E-Commerce on Reserve: Opportunities, Challenges, and Taxation

Alexander E. Buchan[1]

REGINA, SASKATCHEWAN

ABSTRACT

This paper provides an overview of the law relating to the taxation of income stemming from e-commerce[2] on Indian[3] reserves. The paper seeks to identify the opportunities and limitations for e-commerce on reserve, including the specific tax implications[4] for bands, corporations, and individuals, and the practical barriers for Indigenous communities that wish to engage in e-commerce, such as infrastructure and capacity gaps.

[1] At the time of writing, the author was a third year student in the Common Law Section of the Faculty of Law at the University of Ottawa. After graduating in June 2018, the author began his articles at Kanuka Thuringer LLP in Regina, Saskatchewan..

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This paper does not represent the views of Kanuka Thuringer LLP or the University of Ottawa, nor is it intended to serve as legal advice. The paper merely aims to present a coherent legal theory for the intersection of E-Commerce and Aboriginal Business Law.

[2] This paper often refers to e-commerce. E-commerce can be a nebulous term, with a broad or narrow definition depending on the context. For the purposes of this paper, e-commerce refers to commerce conducted over the Internet. Examples of this commerce include online shopping, data storage, and online marketing. The discussion of e-commerce in this article does not include electronic banking, currency exchanges, or using cryptocurrencies such as Bitcoin. While these topics are ripe for discussion and may have potential for a nuanced interaction with Indigenous communities in Canada, they have their own potentials and peculiarities that are beyond the current scope of this paper.

[3] This paper frequently uses the term "Indian." This term is used because it has legal meaning in the statutes and constitution of Canada. It is important to recognize that many Indigenous peoples, nations, and organizations do not use this term, and many find it offensive. In all other instances, this paper will implement the terms used by the source material. See Chelsea Vowel, *Indigenous Writes* (Winnipeg: High Water Press 2016) at chapter 1.

[4] This paper will focus on income tax and avoid a discussion of sales tax. While sales tax is an important concern for e-commerce on reserve and has significant potential for discussion, this paper avoids an overly broad approach by focusing on income taxes.

INTRODUCTION

The past decade has seen a resurgence in Indigenous political identity and a broader awareness of the economic and institutional structures that prevent lasting economic growth for Canadian Indigenous communities. Simultaneously, e-commerce has become a consistently greater share of the global marketplace, and Canada in particular has proved to be fertile ground for e-commerce businesses. Numerous businesses have cropped up in Canada's major cities, offering graphics design, online retail platforms, and more. These businesses have global clout, and Canada is building a reputation for supplying skilled labour to the tech industry, as well as providing a reliable supply of innovative talent. As these business opportunities grow and become a larger part of the Canadian economy, there is significant room for Indigenous communities to join the digital marketplace. This paper seeks to explore whether Indigenous businesses have a competitive advantage through tax exemptions available under subsection 2(1) of the *Indian Act* and section 2 of the *Income Tax Act*, as well as providing a general overview of the practical benefits and obstructions that may face Indigenous businesses looking for opportunities in the e-commerce sector.

The paper begins by defining the scope of the discussion and the opportunities for e-commerce to benefit Indigenous communities. These are followed by a short discussion of how the federal and provincial governments regulate the Internet and tax e-commerce, and an overview of the potential taxation exemptions available to Indigenous persons, bands, and corporations under the *Indian Act*, the *Charter of Rights and Freedoms* (s. 35), and the *Income Tax Act*. The paper then turns to a practical discussion of how those tax exemptions might be applied to e-commerce taking place on reserve and what barriers exist that may prevent Indigenous communities from taking full advantage of e-commerce. The paper concludes with a summarizing discussion.

THE POTENTIAL OF E-COMMERCE

The economic frustrations of Indigenous communities across Canada have received considerable attention in recent years as Indigenous groups continue to challenge the institutional failures that have led to poverty and systemic disadvantage in their communities. Many of these discussions have focused on the economic aspirations of Indigenous communities, noting the loss of traditional economies (Natcher, 2016), the opportunities and pitfalls of band-owned businesses (Anderson, Dana, & Dana, 2006), and the relationship between Indigenous communities and resource extraction (Durnik, 2008). Many initiatives focus on the special constitutional and legislative character of Canadian Indian Reserves, looking to replicate the success of Indigenous groups in the United States that have developed casinos, resorts, and other tourist attractions that would not be otherwise possible under state law (Hawk, 2015).

However, not all Indigenous groups can benefit from these initiatives, as many are highly situational, requiring access to tourist hotspots, low market saturation, and ease of transportation. Other opportunities, such as real estate and infrastructure development (Bickis, 2018), golf courses (Dakota Dune Golf Links), and resource extraction (Papillon & Rodon, 2017) are similarly situational, and often at the whim of large investors (Parlee, 2015). With many bands constrained by geographical location and low interest from investors, what options are available to bring sustained economic prosperity?

E-commerce offers a scalable alternative with limited initial capital requirements and fewer geographical requirements. On a small scale, e-commerce offers the opportunity for individuals to sell consumer goods, taking advantage of Canada's ever-more sophisticated transportation network and innovation in online retail. For example, using an online platform such as Shopify, an Inuit clothing designer can sell her products across Canada and abroad with fewer overheads and more exposure than she might receive with a traditional brick-and-mortar store (e.g., Victoria's Arctic Fashion). Similarly, a retailer like Native Northwest Canada that carries merchandise featuring art by First Nations and Native American artists can access markets across the globe. Many Indigenous individuals already operate online retail businesses, and the sector is growing (Van Der Linde, 2017).

At the furthest end of the scale, there may even be opportunities for contracting and subcontracting data storage. All Internet-based companies need safe and reliable data storage at competitive prices. The world's largest corporations pour billions of dollars into these services, with business analysts estimating that US $18.2 billion was spent on data centres in 2017 (CRBE Group, 2017). Many Canadian companies, including Crown corporations such as SaskTel, offer these services to Canadian businesses (SaskTel, 2017), and there is a belief that Canadian data privacy laws offer more protection against corporate and government surveillance than their American counterparts (Bennett, Parsons, & Molnar, 2014). Because of concerns over data privacy, British Columbia requires that public sector data must be stored in Canada (*Freedom of Information and Protection of Privacy Act*, s. 30.1), creating a market for the safe and secure storage of public information.

TAXATION OF E-COMMERCE

The federal government taxes income stemming from e-commerce wherever the recipient of that income is located, whether they are an individual or a corporation. This is the foundational principle of the *Income Tax Act* (s. 2) and is similarly applied at the provincial level — that is, if a business or individual carrying on e-commerce is registered or resident in Saskatchewan, they will pay income tax in Saskatchewan.

Taxation of Indigenous Persons

The *Indian Act* is the central source of tax exemption for Status Indians, and contains the most important exemptions for the purposes of this paper. Specifically, these are sections 87(1), 89(1), and 90(1), which read:

> **87**(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
> (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 situated on a reserve.
>
> **89**(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> **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 situated on a reserve.

These sections have been interpreted to grant a tax exemption for property and income located on reserve, subject to a number of geographical and contextual factors. These factors were noted in the foundational case of *Williams v. Canada*, where the Supreme Court of Canada ruled that unemployment insurance benefits stemming from on-reserve employment could not be taxed. Because unemployment insurance benefits do not have a physical location, the Court found that it needed an analysis of where that income is located, otherwise known as a *situ* analysis, to determine where there is a connection between non-tangible property and a reserve.

In *Mitchell v. Peguis Indian Band* (hereinafter, *Mitchell*), Justice LaForest reflected on the purpose and justification of the *Indian Act* exemptions, noting that the exemption is not meant as an economic remedy but rather as a way to prevent alienation of that land by government or civil liability. This stems from the government's commitment to protect Indigenous peoples and has a basis in the Honour of the Crown (*Mitchell* at 133). Justice LaForest noted that while this may, in some circumstances, provide an economic benefit to Indigenous persons and communities, an economic benefit is not the direct intention of the provisions and should not be characterized as such (*Mitchell* at 133).

Subsequent cases have made a distinction between debtor and creditors, holding that the purpose of the act only protects against seizure from creditors and does not extend to creditors. In *Taylor's Towing v. Intact Insurance Company*, the Ontario Court of Appeal found that exemptions under section 89(1) did not protect a towing agency located on reserve from returning vehicles that had been ordered released in Small Claims Court. Similarly, in *Mohawk Council of Akwesasne v. Toews*, the Federal Court found that the section 89(1) exemptions did not prevent the seizure of vehicles under section 135 of the *Customs Act* (s. 135). These cases further highlight the purpose of the *Indian Act* exemptions as a method to prevent erosion of reserve property through taxation and lending, and not as armour against other legal mechanisms.

The test in *Williams* acknowledges that these highly contextual issues would need to be resolved on a case-by-case basis. Justice Gonthier identified a two-step process to identify the *situ* of the property. The first step is to determine all connecting factors that may be relevant. The second step is to analyze those factors and determine how each should be weighed in light of three considerations — the purpose of the *Indian Act*, the type of property in question, and the nature of the taxation of that property. When testing these factors and applying weight to them, the question for the Court to ask is, "whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve." In conclusion, the Court found that because the employment activity took place on reserve and the insurance benefits were received on reserve, the benefits were exempt from taxation.

Subsequent cases sought to clarify the importance of this test and how to balance it, with special emphasis on the location of the income and the individual. In *Recalma v. Canada* (hereinafter, *Recalma*), the Canadian Tax Court found that investment income from investments situated off the reserve in the broader Canadian economy was subject to taxation, even if the individual benefiting from that income was living on the reserve. The justification for this ruling was that the commercial mainstream nature of investments was not

adequately relevant to the Indigenous way of life on the reserve, and a number of subsequent cases followed this analysis.[5]

This analysis changed in *Bastien Estate v. Canada* (hereinafter, "*Bastien*"), where the Supreme Court directed the case law away from *Recalma* and upheld the factors outlined in *Williams* by providing additional interpretation for how the factors must be weighed against one another. The Supreme Court reiterated that while it was important to uphold the purpose of the exemption (as outlined in *Mitchell*), an overly purposive approach should not be ignorant of the express language of the provision (para. 27). The Court noted that focusing on the "commercial mainstream" as a method of weighing the factors is often inappropriate, as it may set up a false opposition between commercial activities on and off reserve (para. 56). The Court underlined that the nature of the economic activity should not outweigh the connection between those activities and the reserve, and found that investment income connected with a reserve is exempt from taxation (para. 63).

Released concurrently with *Bastien Estate* was *Dubé v. Canada* (hereinafter, *Dubé*), providing the Supreme Court with the opportunity to apply and comment on their analysis in *Bastien* and *Williams*. In *Dubé*, the Supreme Court was tasked with determining the location of income for the purposes of taxation, though in this scenario the income came from a series of contracts formed on the reserve for transportation services delivered off the reserve. Income from these contracts was invested through term deposits in a financial institution located on the reserve; however, the funds were not spent on the reserve, and Mr. Dubé did not live on the reserve.

Surveying previous case law, the Supreme Court noted that the location of the individual collecting income is of minimal importance to the analysis, and that the connection between an income and a reserve does not require that the individual belong to that particular reserve (para. 18). Recalling the analysis developed in *Bastien Estate* to determine if the appellant's property was situated on a reserve, the Court strongly emphasized the context of the investments. The Court noted that because of the nature of financial investments, and the fact that Mr. Dubé's own reserve did not have an institution where Mr. Dubé could invest his income, less emphasis should be placed on the connection between the place of Mr. Dubé's residence and the place of his financial investments (para. 21).

In regard to the importance of how Mr. Dubé earned the money he invested, the Supreme Court noted a number of important differences between the investment income earned by Mr. Dubé and the unemployment insurance benefits at issue in *Williams*. First, the income generated by Mr. Dubé was created through contracts and services provided, fundamentally different than the unemployment insurance benefits in *Williams*. Secondly, the Court noted that there should be no connection between how income is generated and how that income is used for further income afterwards, as it could open the door to exempting the tax of any and all investment income previously earned on reserve, no matter where it is invested. Third, the Court also noted that focusing on how the money was made and where it was spent was blinding the Court to the key issues — where the contract of investment was entered into (on the reserve), where that investment was made (on the reserve), and where the financial institute was located (on reserve) (paras. 28–30). Finally, the Court noted that where the income is spent should have no relevance to its taxation (para. 31).

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[5] *Canada v. Folster*, 1997 CanLII 6344 (FCA), [1997] 3 F.C. 269*; Mitchell; Southwind v. Canada*, 1998 CanLII 7300 (FCA), 156 D.L.R. (4th) 87, 1998 CanLII 7621 (FCA) [*Southwind*].

With these issues in mind, the Court found a strong connection between the investment income and the reserve it was situated on, ruling that the appellant could benefit from the tax exemption (para. 32).

Taxation of Indian Bands

Alongside Indigenous individuals, Indian Bands are also exempt from income taxes. This exemption comes both from the *Indian Act* and from the principle that an Indian Band is analogous to a municipality, and therefore cannot be taxed under the *Income Tax Act*.

The language of sections 87, 89, and 90 of the *Indian Act* all specifically include Bands alongside individuals in their text, affording Bands all the same exemptions and restrictions that the law applies to individuals.

Under section 149(1)(c) of the *Income Tax Act*, Bands are considered municipalities and are exempt from income taxes. This had been implied by the Supreme Court of Canada (*Musqueam*, para. 48), and has been confirmed as policy by the Canada Revenue Agency in a 2016 letter, noting that because the *Indian Act* permits Bands to levy taxes and create bylaws, they are considered to be public bodies performing a function of government and therefore exempt from taxation. This applies to all bands created under the *Indian Act* (Merrigan, 2016), but it is uncertain that it applies to bands that are not administered by the *Indian Act*, and it is doubtful that it applies to broader entities of self-governance, such as tribal associations. A full list of all Bands and Indigenous political entities that are tax exempt and performing a function of government is publicly listed on the Canada Revenue Agency website (hereinafter, "Revenue Canada List").

While the 149(1)(c) exemption may be unnecessary in light of the exemptions found under the *Indian Act*, they may come into play in situations when determining if a band-owned corporation is exempt from taxation under section 149(1)(d.5) of the *Income Tax Act* (as described below), in situations where a band has waived its *Indian Act* exemption through an agreement with the federal government (*Nisga'a Final Agreement Act*, s. 16), or situations where a Band is not governed by the *Indian Act* but is nonetheless recognized by Revenue Canada as performing a function of government (see *Revenue Canada List* of municipalities, which includes a number of Métis settlements, such as the Buffalo Lake Métis settlement).

TAXATION OF CORPORATIONS ON RESERVE

Under very specific circumstances, corporations based on reserve may gain a tax exemption. This exemption does not stem from the *Indian Act* and is instead drawn from the Band's status as a municipality under the *Income Tax Act*.

A business incorporated by an Indigenous person does not become an Indigenous person — the corporation gains no special rights and is not exempt from income taxes.[6] Similarly, a corporation created by a Band does not gain the benefits of the band's tax exemption under the *Indian Act*. In *R. v. Kinookimaw Beach Associations* (hereinafter, *Kinookimaw*

[6] *Reference re: Constitutional Questions Act*, 1981 ABCA 316 (CanLII) at para. 48, 130 DLR (3d) 636; [1982] 1 WWR 302; 35 AR 412; *British Columbia (Assessor Of Area #25 Northwest/Prince Rupert) v. N & V Johnson Services Ltd*., 1990 CanLII 240 (BC CA), 73 DLR (4th) 170; [1991] 1 WWR 527.

Beach), a group of seven First Nations collaborated to form a corporation for the purposes of developing a portion of Indian Reservation 80A. When the corporation purchased assets, the Government of Saskatchewan levied a tax under the *Education and Health Tax Act*. The Bands refused to pay, arguing that they were exempt under section 87 of the *Indian Act*. Though the Bands were successful at the Court of Queen's Bench in *Kinookimaw Beach Association v. Board of Review Commissioners*, the Saskatchewan Court of Appeal found that a corporation incorporated by a group of seven Indian Bands still had to pay provincial taxes associated with purchasing reserve property for the development of a resort. The Court of Appeal wrote:

> To grant to the association the exemption from taxation provided for in s. 87 of the Indian Act would be to destroy the legal obligations of the association as an independent corporate entity and to determine its obligations by the character of its shareholders. (*Kinookimaw Beach*, para. 12)

However, though a Band-owned corporation is unable to gain a tax exemption through the *Indian Act*, a corporation wholly owned by the Band or owned in partnership with the Crown may be exempt from taxation through section 149(1)(d.5) of the *Income Tax Act*, which provides a tax exemption for corporations owned by public bodies performing the function of government. The section states that:

> **(d.5)** subject to subsections (1.2) and (1.3), a corporation, commission or association not less than 90 per cent of the capital of which was owned by one or more entities each of which is a municipality in Canada, or a municipal or public body performing a function of government in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the entities does not exceed 10 per cent of its income for the period;

When placed in the context of an Indian Band, it appears that so long as the band maintains ownership of more than 90 per cent of the corporation, and constrains its income-generating activities to the boundaries of the reserve, it would be exempt from taxation. Sections 149(1.2) and (1.3) provide specificity to this provision regarding the income generating activity and the ownership and control of the corporation.

Put in the context of e-commerce, it would appear that section 149(1)(d.5) allows a Band-owned corporation to gain a tax exemption from e-commerce so long as the band's activities are constrained to the reserve. This would seem to be similar or analogous to the *Indian Act* exemptions provided to Bands themselves, and would rely on the income generating activities taking place on reserve. For many e-commerce ventures, where business does not need to move beyond the boundaries of the reserve, and where the staff, offices, servers, and other equipment do not need to leave the reserve, it would appear that the exemption would apply.

To determine whether the income generating activities take place within the specified boundary of a paragraph (d.5) exemption, the Tax Court of Canada has focused on the purpose of the exemption. Cases such as *Sakitawak Development Corporation v. The Queen* show that granting municipalities and analogous entities performing the function of government the ability to raise revenue through profitable ventures is an acceptable public purpose, and not contrary to the purpose of the *Act* (paras. 48 and 49). That being said, publications available from Revenue Canada and referenced by the Court in *Sakitawak* show that the intention of limiting municipal corporations to earning 90 per cent or more of their income

within a specific geographical area is intended to stop such corporations from taking unfair advantage of this tax exemption and gaining an unfair advantage over competitors in the broader marketplace (para. 39). In the case of e-commerce, where the diminished importance of geographical boundaries is a prominent feature of the industry, the Court may be more reluctant to find that the exemption applies.

BEYOND THE *INDIAN ACT* AND *INCOME TAX ACT*

A number of Treaty Nations have asserted that oral assurances made alongside Treaty negotiations include a general freedom from taxation.[7] So far, Canadian Courts have been unwilling to accept this interpretation. None of Canada's numbered treaties refer directly to taxation in their text, and the Courts have been unwilling to infer a tax exemption from other clauses. The case of *Benoit v. The Queen* found that oral assurances by the Treaty Commissioners when negotiating Treaty 8 towards a freedom from taxation refer only to taxation on reserve, and are covered adequately by the relevant sections of the *Indian Act*.

Similarly, cases such as *R v. Johnston* have found that the textual clauses in treaties may not be broadly interpreted to include taxation of future services. Specifically, references to a free medicine chest on each reserve for use by any Indian at the discretion of the Indian agent did not translate into a modern exemption from taxation for health purposes (para. 16).

Tax exemptions have also been claimed under section 35 of the *Canadian Charter of Rights and Freedoms*, which affirms existing and treaty rights held by the Aboriginal peoples of Canada. In *Mitchell v. MNR*, the Supreme Court of Canada noted that it may be possible for a tax exemption to exist as a component of a recognized Aboriginal or treaty right, but did not find one in the case at hand (para. 172).

Application of Tax Exemptions to E-Commerce on Reserve

Do the tax exemptions under sections 87 to 90 of the *Indian Act* apply to e-commerce income located on reserve? The Courts have stressed that the application of tax exemptions under the *Indian Act* should be considered on a case-by-case basis, focusing on the factors connecting the income to the reserve. Since the reduction of the commercial mainstream component in *Bastien* and *Dubé*, the connecting factors test focuses on the two-step test discussed in *Dubé*, namely that the Court must first determine the relevant factors, and then weigh those factors in accordance with the purpose of the exemption, the type of property being exempted, and the nature of the taxation (*Bastien*, para. 2).

Determining the relevant factors concerning income derived from e-commerce is a vital step in assessing whether a tax exemption applies. While these factors must be identified on a case-by-case basis, it is worthwhile to predict what factors may feature prominently in the Court's analysis. Cases regarding other economic sectors such as *Dickie v. The Queen* (para. 29) have followed the list of factors identified in *Southwind* (para. 36), narrowing

[7] Treaty Nations are Bands or other Indigenous political units that have signed a modern or historical treaty with the Crown.

their analysis to a select list. However, more recent jurisprudence from the Federal Court of Appeal, in *Kelly v. Canada* (hereinafter, *Kelly*), has discouraged this approach, finding that the practice of "listing factors in the abstract can no longer stand" (para. 45). Instead, the Federal Court of Appeal encouraged an approach that emphasizes *Bastien's* focus on the nature of the property itself (para. 31, citing *Bastien* at para. 16).

In the absence of jurisprudence in the context of e-commerce, these factors cannot yet be determined with certainty. However, noting similarities between characteristics of e-commerce and other industries may shed light on the Court's possible disposition. For example, the customers of e-commerce are likely to be located off the reserve, with the proprietor of that Internet business only managing contracts and storing or distributing goods. Analogously in *Dickie*, where the appellant ran slashing crews for oil and gas exploration, the Court found that though all the work was taking place off the reserve, the income was derived from contracts formed and managed on the reserve. The income from these contracts was therefore exempt from taxation (*Dickie*, para. 72). Similarly, in *Dubé*, though the income from the appellant's investments was invested on reserve, the income from those investments was earned in the broader market located off the reserve. An Internet based business might similarly manage and distribute advertisements or websites that would be designed and published from the reserve, but would circulate in a broader global marketplace. It would therefore be reasonable to raise the place of business and the management of that business as factors, as well as location of customers, the location of employees, and the location of assets and equipment (see *Pilfold Estate v. Canada*).

Conceivably, other factors could be raised and discussed by the Court, such as the business's connection with the reserve. Factors such as the "benefit to the reserve" were dismissed as inappropriate for consideration in *Dickie* (para. 69), yet may return if the Band itself is operating the business.

Overlaying the *Bastien* and *Dubé* analysis is the Court's stated preference for interpreting statutory uncertainties in favour of Indigenous applicants. Courts have repeatedly stated that the statutes of Canada should be interpreted generously when they concern the treatment of Indigenous persons. At paragraph 25 of *Nowegijick v. The Queen*, the Supreme Court wrote that:

> If the statute contains language which can reasonably be construed to confer tax exemption, that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

It only seems reasonable then that if there is some uncertainty about the location of income generated by e-commerce, the Court should lean towards permitting the exemption. Cases such as *Robertson v. The Queen* affirm that this approach, and perhaps the Supreme Court's permissive approach to the taxation of investment income in *Dubé*, are strong indications that any uncertainties should be resolved in favour of an exemption.

Exemptions under paragraph 149(1)(d.5) of the *Income Tax Act* are more speculative. Similar to the *Indian Act* exemption, any business that is wholly owned by the Band or in partnership with one or more government entities and wishes to take advantage of a paragraph 149(1)(d.5) exemption under the *Income Tax Act* will need to prove that its income is being generated within the boundaries of the reserve. However, unlike the *Indian Act* exemption, this exemption is solely focused on geographic location and so far has received little treatment from the Court.

In *Sakitawak*, the only case that has dealt with a 149(1)(d.5) exemption, the Court did not consider the paragraph in the context of an *Indian Band*, did not consider it in the context of e-commerce, and made a decision based on other reasons. However, *Sakitawak* does point to the importance of geographical location, and the Court did emphasize the nature of the statute's purpose, which was to encourage and permit economic development in remote locations. This analysis may change when Indigenous issues are at play, but the statute's emphasis on geographical location and the Court's stated preference for a generous approach to statutory interpretation in *Nowegijick* could be favourable for Indigenous litigants.

Barriers to E-Commerce on Reserve

Despite the opportunities for Indigenous communities who wish to foster e-commerce on their reserves, there are many challenges to overcome in realizing that goal. The largest challenges come from a lack of accessible education and a lack of reliable infrastructure, often brought on by the remote location of many reserves. For this reason, while some e-commerce opportunities, such as online retail or graphics design, may be available to the vast majority of reserves, opportunities with great infrastructure needs, such as data centres, may be more difficult to take advantage of.

Canada's digital divide has been noticed and studied for more than a decade now, and while the gap of Internet availability is closing due to its modern utility and ubiquity, it still stratifies Canadian society. Indigenous communities suffer this gap disproportionately, as many are located in rural or remote locations (McMahon et al., 2011: 4).

The quality of service provided by the infrastructure is critical to its ability to be utilized. While merely having access to the utility may provide participation and communication, slow Internet speeds may make e-commerce impossible (Carpenter, Gibson, Kakekaspan, & O'Donnell, 2013: 93). Specifically, the creation of broadband Internet infrastructure is key to providing economic opportunity, and has a noted link with rural economic development, creating new jobs and making existing jobs more efficient (Hudson, 2013: 46). This gap in Internet access not only prevents Indigenous people from accessing digital communications and participating in the online marketplace, it also greatly increases costs. Studies have found that the cost of broadband Internet services in Nunavut are between three and five times higher than in urban areas, with a much more limited download capacity (McMahon et al., 2011: 5).

The Government of Canada has been alive to these issues, and in 2016 the Canadian Radio-Television and Telecommunications Commission (CRTC) released a policy statement affirming broadband Internet as vital to a modern economy, and proposed strategies and targets for bringing broadband Internet speeds to remote areas. Key among these targets is that Internet service providers in rural and remote areas work towards providing download speeds in excess of 50 Mbps and unlimited data options for fixed broadband services. Alongside these targets, the CRTC began setting up a fund of $750 million over the next five years, with a mandate of focusing on underserved areas. The development of this fund is still ongoing (CRTC, 2017).

Building the capacity of community members to effectively realize the potential of e-commerce is also necessary. For older individuals this may require classes or other formal training. Some communities already offer these courses (Carpenter, Gibson, Kakekaspan, &

O'Donnell, 2013: 93). For younger generations who grow up with some degree of Internet connectivity, e-commerce opportunities may be more intuitive.

Addressing the Infrastructure Gap

Despite these barriers, some communities have had success by tackling the infrastructure gap directly using the OCAP theory (Ownership, Control, Access, and Possession). Initially developed for health research, OCAP theory is an approach to community building and self-determination through research, capacity building, and independent ownership of infrastructure and utilities (McMahon et al., 2011: 6).

In the realm of telecommunications, local ownership of access and distribution of telecommunications is vital to self-determination and community resilience (McMahon et al., 2011). This is especially important to small and rural communities that are often marginalised by large corporate infrastructure that focuses on established urban markets (Beaton & Campbell, 2014). While provincial and federal funds are often earmarked for rural development and providing services to Indigenous communities, there is a palpable lack of accountability and a dismaying lack of interaction with those communities (Beaton, Burnard, Linden, & O'Donnell, 2015).

One example of these self-determination initiatives is K-NET, a non-profit corporation bringing telecommunications to northern Ontario. Operated by the Keewaytinook Okimakanak Council, a tribal council serving six Oji-Cree nations in North-West Ontario, K-NET is operated from Sioux Outlook and includes cellular service, broadband connections, and more.

In 2007, K-NET undertook a project to bring mobile service to remote communities using grants from the provincial and federal governments. Forming a strategic partnership with DMTS, a regional telephone company, K-NET created a pilot project focused on expanding the coverage to provide reliable service to people working on the land, with the goal of improving safety and economic opportunities (Beaton, Burnard, Linden, & O'Donnell, 2015). The pilot was successful, and by 2012 the network was providing service to 20 remote communities. At this stage, KMobile, K-NET's mobile division, took over DMTS and began to operate as a fully licensed and independent telecommunications carrier.

While the infrastructure now exists in northern Ontario, it is not the end of the battle. Many users still experience dial-up speeds, and data costs are still exorbitant for many. In 2013, the high speeds and reliable connections needed for e-commerce were not yet present for everyone using K-NET, preventing individuals from using services as basic as online banking, much less operating a website (Carpenter, Gibson, Kakekaspan, & O'Donnell, 2013: 93). However, with the basic infrastructure in place, there is ample opportunity for K-NET to continue increasing bandwidth and providing new services. Already K-NET is making traditional economic activity on the land safer and more effective (Beaton, Burnard, Linden, & O'Donnell, 2015). The jump to e-commerce may be the next step.

Examples such as K-NET show that Indigenous communities do not need to wait for service to arrive, and are more than capable of developing and maintaining their own services when the need arises. As these services become more widespread, the economic opportunities created by Internet access will become more prevalent, and entrepreneurs will begin to invest.

DISCUSSION: A LEGAL THEORY TOWARDS TAXATION OF E-COMMERCE ON RESERVE

Given the Court's disposition towards income generated in relation to a reserve and the general consensus regarding the placement and taxation of e-commerce, there is a clear opportunity for Indigenous communities to benefit from online business free from taxation.

On a practical level, Indigenous individuals can be confident that personal income derived from online businesses based on a reserve is likely free from taxation. Cases such as *Bastien Estate* and *Dubé* show that for the purposes of section 87 of the *Indian Act*, income is property. When determining if section 87 applies, it is no longer necessary to find a connection between how the income was generated and a traditional way of life. Similarly, there are no restrictions on income derived from the "commercial mainstream". All that is necessary is that the person claiming the tax exemption is an Indian, and that there be a contextually strong connection between that income and an Indian reserve.

For example, should an individual wish to sell or resell goods from the reserve using an online platform, their property and income would be situated on the reserve. Any contracts they formed would occur on the reserve, their website would be hosted from the reserve, and their management of the business would take place on reserve. This would leave that individual free from personal income taxes and free to pursue their venture.

Similarly, for online businesses operated by an Indian Band or a corporation formed by an Indian Band, the law suggests that income derived from online economic activity would be free from taxation. Bands derive their tax exemption from the same section of the *Indian Act* as individuals, and it only follows that the law should treat both similarly. Furthermore, Indian Bands also have the benefit of being a municipal government, and are therefore free from taxation under section 149 of the *Income Tax Act*. Corporations formed by an Indian Band also benefit from this advantage, being corporations managed by a municipality under section 149 of the *Income Tax Act*.

For e-commerce businesses requiring significant infrastructure, such as a data centre, the issues become even clearer. Income from a data centre would again be entirely placed on the reserve, as the infrastructure and the work to protect and maintain it would be physically located on the reserve. E-commerce businesses and investments of this type would be more analogous to operating a storage unit than a business such as online advertising or gaming that may take place entirely online.

These forms of business are not without their challenges. Many Indigenous communities struggle with finding educational opportunities for their youth, which may limit that community's ability to develop or attract the technical expertise needed to start and maintain these businesses. Access to reliable and effective power sources, transportation infrastructure, and fast Internet connections may also limit many communities who are otherwise prepared to do business online. While examples such as K-NET prove that these barriers are not insurmountable, the digital divide in Canada is well-studied and disproportionately impacts Indigenous communities, especially communities that are in remote locations. Overcoming these barriers may be a matter of time for some communities, but may require initiatives and co-ordination with the provincial or federal government to provide the training and infrastructure that the community requires.

Despite these challenges, there is significant opportunity for many communities to generate income through e-commerce, aided by the competitive advantage of a tax exemption. The Internet allows individuals and organizations to overcome geographical limitations, lev-

elling the playing field for businesses that would otherwise find it difficult to build brand awareness and compete against larger businesses. In particular, there may be especially great potential for urban reserves that are already in close proximity to the necessary infrastructure and educational opportunities for building up an online business.

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