans, retirement allowances as well as alimony and maintenance payments. And it is all covered in under 30 pages. There is a brief description of the *Thibaudeau*[13] case where a recipient of child support payments argued that the requirement to include them in her income, as required by the *Income Tax Act*, violated her *Charter* rights. This time the court of first instance agreed with the Minister, the Federal Court of Appeal reversed and agreed with Ms. Thibaudeau but the male members of the Supreme Court of Canada reinstated the Minister's assessment, again over the dissenting voices of the female jurist. The final voice in this saga was a change in the statute which will make child support payments non-deductible to the payor but will not include such payments in the income of the recipient for tax purposes.[14] This will increase the tax revenues overall as the previously permitted deduction usually resulted in less tax payable. It will not impact existing support payments as it only applies to agreements entered into after the change was announced. So Ms. Thibaudeau still loses but the fisc wins again!

The final chapter on which I will comment is on corporations and their shareholders. It deals only with the most common corporate/shareholder situations and does not include inter-corporate machinations such as amalgamations or roll-overs. That is appropriate for an introductory text, as the details involved in those areas are clearly the preserve of tax experts. The chapter does explain the treatment of income received by public corporations and Canadian controlled private corporations, integration concepts and the taxation of dividends. Each concept is clearly adumbrated. I do wonder why public corporations are treated as "intermediaries" between shareholders and corporate customers. While that may be

[13] (1995), 124 D.L.R. (4th) 449 (S.C.C.). It is almost 80 pages long.

[14] Federal Budget of March 6, 1996. Only applies to contracts or court orders made after April 30, 1997.

appropriate in closely held corporations, the idea that General Motors is only an intermediary between its individual shareholders and customers who purchase vehicles, leaves me agog.

The shortcomings of the text are extremely minor, even in total. For anyone who is not a tax expert or has not studied tax in the last few years, this text is an easy way to learn the Canadian Income Tax system, whether you want to get an overview or need a reasonably in-depth understanding of a specific area.

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First Nations and Canadian Taxation.

By PETER RANSON.

Toronto: KPMG. 1994. Pp. 112. (Free).

Reviewed by Faye L. Woodman*

At least for the time being, Indians[1] in this country are generally subject to taxation. The only exemptions recognized by the taxation authorities are a limited one in *The Indian Act*[2] and some in various treaties. While aboriginals have argued for recognition of inherent rights to self government that would preclude their taxation by Canada under principles of international law,[3] the Federal Government and most certainly the provinces have not conceded the point. The Federal Government's position appears to be that taxation is, at best, an area of overlapping jurisdiction subject to negotiation.[4]

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[1] *The Indian Act*, RSC 1985, c. I-5, as amended, subsection 2(1). Inuit are not classified as "Indians" for the purposes of The Indian Act, although they are "Indians" for the purposes of the *Constitution Act*, 30 & 31 Vic., c. 3 (UK). It is the Federal Government's position that provincial governments are "responsible" for non-status and off-reserve aboriginals and Métis.

[2] *The Indian Act, ibid.*

[3] Broad rights to aboriginal self government have not as yet been recognized by the Courts. But see *Westar Timber Ltd.* v. *Gitksan Wet'suwe'en Trible Council*, 37 B.C.L.R. (2d) 352 (CA). Under the principles of international law, one nation cannot tax another.

[4] Federal Policy Guide, *Aboriginal Self-Government: The Government's of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Self-Government*, Ottawa, 1995; P. DiGangi, *Mik'mag Government, Federal Policy and Bureaucracy: A Situational Analysis*, Union of Nova Scotia Indians, 1995.

These fundamental issues are ignored in a publication by KPMG entitled *First Nations and Canadian Taxation*. Nonetheless, this book could be of interest to those lawyers and their clients who want a quick orientation in the area of Indian taxation from the particularly current perspective of the *Indian Act* and some aspects of treaties.[5]

The basis for the legislative exemption from taxation is found in sections 87 and 90 of the *Indian Act*.[6] The Act provides that property is exempt if it is an interest in reserve lands of personal property situation on a reserve. It also exempts from taxation property received by Indians from government appropriations and pursuant to treaty obligations. The intersection of this loosely drawn legislation from another era and modern day conditions has generated considerable litigation. Even so, many situations are governed by complicated federal and provincial interpretations without the force of law. In that regard, the dominance of informal rule-making is striking. Thus, it is not surprising that in 1990 the federal government announced a review of Indian taxation policy. The review was carried out by the Indian Taxation Group of the Department of Finance. Its main emphasis was consultation and the development of consensus, which was not always obtained. Its draft report,[7] submitted in 1993, produced some statements of principles but not detailed recommendations or legislation.

Treaties are the other recognized source of exemption from taxation. Among the older treaties, none mentions taxation specifically in writing.[8] On

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[5] The continuing research of Professor Richard H. Bartlett of the Native Law Centre, University of Saskatchewan is acknowledged. See *Indians and Taxation in Canada*, 3d ed., Saskatoon: Native Law Centre University of Saskatchewan, 1992.

[6] *Supra* footnote 1. 87.(1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situation on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph 1(a) or (b) or otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs 1(a) or 1(b) or for succession thereto if the property passes to an Indian,....

90.(1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situation on a reserve.

[7] *A Working Paper on Indian Government Taxation*, (Ottawa: Department of Finance, 1993).

[8] The only reference to taxation in the oral assurances recorded at the time of any of the treaties is contained in the report of the treaty commissioner in respect of *Treaty no. 8* in 1899, (Ottawa: Queen's Printer, 1899).

the other hand, modern-day treaties provide various explicit financial arrangements, often including some form of temporary tax relief. Settlement corporations and various kinds of trusts have been favoured vehicles. *First Nations and Canadian Taxation* briefly surveys the area of settlement corporations.

First Nations and Canadian Taxation is a slender volume which is attractively presented. It is easy to find things; the headings and subheadings assist in reading the text, and the chapters are arranged logically. Chapter 1 begins with the definition of "Indian". Chapter 2 explores some of the reasons why Indians are exempt from tax. Later chapters deal with more esoteric topics, such as the use of a trust with Indian beneficiaries or trustees or both and taxation of investment income. The final chapter is a useful compendium of the present provincial and federal positions on commodity taxes. However, since so much of the latter area is governed by administrative fiats, which can be readily changed, not all of the material may be up-to-date for practice purposes. It should be mentioned that a second edition is expected before the end of this year.

In a modest book such as this, which deals only in general terms, much of the complexity is omitted. Nonetheless, a number of issues of general concern are usefully covered, although the some of the areas have changed marginally. As would be expected, the taxation of wages and salaries paid to Indians is thoroughly canvassed. The book also considers the taxation of business income earned in partnerships, sole proprietorships and joint ventures, as well as the somewhat anomalous position of Indian-owned corporations. There are also chapters on investment income and non-profit organizations and Indian Bands as municipalities. Tax planning for Indians and their non-Indian partners is given rather short shrift, but occasional references can be found throughout the text.

Since the book is about First Nations and *Canadian* taxation, by definition no mention is made of First Nations taxation of Indians and non-Indians. At present, *The Indian Act* recognizes a limited right of Indians to tax on the reserve.[9] The Working Group, however, recommended the enlargement of Indian powers of taxation concomitantly with increased powers of self-government.[10] There was a general consensus that First Nations should be able to tax First Nations for the purposes of First Nations. There was less agreement,

[9] 83.(1) 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;

(a.1) the licensing of businesses, callings, trades and occupations;...

[10] *Supra* footnote 7.

however, on the taxation of non-Indians. Difficult questions concerning the right of non-Indian taxpayers to representation and services, among other things, must still be resolved. The intricacies of yet a third level of taxation and its relationship to the tax powers of other nations, much less those of the federal and provincial governments, will also have to be worked out, but that is another book.