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Vern Krishna: Canada has hundreds of tax havens, coast to coast



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A file photo of a home at Rama Nation in Ontario. Indian reserves can be tax havens, Vern Krishna writes.

Photo: Peter J. Thompson/National Post

Think “tax havens” and one automatically conjures up an image of a sunny offshore island with sand, sailing, Scotch and secrecy — Caymans, Bahamas, Jersey, to name a few.

A tax haven is a country that does not levy income taxes. In contrast, an avoidance haven is a full tax country — for example, Italy, Greece, and India — where few actually pay the levied taxes.

Canada and high tax OECD countries dislike tax havens because they attract capital, undermine tax bases and erode domestic government spending programs. We have, however, our own havens — indeed, hundreds of them from ocean to ocean — all blessed by the Supreme Court of Canada.

Indian reserves are tax havens for Indians who derive income from property (real or personal) situated on a reserve in Canada (Section 87 of the Indian Act). The Act also provides immunity from seizure of property. The exemption spawns lucrative tobacco, liquor and gambling industries on reserves, all of which escape the taxes that Canadians who indulge in such sins pay. An Indian can also earn income off reserve, import his capital onto a reserve, and invest it tax-free.

Section 87 of the Indian Act provides:

Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province ... the following property is

exempt from taxation, namely:

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

The tax exemption derives from the Royal Proclamation of 1763 in which the Crown acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of their property that they hold *qua* Indians.

The exemption, which is effectively a constitutional limitation, protects reserve Indians from the government's power to tax. Thus, the exemption prevents one branch of government from emasculating the very benefits that another branch of the government gives — a propensity of governments that the Indians wisely recognized nearly 250 years ago.

The exemption applies only to property situated within the boundaries of a reserve. The phrase “on a reserve” has its plain and ordinary meaning. The taxpayer claiming the exemption does not have to reside on the same reserve as the property. The availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life.

In most cases, it is a relatively simple matter to determine the location of real property. The location of personal property, however, is more complex and uncertain. There are various factors that can connect personal property to income.

For example, there is no simple or bright line test to determine the location of investment income, unemployment insurance benefits or pension benefits. In each case, one must determine the *situs* of the particular property and its connection to the income. The connecting factors may depend upon the residence of the payer and the payee, the place of payment, the place of employment, and the place of the contract or the location of the investment activity.

The connecting factors do not all have the same weight in each case. One connecting factor may have more weight than another in determining the sufficiency of connections to locate the particular property, which makes the entire process somewhat uncertain.

If a connection is established, there is sufficient nexus between the income and the reserve, and it becomes a perfect tax haven, but without the sand and sailing. Tobacco, liquor, and gambling, however, are all available without the usual sin taxes.