Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy

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ABSTRACT

The Indian Act was amended in 1988 to allow First Nations to impose property taxes on the reserve lands occupied by leaseholders. These lessees are mostly non-aboriginals who have no rights of voting, representation, or serving in the First Nation governments that tax them. The fact that all of the 80 First Nations across Canada (54 in British Columbia) that have assumed taxing powers have exempted their own members from these taxes further compounds the situation. In addition to the issue of taxation without representation, the choice to exempt band members invokes representation without taxation. These conditions combine to reduce the accountability of First Nations governments both to their taxpayers and to their members. This study examines the genesis of these taxation provisions and the experience to date, focusing on the BC situation and with a case study of one First Nation. It offers a critical analysis of the legal, political, and economic aspects of the provisions and the changes needed to restore representation, non-discrimination, and accountability to taxing First Nations while respecting aboriginal autonomy. The study also assesses the positions taken by various entities, including the federal and BC governments, the Indian Taxation Advisory Board (ITAB), and the Royal Commission on Aboriginal Peoples, on these issues with respect to First Nations taxing powers.

On the representation issue, the analysis rejects the landlord-tenant analogy and finds the existing limited means for input by disenfranchised non-aboriginal

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taxpayers to be inadequate. A division between band government and public government functions of First Nations, following the Sechelt Indian Government District model, would allow for the restoration of non-aboriginal rights in the public government function (including tax policies) while preserving autonomy in uniquely aboriginal domains. On the issue of discrimination in taxes, the legal precedents suggest that First Nations practices may not be acceptable, although a challenge on Charter grounds has not yet been pursued. Removing the aboriginal exemption when the tax is imposed by their First Nation government would not violate the exemption from taxes imposed by other governments; it would also restore balanced treatment and improve accountability. The Indian Act requires that First Nation property taxes be used for "local purposes," and various alternative meanings of this term are considered. However, it is found that the tax revenues were not intended as a substitute for lease rental revenues to be used in any manner that a First Nation might wish. The analysis further considers key tax policy issues of the setting of tax rates and the tax base (property assessments) in the First Nations context. The methods used to assess reserve leasehold lands for property taxes warrants close scrutiny in a separate appendix.

The study's analysis leads to three alternative means of reconciling all of the parties and issues. First, taxation of leasehold reserve lands and their occupants could be pursued by delegated governance. The lessees would establish their own governing and taxing bodies, following the model of the Redwood Meadows Town on an Alberta reserve. A second approach would be one of joint governance, where non-aboriginal lessees would share in governing and taxing decisions with respect to the public government functions of a First Nation. In the few cases where non-aboriginals outnumber the aboriginals resident on a reserve, there might be limits placed on the representation of the former group to ensure aboriginal autonomy even outside areas of unique aboriginal concern. The benefits of joint governance would be enhanced if the property tax exemption for aboriginals were also removed. A third approach would be constrained governance, where the tax rates, assessment methods, and public services of a First Nation would be linked to those of adjacent municipalities or surrounding regions. A form of constrained governance was practised by most First Nations in the early 1980s, but changes in policies of the ITAB have departed from this in more recent years. Pursuing any of these methods would provide the certainty and property rights needed to maximize the rental value of reserve leasehold lands. Hence, resolving these matters of lessee rights and governance would also promote the economic development interests of First Nations.

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INTRODUCTION

In 1988 Parliament passed Bill C-115 amending the Indian Act to allow band governments to assume powers of property taxation over non-aboriginal interests in reserve lands.[1] Since then at least 80 of the more than 600 First Nations across Canada have assumed these property tax powers, with 54 or two-thirds of them in British Columbia.[2] First Nations' tax revenues now exceed $30 million per year and have totalled over $130 million since inception.[3] Before the section 83 amendments of the Indian Act, bands' powers to apply property tax were limited to lands that had not been designated for non-aboriginal leasehold development. For cultural and economic reasons, bands were not eager to tax their own members, and before the Act's amendment there were very few cases of First Nations applying property taxes.[4] While the revenues from these property taxes are significant for some individual First Nations, they pale in comparison with other funding sources for First Nations—chiefly grants from the federal government. At current rates the taxes are barely one-half of 1 percent of total public funding of First Nations.

The expansion of First Nations' taxing powers is part of a larger movement toward enhancing the self-governing powers and resources of aboriginal people in Canada.[5] From the aboriginal perspective, it is simply one manifestation of

1 Bill C-115, An Act To Amend the Indian Act (Designated Lands), SC 1988, c. 23, amending the Indian Act, RSC 1985, c. I-5, as amended.

2 A full, current listing of the taxing First Nations can be found on the Web site of the Indian Taxation Advisory Board at http://www.itab.org. At the time of writing, the site listed 54 First Nations in British Columbia, 10 in Alberta, 2 in Saskatchewan, 2 in Manitoba, 9 in Ontario, 1 in Quebec, and 2 in Nova Scotia.

3 Indian Taxation Advisory Board, *Annual Report, 1997-1998* (Kamloops, BC: ITAB, 1998) and *Annual Report, 1998-1999* (Kamloops, BC: ITAB, 1999).

4 Three First Nations (2 in Alberta and 1 in Ontario) are cited as having "pre-C-115 property taxation bylaws," but no description is provided. See "First Nations with Property Tax Regimes" (1997), vol. 1, no. 1 *First Nations Gazette* 101-117, at 117.

5 This study uses the term "aboriginals" solely with reference to Indians in Canada, since the Indian Act and related tax provisions and exemptions do not apply to other aboriginals such as Inuit and Métis.

the "inherent rights of self-government."[6] However, extending aboriginal taxation to non-aboriginal interests raises thorny questions of representation rights and accountability, since the taxed parties do not have a vote or a voice in the governing process that determines the taxes or spends the tax revenues. The new powers thus invoke the spectre of "taxation without representation."[7] Because all of these First Nations have chosen to exempt their own members' properties from tax, the situation also involves "representation without taxation" as well as issues of discriminatory treatment.[8] These conditions together have left taxed leaseholders in a precarious position, and they may also threaten the certainty needed to promote future economic development on reserve lands. In short, the advent of First Nations taxation, levied principally on disenfranchised non-aboriginals, raises the most critical issues in the practical exercise of tax policy—representation, discrimination, and accountability.

To date, the issues concerning aboriginal taxation of non-aboriginal interests have received little scrutiny or analysis. They have been cited on occasion both in and outside of the treaty context, but methods of resolving the issues have not been carefully formulated. This study will chronicle and assess these developments, identify and evaluate the issues of tax policy and governance, and offer a set of prospective solutions. The study will focus on the experience in British Columbia, mostly drawing on developments on the Musqueam Indian Reserve in Vancouver. The Musqueam Band was among the first to enact property taxes, and its property assessment practices and related decisions of its board of review have had a significant impact on other taxing First Nations. Experience of the Musqueam Taxation Advisory Council also affords some insight into issues of governance and accountability with respect to taxpayers. For reasons that will be explained, the treatment will be confined to residential leaseholders rather than commercial, industrial, or resource leaseholders or residential renters.

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6 These rights are contained in section 35(1) of the Constitution Act, 1982 (schedule B of the Canada Act 1982 (UK) 1982, c. 11), which affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada," though the precise meaning is still being tested in practice. For analysis, see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) and contributions to John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2d ed. (Saskatoon: Purich Publishing, 1999).

7 The popular version, "Taxation without representation is tyranny," was attributed to James Otis, who actually wrote as follows: "No parts of His Majesty's dominions can be taxed without their consent." James Otis, "The Rights of the British Colonies Asserted and Proved" (pamphlet, 1764), 64 (available on the Web at http://ahp.gatech.edu/rights_brit_colonies_1764.html).

8 Throughout this study the terms discriminatory and discrimination are used simply to denote differential treatment of aboriginals and non-aboriginals (or band members and non-members) in a First Nation tax provision; whether such differential treatment is ethically or legally acceptable is a separate matter. An exception to this discriminatory treatment is the Sechelt First Nation, which applies its taxes outside of the Indian Act, as described later.

Non-aboriginal residents on reserves in British Columbia number about 20,000 and represent nearly one-third of all persons living on BC reserve lands. This BC group also accounts for more than 70 percent of all non-aboriginals residing on reserves across the country (see table 1).[9] Not only is the non-aboriginal population living on reserves high in British Columbia, but it has been rising rapidly, both absolutely and relative to on-reserve aboriginals, since at least 1986. Figure 1 shows the comparative growth of the percentages of reserve populations that is non-aboriginal in British Columbia and for the rest of Canada. Between 1986 and 1996, the number of non-aboriginals living on reserves in British Columbia has nearly doubled—from 10,285 to 20,086—greatly outpacing the BC reserve aboriginal population growth from 37,073 to 42,455. As seen in figure 1, non-aboriginals living on reserves outside of British Columbia have been relatively stable. Additionally, as of the early 1990s, it was estimated that British Columbia contained 60 percent of all leased lands on Indian reserves in Canada, and growth of the resident non-aboriginal population suggests that this proportion has grown since then.[10]

The approach taken in this study will be one of tax policy analysis, supplemented by political analysis related to democratic governance. While the key appeal board and court cases will be cited and examined, there is no attempt here to provide in-depth legal analysis. The goal of the exercise is to find an acceptable way to balance the legitimate civil rights of non-aboriginals subject to tax with the legitimate rights to self-governance by aboriginals. Hence, the issues involved are not solely ones of technical tax policy but inevitably engage the broader issues of how tax policies are made in a democratic society. The study will focus on issues of representation and governance, discriminatory taxation, spending of tax revenues, setting of tax rates, and property assessments (valuation methods and appeals). Overviews and critiques will be offered on the treatment of these issues in a 1993 federal Department of Finance working paper, the Royal Commission on Aboriginal Peoples' 1996 report, the Indian Taxation Advisory Board's 1999 proposal to be transformed into a First Nations Taxation Commission, and the parties to recent treaty negotiations.

HISTORICAL AND LEGISLATIVE BACKGROUND

As part of the Royal Proclamation of 1763, the Crown undertook to protect Indians and their lands from settler encroachment. Legislation was passed in 1850 in

9 These figures are based on census counts, which would omit significant numbers of seasonal cottage occupants of reserves whose principal residence is off-reserve, and their numbers may be proportionately higher outside of British Columbia.

10 Union of British Columbia Municipalities, *Indian Property Taxation—A Handbook for Local Government* (Richmond, BC: UBCM, June 1993), 1.

Table 1 Population Living on Indian Reserves, by Province, 1996

Province or jurisdiction	Non-aboriginal	Aboriginal	Total	% Non-aboriginal
British Columbia	20,086	42,455	62,541	32.1
Newfoundland	81	670	751	10.8
Prince Edward Island	17	205	222	7.7
Ontario	2,383	31,985	34,368	6.9
New Brunswick	374	5,215	5,589	6.7
Alberta	2,105	29,710	31,815	6.6
Yukon Territory	24	355	379	6.3
Nova Scotia	444	6,825	7,269	6.1
Quebec	1,169	28,480	29,649	3.9
Northwest Territories	9	255	264	3.4
Manitoba	950	48,130	49,080	1.9
Saskatchewan	589	37,855	38,444	1.5
Canada	28,226	232,145	260,371	10.8

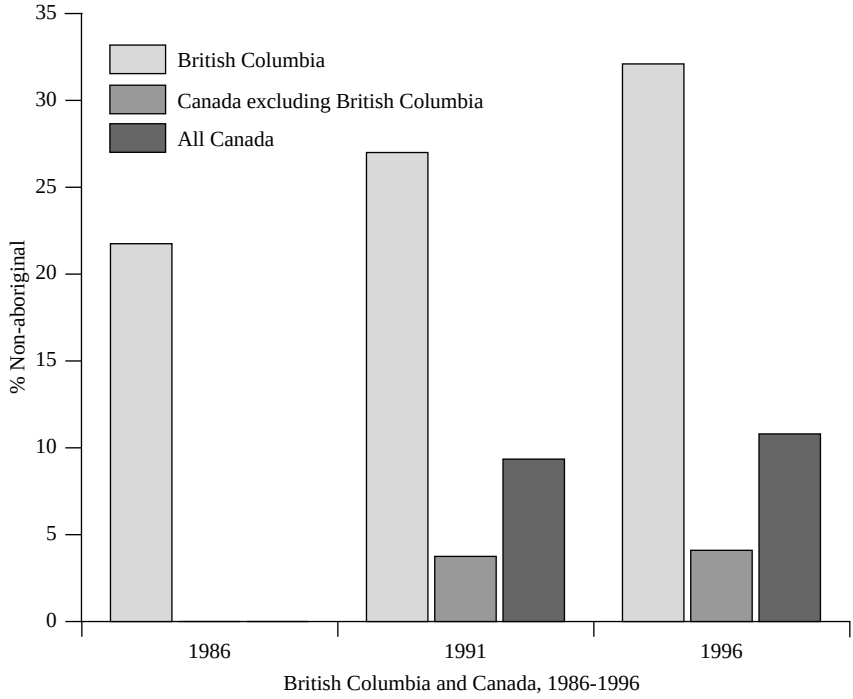
Source: Statistics Canada, 1996 Census, prepared by Population Section, BCSTATS; data in this table do not include incompletely enumerated Indian reserves (an estimated 2,347 persons for British Columbia).

Upper and Lower Canada to address these matters.[11] Under An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury, it became an offence to deal directly with Indians for their lands, and these lands were exempted from taxation and seizure for debts. The Indian Act of 1876 consolidated previous legislation dealing with aboriginal peoples. It kept the pre-existing provisions that were intended to preserve the reserve land base from gradual erosion. These provisions included prohibitions against federal and provincial taxation on natives' real and personal properties on reserves and against liens on or seizure for debt of native property. These features remain in the current version of the Indian Act (1985) and, in particular, section 87 contains the exemption of aboriginals from federal and provincial taxes on their property situated on and income originating from a reserve.[12]

11 Most of this historical account is drawn from Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) (5 volumes) (herein referred to as "RCAP"). RCAP material is cited by volume/chapter/section, which is how the report can be accessed online at http://www.indigenous.bc.ca/rcap.htm. For the present material, the sources are 1/9/4, 1/9/8, and 1/9/11.

12 This tax exemption has been the subject of ongoing dispute and legal analysis. For example, see Nancy E. Hopkins, "Taxation of Indian Peoples Following the Williams Decision," in *Report of Proceedings of the Forty-Sixth Tax Conference*, 1994 Conference Report (Toronto: Canadian Tax Foundation, 1995), 2:141-50; Douglas H. Mathew and David G. Thompson, "Tax Planning for Indians and Bands," in *Aboriginal Law in Canada 1998*, Native Investment and Trade Association Conference (Vancouver: NITA, 1998); and the papers by Leslie J. Pinder and Bill Maclagan in this issue of the *Canadian Tax Journal*.

Figure 1 Population Living on Indian Reserves, Percent Non-Aboriginal



The Indian Advancement Act of 1884 added to band councils' powers taxation of the real property of all band members on reserves, whether held by "location ticket" or by an enfranchised former Indian who had received an allotment of reserve land.[13] Sir John A. Macdonald advised the Parliament in hearings on the act:

> [U]nder this Act, the Indians have power *to tax themselves* for the construction, and maintenance, and improvement of the roads [and other purposes]. . . .
>
> [The council of chiefs will] pass a by-law for raising money, and the by-law will provide for that. They will appoint the machinery, of course. It will be an annual assessment. This is really to encourage them *to tax themselves*. [Emphasis added.][14]

13 Indian Advancement Act, 1884, 47 Vict., c. 28. The full title of this act is telling as to its major purposes: "An Act for Conferring Certain Privileges on the More Advanced Bands of Indians of Canada with the View of Training Them for the Exercise of Municipal Powers." The act sought to replace the role of hereditary chiefs with elected councils, and it was widely opposed by aboriginals and implemented in very few cases. For a detailed history, see Wayne Daugherty and Dennis Madill, *Indian Government Under Indian Act Legislation 1868-1951* (Ottawa: Department of Indian and Northern Affairs Canada, Treaties and Historical Research Centre, Research Branch, 1983).

14 Canada, House of Commons, *Debates*, February 26, 1884, 539 and 542.

This act was applied to the more "advanced" Indians in eastern Canada and modelled on town councils, and it was later incorporated into the Indian Act itself. When the Indian Act underwent a major revision in 1951, portions that drew on the former Indian Advancement Act were retained in some form. The band council power over local property taxation that had been introduced in 1884 was inserted in section 83 of the new Indian Act.[15] The 1988 amendment to the act further eliminated the requirement that a band be at "an advanced stage of development" in order to exercise taxation powers.[16]

It is important to note that the section 83 powers of a band to apply property taxes to its own members does not conflict with the section 87 prohibition on other governments taxing such property. This point is explicitly recognized in the current wording of section 87 (which makes the tax exemption "subject to section 83"). Aboriginal people are not immune from taxation by their own First Nation government, since exercise of this power could not diminish the reserve land base even if non-payment of tax resulted in their loss of the property. Any interests in land that were taken back by a First Nation government would remain in aboriginal hands and part of the reserve lands. The original legislative intentions underlying section 83, as expressed in the Indian Advancement Act, were for aboriginal governments to impose taxes on their own members as a way of developing institutions and practices of self-governance based on a municipal model.

While federal and provincial governments are barred from taxing aboriginal land on reserves, provinces and municipalities are not in general precluded from taxing the real property interests of non-aboriginals on reserves. Such interests would typically take the form of leaseholds of varying periods, either prepaid or with ongoing rental payments to the band. This situation results from a 1914 Supreme Court of Canada decision relating to an occupier of federal Crown land.[17] The court ruled that even though a rural municipality could not tax the Crown land, it was allowed to tax an individual's leasehold interest in the land. The court described the tax as in personam—that is, meaning a tax on the person occupying or holding the interest in land and not a tax on the land itself. By extension, since leased reserve lands are held by the Crown, non-aboriginal interests in such land are not excluded from the property taxes of provinces or municipalities based on either Crown immunity from taxation or the aboriginal tax exemption.[18] This point was confirmed in the 1942 case of *Vancouver v. Chow*

15 However, this and other band council powers were limited between Indian Act amendments in 1918 and the amendments in 1951 that dropped the potlatch ban.

16 Determination of whether a band had reached the "advanced stage" was to be by governor in council, although the term was never defined, and the requirement was deemed offensive by aboriginal people.

17 *Smith v. Rural Municipality of Vermilion Hills* (1914), 49 SCR 563, aff'd. [1916] 2 AC 569 (PC).

18 Some First Nations members refer to the aboriginal tax exemption as an "immunity" from taxation, an inherent right rather than a right granted by non-aboriginal governments. See, for

Chee[19] and further upheld in the 1971 case of *Sammartino v. Attorney General of British Columbia.*[20] In the latter case, a concurring judge stated that "[t]he tax legislation is not concerned with Indian lands but merely imposes a tax personally on an occupier thereof with respect to his occupation."[21]

Despite the legal authority of provincial and municipal governments to tax non-aboriginal interests in land on reserves, not all provinces have chosen to permit these taxes to be applied in recent years.[22] Ontario, Manitoba, and the prairie provinces prohibit their municipalities from taxing non-aboriginal interests in reserve lands. In 1968 the Alberta legislature asserted that "[a]n Indian Reserve is not a part of a municipality for any purpose whatsoever."[23] Similar legislative prohibitions on municipalities were introduced by the government of Saskatchewan in 1972, Ontario in 1973, and Manitoba in 1979. These acts may have been motivated in part by court decisions that provincial and municipal regulatory and zoning laws could not be enforced on reserve lands; they may also have been related to difficulties of supplying services commensurate with the taxes collected on reserve lands. Legislation in Prince Edward Island, Nova Scotia, and British Columbia prohibits the taxation of aboriginal holdings of reserve lands but permits the taxation of non-aboriginal interests in reserve lands. In New Brunswick and Quebec there is no explicit legislative reference to or restriction on the taxation of reserve lands or interests therein.

The current version of section 83 of the Indian Act arose from attempts by the Kamloops Indian Band of British Columbia to impose property taxes to finance services for tenants of an industrial park it had developed on the reserve.[24] The

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example, Chief Manny Jules, "First Nations and Taxation," in Stephen B. Smart and Michael Coyle, eds., *Aboriginal Issues Today: A Legal and Business Guide* (North Vancouver: Self-Council Press, 1997), 154-67, at 157.

19 [1942] 1 WWR 72 (BC CA); this case involved the taxation of a farming leasehold on the Musqueam Indian Reserve in Vancouver.

20 [1972] 1 WWR 24 (BC CA); this case involved a lessee occupying Okanagan Reserve lands under an agreement with an individual band member not conforming to the Indian Act requirement that the lands be conditionally surrendered before leasing.

21 Ibid., at 37-38.

22 Richard H. Bartlett, *Indians and Taxation in Canada*, 3d ed. (Saskatoon: University of Saskatchewan, Native Law Centre, 1992), at 87-88, provides the statutory references. It appears that this prohibition applies only to rural municipalities in Saskatchewan; reserves located in urban municipalities may be taxable on leasehold interests: ibid., at 88, footnote 335.

23 Municipal Government Act, SA 1968, c. 68, section 6; RSA 1970, c. 246, section 6; RSA 1980, c. M-26, section 5.

24 For the source and a more detailed account, see Indian Taxation Advisory Board, *Introduction to Real Property Taxation on Reserve* (Ottawa: ITAB, 1990), at 7-8; also Leslie J. Pinder and Louise Mandell, "Reserve Lands, Surrender and Taxation," in *Conference on Taxation and Economic Development Issues for Indians* (Vancouver: University of British Columbia, Faculty of Law, Native Law Program, 1987), tab 5. There had been previous joint attempts by the

BC government was already imposing taxes on the non-native tenants of the park yet was not providing the required services. A 1984 court decision ruled that the band council did not have the power to apply taxes on lands that had been "conditionally surrendered" for leasehold purposes.[25] Under the Indian Act, reserve lands used for leasehold purposes must be surrendered to the Crown to be held in trust for the band, and the legal issue concerned whether such land remained "land reserved for Indians." The property taxation powers conferred to band governments by the Indian Act, before its amendment in 1988, applied explicitly only to the "reserve," and the court decided that "surrendered lands" were not part of the reserve for that purpose.[26] In the face of this dilemma, Chief Clarence (Manny) Jules and the Council of the Kamloops Indian Band in 1985 proposed to the federal government that section 83 be amended.

Two aspects of the Kamloops situation that motivated a change in the Indian Act's section 83 provisions are noteworthy.[27] First, the leaseholders for whom band taxation was intended were all business entities, tenants of an industrial park, not individual non-aboriginal residents. Hence, while issues of due process and appeals would be relevant to these taxed businesses, issues of electoral franchise and effective political participation in governmental decision making about taxation and public expenditures might not arise.[28] Second, the Kamloops band's expressed motive for wanting to collect taxes was to finance services for the industrial park tenants without making them bear double taxation from the province and the band. Alternatively, the band did not wish to charge service fees on top of the provincial property taxes because this could undermine its competitive position in the market for industrial parkland. Clearly, the immediate impetus for amending the Indian Act was unrelated to issues of representation

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Squamish, Musqueam, and Kamloops Bands to secure First Nations taxation powers over leasehold lands.

25 *Leonard v. R, etc.*, [1984] 4 WWR 37 (BC CA). This case concerned the validity of the section 87 exemption with respect to BC sales tax on purchases by aboriginal residents from businesses located on surrendered lands on their reserve. The court found that such lands were not "in the reserve" (a technical requirement of the Indian Act) and therefore the sales did not qualify for the section 87 exemption. For a similar reason, the decision also had implications for a band's section 83 taxing powers within its leased lands.

26 Because of the wording of the Indian Act, the court decision also excluded conditionally surrendered reserve lands from other band council powers, such as bylaws relating to zoning and regulation.

27 For the sources of the facts underlying this discussion, see *Introduction to Real Property Taxation on Reserve*, supra footnote 24 and the testimony of Chief Clarence "Manny" Jules in Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 36th Parliament, 1st session, 1997-98-99, issue no. 19, February 9 and 10, 1999.

28 Some municipalities do allow business owners in the jurisdiction who do not reside there to have a vote in elections, but their relative numbers and influence in any election would be minuscule in any event.

and discrimination that would inevitably arise with the imposition of band taxes on non-aboriginal residents of reserves.

Section 83 and Implementation

The federal government reacted favourably to the proposed changes to section 83, the first Indian-initiated amendments to the Indian Act.[29] The legislation was passed in 1988 as Bill C-115, An Act To Amend the Indian Act (Designated Lands), often called the "Kamloops" amendment.[30] In essence, the changes extended the range of a band council's taxation powers to include "designated lands," a newly devised term that includes lands that have been conditionally surrendered for leasehold purpose but does not include lands that have been absolutely surrendered with the intention of sale. The key portions of the new section with respect to aboriginal taxation powers are the following:

> 83.(1) . . . 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; . . .
>
> (b) the appropriation and expenditure of moneys of the band to defray band expenses; . . .
>
> (e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest; . . .
>
> (f) the raising of money from band members to support band projects; . . .
>
> Restriction on expenditures
>
> (2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.
>
> Appeals
>
> (3) A by-law made under paragraph (1)(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.
>
> Minister's approval
>
> (4) The Minister may approve the whole or a part only of a by-law made under subsection (1).
>
> Regulations re by-laws
>
> (5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

29 The 1986 federal budget referred to the prospective introduction of Indian Act amendments to allow aboriginal taxation of leasehold lands on reserves. Canada, Department of Finance, 1986 Budget, Budget Speech, February 26, 1986, 21. Note that more than 100 Indian bands across Canada expressed their support for such an amendment.

30 Supra footnote 1.

> By-laws must be consistent with regulations
>
> (6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

Additionally, the section 87 tax exemption for aboriginals residing on reserves continues to be subject to the exercise of taxation powers by the band council under section 83.

Some aspects of the amended section 83 are notable with respect to aboriginal taxing powers over non-aboriginal residents. The section is silent as to whether band taxation must be applied equally to aboriginal residents with similar properties. Still, the act does not explicitly delegate authority for a band to exercise its tax powers in a discriminatory fashion as between aboriginals and non-aboriginals or authorize the minister of the Department of Indian Affairs and Northern Development (DIAND) to approve discriminatory taxation by-laws.[31] The section also offers very limited protections for the interests of non-aboriginal interests subject to aboriginal taxation, given their lack of franchise or effective participation in the local government. Ministerial approval is required for all band taxation and expenditure bylaws. Yet DIAND is far removed from the non-aboriginals on any given reserve and also likely to be influenced by its fiduciary duty to First Nations.[32] The section requires that taxing bands establish an appeal process for assessments, but this is a very limited constraint on band actions. Each band can establish the principles for assessing property values, and an appellant taxpayer can challenge only whether the bylaw has been properly applied, not the principles used for assessments nor the rate of tax that the band chooses to impose.

In January 1989, DIAND established the Indian Taxation Advisory Board (ITAB) to assist it in the administration of the section 83 provisions. According to DIAND:

> The Board's primary purpose is to provide recommendations to the Minister on the approval of taxation by-laws, and to promote the exercise of these new Indian taxation powers. The Board represents a new concept in that it is the first Indian-controlled administrative body to be involved in the exercise of the Minister's decision-making powers under the Indian Act.[33]

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31 In the Kamloops Indian Band context, taxes could potentially be applied to commercial and industrial properties but not to residential properties, which would be one way of taxing non-aboriginal leasehold interests and not aboriginal residents without overt discrimination. The issue of tax discrimination is assessed in a later section.

32 The section also allows for the governor in council to make regulations in this area, but it is reported by ITAB's Ottawa office that, to date, no such regulations have been put in place. At the outset it had been anticipated that "[t]o develop regulations, the government will rely on advice from the Indian Taxation Advisory Board." *Introduction to Real Property Taxation on Reserve*, supra footnote 24, at 10.

33 Canada, Department of Indian Affairs and Northern Development, *Band Property Taxation Powers on Reserves*, Information Sheet (Ottawa: the department, January 1993).

As will be explained later, the ITAB has played a pivotal role in developing aboriginal property taxation policies relating to assessment methods and the setting of tax rates. Chief Jules, who was instrumental in the proposal for Bill C-115, was appointed chairman of the ITAB at the outset and has served to date. In addition, DIAND established an Indian Taxation Secretariat within its Lands, Revenues and Trusts Section. This secretariat is intended to advise the ITAB on technical issues relating to taxation and to examine proposed bylaws and to advise the ITAB and the minister as to their acceptability.

This brief historical review of provisions for aboriginal taxation shows the dramatic change in how these powers have been regarded over time. Section 83 has evolved from an early view in the Indian Advancement Act of 1884 that aboriginals should be encouraged to develop their own local governments financed by taxes on themselves—with little if any thought given to the prospect of aboriginal taxes being imposed on non-aboriginals. The current situation is one where aboriginal property taxes are applied almost exclusively to non-aboriginals. The ITAB's recent proposal to be remade into a statutory First Nations Taxation Commission, described and assessed later, would remove the role of ministerial approval of First Nations taxation and expenditure bylaws and leave the final authority with First Nations institutions. Pursuing that course would undermine any assertion that non-aboriginal taxpayers on First Nations lands had even a vestige of representation rights.

BC Context and Provisions

British Columbia offers a natural laboratory for observing how aboriginal taxation policies have developed in practice. It is not surprising that two-thirds of all First Nations to enact property taxes to date are from this province, which accounts for nearly one-third of all bands in Canada and has more reserves in greater proximity to urban areas than is typical in other provinces. Bands have chosen to apply their property taxes almost solely to non-aboriginal interests in reserve land, and closeness to more populated areas is associated with residential, industrial, and commercial leaseholders. As shown in table 1, British Columbia has by far the largest number of non-aboriginal persons living on reserves, the great majority of them being leaseholders.[34] As seen in table 2, within British Columbia, most non-aboriginal residents are also concentrated on relatively few reserves. Reserves in just a handful of districts account for the preponderance of non-aboriginal reserve residents; those on the Westbank First Nation, in the Central Okanagan district, account for one-third of all such residents in the province. Some bands in remote areas have imposed property taxes on utilities or railway lines that run through their reserves. By focusing on a single province, it is also

34 Of course, some non-aboriginal residents are renters rather than leaseholders of First Nations housing developments, and others are non-aboriginal spouses, other relatives, and friends residing in aboriginal households on reserves. The data do not permit this distinction to be made.

Table 2 Population Living on Indian Reserves in British Columbia, by District, 1996

Regional districts	Non-aboriginal	Aboriginal	Total	% Non-aboriginal
Districts with more than 25% non-aboriginal				
Central Okanagan	6,610	560	7,170	92.2
Okanagan-Similkameen	1,270	330	1,600	79.4
North Okanagan	1,405	485	1,890	74.3
Capital (Victoria)	2,580	1,230	3,810	67.7
Greater Vancouver	3,750	1,960	5,710	65.7
Sunshine Coast	350	400	750	46.7
Columbia-Shuswap	320	380	700	45.7
Fraser Valley	1,265	2,400	3,665	34.5
Powell River	170	395	565	30.1
East Kootenay	150	415	565	26.5
Total of above districts	17,870	8,555	26,425	67.6
All other districts	1,940	30,925	32,865	5.9
British Columbia[a]	19,810	39,480	59,290	33.4

[a] These figures differ from the corresponding figures in table 1 because the latter include 2,668 for reserves with 50 or fewer people and 586 as a result of the aboriginal identity information coming from the census long form (20 percent sample) versus the total population number coming from all respondents.

Source: Statistics Canada, 1996 Census, prepared by Population Section, BCSTATS; for reserves reporting a population of at least 50 people and excluding incompletely enumerated reserves (see note to table 1 for the estimated number).

possible to examine in some detail the institutional context such as provincial enabling legislation and comparative assessment practices.

Since most of the leased reserve lands were in proximity to urban areas, and some within municipalities, issues naturally arose about the transfer of taxing and servicing powers from municipal or regional authorities to newly taxing First Nations.[35] Section 409(5) of the BC Municipal Act provided that municipalities could levy taxes "so far as applicable, to land held in trust for a band of Indians and occupied, other than in an official capacity, by a person not an Indian." Regional districts also could impose levies on leased reserve lands. When First Nations first assumed taxing powers, some BC municipalities were concerned about the possible loss of tax revenues or how they would recover their costs of providing services to reserve leasehold properties. The amendment of section 83 did not remove the provincial and municipal governments' authority

35 This account draws on *Indian Property Taxation—A Handbook for Local Government*, supra footnote 10, at 4-5; reference to the Municipal Act is to the then-current version. Note that the 196 Indian bands in British Columbia have about 1,600 separate reserves, with 45 of the reserves located within municipal boundaries and 30 additional reserves adjoining municipalities. Ibid., at 17.

to tax non-aboriginals occupying reserve lands. Thus, the advent of First Nations tax powers over leasehold interests in reserves also raised the prospect of double taxation of those properties.

To address these issues, the BC government passed the Indian Self Government Enabling Act (ISGEA; Bill 64) in 1990.[36] This act reduces or removes local and provincial taxes from reserve properties that become subject to First Nations taxation. It also allows each band to choose from three options for taxing arrangements—concurrent, independent, and Indian district taxation. Concurrent taxation involves joint occupancy of the reserve property tax base by the First Nation and provincial and/or municipal governments; it allows a band to avoid the burdens of administering the tax but at the cost of sharing the revenues. The independent band taxation method makes the First Nation the sole taxing authority on the reserve, with the concomitant administrative burdens but full retention of the tax revenues. All taxing First Nations in British Columbia have opted for independent band taxation, although a few initially explored the possible use of concurrent taxation.

The final option, Indian district taxation, has not been used by any BC band taxing under section 83 of the Indian Act. This option provides a participating band with some advantages, such as grants and other benefits provided by the province to municipalities. However, this option requires that the band first negotiate a self-government agreement with the federal government. This approach was modelled after the Sechelt Indian District experience, which is described later. The BC act provides that bands opting for the Indian district taxation method may be required to "establish an advisory council to represent all the residents of an area over which an Indian district has jurisdiction."[37] Otherwise, taxing First Nations do not face any federal or provincial requirements to have advisory bodies for non-aboriginal taxpayers.

A band wishing to proceed under the independent band taxation method must satisfy statutory requirements for notifying any affected municipalities or district jurisdictions. It must also negotiate with those bodies for the continuing supply of services to the leasehold portions of the reserve unless alternate arrangements are made. After these points have been satisfied and the band has an approved taxation bylaw, the BC minister of aboriginal affairs exempts the reserve leasehold lands from provincial, municipal, and district taxes. The ISGEA also gives the provincial Cabinet authority to compel local governments to continue negotiations with the band for the provision of services. Taxing First

36 Indian Self Government Enabling Act, SBC 1990, c. 52. For discussion of the act, see ibid. and British Columbia, Ministry of Aboriginal Affairs, *Guide to the Indian Self Government Enabling Act* (Victoria: the ministry, December 1990). This act was preceded in 1989 by Bill 77, the Indian Land Tax Cooperation Act, which was never proclaimed because it proved unacceptable to First Nations for failing to recognize their full jurisdiction over reserve taxation.

37 Indian Self Government Enabling Act, RSBC 1996, c. 219, section 25.

Nations must enact an assessment bylaw, which can use concepts and processes that depart from those used in the province at large. Almost all of the First Nations have contracted with the BC Assessment Authority (BCAA) to prepare their property tax rolls with just a few using other parties for this task. However, even when the BCAA prepares the assessment rolls, it must apply the First Nation's assessment bylaw and not the BC Assessment Act.

Many First Nations in British Columbia were attracted to property taxation by the fact that their tenants were receiving relatively few public services from the taxing municipalities or rural districts.[38] One study from 1987 found that only about 25 percent of the local services provided to other municipal taxpayers were supplied to reserve leaseholders without added fees for contractual supply.[39] This imbalance between taxes imposed and services supplied to reserve leaseholds depressed the rental rates that First Nations could derive from their lands. Moreover, the differential between taxes and services varied widely across reserves, depending on the nature of their leaseholds. For example, where the leaseholds were primarily low-valued residential properties, such as manufactured home or trailer parks, the taxes typically fell short of the value of public services.[40] In some First Nations the leased lands were owned primarily by individual band members ("locatees") rather than the band collectively.[41] Sometimes the bands imposed schemes for sharing the locatees' leasehold rental revenues. After the shift to a First Nations tax jurisdiction, the imposition of higher tax rates was one channel by which a band could share in the locatees' rental revenues.

Even when a taxing First Nation applies the same tax rate as for an adjacent area (and assuming that its assessments are done on the same basis), it derives far more in revenues than a counterpart municipality. The reason is that the total

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38 The account in this paragraph draws on Robert L. Bish, "Implementing Aboriginal Self-Government Taxation and Service Responsibility in British Columbia" (1993), vol. 36, no. 3 *Canadian Public Administration* 451-60. Note that outside of municipalities, these properties were subject to provincial taxes for rural areas. For analysis of the taxation aspects of property development on Indian reserves before Bill C-115, see D.B. Fields and W.T. Stanbury, *The Economic Impact of the Public Sector upon the Indians of British Columbia: An Examination of the Incidence of Taxation and Expenditure of Three Levels of Government* (Vancouver: University of British Columbia Press, 1973), chapter 9, "The 'Taxation' of Indian Reserves."

39 Robert L. Bish, *Property Taxation and the Provision of Government Services on Indian Reserves in British Columbia* (Victoria: University of Victoria, Centre for Public Sector Studies, 1987).

40 Because of the relatively high costs of servicing such properties, ITAB has recently recommended that First Nations set up a new taxation rate class to cover the costs of servicing these leaseholds. *Annual Report, 1998-1999*, supra footnote 3.

41 The term "locatee" originally was used to describe a band member owning land on a reserve by a location ticket, but is now used for those holding land by certificate of possession; both legal forms are more restrictive than a fee simple. See Donna L. Kydd, *Indian Land Holdings on Reserve*, Legal Information Booklet no. 1 (Vancouver: Legal Services Society of British Columbia, Native Programs, 1992).

property tax bill for residential properties in British Columbia is typically around half composed of municipal taxes; the balance is mostly the provincial school tax on property and several smaller district and special-purpose levies.[42] Hence, even where the First Nation must pay a municipality for the continued supply of services under a contract, it can retain a large portion of the revenues for its own purposes.[43] This fact in part explains the popularity of property taxation powers for First Nations in British Columbia. The BC government offers property taxpayers a homeowner grant—a flat amount that is used first to offset provincial property tax and then, if there is any amount remaining, municipal tax.[44] Taxing bands in British Columbia are not required to offer a corresponding grant, even though they collect the counterpart to the provincial school property tax, but many have opted to parallel the provincial grant scheme.[45] The BC ISGEA guarantees access of reserve residents to public schools even though the school tax has not been paid by the respective First Nation.

The BC government's decision to allow taxing First Nations to retain the school portion of the property tax under the ISGEA was motivated by several considerations.[46] Both the provincial government and the bands wanted to avoid any actions that might upset the master tuition agreement with the federal government. This agreement provides for federal compensation to the province at the full per-student cost for each status aboriginal student or a similar payment to the band if it operates the school. These transfers are larger than they should be because BC aboriginals already pay substantial provincial taxes used to finance public schools through their off-reserve purchases and earnings. Additionally, the BC Ministry of Finance questioned whether it could legally

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42 In the Vancouver area, for example, the proportion it can retain is more than half (see the figures given in the later section on expenditures under the Musqueam experience); the proportion is less than half in other areas because the municipal mil rates for residential properties are higher on account of lower average property values.

43 As discussed later, bands' use of taxation funds must satisfy the criterion of "local purposes" as specified in section 83(1)(a) of the Indian Act.

44 In 1999 the basic grant available to all homeowners was $470, with a higher figure of $745 for those aged 65 and over, veterans, and disabled persons on benefit; however, for higher-valued properties, the basic grant was phased out at 1 percent of the value exceeding $525,000, so that it was fully eliminated at property values above $572,000 (or above $599,500 for those qualifying for the larger grant).

45 Note that the province provides municipalities with grants to offset their loss of revenue in cases where the homeowner grant cuts into the municipal portion of the property taxes. Under section 14 of the ISGEA, supra footnote 37, the province can provide a similar grant to a band when the homeowner grant is greater than what the province considers to be the school tax room.

46 I thank Bob Bish for these observations. He also notes early opposition by the municipality of Chilliwack when the Sto:lo Nation proposed a lower property tax rate to attract business to the reserve. Out of this grew the common practice for BC First Nations to set their property tax rates roughly in line with the adjacent municipality plus provincial school tax rate—and ITAB's "comparable tax rate" policy.

continue to apply the school tax to reserve leaseholds—under the fiction that it was a personal tax—after a First Nation began taxing them. To avoid the possible conflict over this issue and in view of the small amount of funds involved, the BC government decided to leave the school tax room for the First Nations to occupy. Another interpretation is that the provincial legislators wished to provide fiscal resources for the exercise of aboriginal government or in lieu of the grants that municipalities obtain from the province.

One other property-tax-related provision differs in British Columbia as between reserves and the rest of the province. The government offers a property tax deferment program, which allows homeowners the option of deferring their annual property taxes if they are aged 60 or more, a surviving spouse, or disabled as defined under a provincial act. Interest is charged on the accumulating debit balance on very favourable terms, and the debt must be discharged when the property is sold or its owner dies. After the initiation of First Nations taxation on reserve leaseholds, some homeowners wished to continue their use of this tax deferral option. At least one taxing First Nation declined to extend this provision to its lessees, who received the following response from the provincial authorities:

> Many Indian bands in the province have elected the option to implement independent taxation under federal jurisdiction, to which the province has responded by withdrawing from taxing the same interests. Given the increasing trend toward Indian taxation of property, programs such as those for home owner grants and tax deferments should be integrated into their tax framework, for their taxes. Accordingly, the province should not re-enter the field through tax relief or assistance programs, for property taxes not levied under provincial jurisdiction.[47]

This case reflects the decision by the province not to extend to reserve leasehold residents a program of general benefit, one financed out of general revenues including various taxes paid by the same leaseholders.[48]

Sechelt First Nation Taxation

A unique experiment in First Nations self-governance, with important tax policy aspects, was launched in 1988 with the Sechelt Indian Government District (SIGD) in British Columbia. The Sechelt Indian Band possesses prime lands on the coast north of Vancouver, with extensive lease holdings by non-aboriginal residents and businesses. The band wished to be freed of the constraints of the Indian Act in its ability to develop its lands. After long and complex proceedings, it achieved this goal with the establishment of the SIGD, which is a quasi-local

47 Letter from Elizabeth Cull, BC Minister of Finance, to Shelley Nitikman, President, Musqueam/Salish Parks Residents' Association, October 15, 1993, attached to Minutes of Musqueam Taxation Advisory Council, meeting no. 18, February 22, 1994.

48 The provincial government's main objection to giving tax deferment on reserve was reputed to be its inability to secure loans against the property. However, most financial institutions have found adequate security in these leaseholds to offer mortgage loans.

government entity with broader powers than a conventional BC municipality.[49] The SIGD also embodied the federal government goal of encouraging aboriginal self-government and the provincial goal of facilitating aboriginal self-governance outside of a constitutional or treaty context while considering the interests of affected non-aboriginals. With these new arrangements, the Sechelt Band was removed from the Indian Act and held all of its land collectively as a fee simple rather than as reserve land.[50]

The SIGD is often called "municipal-style" self-governance. The SIGD can opt to use provincial provisions such as the BC Municipal Act, and it qualifies for provincial benefits to municipalities such as grants. There is a division between the band government (the band council) and the public government (the SIGD council), although the public government body is formed solely of members of the band council. Non-aboriginal residents of the Sechelt lands cannot vote for or serve on either of those bodies but have non-legislative input to the SIGD council via an elected advisory council.[51] Property assessments and taxation are among the powers delegated from the band to its public government body. The province agreed to rescind the rural area property tax on Sechelt lands. The Sechelt agreed to collect property taxes from both aboriginals and non-aboriginals living on their lands, and to remit the relevant portions to the province and district authorities. Sechelt taxpayers receive homeowner grants from the province, unlike taxpayers facing First Nation taxes under the Indian Act. Band members' and lessees' interests in land are assessed on a uniform basis by the BCAA for tax purposes. Unlike First Nations taxing under the terms of the Indian Act, SIGD tax policies do not require DIAND approval.

This "municipal" model of aboriginal self-governance has been rejected by most other First Nations and in fact has not been adopted by any other since the Sechelt. This may be partially explained by the advent of section 83 taxing powers under the Indian Act in 1988, around the same time as the Sechelt arrangements were concluded. Under section 83, a First Nation does not have to share any of its property tax revenues with provincial or district authorities, except

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49 This entity is a complex meld of federal and provincial legislation—the federal Sechelt Indian Band Self-Government Act (1986) and the BC Sechelt Indian Government District Enabling Act (1987)—as well as a Sechelt constitution. For a detailed review and analysis of these developments, see John P. Taylor and Gary Paget, "Federal/Provincial Responsibility and the Sechelt," in David C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989), 297-348. This account also draws on an interview with Harold Fletcher, the SIGD administrator.

50 The provisions allow for the sale of Sechelt land to others only with a 75 percent vote of members, and members' individual use of land is by band resolution rather than by certificates of possession as is common on reserves.

51 The advisory council is established under the provincial legislation; it does not prohibit band members from running for office, but in practice all advisory council members have been non-members.

to the extent that it needs to contract for the supply of services. It also does not face the BC-imposed requirement that native government offer an advisory body for non-members subject to its jurisdiction. Conversely, bands taxing under section 83 do not qualify for provincial grants to municipalities; it has been estimated that Sechelt at least breaks even in the taxes it must remit versus the grants and other provincial benefits that it receives. The main reason for aboriginal organizations' disaffection for the Sechelt model is that it is established under legislation rather than a constitutionally entrenched recognition of the right of self-government, which would also provide wider powers.

The Sechelt model and experience also have implications for issues of representation and discrimination that arise with section 83 First Nations taxation. It has been argued that "[t]he separation between 'band government' and 'local government' represents a unique attempt at dealing with the dilemmas associated with non-native occupiers of band lands."[52] However, the decision-making body for "public government" on Sechelt lands, the SIGD council, is fully constituted by members of the Sechelt Band Council, with only advisory input from non-band residents. In response, it has been asserted:

> Although the fact that effective political control rests with the band council has been criticized as disenfranchising the non-Indian population, it would be unacceptable for the band to do otherwise. Non-native occupiers could outnumber band members on Sechelt lands. If the franchise were universal, and non-Indians could vote and hold office, there would be the constant threat that political control of the Sechelt Band and its lands would fall out of Indian hands.[53]

Yet, disenfranchising non-aboriginal residents is an extreme response to the possible threat to aboriginal control of government. Other institutional arrangements could be devised to provide non-aboriginal residents franchise in the decision-making body but still limit their maximum potential representation. These arrangements will be discussed later in the study.[54]

Another notable aspect of Sechelt taxation is that the band accepted the imposition of SIGD taxes on its members along with resident non-members. This point was a crucial one for the BC government in settling the terms of the Sechelt package. Still, among the band's members, the prospect of being taxed, even by their own government, was not a welcome one. The Sechelt Band resolved this matter by agreeing to pay each member's net property taxes directly to the SIGD; these payments have been made in all years and for all members regardless of their individual financial circumstances. The moneys come from

52 Taylor and Paget, supra footnote 49, at 340.

53 Ibid., at 327.

54 This point is not to suggest that the current advisory role for non-aboriginal residents has worked badly in the Sechelt context. Through its financial relations with the SIGD, the province also stands prepared to protect the interests of the non-aboriginal residents if this ever proved necessary.

the band's own-generated funds and its grant receipts from other governments. While on the surface this approach eliminates any charge of discriminatory taxation on aboriginal vis-à-vis non-aboriginal residents, it may defeat one primary purpose of taxation in a democratic framework. The payment of taxes by individual voters, out of their own pockets, makes them demand responsive and accountable government. As some analysts have observed:

> Whereas the Boston Tea Party demonstrated that there could be no taxation without representation, self-financing within Aboriginal self-government adheres to the reverse proposition—there can be no effective representation without taxation.[55]

BC First Nations Sales Taxes

Eight First Nations from British Columbia plus five from other provinces have obtained powers to collect federal taxes on reserve sales of fuel, alcohol, and/or tobacco products in recent years. The 1997 federal budget indicated the government's "willingness to put into effect taxation arrangements with First Nations that indicate an interest in exercising taxation powers," and this invitation was reiterated in the 1998 federal budget.[56] Federal legislation was passed in 1997 and 1998 allowing for the assumption of taxing powers over some or all of these products by the Cowichan Tribes, the Westbank First Nation, and the Kamloops First Nation, all located in British Columbia.[57] This list was extended to BC's Sliammon First Nation in 1999 and in 2000 to an additional four BC First Nations (Adams Lake, Chemainus, Osoyoos, and Tsawout) plus one in New Brunswick and four in Manitoba.[58] These First Nations chose to assume goods and services tax (GST) powers over a limited range of products to avoid exposing their members to tax on items such as vehicles and consumer durables. As of 1998, the Westbank and Kamloops First Nations were receiving the GST revenues from on-reserve sales of these goods through tax-collection agreements with the Canada Customs and Revenue Agency.[59]

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55 Allan M. Maslove and Carolyn Dittburner, "The Financing of Aboriginal Self-Government," in *Aboriginal Self-Government in Canada*, supra footnote 6, 392-410, at 399.

56 Canada, Department of Finance, 1997 Budget, Budget Plan, February 18, 1997, 91-92 and 1998 Budget, Budget Plan, February 24, 1998, 230.

57 Bill C-93, Budget Implementation Act, 1997, SC 1997, c. 26, parts II-III. Bill C-36, Budget Implementation Act, 1998, SC 1998, c. 21, part 4, assented to June 18, 1998. The Kamloops tax replaced a tax that the band had applied to its own members' on-reserve purchases of gasoline and tobacco for several years in order to finance the legal costs of protecting traditional lands. See the testimony of Chief Clarence "Manny" Jules to the Standing Senate Committee on Aboriginal Peoples, supra footnote 27.

58 Bill C-32, Budget Implementation Act, 2000, SC 2000, c. 14, part IV, consolidated and replaced the preceding legislation.

59 See CCRA document no. RC4072.

Two aspects of these taxes offer a notable contrast to BC First Nations' approach to property taxation. First, the taxes are applied equally and without discrimination to both aboriginal and non-aboriginal purchasers of the taxable goods on reserve; the First Nations waived their members' rights to be exempted from on-reserve purchases. This situation does not violate the Indian Act's section 87 tax exemption because the taxes are being imposed and received by First Nations governments even though they are collected by the federal government. Second, the taxes must be applied using the same rules, processes, and rates as the corresponding federal tax in order to qualify for a tax-collection agreement; this is stipulated in the legislation. Hence, these First Nation taxes are applied uniformly both within the reserve and relative to comparable off-reserve taxes. These features reflect the federal government's views about workable forms of aboriginal tax powers, as embodied in a 1993 Department of Finance working paper to be reviewed later.

A different approach to First Nations sales taxation has been pursued by the Quebec government and the Kahnawake Mohawks.[60] In early 1999 the two parties concluded an agreement for the province to collect taxes on the sale of tobacco, petroleum, and alcohol products on reserve and to remit the estimated tax revenues to the First Nation. This tax would be paid equally by aboriginal and non-aboriginal purchasers on reserve. A second Quebec-Mohawk agreement covered the provincial sales tax. It extended the aboriginal tax exemption for purchases off reserve but allowed for a First Nations charge (in lieu of the Quebec sales tax) on sales to non-aboriginals on reserves. Unlike the First Nations sales taxes in British Columbia, this Quebec tax would apply only to non-aboriginals' purchases on reserve. The official federal reaction to these proposed arrangements was reported as follows:

> Finance Department sources said Ottawa has serious concerns that the deal will discriminate against non-native Canadians. . . . Under the agreement, the Mohawk First Nation will charge a levy on non-natives within the reserve, without applying that same fee to natives. This, Finance sources say, raises questions about accountability because the band council would be taxing people who do not elect it. The federal government is also concerned about the precedent being set and its effect on other native communities in the country. . . . Under proposed federal arrangements, native communities could replace the GST with their own tax system, collected equally from both native and non-native residents.[61]

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60 For text of the agreement, see (1999), vol. 8, no. 2 *Onkwarihwa'shon:'a—Our Affairs* 5-8 (newsletter of the Mohawk Council of Kahnawake). The agreement also contains provisions to control abuses that would undermine the provincial tax revenue base. As of mid-2000, neither of the Quebec-Kahnawake tax agreements was yet in operation, according to André Brindamour of the Quebec Ministry of Finance, who also furnished other related information.

61 "Quebec Mohawks Win Special Tax Treatment: Ottawa Fears Discrimination over Sales Levy," *The Globe and Mail*, March 31, 1999.

Focus on Residential Leaseholders

This study's analysis focuses on residential tenants of First Nations lands, in particular residential leaseholders, and excludes other types of tenants and leaseholders.[62] Thus, the situation of commercial, industrial, resource, and agricultural leaseholders and utilities and transportation facilities that run through reserves is not addressed. One reason for this focus relates to the democratic representation rights of individuals as residents, voters, and taxpayers. Business entities do not normally have democratic representational rights of the same kind as individuals. Even where municipalities allow businessowners who own real property there but do not reside there to vote, their total influence on electoral outcomes will be minimal.[63] On account of their resources, businesses can also influence governments in ways that individual voters cannot usually muster. Additionally, the application of taxes that discriminate between aboriginals and non-aboriginal interests is a less salient matter when the non-aboriginals are business entities rather than individuals.[64]

There is yet another reason for focusing on the situation of residents who hold leases rather than rent their accommodations on First Nations lands.[65] Unlike renters, leasehold residents will typically have substantial sums invested in their home structure and site improvements. When they reach an agreement with the First Nation on the prepaid amount for a long-term lease, or on a schedule of ongoing annual rental lease payments, this would normally be the final terms of the contract. Yet if a First Nation then imposes and/or raises taxes in a way that reflects revenue generation for the band rather than the cost of supplying services to the leaseholds, this is a backdoor method of rewriting the terms of the leasehold contract. In the case of renters or lessees with frequent

62 Rather dated figures are available for the composition of BC leasehold lands by type. A 1986 survey that included 21 municipalities found in terms of assessed values the reserve leaseholds comprised the following: residential 36.4 percent, industrial 21.6 percent, business 33.1 percent, and the remaining 9 percent utilities and farmlands. Union of British Columbia Municipalities, "Taxation of Leased Lands on Indian Reserves: Survey Results" (mimeograph, Richmond, BC, May 29, 1986), 3.

63 In British Columbia, the owner of a business who also owns property on which the business is sited, but who would not otherwise obtain a vote in that municipality by virtue of not residing there, can obtain a municipal vote there; before the 1993 amendments, small businesses that did not own the property on which they operated also had some access to the municipal vote. BC Municipal Act, RSBC 1996, c. 323, as amended, section 51. Other provinces offer similar provisions for municipal voting by non-resident property owners.

64 Interestingly, the only court cases to date on such discrimination in the application of First Nations taxes are in the context of business interests. *Canadian Pacific Ltd. v. Matsqui Indian Band* is discussed below.

65 Note that, for purposes of the current analysis, the latter group includes those with homes that can easily and economically be removed from the reserve land, such as trailer homes and some manufactured homes.

rent adjustments, attempts by a First Nation to derive additional revenues through tax hikes will be self-defeating. Such actions will reduce the rental rates they can obtain in a competitive property market, thus instilling a form of accountability on the First Nation via the marketplace.[66] But for long-term lessees with a substantial investment in their homes, tax increases imposed either through higher mil rates or inflated assessments constitute a unilateral taking of property.

This economic dynamic explains why leaseholders on reserve lands face a potential threat to their position via First Nations taxing powers, and it reinforces the civil libertarian grounds that might be cited for their having some form of representational rights in the local governance. Moreover, a similar dynamic faces leaseholders of any kind—including those with commercial or industrial activities—where the lessee needs to make an irreversible or immovable investment on the reserve lands in order to achieve the benefits of the leasehold. This uncertainty by reserve leaseholders over future taxing practices or rates introduces a form of risk premium, which might be expected to lower the returns that First Nations can obtain through any *future* leasehold developments. Hence, institutional arrangements to constrain aboriginal governments' taxing powers might in fact increase the total economic benefits that all First Nations can achieve by developing their lands.

The ITAB has argued that lessees who lack political voice in the First Nations where they reside may nevertheless find protection in other ways:

> The fact that non-Indian ratepayers cannot vote in first nation elections means that mechanisms other than the vote which act as influence on [tax] rates will gain greater importance—such as market forces and the influence of ratepayer groups.[67]

ITAB has asserted that there is no inherent conflict between the interests of the two parties:

> [I]t is sometimes assumed that First Nation interests are best served by charging the maximum property tax rates to existing taxpayers. This would suggest that taxpayer interests are directly opposed to First Nation interests. This strategy is wrong. . . .
>
> What can be earned from new investment far outweighs what additional funds can be squeezed from the existing tax base. New investment means new taxpayers, increases in the value of the tax base, higher lease revenues.[68]

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66 This case assumes that the lessor is the band and not individual band members. Where the land is owned by individual band members (as in the Westbank situation described later), they have an interest in seeing the tax burden on leaseholders minimized so as to maximize their own rental returns.

67 Indian Taxation Advisory Board, "The Question of Rates in Indian Taxation" (mimeograph, Ottawa, Indian Affairs and Northern Development, 1991), 8.

68 Indian Taxation Advisory Board, *Responding to Challenges—The Future of the Indian Taxation Advisory Board* (Kamloops, BC: ITAB, August 1999), 3-4.

However, the assertion that there exists a congruence of interests via market forces hinges on a number of special conditions that do not hold for all First Nations. Table 3 identifies the conditions that support as well as those conditions that weaken such a congruence of interests. For example, if a First Nation has little additional land available for leasing, and its existing land is tied up in long-term prepaid leases, it faces incentives to maximize the revenues derived from taxes on the existing leaseholds. The case of the Musqueam Indian Reserve, which follows, exemplifies some of the consequences that may arise when the interests of the two parties diverge.

EXPERIENCE ON MUSQUEAM INDIAN RESERVE

The experience on Musqueam Indian Reserve No. 2 offers valuable insights into the issues of representation, discrimination, and accountability arising under First Nations property taxes applied to non-aboriginal residents.[69] This situation illustrates the stresses that are more likely to arise for bands that have already committed most of their available lands to long-term leaseholds; they do not face incentives to restrain their taxes via market effects on the leasehold rental rates they can obtain.[70] This case study is more relevant to the situation of First Nations with lands in close proximity to urban areas than in remote areas. The Musqueam Indian Band has been a leader in expanding the frontiers of aboriginal rights in Canada, with two landmark legal decisions to its credit (*Guerin v. The Queen* (1984) and *R v. Sparrow* (1990)).[71] Musqueam was also in the forefront of bands to pursue their taxation powers under the amended section 83, the first to advise the BC government that it wished to pursue property taxes in 1990.[72] Additionally, decisions of the Musqueam Indian Band Board of Review have exerted a significant impact on assessment principles for First Nations property taxes across British Columbia and beyond.

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69 The account in this section draws upon minutes of the Musqueam Indian Band Taxation Advisory Council and discussions from 1991 onward with the Musqueam Surveyor of Taxes (who also acts as general counsel for the band) and with presidents of the Musqueam/Salish Parks Residents' Association; also Jonathan R. Kesselman and C.W. (Chuck) Albert, "Musqueam Indian Band Taxation Advisory Council—The Leaseholder Experience, 1991-1999" (mimeograph, February 25, 1999).

70 In contrast, the Tsawwassen and Westbank First Nations described later have had considerably less strains with their taxpayers; both bands still have substantial reserve lands that they hope to use for additional leasehold developments.

71 [1984] 2 SCR 335 and [1990] 1 SCR 1075, respectively.

72 The Musqueam Band gave notice to the government of British Columbia under the provincial enabling act on August 22, 1990, although a few other bands were able to get their taxation bylaws approved by DIAND before Musqueam. *Indian Property Taxation—A Resource Book for Local Government*, supra footnote 10, at tab 4.

Table 3 Conditions That Support or Weaken the Congruence of Interests Between a First Nation and Its Lessees

Supportive conditions	Adverse conditions
Land is leased for short periods[a] (frequent rent renewals)	Land is leased for long periods on fully prepaid terms
Leased land is currently in highest-valued use	Leased land would yield higher returns in alternative use
Band has additional lands available for leasing	Band has little or no additional lands available for leasing
Prepaid leases have substantial terms remaining, and band has a long planning horizon	Prepaid leases have substantial terms remaining, but band faces immediate financial pressures
Leased land is owned by the band directly	Leased land is owned by individual band members

[a] Or a long-term lease that is approaching the end of its term.

General Background

Musqueam Indian Reserve No. 2 (MIR) is the band's largest and main reserve. It has 471 acres located in the southwest corner of Vancouver, BC, near to some of the most highly priced residential properties in all of Canada. About 500 members of the Musqueam Band reside on MIR, with another 450 living off reserve, many of them on a waiting list for housing on the reserve. Almost all available land on MIR is currently devoted to band housing or to long-term leaseholds. The leaseholds include two commercial tenants, both golf courses, and two residential developments.[73] Both of the residential parks were originally leased for 99 years and consist of detached homes on relatively large lots. The Musqueam Park area was developed beginning in 1965 and contains 75 homes, with leases that require ongoing annual payments. The terms of those payments were set for the first 30 years, but in 1995 they were to be adjusted based on then current land values; this issue has been a matter of ongoing dispute.[74] The

73 There was also originally a townhouse leasehold, but this has since been repurchased by the band, which continues to operate it for residential renters.

74 The rents were not resolved by negotiations, and at trial level a court set the average annual rents per lot at just under $10,000 (*Musqueam Indian Band v. Glass et al.* (1997), 137b FTR 1 (FCTD)); the band took this decision to an appeal court, where the average rent figure was raised to $22,800 per year (*Musqueam Indian Band v. Glass*, [1999] 2 FC 138 (FCA)). The latter decision, which caused much publicity about all of the MIR-leased homes, did not occur until December 1998. The case was heard by the Supreme Court of Canada in June 2000. A key issue in the dispute is how the leased lands in Musqueam Park are to be valued—at their on-reserve market value or as off-reserve freeholds—an issue that has been paralleled in band-leaseholder disputes over property tax assessments, as described later.

other MIR development, Salish Park, began in 1974 with fully prepaid leaseholds and 144 properties. Total population living on the two leasehold developments is estimated at nearly 700. Combined with the renters living in a reserve townhouse development, the total non-aboriginal population exceeding 800 outnumbers the band members residing on the reserve.

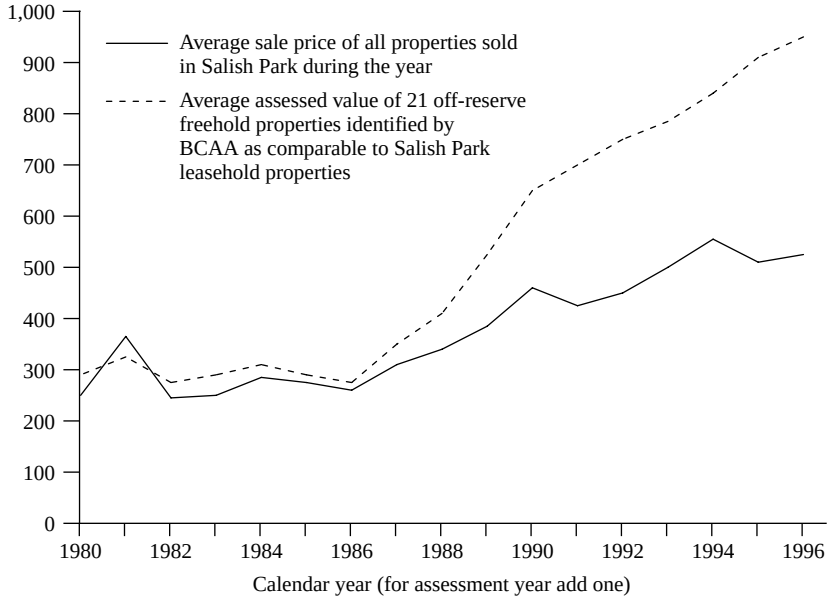
The Musqueam leasehold lands were serviced and taxed by the city of Vancouver under agreements to expire at the end of their respective leases. In 1991 the Musqueam Band, after talks with the province and the city, terminated these agreements and assumed the rights to tax and supply services. The city had to cooperate because the operation of Bill C-115 and the provincial enabling legislation removed the right of municipalities and taxing districts to collect taxes on Indian reserves that had initiated their own taxing regimes.[75] The Musqueam taxation bylaw specifically exempted lands occupied by band members from the band property taxes. While lessees' properties continued to be assessed by the BCAA, this was now done under a contract with the band that required the Musqueam assessment bylaw to be applied rather than the BC Assessment Act. Lessees' local public services continued to come from the city of Vancouver, but this was done under a contract with the band that was periodically renewed for various terms. For these services the band pays the city a sum equal to the municipal mil rate times the leasehold properties' assessed values. The band levies taxes on the leaseholds that reflect the mil rates of all taxing jurisdictions, so that it obtains a large surplus of funds over its cost of servicing the leasehold areas. Lessees' tax bills also jumped sharply at two points during the 1990s with changes in the way their properties were assessed.

A variety of factors have sharply depressed the market values of the MIR leasehold residential properties. Figure 2 displays the average market prices of leasehold properties sold in the Salish Park subdivision (with fully prepaid leases that expire in 2073) relative to the values of freehold properties in Vancouver identified by the BCAA as comparable in their structural quality, size, and age as well as lot sizes and amenity.[76] The charted period begins well before the start of Musqueam Band taxation; in the earlier 1980s the Musqueam leaseholds were viewed as nearly identical to Vancouver properties, other than the finiteness of their leases. The leaseholds then sold for virtually the same prices as off-reserve freeholds, consistent with observations by real estate experts that leaseholds with long terms remaining typically sell at prices close to freeholds, so long as there

75 See Manager's Report to Vancouver City Standing Committee on Finance and Priorities, "Status Report on Indian Taxation—Musqueam Band," September 4, 1990; this report also cited the risk of double taxation to leaseholders if the band proceeded to tax without other authorities vacating their tax room.

76 The figures underlying this chart were introduced as evidence in the Musqueam Board of Review's 1998 hearings, and they were reviewed and accepted as correct by the BC Assessment Authority representative.

Figure 2 Market Values of Prepaid Reserve Leaseholds Relative to Off-Reserve Freeholds, Vancouver, 1980-1996



are no other factors that differ. As seen in figure 2, a price gap began to emerge in 1988, after passage of Bill C-115 and anticipation by many realtors and some homebuyers that the taxing regime could change. The gap widened in 1990, when it became clear that Musqueam would be assuming taxing powers, and that gap has continued to grow in the ensuing years after the lessees' experiences with the new tax and assessment practices. As of 1996, the discount on the fully prepaid leaseholds had jumped to about 45 percent. The discount remained large in the following years—a home assessed at $904,000 sold for $475,000 in 1997, and one assessed at $750,000 sold for $390,000 in 1999.[77]

Of course, it is impossible to disentangle the advent of Musqueam tax jurisdiction from other factors that might have contributed to the sharp slide in market values of the MIR leaseholds. Some of these factors may have included repeated disputes over the MIR property assessments and an ongoing dispute over annual lease payments affecting one-third of the properties (excluded from figure 2). Media coverage of other First Nations developments, including the BC treaty process and intense incidents such as those in Quebec in 1990 and British

77 The addresses of these properties are 4253 and 4264 Musqueam Drive, respectively, and their discounts from assessed values were 47 percent and 48 percent, respectively. The assessed values are taken for the points nearest to the sale dates. Sale prices and assessed values are a matter of public record.

Columbia in 1995, may also have blunted the interest of home purchasers in reserve leaseholds. However, these events did not exercise such sharp downward pressure on the values of reserve leaseholds elsewhere in British Columbia (see the account below). Hence, it appears that Musqueam-specific developments must have played some role in the declining value of MIR leasehold properties. Note also that the slide in values of the prepaid Musqueam leaseholds long predated the media's intensive coverage of the rental rate dispute over the non-prepaid leaseholds on MIR.

Taxation Advisory Council

At its own initiative, the band instituted the Musqueam Taxation Advisory Council (TAC) as a venue for the reserve taxpayers to "advis[e] Chief and Council on all relevant aspects of assessment, taxation, and the delivery of local services."[78] The TAC was composed of 10 representatives—five chosen from the band (usually but not always members of the band council), one from the commercial lessees, and four elected by the residential lessees. Terms of office were two years, the same as for the band's chief and council. The TAC met first on a non-interim basis in March 1992.[79] The intention was to have meetings on roughly a monthly basis; with many meetings cancelled or postponed, a total of 42 meetings were held by the time of the last meeting in May 1998.[80] The demise of the TAC as a formal body was largely the result of both parties' frustrations over the process and its limited results; tensions over assessment and leasehold rental disputes further clouded the process. Lessee representatives stated at a TAC meeting in January 1998:

> 1. The band is not accountable; 2. The band exempts itself from taxation; 3. The leaseholders' recommendations are rejected; 4. Legal cases are costly; 5. The leaseholders were not consulted regarding changes to the valuation clause before the final draft of the most recent assessment bylaw was sent to Ottawa for approval; and 6. Musqueam is not a democratic society. There are both residents who can vote for Chief and Council and those who cannot vote. . . . The leaseholder representatives . . . are frustrated by the poor attendance to TAC meetings by Band representatives.[81]

78 Musqueam Indian Band, Band Council Resolution, March 27, 1991.

79 The TAC passed a motion that its chair meet periodically with the band chief and council to present recommendations. After two such meetings, the band council indicated that it "prefers only to read the Advisory Council minutes rather than listen to a presentation." Minutes of Musqueam Taxation Advisory Council, meeting no. 1, March 19, 1992, and meeting no. 5, July 20, 1992.

80 Since then occasional informal meetings have been held between band representatives and several of the Salish Park leaseholders.

81 Minutes of Musqueam Taxation Advisory Council, meeting no. 39, January 20, 1998, paragraph 39.01.

At most meetings of the TAC, the band's general counsel (though not a voting member) spoke for the band on matters relating to tax rates and related policies, property assessments, and local service provision. The TAC deliberations also covered a wide range of local issues, such as a youth curfew bylaw, traffic, noise, roads, local security, and various beautification projects. Although many of these topics were discussed at length, few of the proposed matters were ultimately put into effect. Some proposals such as street signage, a security gate at the cemetery, and cleanup of a vacant band lot were implemented. In areas where the representatives from the band and lessee communities differed, the issues either died within the TAC, or if the lessee representatives won a formal vote on a recommendation, the matters were referred to the chief and council where they usually were rejected. The TAC's mandate was intended to be purely advisory, and the chief and council of the band viewed themselves as the governmental decision-making body. On one issue, the band referred a draft amended bylaw for assessments to the lessee representatives for review in 1995. Only after the amended bylaw was approved and put into effect did the leaseholders learn that key wording in the valuation section had been changed without any intervening consultation.[82] The use of $1.4 million of tax funds to build a new band administration office, which had originally been billed as a "community complex" to include recreation facilities, was another sore point with lessees.

The lessees' failure to have more influence on issues that were most important to them—taxes, assessments, and local services—led them to propose other forms of local governance that would give them effective representation in decisions. One such proposal is described in the Musqueam Reserve leaseholders' presentation to the Royal Commission on Aboriginal Peoples.[83] It would amend the BC enabling legislation (ISGEA) to require that taxing BC First Nations establish a "leasehold land administration council" with "legal and legislative authority to review, alter and approve all matters affecting assessments, tax rates, provision of services and expenditure of taxes collected on the leasehold lands." It was proposed that this new body have equal elected representation from the leaseholders and the band and that tie votes be settled by binding arbitration. Other proposals of this kind were presented by the Musqueam Reserve leaseholders to the band on two occasions during the 1990s. These proposals stressed that lessees did not wish to intrude on strictly band or aboriginal matters, but to participate in decisions affecting matters of local public governance. On both occasions the band declined to accept or entertain any change in the governing relationship with leaseholders resident on MIR.

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82 The change was the addition of the words "located off reserve" to the phrase "as if the interest holder held a fee simple interest located off reserve" in section 26(1) of the amended bylaw, an issue discussed at length in later sections of this study on assessments.

83 Musqueam/Salish Parks Residents' Association, "Brief to the Royal Commission on Aboriginal People," October 5, 1992, 11-12.

The Musqueam Reserve leaseholders' influence with other parties in the process that determined their taxing and servicing regime was even more limited. Letters on various issues from the leaseholders' association to the federal and provincial departments related to aboriginal policies were acknowledged, often with an explanation of current policy, but never was a policy or approval of a proposed bylaw affected by the submission. Attempts by the leaseholders to join in the negotiations over the local service agreement between the city of Vancouver and the band were rebuffed by the band, since it regarded the matter as one of "government to government."[84] In January 1990, before the start of band taxing powers on MIR, reserve leaseholders appeared before the ITAB and expressed concerns over taxation without representation and the prospective unilateral withdrawal of the band's contract with Vancouver for supply of services for the duration of the leases.[85] The next time that the ITAB communicated with Musqueam lessees was early 1999, after extensive media coverage of the lease rental dispute on MIR. At no time in the intervening nine years did the ITAB have any contact with Musqueam lessees about changes that were being considered for First Nations assessment or tax rate policies.[86]

Local Services and Expenditures

The Musqueam First Nation maintains a taxation fund as part of its financial statements. Funds raised from taxes are supposed to be used for general "local purposes" as distinct from other purposes that fulfill the band's responsibilities to its members. With respect to resident leaseholders, the main obligation of the Musqueam taxation fund is the provision of municipal-type local public services. Most lessees had purchased their homes on MIR before the band's assumption of powers over taxes and services, and they had expected that these powers would reside with the city of Vancouver for the full duration of their leases.[87] The Musqueam Band has reached a series of agreements for the contractual supply of the full range of city services to the leasehold part of MIR (another

84 Minutes of Musqueam Taxation Advisory Council, meeting no. 20, May 17, 1994. A band representative to TAC stated that "it is a matter of trusting the band council to represent the interests of the residents."

85 Wilfred Morgan and Ken Cristall, submission on behalf of the Musqueam/Salish Parks Residents' Association, January 18, 1990, in Musqueam/Salish Parks Residents' Association, "Brief to the Royal Commission on Aboriginal People," supra footnote 83, exhibit 1.

86 The residents' association did send a letter to ITAB in 1995 expressing some concerns about the proposed amendments to the Musqueam Assessment Bylaw, but this letter was never even acknowledged by ITAB.

87 The lease contracts for the lessees in Musqueam Park (but not Salish Park) had explicitly stated that they would pay taxes directly to and receive services from Vancouver for the duration of their leases.

agreement covers the band-occupied portion). These agreements have typically been for two-year periods, and at some points the term had expired without another agreement yet in place. The MIR lessees have pressed the band to conclude a long-term agreement with the city that would ensure the uninterrupted provision of services for the balance of the leases. The band has declined to commit to such a long term but indicated that it might consider terms of up to 10 years, with provisions for opting out with notice.[88]

Payments to the city from the Musqueam taxation fund are based on negotiated terms. To date, the city has accepted a payment equal to its municipal mil rate times the MIR assessed residential property values plus a concessionary mil rate times the MIR assessed commercial property values.[89] The city's expressed intention was to eliminate the concession on the commercial portion after a period. With respect to the taxes generated from the residential leaseholds, the Musqueam tax fund could typically retain more than half of the revenues even after payment of the city service charge. For example, in the 1999 tax year, the property taxes of a Vancouver homeowner were (aside from fixed water charges) 47.6 percent municipal taxes, 45.4 percent provincial school property tax, and the other 7 percent for various district levies.[90] The MIR lessees have received from the Musqueam Tax Authority, in addition to the city-supplied services, some minor beautification projects and occasional trash bins.

There have been ongoing differences of view expressed in the TAC about the uses of tax revenues collected from the lessees beyond the amounts needed to pay for services from the city. The band representatives have argued that the leaseholders are no worse off than they would be under city jurisdiction, because they get the same package (if not more) of public services and pay no more in taxes. This is based on the band's commitment not to apply a tax rate any higher than in Vancouver, along with an assumption that the assessed property values would be the same under provincial authority. In the band's perspective, any excess revenues that exist by virtue of the province and district authorities vacating their tax room should go to the benefit of its members, not as a tax haven for lessees who happen to reside on MIR. The lessee representatives have argued that, because their taxes have often been higher than they would be without Musqueam taxing authority, on account of different assessment practices, they

88 Minutes of Musqueam Taxation Advisory Council, meeting no. 3, May 25, 1992.

89 At the outset there was no charge on the commercial properties, but in 1995 this was raised to half of the normal charge. This concession was intended to reflect the additional costs that Musqueam faced as tax collector, such as defending assessment appeals.

90 These figures ignore the availability of homeowner grants, which offset the provincial portion of the property tax, but with the high assessed values applied on MIR residential leaseholds since 1997, few of the properties receive these grants.

should have a say in spending the rest of the funds. Enactment of Musqueam's Property Taxation Expenditure Bylaw in 1998, which defined "local purposes" for the spending of tax revenues, did little to allay the taxpayers' concerns.

The Musqueam taxation fund has devoted an unusually large proportion of its total funds to the category of administration. For example, in its 1997-98 budget, $572,000 of expenditure (or 41 percent of the $1.4 million of total tax revenues) was classified as "administration (taxation/legal & general)."[91] Within this spending category, $161,000 was for administration (general), $251,000 for legal and professional services, and $148,000 for salaries and benefits. These administrative charges include many services provided within the band office to its members; almost none of those services are used by the lessee taxpayers (other than administering their property assessments and taxes). In contrast, the servicing agreement with Vancouver cost just $524,000 (net of an estimated refund; or 37.5 percent of total tax revenues). In reviewing the Musqueam taxation fund with the TAC, the band's accountant stated that his audit methods cannot confirm precisely what many expenditures from the fund covered or whether they were in conformity with the band's Property Taxation Expenditure Bylaw. For example, the large sums charged to the tax fund for legal and professional services could in fact cover services used almost exclusively by band members rather than general local purposes.[92]

For the last few years the band has followed a practice of setting aside 10 percent of annual tax revenues in an "income stabilization fund" and a further 10 percent in a "capital projects reserve." Amounts unexpended in the stabilization fund after one year can be transferred to the capital reserve. In the earlier years of Musqueam taxation the surpluses were even larger, because few projects had been initiated beyond the city service contract. In 1997 the band spent over $1.4 million of the accumulated taxation funds to construct a new band administration office. In TAC discussion of this project, the band indicated its intention to include recreational facilities as well as administration. After the project was well advanced, it was learned that the band would use all of the building for administrative purposes, including provision of many services for band members, and the recreational facilities would have to be deferred to some future time. In the band's taxation fund statement, the building's cost is nevertheless

91 The figures reported here (rounded to the nearest $1,000) are from a budget published in "Musqueam I.B. Property Tax Expenditure By-law No. 1998-01" (1999), vol. 3, no. 1 *First Nations Gazette* 65-72, at 71-72.

92 There is evidence that that has in fact occurred. At one point the TAC was advised by the band's counsel that Musqueam tax funds could be used by the band to cover its costs in negotiating the lease renewals, even though the increased lease rentals would flow to the band's account and not the taxation fund; at a later point it was confirmed that tax funds were being used for this purpose. Minutes of Musqueam Taxation Advisory Council, meeting no. 7, October 19, 1992, and meeting no. 11, March 23, 1993.

classified in "Category 4: Recreational and Cultural Services . . . Community Centre—Phase One."[93] Tax administration uses just a small part of the total building space, which includes the band council meeting room.[94]

Property Tax Rates

The Musqueam First Nation began its taxing jurisdiction with a public commitment to apply taxes at rates that were equal to or less than those imposed by Vancouver. This point was repeated by several chiefs and stated in various communications from the Musqueam Indian Band and its taxation authority:

> By resolution of the Musqueam Chief and Council, Musqueam committed itself to having effective tax rates that were equivalent to or lower than the tax rates of surrounding municipalities.[95] . . . The Chief and Council of the Musqueam Indian Band made a commitment to the Musqueam leaseholders that the effective tax rates would, if at all possible, be equal to or lower than the tax rates utilized by the City of Vancouver.[96]

In terms of the actual mil rates applied, the band has honoured this commitment to date. In most years the total mil rate applied by the Musqueam Taxation Authority has been exactly equal to that used in Vancouver (including the provincial and district property levies), in a couple of years it has been slightly below the Vancouver rate, and in 1993 it was set 25 percent below the Vancouver rate in an attempt to blunt the impact of the radically increased property assessments that were applied that year. (The high assessed values for 1993 were reversed after a ruling of the Musqueam Board of Review, described below.) However, with changes to the method used for assessing leasehold property values, since 1997 the lessees have borne much higher total tax burdens than they would have faced under Vancouver jurisdiction using BC assessment principles (see table 4).

Musqueam grants, typically equivalent to the BC homeowner grants, have also been provided in most years. These grants consist of flat dollar amounts that offset the property tax liability; the amounts are higher for seniors and the disabled. Following changes in the provincial grants in 1993, the Musqueam grants have been phased out for higher-valued properties. As of 1999, the grants begin to phase out for homes valued above $525,000 and are fully phased out at $572,000 (for those with the larger grants, the phase out is completed at $599,500). Given the high assessed values applied to the Musqueam residential leaseholds since 1997, most of the lessees no longer qualify for any grant. In 1991 the Musqueam grant equalled the BC grant; in 1992 it exceeded the BC grant by

93 Supra footnote 91, at 71.

94 In the previous seven years, the band had put up two other buildings, in sequence, specifically for its tax and legal department, both at the expense of the taxation fund.

95 Letter to taxpayers from Chief George Guerin, Musqueam Indian Band, April 28, 1993.

96 Musqueam Indian Band Taxation Authority, 1993 Tax Notice, 3.

Table 4 Tax and Assessment Provisions for Musqueam Reserve Residential Leaseholds, 1990-2000

Year	Tax rate vs. Vancouver[a]	Homeowner grant vs. BC	Basis for assessments	Total tax vs. Vancouver[b]
1990[c]	same	same	on-reserve freehold[d]	same
1991	same	same	on-reserve freehold[d]	same
1992	same	$300 higher	on-reserve freehold[d]	lower
1993[e]	25% lower	none	off-reserve freehold	higher
1993[f]	25% lower	none	on-reserve leasehold	lower
1994	same	none	on-reserve leasehold	same
1995	same	same	on-reserve leasehold	same
1996	same	same	on-reserve leasehold	same
1997	same	same	off-reserve freehold	higher
1998	same	same	off-reserve freehold	higher
1999	same	same	off-reserve freehold	higher
2000	3% lower	same	off-reserve freehold	higher

[a] Very small differences are denoted as "same"—for example, in 1991 the Musqueam mil rate was set 1% below that in Vancouver. [b] These results are relative to Vancouver tax rates and BC homeowner grant plus BC property assessment; assessment by on-reserve leasehold is deemed to yield figures very similar to on-reserve freehold for long-term leases; very small differences are denoted as "same." [c] For years up through 1990, when Musqueam leaseholds were under the Vancouver taxing jurisdiction and the BC Assessment Act. [d] It is presumed that the assessments for these years were done as on-reserve freeholds, although it is possible they were done as on-reserve leaseholds, with very similar results. [e] Assessment method applied for the year prior to reversal by the board of review. [f] Assessment method applied for the year after the *Huyck-Lyman I* decision.

$300; Musqueam discontinued the grants for 1993 and 1994 but reinstated them for 1995 and the following years on the same terms as the BC grants. The cost of these grants is borne by the Musqueam tax account, but since the band does not have to remit any of the amounts it collects reflecting the provincial property tax, this simply reduces its net revenues collected. Penalties for late payment of taxes were 5 percent through 1996, after which they were lifted to 10 percent.

The Musqueam Tax Authority has not offered a seniors' tax deferment option similar to that offered by British Columbia for off-reserve homeowners.

Property Assessments

In order to implement its property tax system, the Musqueam Nation enacted a property assessment bylaw in late 1990 (and a companion property taxation bylaw). In general terms, the sections describing valuation in the original Musqueam bylaw paralleled those in the BC Assessment Act.[97] Hence, it was anticipated that the assessed values for the MIR leasehold properties would be the fee-simple interest in land and improvements. This approach conforms with the practice used in British Columbia and most other jurisdictions for valuing leasehold properties. The intent is to include both the lessee's and the lessor's interest in the property, which is the fee-simple equivalent value. If the lessor's interest were excluded from the assessed value, the property would not bear its fair share of the total tax burden, especially where the remaining term of the lease was very short and the lessors' interest was large.[98] For leaseholds with long terms remaining, the current value of the lessors' future interest is very small. Real estate experts commonly observe that a 99-year leasehold will initially command a market value almost the same as a freehold with the same physical characteristics. Even with 50 or 60 years left on a leasehold, its market discount to a freehold will be very small.

The leasehold properties on MIR had always been assessed by the BCAA before Musqueam's assumption of taxing jurisdiction. In the period before this change, the properties had typically been assessed at figures close to their market values, which was the lessee's interest in the property.[99] Given the long period left on the leases, this approach would reasonably approximate the fee-simple equivalent value. With the first tax assessment notices issued by the Musqueam Taxation Authority for 1991-1992 (a biennial assessment cycle), the assessed values of the residential leaseholds remained close to their market values and well below off-reserve freehold values. However, with the tax assessment notices for 1993, the assessed values jumped dramatically, an average of more than 65 percent

97 Some differences in the wording of the band's original bylaw vis-à-vis the provincial act are noted below in the 1994 decision of the board of review.

98 Another reason for using the freehold-equivalent principle in valuing leaseholds for property tax purposes is that counting only the lessor's interest would create opportunities for tax avoidance schemes. An example would be two homeowners leasing each other their homes for a short period.

99 Before 1988 there was no significant difference between on-reserve and off-reserve property values, so that an off-reserve comparable freehold would closely approximate the on-reserve fee-simple equivalent value of a leasehold.

over the previous notices, even though the leasehold market values had appreciated little in the interim. In a letter to taxpayers, the band chief stated that

> [t]he basic assessment principles upon which your properties were assessed are exactly the same, word for word, as the assessment principles previously used when jurisdiction was exercised by the Province of British Columbia and the City of Vancouver. In other words, assessed values under the Musqueam Assessment Bylaw are established using precisely the same principles as had been used prior to Musqueam assuming taxation jurisdiction.[100]

No explanation was provided for the sharp increase in assessed relative to market values of the leaseholds, despite no change in the relevant Musqueam bylaw.[101]

Huyck-Lyman I

The lessees launched an unprecedented mass appeal of their 1993 assessments to the Musqueam Board of Review. The board heard the appeal in a test case, cited here as *Huyck-Lyman I*.[102] The respondent in the case was the BCAA, acting for the Musqueam Band under a contract that requires it to defend all assessment actions. The board's decision in early 1994 supported the appellants' position that the leaseholds be valued at their on-reserve market values. However, for the non-prepaid leaseholds in the Musqueam Park subdivision, it found they should be valued as if they were in the prepaid subdivision of Salish Park, in order to remove the market effects of current and uncertain future lease rental payments. The board heard evidence from the appellants' expert witness about the values the MIR leaseholds would have if they were freeholds on the reserve, but it rejected this evidence as unconvincing.[103] The board also relied on bylaw provisions such as section 45(1)(b), which specified that the board must "adjudicate on the appealed assessment so that the assessment shall be fair and equitable and fairly represent actual values *within the reserve*" (emphasis added), and section 34(2), which referred to valuing the interest of the "interest holder," implying the lessee and not the lessor.

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100 Letter to taxpayers from Chief George Guerin, Musqueam Indian Band, April 28, 1993.

101 The area assessor for the BC Assessment Authority also claimed that there had been no change in their assessing practices for the Musqueam leaseholds, and he attributed the large increases for 1993 to the "undervaluation" of the properties in the previous assessment cycle, caused by a roll-back in values by the Court of Revision. Memorandum: "Meeting of Area Assessor with Taxation Advisory Council," attachment to Minutes of Musqueam Taxation Advisory Council, meeting no. 13, May 21, 1993.

102 *Edward B. and Dorothy A. Huyck and Robert B. and Margaret M. Lyman v. Assessor for the Musqueam Indian Band*, reported by Musqueam Indian Band Board of Review, January 26, 1994. A second case involving the same appellants, described later, will be cited as *Huyck-Lyman II*.

103 The board did conclude from the evidence that the Salish Park (prepaid) leases had market values of about 68 percent of comparable off-reserve freeholds and the Musqueam Park (non-prepaid) leases about 54 percent of comparable off-reserve freeholds. Ibid., at 11.

The decision in *Huyck-Lyman I* provided reasons to prefer values observed on the reserve rather than taking off-reserve market values to assess the reserve leaseholds. The board cited points offered by counsel for the appellants:

> 1. the introduction of self-government on the reserve represents a new and different political system which creates uncertainty and is reflected in market values; 2. leaseholders have no right to vote in respect to Band matters; 3. leaseholders have no right to be elected to the Musqueam Indian Band Council; 4. adverse publicity regarding the disposition of lease renewals in the Musqueam Park area; 5. a large number of residents (Band members) receive the same services as the leaseholders but are not subject to taxation; 6. lack of a long-term servicing agreement with the City of Vancouver.[104]

The assessor also cited as a reason for the depressed MIR leasehold values "[t]he adverse publicity of taxation moving from the City to the Band. Buyers tend to shun any area where controversy exists."[105] The board members concluded:

> In our opinion market evidence from the reserve should provide a superior basis for determining actual values on the reserve so long as there is a stable body of evidence available. To do so provides a comparison of values that reflects both the positive and negative features of leasehold occupancy. . . . The evidence is clear that market values of the leasehold interests on the reserve are markedly different than the fee simple interests off the reserve even after adjustments for physical dissimilarities and in spite of the lengthy leases in place. . . . [W]e question the proposition that actual values developed from a fee simple comparison of properties in another jurisdiction is a fair representation of actual values on the reserve.[106]

After the decision in *Huyck-Lyman I*, the assessments were reworked based on the principles in the case, and tax refunds were issued to the MIR leaseholders. The decision appeared to differ from the practice of assessing leaseholds off reserve in British Columbia, in that it took their market values (the lessee's share only) rather than their fee-simple equivalent values. But given the long remaining terms on the leases, these figures were much closer to on-reserve freehold values than were the original assessed values based on the off-reserve freeholds. Assessments using the on-reserve values of prepaid leaseholds continued to be undertaken for the 1994 through 1996 tax years. Even before the *Huyck-Lyman I* decision was rendered, the band had announced that it would be amending its assessment bylaw to ensure conformity with a changing BC Assessment Act. This process eventually led to an amended Musqueam assessment bylaw passed by the band and approved by DIAND in 1996.[107] Assessments under the amended bylaw were first undertaken for the 1997 tax year. These yielded assessed values

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104 Ibid., at 10-11.

105 Ibid., at 11.

106 Ibid., at 15-16.

107 See the earlier discussion of the consultation process with lessees that accompanied this amendment.

that soared by roughly 65 percent over the 1996 assessed values for the residential leaseholds, despite a sluggish market. As a result, the leaseholders again launched a mass appeal to the Musqueam Board of Review.[108]

Huyck-Lyman II

The Musqueam Board of Review sat for five days in mid-1998 to hear the test case, cited here as *Huyck-Lyman II*.[109] The arguments in this case turned closely on the wording of the valuation section of the amended Musqueam assessment bylaw. Table 5 reproduces the relevant portions of section 26 along with the counterpart section of the BC Assessment Act. The key part is the reference to "fee-simple interest located off reserve" as the basis for assessing the values of MIR properties. While the provincial practice in assessing leaseholds is to take their fee-simple equivalent value, there is nothing in the BC act that parallels the use of off-reserve properties; this may be understandable in that the great majority of properties covered by the BC act are not located on reserves. A central issue in the *Huyck-Lyman II* proceedings was whether the phrase "located off reserve" was to be taken in a literal and highly restrictive sense. Alternatively, the phrase could be taken in the sense that fee-simple properties exist only off reserves but that location and jurisdictional factors affecting the market values of reserve leasehold properties could also be considered in the assessment process.

In its decision on *Huyck-Lyman II*, the Board of Review noted that

> [t]he Assessor maintains that 26(1) is imperative—it directs the Assessor to determine the actual value of the land as if the property was located off Reserve. The Assessor contends the factors identified in subsection 3 of Section 26 may be considered, but only applied where they would not conflict with the definition of actual value as if off Reserve, especially considering the last eight words in subsection 3, i.e. "provided such considerations do not conflict with subsection (1)."[110]

The board accepted this highly restrictive interpretation, based in part on its interpretation of other cases relating to the assessment of properties on reserves.[111] It concluded that

> [t]he Board finds that Section 26(1) must be read as mandatory and the section is to be read so that properties on the surrendered portion of the Reserve are to be valued as if they are fee simple and as if they are located off the Reserve. . . . The

108 Of the 219 leaseholds, 164 or 75 percent joined in the appeal, possibly a record for a case of this kind.

109 *E.B. and D.A. Huyck, R.B. and M.M. Lyman, and Dr. J. Kesselman v. Assessor for the Musqueam Indian Band* (Musqueam Indian Band, Intervenor), reported by Musqueam Indian Band Board of Review, July 1998.

110 Ibid., at 30.

111 For discussion of these arguments and some of the cases cited, see the later section and appendix that examine the issue of assessments for First Nations taxation.

Table 5 Comparison of Assessment Valuation Sections, BC Act and Musqueam Bylaw

BC Assessment Act, as Amended, 1996	Musqueam Indian Band Property Assessment Bylaw PR-96-01
Valuation for Purposes of Assessment 19.(1) In this section: "actual value" means the market value of the fee simple interest in land and improvements; … (2) The assessor must determine the actual value of land and improvements and must enter the actual value of the land and improvements in the assessment roll. (3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to the following: (a) present use; (b) location; (c) original cost; (d) replacement cost; (e) revenue or rental value; (f) selling price of the land and improvements and comparable land and improvements; (g) economic and functional obsolescence; (h) and any other circumstances affecting the value of the land and improvements. . . . (5) If the land and improvements are liable to assessment under section 26, 27 or 28, the assessor must include in the factors that he or she considers under subsection (3), any restriction placed on the use of the land and improvements by the owner of the fee. (6) The duration of the interest of a holder or occupier of land and improvements referred to in subsection (5), or the right of the owner of the fee to terminate that interest, is not a restriction within the meaning of that subsection.	*Valuation for Purposes of Assessment* 26.(1) In this *bylaw* "actual value" means the market value of the fee simple interest in land and improvements *as if the interest holder held a fee simple interest located off reserve*. (2) The assessor *shall* determine the actual value of land and improvements and *shall* enter the actual value of the land and improvements *within each named reserve* in the assessment roll. (3) In determining actual value, the assessor may, except where this *bylaw* has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue or rental value, selling price of the land and improvements and comparable land and improvements *both within and without the reserve*, economic and functional obsolescence, *the market value of comparable land and improvements both within and without the reserve, jurisdiction, community facilities and amenities*, and any other circumstances affecting the value of the land and improvements *provided such considerations do not conflict with subsection (1)*. . . . (3.2) The assessor *may* include in the factors that he considers under subsection (3), any restriction placed on the use of the land and improvements by the *band*. (3.3) The duration of the interest of *an interest holder*, or the right of *an interest holder or any other person* to terminate that interest, is not a restriction within the meaning of *subsection (3.2)*.

Note: Italicized passages are ones that differ from the BC Act.

> Board finds that Section 26(3) does not override Section 26(1). Section 26(3) merely identifies criteria which may be considered in determining whether the value is reflective of all interests in the property.[112]

Note that section 26(3) cites a range of factors, including "jurisdiction, community facilities and amenities, and any other circumstances affecting the value." Yet, in taking the values of off-reserve freeholds without adjusting for any differential in these factors as they arise on the reserve, the board chose to ignore all such local and jurisdictional factors. Only off-reserve freeholds of comparable physical attributes for the lot and structure could be used to value reserve freeholds for assessment purposes.

In cross-examination before the board, the expert for the BCAA agreed that assessments of off-reserve BC properties, whether freehold or leasehold, consider almost any factors that affect relative market values—including local amenities, condition of adjoining properties, uncertainties over future local developments, and the perceived quality of local government. The assessor would simply examine relative market values of various properties and not attempt to ascertain the underlying causes. The expert witness also acknowledged that his assessed values for the MIR leaseholds had ignored many analogous conditions—including distance to the nearest schools, shopping, and public transit; presence in the neighbourhood of some dilapidated homes and unkempt properties; and leaseholders' lack of input on local zoning of adjoining properties and their concern about their future tax levels and public services. In effect, the board's decision in *Huyck-Lyman II* established a totally new standard for assessing reserve leaseholds under which all local neighbourhood and jurisdictional factors affecting market values will be completely disregarded, no matter how severe their impact on the market values.[113] This approach departs from that used to assess non-reserve Crown leaseholds in British Columbia.

Two other major issues were raised by the appellants in *Huyck-Lyman II*. One was whether the reserve properties owned and occupied by band members had been properly assessed. Although these properties were exempted from Musqueam taxes, their assessed values were needed to price the supply of local services by the city of Vancouver under contract to the band. The band assessor had valued the land component of each band-owned home at just $15,000, whereas there were equal-sized leased lots directly across the street that had been valued at $400,000 (nearly 27 times as much). If fee simple, off reserve was to be the standard for MIR assessments, should it not apply equally to all residents on the reserve? The board concurred with the band's assessor in finding that the form of title by which band members held their homes, which allowed them to sell only to other band members, constituted a restriction that could be considered

112 Supra footnote 109, at 31 and 33-34.

113 Transcript for hearing in *Huyck-Lyman II*, at 362-79.

under section 26(3.2) of the Musqueam assessment bylaw.[114] The other major issue raised in the case was whether the Musqueam Nation could legally exempt its members from the property taxes it imposed on non-members. The board upheld the use of a tax exemption for band members, stating that "[s]ection 83 of the *Indian Act* grants a Band a right to tax Indians residing within the Reserve, but does not impose that obligation."[115] The board did not directly address the issue of discrimination in this case.

Appeal Process and Experience

The provisions for appeal of assessments with the Musqueam Board of Review are set out in part 5 of the Musqueam Property Assessment Bylaw. The board has powers to review and order changes to individual or groups of property assessments. Individuals can appeal to the board with respect to their own property or other properties, and there is a $25 filing fee for each appeal. The band council and its assessor can also initiate complaints to the board. The band chief and council appoint the members of its board, "only one of which may be a band member."[116] One member must be qualified to practise law in British Columbia, and at least one member must have had prior experience in the appraisal of real property. Each appeal is heard by a panel of three members of the board, which can include a larger number. The board can establish its own rules of operation, and it has been much more formal in its proceedings and standards of evidence than the courts of revision that first hear BC property assessment appeals off reserves.[117] Each of the two test cases brought before the board (*Huyck-Lyman I* and *II*) involved total legal and expert costs to the appellants exceeding $100,000. Costs of operating the board are charged to the Musqueam taxation fund, and the band's assessor's costs in defending its assessment roll are absorbed by the BCAA as part of its charge to the Musqueam Band for its services.

Preceding the hearing of *Huyck-Lyman II*, some unusual events transpired that illustrate graphically the potential hazards of a taxing First Nation operating the process for appeals while it has a financial interest in the outcome of the process. Early in 1998, the Musqueam Board of Review began its sitting to hear the case, but it was quickly adjourned after objections by the band and the

114 However, the witness for the band's assessor offered meagre evidence about why a value of only $15,000 had been accepted as the appropriate land value. Ibid., at 719-22. These properties are held by a "certificate of possession."

115 *Huyck-Lyman II*, at 41.

116 Section 40(2); note that Musqueam has to date not appointed any members of its band to serve on boards; the taxation bylaws of some other First Nations, such as Tsawwassen, require that at least one member of their boards be a band member.

117 In effect, Musqueam has dispensed with the first level of appeal that operates elsewhere in British Columbia; some other First Nations, such as Tsawwassen provide for both a less formal Court of Revision and a second appeal level, called an Assessment Review Committee.

band's assessor that two of the board panel members might have a conflict of interest.[118] Shortly after that all four members of the board (only three of whom were sitting on the panel to hear the test case) suddenly resigned. The band provided no reasons for the resignations either at that time or when a newly appointed board sat a few months later to hear the test case, despite the repeated requests by counsel for the appellants for an explanation. Only later in the year, after *Huyck-Lyman II* had been decided, did the appellants obtain documents related to the resignations. The minutes of the final meeting of the departing board, with all four members attending, stated:

> Upon considering the events which have occurred, all members indicated they no longer felt comfortable participating on the Board as it appears to lack the support of the Band and its independence appears to be in question. All present indicated they would be submitting their resignations independently to the Chief and Council of the Band.[119]

The letter of resignation by the board chairman was even more pointed:

> The events of the past few months have been disturbing. [Cites actions by the band] . . . raise concerns regarding the ability of the Board to function impartially.[120]

After discovering the reasons that had led to the board resignations, the MIR lessees initiated an action for judicial review in Federal Court alleging apprehension of bias in the proceedings of the reconstituted Board of Review that heard *Huyck-Lyman II*. The Federal Court case was heard in November 1999 and a decision rendered in May 2000. The judge found grounds for a reasonable apprehension of bias, concluding as follows:

> [I]n my opinion, the Band *qua* Band did have an obligation to disclose the following two pieces of information to the Applicants [identifies the items]. . . .
>
> Considering that the Applicants are non-native residents of the Reserve with no right to vote, that their property is assessed by a Board whose members are all appointed by the Band, and that the Band is a party to the litigation, it was of the utmost importance to ensure that the MIBBR was not only independent, but that it was also perceived to be independent by all the parties. . . .
>
> [A] reasonably informed person, fully apprised of the MIBBR's belief that its independence was in question, would not be assuaged by the fact that a new panel

118 This occurred despite the fact that the band had appointed one of the two just weeks earlier.

119 Musqueam Indian Band Board of Review, Minutes of Meeting, February 23, 1998. Exhibit K in the affidavit of David C. Cavazzi, at tab 2 in the Applicants' Motion Record, *D.A. Huyck et. al. and R.B. and M.M. Lyman et al. v. The Musqueam Indian Band et al.*, Federal Court—Trial Division file. no. 98-T-58. Note that the board chairman was an accomplished appraiser and a past president of the BC chapter of the Appraisal Institute of Canada; another member of the resigning board was a distinguished retired aboriginal judge.

120 Letter from David C. Cavazzi to the Musqueam Indian Band, March 3, 1998. Exhibit O in the affidavit of David C. Cavazzi, at tab 2 in the Applicants' Motion Record, ibid.

> had been appointed. . . . Accordingly, I find that the reasonable apprehension of bias due to the Band's non-disclosure extends to the second panel.[121]

Despite his finding in support of the lessee applicants, the judge dismissed their request for judicial review on the basis that they had waived their right to raise the issue. This decision was based on comments by the applicants' counsel at the start of the reconstituted board hearing of *Huyck-Lyman II*. Yet, it is unclear whether counsel for the applicants could culpably waive their rights, given that they did not have access to the materials that formed the basis for an apprehension of bias until well after those hearings.

Other Reserve Leasehold Experience

Westbank First Nation

The experience with taxation of residential leaseholders and related matters of assessments and representation on the Musqueam Indian Reserve is not necessarily reflective of other BC reserve lands. Relations between leasehold residents and band leaders have more often been amicable, and the market values of long-term leaseholds have usually remained much closer to off-reserve freehold values. A prominent example of this arises with leaseholds on the Westbank Indian Reserve, located near Kelowna, BC.[122] This First Nation has the largest number of leaseholders and non-aboriginal residents of any in British Columbia or Canada. Leasehold properties are estimated at 2,500, and the population residing on these properties now exceeds 7,000 (one-third of all non-aboriginal reserve residents in British Columbia). Hence, the leaseholders outnumber the roughly 400 resident band members by more than 17 to 1. The majority of the lessees live in manufactured home parks, though in the 1990s leasehold parks with permanent homes grew quickly; almost all the leaseholders are year-round residents. The Westbank leasehold developments were made on lands owned individually by a few band families rather than the band collectively.[123]

The market values of the Westbank long-term prepaid leaseholds are generally in line with market values of comparable off-reserve freehold properties. Assessed values for the purposes of property taxation, undertaken for the band by the BCAA, are also in line with their market values. The tax rates imposed by

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121 *D.A. Huyck et al. and R.B. and M.M Lyman et al. v. The Musqueam Indian Band et al.* (May 5, 2000), court file no. T-49-99 (FCTD) [not yet reported], reasons for judgment, paragraphs 73-76.

122 Most of this account of the Westbank situation is based on an interview with Ray Manzer, who represents the leasehold residents in the manufactured homes, and confirmed with other sources.

123 There were incidents in earlier years of disputes arising over the validity of leasing arrangements for lands held directly by locatees where the lands had not been properly established with a head lease and conditionally surrendered to the Crown before leasing. Following long Canadian legal precedent, non-aboriginals cannot contract directly with aboriginals for the use of their lands.

Westbank First Nation on its residential leaseholders are in the general range of the rates imposed by the nearby towns of Kelowna and Peachland. There reportedly have been no significant complaints by the leaseholders over matters of assessments or taxes. Public services are provided to the leasehold properties by the regional district under contract to the Westbank Band as well as by the band directly. A leaseholder advisory council was established by the band at the start of 2000, with monthly meetings, and the band reportedly responded to the lessees' concerns about a proposed 5 percent increase in the taxation budget by trimming it.

Tsawwassen First Nation

The situation of depressed leasehold property values is not unique to the Musqueam Indian Reserve, even if it is more acute there than on other BC reserves. In 1986 the Tsawwassen First Nation south of Vancouver began a residential development called "Stahaken," with 92 long-term leasehold properties.[124] Despite the fact that these leaseholds are fully prepaid and have nearly 90 years left, they have sold at discounts relative to off-reserve freehold counterparts of up to 30 percent.[125] Before the band's assumption of taxing powers, the leasehold properties had carried little if any discounts. The leasehold values reportedly declined after the band began taxing in 1994 and fell further with the publicity of events on the Musqueam Reserve. But unlike the assessment methods used on the Musqueam Reserve and on some other BC First Nations reserves, the assessed values for Stahaken leaseholds have generally been close to on-reserve market values rather than those of off-reserve freehold properties. This outcome appears to result from a less restrictive wording of the bylaw for Tsawwassen assessments, which refers to "the value that [properties] would have if the land was held in fee simple," with no reference to "off reserve."[126] The Tsawwassen First Nation has thus had a financial incentive to maintain the market values of the leaseholds, because its tax revenues are tied directly to those values. However, this incentive may be affected by a recent bylaw amendment, which adds to the

124 Lessees in the Stahaken and other leasehold developments on the Tsawwassen Reserve outnumber the roughly 150 resident band members, but not to the same degree as on the Westbank Reserve lands.

125 This is the estimate of a realtor who has handled real estate sales on the Stahaken Park development over the past decade. Interview with Cynthia Havdale, Remax Progroup Realty, Delta, BC. The account of events on Stahaken was also based on interviews with Robert McKerracher, tax administrator for the Tsawwassen First Nation, and with an actively involved resident leaseholder.

126 This passage comes from the bylaw's definition of "market value" in section 2.1 and the stipulation in section 7.1 that "the chief assessor shall determine the market value of all property that is subject to assessment." Tsawwassen First Nation Assessment Bylaw, 1994, as amended in 1995.

definition of "market value" the clause "without any reduction in value by reason of being situated on the reserve."[127]

Several other factors are unique to the Tsawwassen First Nation taxing and servicing provisions. As part of the original Stahaken arrangements, the individual lessees entered into contracts with the adjoining municipality of Delta for the supply of services for the full terms of their leases. In return, the leaseholders agreed to pay Delta a service charge equal to the municipal taxes that they would otherwise pay Delta. From 1994 through 1998 Delta collected the lessees' entire tax bills and remitted to the band the counterpart to the BC school property tax. When the band expressed its desire to collect the lessees' full taxes and remit the municipality's portion, Delta refused to accept this arrangement.[128] Since 1999 the band has collected its own taxes from lessees at a rate close to the provincial tax, with allowance for an equivalent to the BC homeowner grant. Each lessee also gets a separate bill from Delta for their municipal services. Over the 1990s there were conflicts between the Tsawwassen First Nation and Delta related to the supply of public services to other residential leasehold developments on the reserve.[129] In general, relations between the leaseholders and the band have been congenial and without incident, although there is no active formal advisory mechanism.

Redwood Meadows

Another reserve leasehold situation, Redwood Meadows in Alberta, is notable and perhaps unique with respect to its arrangements for taxation and governance.[130] In 1974 the Tsuu T'ina Nation (then called the Sarcee Indian Band) began developing residential leaseholds through its wholly owned company, Sarcee Developments Ltd. (SDL). The development is now complete, with 351 properties on a reserve area 10 miles west of Calgary. The leaseholds were sold on a fully prepaid basis, with 75-year terms, typically for values equal to those of comparable off-reserve freehold properties. After some initial funding and governance problems by the SDL, the lessees formed the Townsite of Redwood

127 "Tsawwassen First Nation Assessment By-Law Amendment By-Law 1999" (2000), vol. 4, no. 2 *First Nations Gazette* 250-58, at 251.

128 The band does collect the full taxes for leaseholders in its other developments, since they do not have a direct contractual obligation to Delta, and the band then pays the municipality a fee for their services.

129 These disputes resulted in the band having to construct its own costly sewage treatment plant, when Delta refused connections to its sewage system, and a threatened cut-off of fire protection services. The situation reflects the municipality's concerns over having to bear the spillover costs of large expansion of the reserve leasehold population without a role in planning or ability to recover the costs.

130 This information is taken from interviews with Tim Anderson, the long-serving mayor of Redwood Meadows, and the Townsite manager, Debbie Field.

Meadows Administration Society in 1986. Some form of local government had been envisaged in the SDL's original subleases with the residents. In 1987 the society reached agreement with the band's development agency to assume powers of providing local services within the leasehold area and collecting the taxes needed to finance them, and the scheme was put into effect the following year.

The lessees' town council sets its own budget, determines the types and levels of services to be provided, collects the requisite taxes, and administers the budget. Because the land subleases were fully prepaid at values equivalent to freehold land, no payments are made to the band. Redwood Meadows is operated as if it were an incorporated Alberta town, but it is not because of its location on a reserve subject to federal jurisdiction. Still, the town files reports with Alberta Municipal Affairs and receives provincial grants.[131] The town is run by the society, which has an elected mayor and councillors, all lessees who serve as unpaid volunteers. Property assessments are performed by an accredited Alberta assessor under a contract with the town council. The town also contracts with other parties for the supply of services and employs staff members. To allow the residents' children to attend nearby schools, the province created a school district for the town, which was attached to the adjacent school division. Like other municipalities, the administration society is the local collecting authority for the school taxes. Before the establishment of the school district, the lessees had faced problems in accessing the schools. In general, relations between the lessees and the Tsuu T'ina Nation have been cooperative.

One recent incident suggests some remaining uncertainty about taxing jurisdiction for Redwood Meadows. Sarcee Development Limited's agreement with the society conferred to the lessees the power to collect taxes to service the leased area. In 1998, Canadian Western Natural Gas Company Limited filed an application with the Alberta Energy and Utilities Board to recover from the Redwood Meadows lessees a recently imposed Tsuu T'ina property tax on the utility. The board's hearings included submissions stating:

> Redwood Meadows argued that it obtained the exclusive right to impose taxes on the lands comprising the Townsite by virtue of the terms of the Administration Agreement. Redwood Meadows pointed out that the clear intention . . . was to assign the fiscal control, including the implementation of taxes on utility assets located within its boundaries, to itself. . . . Both CWNG and the Tsuu T'ina Nation submitted that the Nation possessed the requisite authority to impose a tax on utility facilities located within the boundary of Redwood Meadows on the basis of section 83 of the Indian Act.[132]

131 By order-in-council of the Alberta government, the Redwood Meadows Townsite is a recognized entity eligible to receive provincial grants.

132 Alberta Energy and Utilities Board, decision no. U99011, application no. 980311, file no. 5626-31, Canadian Western Natural Gas Company Limited Redwood Meadows Rider "B," Calgary, December 2, 1999.

In its decision the board argued:

> The Administration Agreement between SDL and the Society cannot confer on Redwood Meadows the Nation's right to tax the lands. There is no legislative authority for the Nation to transfer such rights to anyone. The Administration Agreement does, however, give the Townsite the right to collect the costs of operating Redwood Meadows from the homeowners. These costs have been termed "taxes" in the Administration Agreement, but their nature is more properly characterized as a contractual right negotiated between private parties. Both the taxes imposed by the Nation and the costs incurred on behalf of the residents and collected by Redwood Meadows may co-exist concurrently.[133]

This incident raises the question of what would happen if the Tsuu T'ina Nation sought to impose taxes directly on its Redwood Meadows lessees. Section 83 of the Indian Act gives it this power, but the First Nation's lease contracts do not provide for the payment of taxes to the Tsuu T'ina beyond the cost of services provided to the lessees.[134]

ANALYSIS OF THE ISSUES

Several issues arise in the taxation of non-aboriginal residents by First Nation governments—representation and governance, discriminatory taxation, the expenditure of tax revenues, the setting of tax rates, tax assessment methods, and the assessment appeal process. In essence, all of these issues are interrelated and linked to the central issue of voting and representation rights. Without those rights, non-aboriginal residents lack the channels for participation, influence, and restraint that are conventional in institutions for democratic governance. While these concerns are relevant to the full range of governmental powers, they are heightened in the arena of taxation for reasons of tradition and financial impact. The issue of discriminatory taxation further aggravates the lack of representation rights. In all First Nations taxing under section 83 of the Indian Act, one group bears taxation without representation *and* is subject to governance by another group that enjoys representation without taxation. Even taxation issues that in another context might be seen as relatively technical become political matters when taken in this First Nations setting.

All these issues must be considered in the context of First Nations autonomy, or the "inherent right of self-government." This principle has many renditions, depending on the perspective taken, and is still evolving subject to political and legal developments. In the establishment aboriginal view, as expressed by the

133 Ibid.

134 Note that this is unlike the lease contracts on the MIR, which do provide for the payment of taxes, although in one of the two subdivisions those taxes are to be paid directly to Vancouver.

then national chief of the Assembly of First Nations, taxation powers are an essential part of these rights of self-governance:

> First Nations did not give up their concept of sharing, or in the vernacular of today, taxation jurisdictions. . . . We take the position . . . that at no time did our First Nations give up the right to govern ourselves, and at no time did we give up our jurisdiction in relation to taxation, a fundamental function of governing. . . . The right [of First Nations] to tax is not dependent upon the existence of statutes such as the *Indian Act*.[135]

However, even this perspective leaves open the question of the rights of First Nations to tax others within their territories as well as the rights that such non-member taxpayers should possess. Aboriginal Canadians living off reserve are subject to all taxes of general application where they live, but they also have full rights of voting and representation in those governments that tax them. The question to be addressed here is the extent to which non-aboriginals resident on First Nations lands and subject to their taxes should similarly have democratic rights in those governments with respect to their taxation, spending, and other public functions.

Representation and Governance

The right of individual citizens to vote and be represented in their government, particularly but not uniquely with respect to taxation matters, is well established in Canada.[136] Section 3 of the Canadian Charter of Rights and Freedoms states that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership." Section 53 of the Constitution Act, 1867, states that "[b]ills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." In its decision in *Eurig Estate*, the Supreme Court of Canada asserted that section 53 "codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature."[137] It further cited a passage from a law journal article:

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the

135 Ovide Mercredi, "Special Address," in *Indian Governments and Tax: Conference Highlights Report*, Whistler, BC, November 12-15, 1991 (Ottawa: J. Phillip Nicholson, Policy and Management Consultants, n.d.), 10-11. For another First Nations view of taxation and aboriginal self-government, see Chief Manny Jules, "First Nations and Taxation," supra footnote 18.

136 A few parts of this section's analysis draw on "Taxation Without Representation!? A Civil Liberties Analysis of the Claims of Unfair Treatment of Non-Aboriginal Residents on Aboriginal Land" (January 2000), a draft discussion paper prepared by the BC Civil Liberties Association but not approved by their board as official position.

137 *Eurig Estate (Re)*, [1998] 2 SCR 565, at 581.

> Senate, and consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.[138]

Section 90 of the constitution extends this principle of representation and consent to the provincial legislatures from which municipalities derive their authority. In the context of First Nations taxation, authority flows directly from the Commons. The representation issue also likely would invoke the Charter's section 15(1) assurance of equality rights.

In another recent decision, *Westbank First Nation v. British Columbia Hydro Power and Authority*, the Supreme Court ruled that the property taxes levied by the First Nations were indeed taxes.[139] The court reviewed a First Nation's attempt to apply its tax to a provincial Crown corporation. Section 125 of the Constitution Act, 1867, forbids each level of government from taxing the property of the other level. This prohibition is aimed to facilitate the operation of the federal system and prevent each governmental level from infringing upon the other. However, each level of government may apply user fees and regulatory charges to the other level or bodies under its authority. The court found:

> The impugned charges bear all of the traditional hallmarks of a "tax." They are enforceable by law, imposed pursuant to the authority of Parliament, levied by a public body, and are imposed for a public purpose. There is no "nexus" between the revenues raised and the cost of any services provided. As such, they do not resemble a user fee, nor any other form of a regulatory charge. . . . As such, these charges are properly characterized as being in pith and substance "taxation" levied under s. 91(3) of the *Constitution Act, 1867*.[140]

In reaching this result, the court considered the ostensible purpose of the levy in section 83(1)(a) of the Indian Act, which was "taxation for local purposes," as well as the levy's other attributes. The court also rejected the appellant's attempt to characterize the taxes as being a component of a regulatory scheme rather than simply a revenue generator.

Individuals' rights to vote and be represented in government apply with regard to the full range of governmental decisions that affect them. The nexus between these rights and taxation, though, has been stronger historically than for most other areas of public policy. Traditionally, the right to vote was restricted in many regions to (male) landowners, in an era when property taxes were one

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138 Elmer A. Driedger, "Money Bills and the Senate" (1968), 3 *Ottawa Law Review* 25-46, at 41; cited in *Eurig Estate*, supra footnote 137, at 582. For analysis of this case, see Stephen W. Bowman, "Ontario Probate Fees: If You Thought You Were Being Taxed, You Were Right," Current Cases feature (1998), vol. 46, no. 6 *Canadian Tax Journal* 1278-83; and Paul LeBreux, "Eurig Estate: Another Day, Another Tax" (1999), vol. 47, no. 5 *Canadian Tax Journal* 1126-63.

139 *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134.

140 Ibid., at 139.

of the few major sources of public revenue along with customs duties. Even currently, municipalities in most Canadian provinces extend voting rights, beyond their resident individuals, only to non-resident owners of real property; presumably this provision is in recognition of their liability to property taxes. Before 1960, aboriginals who resided on reserves and enjoyed tax exemptions were denied the federal franchise, whereas off-reserve taxable aboriginals could vote. In 1950 the vote was extended to on-reserve natives who waived their Indian Act tax-exempt status.[141] This historical linkage between taxable status and voting rights is ironic in view of the current status of non-band members living on reserves, who are denied local voting rights while being the only residents subject to First Nation property taxes.

Landlord-Tenant Analogy

It has been argued that non-aboriginals living on reserves are not entitled to rights of representation, based on the fact that they choose to live on those lands and must accept whatever conditions the First Nations allow. In this view, the relationship is likened to one of landlord and tenant, where the landlord can establish the rules by which the tenant must abide.[142] Individuals who do not like the rules can simply choose to live elsewhere. One possible objection to this perspective arises where the First Nation rules, such as the taxing powers or provisions, have been changed after the tenant made an investment in the leased property. With the changed rules, the lessee's investment (such as a prepaid leasehold interest or a non-prepaid leasehold where the lessee has invested in an immovable structure) will depreciate in value. Hence, even though the lessee can move, it will be at a financial loss that will restrict his or her choices of affordable off-reserve places. Although the lease or rental contract is still in force, the landlord can thus unilaterally change the underlying terms or value of the agreement by the exercise of First Nation powers. This situation is very different from the voluntary and mutually agreed choices that a tenant and landlord make in renewing the terms of a rental or lease agreement upon its expiry.[143]

A more fundamental objection to the tenant-landlord characterization of First Nations legal relationships to their non-aboriginal residents is that the powers involved are different in kind from those of a landlord. The taxing powers under

141 RCAP, at 1/9/9.12.

142 Former BC premier Glen Clark used the landlord-tenant analogy for the Nisga'a Treaty: "The treaty will make Nisga'a territory the equivalent of private land owned and administered by the Nisga'a authority, and the Nisga'a will have the same right to determine what happens on their own land as any other landowner." *The Vancouver Sun*, August 8, 1998.

143 The landlord-tenant analogy is rejected on these grounds in Robert L. Bish, "First-Nation Governments and Non-Native Taxpayers: Harmonizing Relationships," in course package for ADMN 448, "Property Tax Policy and Administration," Diploma in Public Sector Management Program, University of Victoria, 1998.

section 83 of the Indian Act, as well as the decisions about how to spend the tax revenues, and other regulatory, zoning, land-use, and bylaw-making powers of First Nations extend well beyond the domain of a private landlord's powers. These are, in essence, powers for the exercise of governmental authority. When First Nations exercise their tax or other governmental powers over non-aboriginal residents, they are acting in two roles simultaneously. They are acting as band *qua* band, in the financial and other interests of their aboriginal members, and they are also acting in the capacity of public government. If a government is expected to act in the interests of the public generally, a First Nation government that lacks representation of all the governed is intrinsically in a conflict of interest. The arrangements devised for the Sechelt Indian Government District (described earlier) recognized the need to distinguish between band government and public government. In the latter it provided for rights of representation, albeit very limited ones, for non-aboriginal residents.

Existing Provisions for Input

One might next ask whether the rights of individuals to be effectively represented in their government, at least with respect to matters that directly or significantly affect them, can be achieved by purely consultative or advisory bodies. Such bodies were implemented for non-aboriginal residents in Sechelt and some First Nations taxing under section 83. Where relations between a First Nation and its non-aboriginal residents are congenial, and where the two groups' interests are closely aligned, advisory input may suffice to provide meaningful and effective participation. This circumstance is most likely to arise where the First Nation has lands available for future development with high value, such as in the Sechelt First Nation and some First Nations taxing under section 83. Any failure to respect the legitimate needs and wishes of resident non-aboriginals, or any actions that cause public controversy, will reduce the value the First Nation can get from future land development. In other cases the First Nation may have little available land to develop relative to the tax revenues that it can extract from existing long-term lessees.[144] In that situation, as shown by the Musqueam experience, an advisory body will be inadequate to provide effective participation for non-aboriginals. Regardless, individuals' political rights should not hinge on the existence of particular circumstances or the goodwill of one group. Constitutions and governance institutions must be designed to handle instances of disparate interests or visions among groups, which will inevitably arise in even the most cooperative of settings.

One must ask further whether the existing means of participation by non-aboriginals resident on the lands of taxing First Nations are adequate to satisfy

144 Also see table 3 for other conditions that can cause the interests of a band and its lessees to diverge.

their basic rights. The only form of participation afforded non-aboriginal taxpayers on First Nations in section 83 of the Indian Act is the requirement that the minister of DIAND must approve all taxation and related expenditure bylaws of First Nations.[145] This provision presumes that effective representation arises via the fact that the minister is an elected member of Parliament, responsible to the government of the day and to the electors at large, and the fact that non-aboriginal residents on reserves can vote in federal elections (albeit few of them in the riding of the minister). The constitutional adequacy of this provision for allowing the taxation of an otherwise disenfranchised group has not been tested in the courts. Some guidance can be drawn from the Supreme Court's decision in *Re Eurig*: "[Section] 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates."[146] But with Indian Act taxing powers, the matters delegated for approval are hardly details, as they relate to the two basic defining aspects of a tax—its base (via property assessment methods) and its rate. Additionally, the assumption that DIAND can effectively represent the interests of non-aboriginal reserve residents seems highly implausible. The minister has a fiduciary duty to aboriginals, and he is far removed from the situation arising on any particular reserve across Canada.

Balancing Groups' Rights

The section 3 Charter rights of representation of all Canadian citizens are subject to the section 25 provision that they "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." Obviously, there is a potential conflict between the rights of non-aboriginal residents on First Nations reserves and aboriginal rights to self-government. Hence, there arises the question of how to reconcile the rights of the two groups, giving effective representational rights in decision making to non-aboriginal residents while preserving the autonomy and self-government rights of aboriginals.[147] At one level, this dilemma can be resolved by the distinction between band government and public government on First

145 There is also the statutory requirement for an assessment appeal process, but that is an administrative matter rather than one of governmental decision making. Opportunity for effective participation in real decision making by non-aboriginal residents via the Indian Taxation Advisory Board is also lacking, as noted in the earlier review of the Musqueam experience.

146 *Eurig Estate*, supra footnote 137, at 581.

147 Constitutional law experts state "it is probable that a court would hold that Aboriginal governments are bound by the Charter," but this still does not resolve the issue at hand. Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues," in *Aboriginal Self-Government: Legal and Constitutional Issues*, research studies for the Royal Commission on Aboriginal Peoples (Ottawa: Supply and Services, 1995), 375-440, at 416.

Nation lands. If the aboriginal rights of self-government extend only to matters of inherently aboriginal content, such as culture, education, and public services that require special aboriginal adaptations (such as child welfare), then one can achieve aboriginal self-government and shared public government with no compromise to the rights of non-aboriginal residents.

Making this distinction in practice should be no more difficult than the design of the Sechelt Indian Government District and considerably less difficult than what will be needed to implement the Supreme Court's 1999 ruling in *Corbiere v. Canada*. That landmark decision requires that bands conducting their elections under the Indian Act extend the vote to members who reside off-reserve. The court argued that

> [r]ecognizing non-residents' right to substantive equality . . . does not require that non-residents have identical voting rights to residents. Rather, what is necessary is a system that recognizes non-residents' important place in the band community. It is possible to think of many ways this might be done, while recognizing, respecting, and valuing the different positions, needs, and interests of on-reserve and off-reserve band members. One might be to divide the "local" functions which relate purely to residents from those that affect all band members and have different voting regimes for these functions.[148]

Similar to the issue in *Corbiere*, the matter relates to the differential but often concurrent interests of resident aboriginals and non-aboriginals in various local functions of First Nation governments.

Distinguishing between uniquely aboriginal matters and matters of general public governance would provide a relatively simple solution to the representation rights of non-aboriginal residents. Yet some native leaders would argue that the economic, development, and fiscal powers of a First Nation government are integral to aboriginal autonomy and self-government. If that view were accepted, it would be necessary to devise a method of balancing aboriginal rights of autonomy with non-aboriginal rights of representation and equality. Where non-aboriginal residents were in a clear minority on a reserve, they might still be granted full voting and participation rights in the band public government. In cases where the non-aboriginals were in the majority on a reserve, there might be reason to restrict their representative numbers in the decision-making body. However, they should have not just a token role but one where they can effectively represent their interests. That might be achieved by giving the non-aboriginals a bare minority of the total seats in the decision-making body. Then they could not outvote the aboriginals as a block but would still be in a position to form coalitions and tradeoffs to achieve their foremost needs. There is legal precedent for differential voting rights, as in rural ridings that have smaller

148 *Corbiere v. Canada*, [1999] 2 SCR 203, at 272-73.

electorates than urban ridings,[149] and also in Nova Scotia's recent provision of designated places on school boards for black representatives.[150]

Alternative Perspectives on the Issue

In a more classic civil libertarian view of this issue, non-aboriginal residents of First Nations lands should not be deprived of any rights to vote or be represented in the public government functions of the First Nation. This view grants that the non-aboriginals are not citizens of the First Nation, as defined by membership in the band, and that they should not have rights in matters of band government, such as aboriginal culture and education. But in this view, non-aboriginals residing on reserve lands are still citizens of Canada, and in that capacity they retain their rights to meaningful and effective participation in matters of governance, at the local as well as other levels, on all issues that affect them. Thus, they should retain the right to run for local public office, and their votes should count as much as those of all others who reside in the area. While this approach may pose strains on the aboriginal right of self-government, First Nations can effectively control the numbers of non-aboriginal residents on their lands if they fear the sharing of political power. They can develop fewer residential leaseholds, or buy back existing leaseholds, or alternatively use their lands for commercial, industrial, resource, agricultural, and/or recreational leasehold developments. While for some First Nations, particularly those located near urban areas, this may reduce the potential lease revenues that can be generated, this is simply a cost to be borne in return for exercising undiluted political autonomy.

In a polar First Nation view of this issue, non-aboriginal residents of First Nations lands are not entitled to representation rights simply because they are not citizens of those jurisdictions.[151] This mirrors the situation where resident aliens do not have the right to vote or run for public office in their country of residence. Any rights or privileges that they enjoy in their host country is at the grace of that country, and any further rights must be achieved by their country of citizenship via treaties or fiscal leverage that it can exercise. In fact the Canadian government, as manifested in a Finance Department paper reviewed later, appears to accept this kind of analogy. While acknowledging that there are tensions over the lack of representation by resident non-aboriginals who are taxed by First Nations, it accepts this as a reality. Finance Canada then argues that the federal

149 *Ref. re: Electoral Boundaries Com'n Act* (1991), 81 DLR (4th) 16 (SCC); the important principle established in this case was one of "effective representation" rather than the equality of voting power per se.

150 "N.S. Blacks Get Voice on School Boards," *The Globe and Mail*, April 28, 2000.

151 Note that the report of the Royal Commission on Aboriginal Peoples, reviewed later, granted that non-aboriginal residents must be given some means of representation in the decision making of First Nations government, but it appeared to accept the adequacy of an advisory role.

government should seek to protect the interests of these groups through negotiated fiscal arrangements and tax revenue-sharing agreements with First Nations.

The proposed analogy between reserve non-aboriginals and the position of resident aliens in other countries breaks down in the context of Canadian First Nations. Most apply taxes to their non-citizens while exempting their own citizens from the same taxes; such discriminatory tax treatment is rare in the international setting and widely condemned when it does arise. In Canadian history, the only example is the discriminatory head tax imposed by the 1885 Act To Restrict and Regulate Chinese Immigration into Canada and expanded in later legislation. At its root, the hypothesized analogy with the situation of resident aliens seems ill-suited because even "autonomous" First Nations must exist within the confines of Canadian sovereignty and must comply with the Canadian constitution. Both aboriginal and non-aboriginal people are members of a larger community, which is Canada. Non-aboriginal residents of First Nations are (usually) citizens of Canada, as are aboriginal residents, and they both derive certain inalienable rights from that relationship. Still, the nature and scope of the representation rights of non-aboriginals in the public governance functions of a First Nation to which they are subject have yet to be tested in the courts.

Discriminatory Taxation

All of the First Nations that have assumed taxation powers under section 83 have opted to exempt their own resident members from the taxes that they impose on non-members. The issue of discriminatory application of taxes thus combines with the lack of representation for non-aboriginal residents to aggravate their disadvantage. These two circumstances also work together to weaken the accountability of First Nation governments with respect to their non-aboriginal resident taxpayers. Not only is there taxation without representation, but the resident aboriginals enjoy representation without taxation. Hence, the First Nation government faces a political incentive to raise the taxes on one group in order to finance enhanced benefits for the other group. The ordinary restraint from taxpayers acting in their role as voters is absent in this context. This institutional arrangement is further aggravated by the socio-economic facts that characterize most First Nation communities. Typically, there is a sharp divide between the economic and wealth position of the resident leasehold population and the status of resident aboriginals. This situation and the many unmet needs of on-reserve aboriginals can heighten the pressures for increased tax burdens.

An aboriginal perspective on this issue is that First Nations have the authority not only to impose taxes within their territorial jurisdiction but also to decide whether to exempt their own members from the taxes they do apply. Chief Manny Jules, the ITAB chairman and progenitor of Bill C-115, argued as follows:

> Suppose a First Nation government decides to pass a law, but within the law there is a provision distinguishing between an Indian and a non-Indian interest. The law might state, for example, that "any interest held by . . . a band member . . . is

> exempt." Is such a provision legal? Or would it be struck down as discriminatory? The Indian Act already exempts Indians from taxation. This establishes a legitimate legislative purpose for singling out Indians as a separate group and continuing the historic exemption.[152]

However, one might question whether the "legitimate legislative purpose for singling out Indians" in the Indian Act for purposes of tax exemption—which historically was to protect their reserve lands against encroachment—is relevant in the context of First Nations' own taxing powers. If a band member were to default on his or her tax liability arising under a band-imposed tax, at worst the land would revert to the First Nation.[153] It would not be in danger of falling into the hands of a non-aboriginal authority or of being lost to the reserve.

The issue of discrimination in First Nation property taxes has been raised in court cases involving corporate entities with rail and utility lines running through the reserve lands of several First Nations.[154] While some aspects of discriminatory taxation differ between individual and corporate entities, it is useful to review the existing case law on the issue. In *Canadian Pacific Ltd. v. Matsqui Indian Band*, the appellants sought judicial review of the First Nations' ability to tax their interests on the reserves and raised two key challenges. One was whether their properties were "in the reserve," as required by the Indian Act for the properties to be taxable. The appellants maintained that they had fee simple titles to their properties, so that they were not "in" the reserve and thus were not taxable by the First Nations. Their other key challenge, which will be reviewed here, related to the validity of the First Nations taxing bylaws based on the fact that they "are discriminatory as among different types of properties and ownership or interest therein."[155] Argument on this matter focused principally on whether there was adequate delegation of authority to enact discriminatory tax bylaws. In reasons for judgment, the judges at the trial and appeal levels also offered

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152 Chief Manny Jules, "First Nations and Taxation," supra footnote 18, at 165.

153 Discussion in this section relates mainly to aboriginals who hold title to their homes by certificate of possession. Many aboriginals do not have such title to their residence and occupy at the pleasure of the band council; it is unclear whether they or the band itself should bear the liability for non-discriminatory taxes, if those revenues were used for the joint benefit of lessees and band members.

154 An earlier series of court cases between Canadian Pacific Ltd. and the Matsqui Indian Band, both joined by other parties, culminated in a Supreme Court of Canada decision in 1995. This case turned on issues of whether Canadian Pacific had an "adequate alternative remedy" at the band appeal level, and whether it should have pursued that route before seeking judicial review in Federal Court; the case did not raise the issues of discrimination that were invoked when the parties contested again in subsequent Federal Court actions at the trial and appeal levels. Some reference to the earlier *CP-Matsqui* case is made later in the section on the issue of assessment appeal procedures.

155 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1996] 3 FC 373, at 381 (FCTD). This case was joined by half a dozen others involving the same issues.

useful insights into broader issues on the acceptability of First Nation taxes that discriminate between aboriginal and non-aboriginal interests.

CP-Matsqui Trial Decision

At the trial level, the *CP-Matsqui* case focused on two broad issues related to the ability of taxing First Nations to apply discriminatory taxes. First was whether the Indian Act contained expressed or implied authority for delegation of powers to enact discriminatory tax bylaws. Part of the debate on this issue at trial turned on whether Indian band councils are creatures of statute analogous to municipalities. The judge found that band councils are not autonomous creatures of statutes, because of the requirement that DIAND must approve their taxation bylaws. He accepted the validity of First Nations' ability to levy variable and discriminating tax rates across classes of property, "even though not outlined in the powers given to the band,"[156] as an essential component of the exercise of tax policy. However, on the central matter of discrimination, he argued:

> Parliament never intended to grant powers to the Indian bands to exempt certain individuals from being taxed and certain others from not being taxed. This can lead to all kinds of abuse. Had it been Parliament's intention to grant such powers it may very well do so. I am not deciding that matter. All I am saying is that Parliament would have clearly stated this if that is what they intended.[157]

As a consequence, the trial court decision severed the part of the bylaws that discriminates as between persons. If uncontested or upheld on appeal, this finding would have required First Nations to extend their property taxes to their own members.

The second discrimination-related issue raised at trial in *CP-Matsqui* was whether section 87 of the Indian Act exempts band members from their own First Nations' taxation bylaws. The judge concluded on this point that

> [t]he respondents' [the bands party to the case] argument is contrary to the very aims and objectives of self-government that were quoted to me from the [1995 Supreme Court] Matsqui decision. . . .
>
> It is my view that section 87 applies to outside authorities and not to the Indian band itself pursuant to section 83. . . . Self-taxation is part and parcel of Indian self-government and it will only serve to strengthen it.[158]

This matter seems fairly straightforward, given not only the professed aims of aboriginal self-government but also the wording of section 87 of the Indian Act, which makes the aboriginal tax exemption "subject to section 83." Indeed, it is surprising that an argument of aboriginal immunity to taxation even by First

156 Ibid., at 419.

157 Ibid.

158 Ibid., at 419-20.

Nations would be raised by the contesting bands, and again at the appeal level with the ITAB as intervenor, given the ostensible goals of aboriginal self-government.

CP-Matsqui Appeal Decision

When the *CP-Matsqui* case was appealed, the Federal Court of Appeal reconsidered the same two key issues—whether the properties were "in" the reserve and whether the discriminatory tax provisions were lawful. The decision on appeal was complicated by the presence of three judges, who were divided on the two issues in such a way that the appellant First Nations were denied their appeal even though two of the three justices concluded in their favour on each of the two issues. Each judge prepared separate reasons for judgment (or dissent), and their varying analyses of the discrimination issue are revealing. Marceau JA offered the following in his reasons for judgment:

> I fail to understand the rationale behind the distinction made by the Motions Judge between the possibilities of different treatments that he considers impliedly authorized and those he rejects, since, in all cases, it is the taxpayers who are targeted. . . .
>
> It is to me inconceivable that Parliament could have made the exercise by the bands of their new tax-levying power—a power they have been claiming for a long time in their quest for greater autonomy—subject to an implicit forced renunciation by all their members of that basic privilege, without taking care to spell it out in unequivocal terms.[159]

He further asserted:

> The learned Motions Judge speaks of the possibility of abuse. However, it seems to me that any such fear should be greatly alleviated by the realization that all such taxing by-laws must be approved by the Minister of Indian Affairs.[160]

Offering concurring reasons for judgment that the appeal be denied, Desjardins JA departed from Marceau JA on the issue of discrimination. She argued that

> [n]o liberal or generous interpretation of paragraph 83(1)(a) of the Act is possible. The spirit of section 87 is simply not there. What paragraph 83(1)(a) does is to empower band councils to tax all interests in the reserve, whether they are Indian or non-Indian interests. Paragraph 83(1)(a) does not exempt Indian interests from the taxing power of band councils, as section 87 does with regard to acts of Parliament and the provincial legislatures.[161]

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159 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [2000] 1 FC 325, at 353-54 (CA).

160 Ibid., at 354.

161 Ibid., at 365. Marceau JA argued that section 87 of the Indian Act should be read into section 83: ibid., at 354. Robertson JA followed Desjardins JA and stated that "by the phrase 'but subject to section 83,' section 87 expressly allows a band council to tax band members' interests in reserve lands": ibid., at 413.

Desjardins JA concluded as follows:

> I find no express provision or implicit delegation by necessary inference which would authorize the discrimination reflected in the appellant's taxation by-laws. I conclude that these by-laws are invalid because they run contrary to a principle of fundamental freedom which is also a fundamental principle of administrative law.[162]

She then argued that "[t]hese by-laws are invalid *in toto* since it cannot be assumed that they would have been adopted had it been known that certain portions of them were invalid."[163] That is, First Nations members might not have supported the enactment of property taxes if they had known that they would be subject to those taxes.

A dissenting opinion was offered by Robertson JA, who found both that the taxed interests were "in" the reserve and that the bylaw's differential tax provisions had adequate delegated authority. He reasoned as follows:

> For those who view the issue before us as involving a taxation scheme which benefits Indians at the expense of non-Indians, the concept of "good governance" would appear to prescribe the equal treatment of all citizens, regardless of race. On the other hand, I understand that the Indian bands in question might view the issue differently. For them, the concept of "self-government" is better equated with the idea of autonomy. . . . Understandably, the Indian bands in this case do not wish to be compelled to tax themselves in order to impose taxes upon those who use their lands.[164]

The judge then considered evidence, such as a DIAND pamphlet, which indicated that the properties of aboriginal residents would remain exempt from First Nation property taxes, and weighed the "competing policy considerations."[165] He observed:

> It is sufficient to note that, to the extent that the tax exemption for the Indian interest in reserve lands flows from notions of Aboriginal sovereignty, such exemption should be protected in the absence of statutory directions to the contrary.
>
> It is highly significant that the *Indian Act*, by its very nature, draws distinctions between Indians and non-Indians in Canada. . . . By-laws enacted by an Indian band pursuant to section 83 of the *Indian Act* constitute subordinate legislation. Accordingly, it is reasonable to imply that the constitutional authority to distinguish between

162 Ibid., at 370.

163 Ibid.

164 Ibid., at 414-15.

165 Ibid., at 415. He also alluded to a submission of the Indian Taxation Advisory Board, an intervenor in the case, that before the passage of Bill C-115 legal advice was received by concerned First Nations from government authorities that it would be acceptable to pass taxation bylaws that exempted band members, but he stated that such evidence could be given little weight. Ibid., at 416.

> Indians and non-Indians for the purpose of taxation was delegated to the Indian band councils.[166]

Despite this statement, Robertson JA then offered the seemingly contrary comment, "In my view, any attempt by a band council to impose the entire burden of taxation policy solely on non-Indians would not survive the light of day."[167]

Removing Discrimination

While the *CP-Matsqui* case offers relevant legal insights as to the admissibility of First Nations discriminatory taxing provisions, it was based on the situation of corporate rather than individual taxpayers. One can speculate whether the reasons for judgment would have been altered if the affected taxpayers had been individuals rather than business entities. As noted in the appeal decision:

> To the extent that the by-laws in question can be said to be discriminatory, such discrimination is based on "race," since non-Indians are treated differently than band members even though both occupy lands within a reserve. Whether this apparent inequality is discriminatory within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms* . . . is a separate question, which need not be decided since neither the Charter nor other human rights legislation has been invoked in this case. Understandably, the law will not readily condone the unequal treatment of people based on racial classification, whether the discriminatory law is adopted by the federal government, a federal agency, a provincial government, a municipality or an Indian band council.[168]

This view was offered by the dissenting justice in the case, who nevertheless found that there existed adequate authority for the delegation of authority of First Nation governments to enact discriminatory taxing bylaws.

Any legal test of the First Nations use of a tax exemption for band members when applying property taxes to non-aboriginal resident individuals would almost certainly refer to Charter issues as well as the matters of delegated authority raised in *CP-Matsqui*. Even if there were an adequate delegation of authority for First Nations to enact discriminatory bylaws, the equality rights of individuals would still need to be addressed. Given the nature of the situation, the Charter's section 25 provisions on aboriginal rights and the provisions for amelioration of the disadvantaged in section 15(2) would most likely be weighed against the equality rights principle of section 15(1). It also appears likely that non-aboriginal taxpayers' double disadvantage with respect to their lack of representation rights on reserves would be relevant in such a legal test. The effect of tax discrimination compounds with that of non-representation to place the affected reserve

166 Ibid., at 418.

167 Ibid., at 419.

168 Ibid., at 414 (comment by Robertson JA).

residents in a particularly disadvantaged position, one based on their national origin or group identity.

Even without a Charter challenge, the discriminatory application of First Nation property taxes could be remedied through federal government actions. Section 83 of the Indian Act could be amended to make explicit that there is no implied authority to delegate powers to enact discriminatory bylaws with respect to both First Nations and DIAND. A simpler solution would be to invoke the quiescent section 83(5), which allows the governor in council "to make regulations respecting the exercise of the by-law making powers of bands under this section."[169] A period of transition would have to be provided for First Nations to amend their taxing bylaws and make whatever adaptations they found to be appropriate. The federal government has consistently—at least since the Department of Finance 1993 Working Paper on Indian Government Taxation and in policy actions since then—taken the position that non-discrimination is an essential requirement for First Nation taxes applied to non-members. The changes indicated here would bring the existing First Nation property tax powers in a non-treaty setting into line with federal policy and obviate the need for a Charter challenge.

Of course, one way that First Nations might respond to a requirement that they not discriminate in the application of their property taxes would be to emulate the Sechelt First Nation approach. When confronted with the need to apply its taxes in a uniform manner in implementing self-governance, the Sechelt First Nation simply decided to pay its members' taxes for them. This method transferred funds from the band government to its public government function, without burdening individual members in any way. This approach may be more consistent with aboriginal traditional practices of sharing costs in a communal manner, and it is the prerogative of a First Nation to pursue this approach. However, this approach would dilute the incentives for greater accountability of First Nation government that might be instilled by having the individual band members pay a share of taxes. If the band council essentially controls the spending of its public government, then it can effectively substitute public government spending on band members for band spending on its members. But under this approach, removing the discriminatory application of tax would still not provide any form of accountability for the resident non-members unless they simultaneously obtained representation rights in the spending of tax revenues. This example illustrates how the issues of discrimination and representation are interconnected.

169 Undoubtedly, the taxing First Nations would object to this approach, so that a full debate of the issue possibly leading to statutory amendment in Parliament would likely be the more appropriate route.

An alternative approach that a First Nation could take in responding to a requirement that it remove its property tax exemption for members would be to institute a system of grants or a general exemption on lower-valued properties. These grants or exemptions would be provided on a non-discriminatory basis to all individuals resident on the reserve. The grants could be used to offset the individuals' property tax liability, and they might be inversely tied to individual or household income. Such an income linkage for grants, though, might be difficult to implement for on-reserve aboriginals, most of whose earnings may be tax exempt and thus difficult to measure or verify. An exemption on lower-valued properties would be suitable only if the methods for assessing the properties held by the aboriginal residents were implemented on the same basis as the property assessments for resident non-aboriginals.[170] These approaches could ensure that on-reserve residents, whether aboriginal or non-aboriginal, would be relieved fully or partially of their property tax burden if they had inadequate resources. So long as the system were implemented in a manner that left a significant and growing part of the aboriginal population subject to some taxes, it might help to foster accountability by the First Nation government.

Expenditure of Tax Revenues: "Local Purposes"

Section 83(1)(a) of the Indian Act specifies that First Nations property taxes can be levied only for "local purposes," and section 83(2) further requires that the expenditure of tax revenues must be made with "the authority of a by-law of the council of the band." The presumed intention is that the expenditure of tax revenues should be for purposes of the local community, including non-band resident taxpayers as well as band residents. A taxing First Nation must maintain an account or subaccount for its taxation revenues and outlays distinct from the band's own financial accounts. The latter accounts would receive revenues from the band's own properties, leaseholds, and business activities as well as the grants it receives from DIAND and other governmental agencies on the band's behalf. The purpose of this separation is to distinguish "band" functions on behalf of its own members from the "public government" functions of the band. In this perspective, taxation revenues should be spent only on "local purposes" that are equally accessible to band members and resident non-members including taxpayers.

ITAB requires that each taxing First Nation enact a "property tax expenditure bylaw" to guide allowable outlays from the band's taxation account, and it has published a sample bylaw.[171] While noting that "[i]ndividual revenue and expenditure

170 As the experience on the Musqueam Indian Reserve indicates, the assessed values for residential land held by an aboriginal can be wildly less than if the same land is held by a non-aboriginal leaseholder.

171 "Sample First Nation Property Tax Expenditure Bylaw" (1997), vol. 1, no. 1 *First Nations Gazette* 90-95.

items may vary with each jurisdiction,"[172] ITAB's sample bylaw lists specific "community works," "community services," "general government services," "public works," and "utility services" that are suitable for tax financing. Most of the suggested items are familiar from the operation of municipal and regional governments. A few items, however, are peculiar to the reserve setting, such as "cemeteries, longhouses, and cultural centres."[173] Insofar as facilities of these kinds are designed or operated employing aboriginal cultural traditions, one might ask whether non-aboriginal residents would be granted equal access to them (or would feel welcome to use them). The sample bylaw further cites the supply of community services "of benefit to any residents of reserve (whether in common with any non-residents of reserve or not),"[174] but it does not require that tax-financed services or facilities be provided on a non-discriminatory basis.

Even if the facilities and services financed by First Nations taxes are offered on an equally accessible basis to all reserve residents, this does not provide any assurance that the specific facilities and services selected by a band council will reflect the preferences of all residents. Given the stark asymmetries in political representation and tax liability between resident aboriginals and non-aboriginals, one would expect the particular services chosen to cater to the politically enabled group more than the disenfranchised group.[175] Moreover, many local services are highly localized even within the reserve area, so that the level and quality of their provision to some residents can differ from that enjoyed by others. This issue involves practical matters such as which roads are well maintained, whose garbage is removed and how reliably, and where street lights are to be installed. Undeniably, redistribution via public spending as well as taxes is part and parcel of the modern state, but the situation of taxing First Nations differs in kind from elsewhere in that the most likely beneficiaries of public spending are the only ones with a vote. Even if rules were externally imposed to ensure non-discrimination in the application of First Nations taxes, there would still need to be representational rights for all residents at the individual reserve level to ensure that the benefits of those taxes are equitably distributed.

A more restrictive interpretation of the term "local purposes" in section 83(1)(a) is that all property tax revenues collected from reserve leaseholders should be spent on services to the leasehold lands and residents. So long as aboriginal residents of reserves are exempted from First Nation property taxes, this view is consistent with principles for public sector budgeting. It requires a

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172 Ibid., at 95.

173 At one point the Musqueam Band indicated that it wished to use tax funds to supply water to the band cemetery. Minutes of Musqueam Taxation Advisory Council, meeting no. 35, May 21, 1996.

174 Supra footnote 171, at 91.

175 See the example of expenditures out of tax revenues in the Musqueam Reserve case study above.

proper allocation between tax financing and band financing of local facilities and public services when these are shared between lessees and band residents. This approach is also consistent with the notion that band members should benefit from land development via the leasehold rental revenues, not the tax revenues from lessees; by providing an attractive mix of taxes and services to their lessees, a First Nation can maximize its economic return. Such a distinction further promotes support from the lessees, who care about how their taxes are spent but have no legitimate say in the spending of lease revenues. In the BC context, where taxing First Nations collect from their lessees a counterpart to the provincial school tax, a further issue arises. Should those funds be spent solely for the benefit of lessees, who have guaranteed access to the public schools, or should they be for the sole benefit of band members or shared in some way? This question has no unambiguous answer, which hinges on legislative intent and public policy goals.

Setting of Tax Rates

Tax rates are one of two central decisions in determining tax policies, the other being the tax base. Key issues for First Nations property taxes are how the rates are set and whether there are any external constraints on the rates. The matter of tax rate constraints is germane for non-aboriginal taxpayers on reserves, who are subject to taxes for which they have no direct legislative role. In a more customary democratic framework, taxpayers act in their capacity as voters to achieve their desired balance between public services and the taxes they pay. Hence, constraints on tax rates are rarely considered beyond the need, at the municipal level, to balance annual budgets except where borrowing approval has been obtained. If the public wishes to secure more and/or better public services, and is willing to pay the cost via higher taxes, then tax rates will be raised. Legislators who miscalculate the public's tastes for taxes face their fate at the next election. In the First Nations property tax context, where the voters are exempt from the taxes they impose on other residents, and where the taxpayers lack a vote over both their taxes and how the proceeds are spent, none of the standard democratic process for governmental accountability is operative.

The ITAB plays a key role in the formulation and review of First Nations property tax bylaws, including tax rate bylaws. Each taxing First Nation must pass a rate bylaw each year, and this bylaw requires the review and approval of ITAB before being sent to DIAND for final approval.[176] The ITAB Rates Committee undertakes this task and develops related policy and procedures. Perhaps reflecting the kinds of concerns described above, ITAB applied a policy that

176 ITAB reports that "[t]he Minister of Indian Affairs . . . power of allowance or disallowance of First Nation taxation laws . . . has been without exception exercised in keeping with recommendations of ITAB." *Responding to Challenges*, supra footnote 68, at 1. Hence, ITAB's role in the policy process is critical.

constrained First Nations' tax rates from inception to 1997. Then it switched from a "comparable rates" policy to a "budget-based rates" policy. It explained this development as follows:

> Historically, ITAB's tax rate policy has established that First Nation property tax rates must be based on rates charged by the "comparable taxing jurisdiction." The policy was developed to ensure a smooth transition from one taxing authority to another. Although effective, ITAB's tax rate policy places limits on the autonomy and independence of the First Nation tax system. Autonomous tax systems, for example, do not usually depend on the other tax jurisdictions to set rates in order to mimic those same rates. As a result, ITAB is reassessing its current tax rates policy with a view to encourage a new era of independent First Nation taxing authorities. The cornerstone of the proposed policy is budget-based tax rates which are calculated on the basis of a First Nation property tax budget.[177]

ITAB's new budget-based rates policy was adopted in 1997, with a transition period of voluntary usage until 2002, when it will become the standard practice for all taxing First Nations.[178] Until the point of mandatory application, budget-based rate setting is available to a First Nation only after at least one year of applying a tax rate equal to that of the previous taxing jurisdiction. Where there was no previous taxing jurisdiction, the First Nation is expected to consider the rates of the nearest jurisdiction to the reserve. The ITAB policy also states that year-to-year increases in the tax rate of up to 5 percent will be allowed under an expedited approval process. Larger tax rate increases might be allowable but only after fuller scrutiny of the applicant First Nation's expenditure budget along with a written justification and notification of taxpayers.[179] For taxing First Nations in British Columbia, the ITAB imposes a further condition that the rate multiples for various classes of properties with respect to school and hospital taxes not exceed the multiples used in nearby jurisdictions.

One might assess ITAB's policy of blanket approval of annual 5 percent increases in First Nations property tax rates on strictly technical grounds. While this policy may appear to be partially constraining, in fact it would allow very large cumulative tax hikes relative to those in comparable off-reserve jurisdictions over time. This policy ignores the fact that the tax base, total assessed value of taxable reserve lands, will itself rise over time, generally at or faster than the inflation rate. A 5 percent annual rise in tax rates will compound with the rising property values to allow for expenditure budgets that grow at perhaps 8 or 10 percent per year. Annual increases in the total tax burden in this range, let alone rates of 5 percent, will rapidly outpace the cost of providing services

177 "New ITAB Software Tackles Changing Tax Rules" (1996), vol. 1, no. 4 *Clearing the Path* 3-4.

178 Details of this new policy are found in Indian Taxation Advisory Board, "Rates Policy" (mimeograph, April 30, 1997); the ITAB rates policy was further amended in 1998.

179 In its approval of annual tax rates ITAB can also consider other factors, such as a change in the methods used for property assessments. Ibid.

and the incomes of average taxpayers, at least relative to the low rates of inflation and income growth over the past decade.

A more fundamental critique of shifting from a comparable rates policy to a budget-based rates policy relates to the accountability issues described earlier. The initial constraint of using tax rates in comparable off-reserve jurisdictions offered some protection to the interests of disenfranchised taxpayers. Shifting to budget-based tax rates is an invitation for taxing First Nations to expand their taxation budgets as far and quickly as they can within the allowed annual rate increases.[180] The ITAB has expressed its concern over the position of unrepresented taxpayers, both before and after its change in rate policies. For example, early in its mandate the ITAB Rates Committee saw its main challenge as

> [b]alancing the need to respect taxpayers' rights to fairness and equity, and the need to respect the accountability of First Nation/Band governments to their citizens and inhabitants. . . .
>
> Ratepayers will surely compare the rate in one jurisdiction with that of others. A relatively comparable rate will give ratepayers some assurances that they are treated equitably in like situations.[181]

Even with its change in rate-setting policies in 1997, the ITAB reiterated its need to balance the considerations that "tax payers are treated with fairness, justice and equity, while First Nation governments as taxing authorities, are free to assert their jurisdiction."[182]

Despite ITAB's statements of concern over fairness to non-aboriginal taxpayers, its asserted role of balancing the interests of First Nations and their taxpayers constitutes an impossible task. All aspects of determining tax policies are innately and intensely political functions of any government. Autonomy over taxation policy must not be mistaken with accountability for taxes by First Nation governments. The governance framework for First Nations' taxes and spending of tax funds simply lacks the electoral rewards and penalties that are essential for accountability.[183] ITAB may on occasion serve a useful role in seeking to intermediate between these disparate interests, but in its role as supervisor of

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180 Of course, based on our earlier analysis, First Nations that have substantial lands that they still wish to develop for leasehold purposes may face natural incentives through the market to restrain the tax burdens they impose; those that already have all available lands leased on long terms will not face this restraint.

181 Supra footnote 67, at 8 and 17.

182 Supra footnote 178, at section 9.

183 For a similar perspective by a political scientist familiar with First Nations governance issues, see Tom Flanagan, "The Last Immigrants" (Summer 1998), *The Next City* 27-33 (available on the Web at http://www.nextcity.com). He asserts that "[t]he single most constructive reform would be for the members of native communities to begin taxing themselves, to give them a greater stake in the doings of their own governments." (Ibid., at 33.)

First Nations tax policies it can hardly be a neutral party. ITAB is an administrative creation and instrumentality of DIAND, which has a legal fiduciary obligation to protect the interests of aboriginal people. And ITAB, by its own description, is "a national institution of First Nation governance,"[184] one whose mandate requires that "[a]ll members of the Board will be of Aboriginal descent."[185] The notion that ITAB can or does serve as a neutral party that balances the interests of taxing First Nations and their taxpayers is thus difficult to sustain.

Tax Assessment Methods

Besides the setting of tax rates, the choice and measurement of the tax base is the other key aspect of determining tax policies. For a property tax in the First Nations context, the basic question is how to value a leasehold interest in reserve land.[186] This matter involves both conceptual and legal issues, as well as practical issues of implementation. Our technical analysis of those issues appears in an appendix, with the main conclusions summarized here. Clearly, how properties are assessed relates to tax fairness and also affects the total tax burden in a context where First Nation governments are partially constrained as to the tax rates they can apply. In the earlier-cited experience on the Musqueam Reserve, the band government applied tax rates that never exceeded those of the adjoining municipality, but in some years the assessed values of the leased properties have far exceeded their off-reserve counterparts. Thus, the methods used for assessment will also carry implications for governmental accountability in a situation where taxpayers lack representation rights.

The proper basis for assessing leasehold properties—whether on or off Crown or reserve lands—is their fee-simple equivalent value. That is, the market value of a leasehold represents the lessee's interest in the property, and comparability with freehold properties requires that the lessor's reversionary interest in the property also be included for property tax assessment purposes. For a fee simple or freehold property, the holder of the fee in effect owns both interests. To illustrate this point, consider two physically identical lots and homes side by side, one a freehold and the other a leasehold, both situated on non-Crown land. Both enjoy identical neighbourhood amenities and both are also subject to the same political

184 *Responding to Challenges*, supra footnote 68, at "Message from the Chairman."

185 Memorandum of Understanding Between the Minister of Indian Affairs and Northern Development and the Indian Taxation Advisory Board, signed March 2, 1998, at section II(1), reproduced in (1998), vol. 2, no. 2 *First Nations Gazette* 371-75, at 373. According to Chief Manny Jules, the all-aboriginal nature of the board was "a result of federal budget constraints and not an ITAB recommendation" (letter July 19, 2000).

186 If the First Nation tax exemption for band members were removed, there would also arise the question of how to assess their properties held by certificate of possession. See the earlier Musqueam experience on the assessment of band-held lands at just 4 percent of the assessed value of identical leasehold lands.

jurisdiction and conditions. While the leasehold commands a lower market value than the freehold, it offers the same value or utility to users as the freehold property. The lower value mirrors the lessor's interest in the property when the lease expires; it is the present value of the future use of the property in all the years beyond the lease. It would be unfair to assess the two properties at different values, and the market value of the freehold property in this case can be used to assess the full value of the leasehold. Legislation and court precedents in British Columbia, as well as most other jurisdictions, support this position with respect to leaseholds, whether on reserves, Crown lands, or non-Crown lands.

Assessments of properties also need to consider other factors that affect their relative values or utility to owners or users. These attributes can be subdivided into three main categories—physical attributes of the individual property's land and improvements; local neighbourhood attributes; and jurisdictional attributes relating to governance and zoning. It is well accepted that differences in physical attributes of properties that affect their market values should be considered when assessing their values. Comparison properties are selected with the same physical attributes as the subject property, with calculated adjustments made for any differences in their attributes (such as different lot sizes). Neighbourhood attributes are also considered in assessments by taking comparison properties from the same locale insofar as possible. One would not select comparison properties that are physically similar but from a neighbourhood with significantly better or worse conditions. Moreover, jurisdictional attributes are considered in assessing properties by selecting comparisons within the same governing area. If there is a difference in neighbourhood or jurisdictional conditions, these are not ignored. For example, two freehold homes might be located side by side but divided by the boundary for school catchment areas, one served by an excellent school, the other served by a mediocre school. If home buyers care about this difference, they will pay more for homes of equal physical attributes located in the catchment of the better school. To assess the home located on the "wrong" side of the boundary, it would be incorrect to value it based on the sale price of the adjoining property on the other side of the boundary rather than a home that had sold within its catchment even if further away.

Extending these principles to assessing leaseholds on Crown or reserve lands raises interesting questions. Clearly, if freeholds are chosen off the Crown or reserve lands to value the leaseholds, in order to measure the lessor's interest in the properties, it is critical to choose comparison properties with the same physical, neighbourhood, and jurisdictional attributes as the leaseholds. Controlling for physical attributes does not usually pose much difficulty, and neighbourhood attributes can also usually be handled. For leaseholds on Crown lands, there is some difference in jurisdiction when taking non-Crown freeholds. However, this difference is typically not large in that owners of both kinds of properties have voting and representation rights in the governments that tax them and provide their local services. For non-aboriginal lessees on reserve lands, a far sharper

distinction arises in the comparison with owners of fee simple properties off reserve. The lessees do not have any voting or representation rights in the First Nation government that taxes them and provides their local services. Depending on how that governance is exercised, and how the public perceives it, this differential jurisdiction may have little or massive impact on the market values of the reserve leaseholds. Assessments of reserve leaseholds cannot simply assume that there is no impact of this jurisdictional factor and take physically similar off-reserve properties for valuation purposes.

Assessment practices for reserve leaseholds in British Columbia since the advent of First Nations taxation have followed varied courses. Since the mid-1990s the assessment bylaws of several First Nations have been amended to specify that the reserve properties should be valued as if they were "fee simple off reserve." This wording has even been incorporated in ITAB's sample bylaw for First Nations assessments.[187] The term "off reserve" has been construed to mean that differences in neighbourhood and/or jurisdiction between the reserve and the comparison off-reserve freeholds must be ignored in the assessments. This outcome has resulted from the way that the BCAA, supported by the appeal boards of several First Nations, have interpreted court cases relating to assessments. However, this view appears to misconstrue the court decisions, which dictate that a fee-simple equivalence be used for valuing Crown and reserve leaseholds, not that differences in neighbourhood and/or jurisdictional attributes between the Crown or reserve and the non-Crown properties should be ignored. Thus, the wording and application of some First Nation bylaws has created a radically new standard for assessments by ignoring the neighbourhood and/or jurisdictional attributes of reserve properties. Most recently, the Tsawwassen First Nation amended its assessment bylaw to state that "market value" should be assessed "without any reduction in value by reason of being situated on the reserve."

While ignoring jurisdictional differences may pose little harm when assessing leaseholds on non-reserve Crown lands, it has very different implications for reserve leaseholds. Given that reserve lessees lack rights of voting and representation in their First Nation government, their market values will be depressed if that governance is exercised in a manner that disregards their interests. Moreover, the ensuing depressed market values of the leaseholds will be completely ignored in their assessed values, based on market values of physically similar off-reserve freeholds. Even if a First Nation government were to pursue taxation, zoning, or land-use decisions that devastated the values of the leaseholds, there would be no impact on the assessed property tax base. Hence, the use of

187 "Sample First Nation Property Assessment and Taxation Bylaw" (1997), vol. 1, no. 1 *First Nations Gazette* 41-89, at 43. More recently, ITAB has "been reviewing the feasibility of developing a national real property assessment policy for First Nations." *Annual Report, 1998-1999*, supra footnote 3, at 11.

this method of assessment removes any financial accountability for a form of governance that already lacks political accountability to its taxpayers. Restoration of conventional assessment methods, which reflect both neighbourhood and jurisdictional effects on market values, would at least place some market constraints on First Nations governments with respect to any decisions that adversely affected their disenfranchised taxpayers.

Assessment Appeal Process

Section 83(3) of the Indian Act requires that First Nations that wish to exercise tax powers "provide an appeal procedure in respect of assessments." The provision of an appeal process should not obscure the more elemental fact that the leaseholders have no control over the content of the First Nation assessment bylaws, in particular their valuation principles, or the tax rates that are applied to their assessed property values. Nevertheless, the processes by which First Nation appeal bodies for taxed non-members are constituted and operate raise fundamental questions about natural justice. The previously cited case of the Musqueam Indian Band Board of Review, with its evidence of band interference in the board's independent operation, illustrates the problem. So long as a First Nation exempts its members from the taxes that it applies to non-members, there will be a political incentive to extract more revenues from the disenfranchised taxpayers. To the extent that there are regulatory, political, or other constraints on the tax rate that a First Nation can apply, it will still be able to enlarge its tax revenues through higher property assessments.

Even apart from an appeal body's ability to operate impartially and independently of the First Nation to whom it is accountable, the fact that appointments are made solely by the First Nation opens the choices to being managed. In other administrative and judicial contexts where opposing interests are at stake, procedures are established to ensure that the adjudicator, arbitrator, judge, or jury is not predisposed toward one of the contesting parties. For example, in the arena of labour-management disputes, independent arbitrators are chosen by the joint agreement of both parties. The past decisions of candidates for the position are a matter of record for both parties to assess for impartiality. Individuals cannot successfully pursue an arbitrator's career if their record shows them unduly favourable to either labour or management. In the arena of courts and public adjudicating bodies, the appointments are made by a government that is not inherently beholden to one or the other of the contesting parties; both of them and their like-minded citizens have the right to vote in general elections to choose the government that makes the appointments. None of these conditions for an impartial selection of members is present in the case of First Nations appeal bodies with respect to the interests of non-aboriginal residents.

The Supreme Court of Canada commented on this situation as follows:

> A further factor contributing to an apprehension of insufficient institutional independence arises when one considers that the Chiefs and Band Councils select the

> members of their tribunals. . . . This fact contributes to the appearance of a dependency relationship between the tribunal and the band, particularly in the case at bar where the interests of the band are clearly at odds with the interests of the respondents.[188]

The court further commented on the difficulties faced by an appellant before such a band-appointed appeal body when the bands themselves are allowed to be parties in the same hearings. It remarked:

> The respondents are thus faced with presenting their case before a tribunal whose members were appointed by the very Band Chiefs and Councils who oppose their claim. . . . This case . . . raises the . . . concern that a party should not be required to present its case before a tribunal whose members have been appointed by an opposing party. . . . Effectively, the tribunal members must determine the interests of the very people, the bands, to whom they owe their appointments.[189]

The court argued that other factors were also relevant in assessing the independence and perceived impartiality of a First Nation appeal body, such as whether the board members had appointments for fixed terms and set rates of pay.

Some concrete examples illustrate the hazards facing leasehold residents in the choice of members to sit on First Nation assessment appeal bodies. The Musqueam Board of Review panel that heard the *Huyck-Lyman II* case had a chairman who concurrently served as chair of about 15 other First Nation appeal boards and had so served between 1992 and 1998. Both of his co-panel members had also served on the boards of other First Nations, one concurrently as chair of three other First Nation appeal boards.[190] Regardless of the professional experience that this brings to a First Nation board, it clearly represents a set of incentives for the board members to render decisions favourable to the First Nation or its assessor and not the non-member taxpayers. The future appointments of these individuals, and the associated fees and status, hinge upon pleasing the First Nation community and not the lessee appellants.[191] In another example, the Tsawwassen First Nation provides two levels of appeal bodies for assessments; each level requires that "at least one [member] . . . is a member of the First Nation or an agent of the First Nation."[192] It further requires that no band

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188 *CP Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, at 56-57.

189 Ibid., at 57-58.

190 Transcript of *Huyck-Lyman II*, 7.

191 Indeed, the fact that the Musqueam Band's general counsel had circulated a notice to the board members describing the possibility of future cross-appointments with other First Nation appeal bodies was cited by the lessees in their Federal Court action as one piece of evidence of the band attempting to influence the board members. The judge did not accept this particular argument for apprehension of bias.

192 Tsawwassen First Nation Assessment Bylaw, sections 30.1.2 and 45.1.2.

member or other person shall serve on either appeal body where that person "has a direct or indirect interest in the property to which the complaint relates."[193]

One might ask whether it is possible to satisfy the criterion of "no indirect interest" in the case where band members can sit on appeal bodies for First Nation tax assessments. It would appear that band members in general would benefit from the larger tax revenues that are associated with higher assessed property values. A Supreme Court of Canada decision opined that this circumstance did not pose a problem:

> There is clearly an important interest in having band members sit on appeal tribunals. The concern that these members might be inclined to increase taxes in order to maximize the income flowing to the band is simply too remote to constitute a reasonable apprehension of bias at a structural level. More to the point, the income raised through the tax assessment scheme does not accrue to any individual, but rather to the community as a whole.[194]

Yet this judgment does not reflect the reality on some First Nations. First, decisions of a board of review can affect not just the value of a single property but the methods used for valuing an entire class of properties, such as the Musqueam Board's test cases of *Huyck-Lyman I* and *II*. Second, the number of band members on a reserve, who will benefit from the tax revenues, is in some cases small both absolutely and relative to resident taxpayers, so that the financial benefit to an individual band member sitting on an appeal board can be significant. For example, the Tsawwassen First Nation has only about 150 band members resident on the reserve, fewer than 50 families, whereas its leasehold population is several times as large. For the Westbank First Nation, the non-aboriginal taxpayers outnumber resident band members by more than 17 to 1. In that situation, an appeal board decision that led to a tax increase on all leasehold properties of just $100 each would imply more than $500 to each band member or nearly $2,000 for each band household annually.

COMMENTARIES ON THE ISSUES

Department of Finance (1993)

In December 1990 the federal minister of finance announced a review of Indian taxation policy. This review, undertaken by the Indian Taxation Policy Group of the Department of Finance, involved informal meetings with various parties and

193 Ibid., section 68.1.

194 Supra footnote 188, at 45. The decision further argued that "the allegation that band members have an economic interest in imposing higher tax assessments (because they pay no taxes) is speculative. It could as easily be said that band members have an interest in keeping property taxes low in order to attract investment, since taxation powers can be used both to raise revenues and to promote economic development." Ibid., at 44.

a conference on "Indian Governments and Tax" in 1991.[195] The review culminated in the release of *A Working Paper on Indian Government Taxation—Draft* in March 1993.[196] By its own description, the paper "represents the first detailed examination of a new tax relationship between the federal government and Indian governments and their people," although it also avers that "[t]his is not a government policy paper."[197] The federal government has not released any further analysis of these issues, so the working paper stands as the latest version of their perspective on First Nations taxation issues. More recent legislative provisions such as the First Nations receiving GST through tax-collection agreements (described earlier), and the personal income tax agreements with the Yukon First Nations (described below) also offer further views into the federal stance on these issues.

Sections of the working paper are devoted to issues of how the Indian Act tax exemption should be applied, the tax treatment of Indian government institutions, the taxing powers of First Nation governments, and coordinating tax policies among the levels of government including First Nations. The paper does not suggest any change with respect to the Indian Act tax exemption, but it offers a proposal for "redirection" of the federal income and sales taxes paid by reserve-resident aboriginals on their off-reserve activities and purchases back to their First Nations governments. The paper proposes that Indian governments and their agencies and corporations be granted exemption from the taxes of other governments on the same terms as are other governments and their instrumentalities. For off-reserve commercial activities of First Nation-owned entities, this would entail their taxation for reasons of competitive neutrality. Where First Nations governments obtain additional revenues through expanded taxing powers or redirected taxes, the paper suggests that these revenues not be used to offset existing public transfers to First Nations until

> an Indian community has in place an institutional infrastructure and level of service provision that is reasonably equivalent to that in place in surrounding communities. At that point, tax revenues should be taken into account in a manner which retains an incentive to develop tax revenues.[198]

Issues of tax policy coordination between First Nations and other governments are given particular attention in the paper. It states that "Indian governments should

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195 For the conference report, see *Indian Governments and Tax*, supra footnote 135. The Finance entity has since been dissolved and its functions assumed by the First Nations Section, Intergovernmental Tax Policy Division, Department of Finance.

196 Canada, Department of Finance, *A Working Paper on Indian Government Taxation—Draft* (Ottawa: the department, March 1993); no revised or subsequent version of the document was ever issued.

197 Ibid., at 31 and the foreword.

198 Ibid., at 14.

have the capacity to implement as wide a range of taxes as is possible within the context of Canadian confederation and the larger Canadian economic union."[199] The paper argues that First Nations should not have access to indirect taxes (customs and excise levies) for the same reasons that the constitution makes these the exclusive domain of the federal government. It argues that First Nations governments should be able to apply all forms of direct taxes on all entities within their lands, in order to generate revenues to support social and economic development. It draws a parallel between First Nations taxation of all reserve residents, including non-aboriginals, and the residence basis used for taxing individuals in Canada and across the provinces. The paper argues that provisions must be made to avoid both double taxation and the tax havens that might arise with non-taxation on aboriginal lands. The asserted objective in this area is to avoid distortions to the efficient allocation of capital and labour. The paper then suggests that First Nations' tax administration and compliance costs might be made manageable by arrangements for tax collection by other governments, and it notes that this would require a high degree of harmonization of the First Nations tax provisions with those of other governments.

The paper also addresses the general principles and specific issues that arise when a First Nation applies its taxes to non-members subject to its jurisdiction. It cites

> the critical issues involv[ing] the rights that potential taxpayers have to participate in the political processes which determine government tax policies and the rights that those same taxpayers have to receive services from the taxing government. . . . [Non-members] living or doing business on Indian government lands will generally not be in a position to participate in the Indian government. Therefore, where those who are not members of the First Nation are subject to Indian government taxation, their political recourse to government will be very limited.[200]

Because of the limited political position of non-member taxpayers, the paper argues for

> [a] negotiated framework [that] should include at least two, and possibly more, elements. First, it should ensure that the First Nation government does not tax non-members of the First Nation at a more burdensome level than it taxes First Nation members in the same circumstances. Second, it should seek to ensure that established economic interests within Indian lands are not subject to punitive levels of taxation. Taxation would be considered punitive where its purpose is to confiscate the property in question. Taxpayers should be able to seek relief through the courts where a tax imposed by an Indian government does not satisfy one or both of these elements.[201]

199 Ibid., at 24.

200 Ibid., at 25.

201 Ibid., at 26.

The working paper draws a parallel between the federal government's obligation to prevent tax discrimination under First Nation governance and the circumstances motivating non-discrimination clauses in international tax treaties:

> Citizens of one country residing in another country are vulnerable to discriminatory taxation since they normally have no recourse to the political process available to citizens of the host country where they reside—they are, in effect, subject to taxation without representation. Consequently, they must rely on their own government to protect their interests while resident or doing business in another country.[202]

The paper then elaborates on what constitutes acceptable levels of First Nation taxation on non-members:

> [T]here is cause for concern where taxation is used for the sole reason of depriving one taxpayer, or a group of taxpayers, of their property. . . . This is not to say that the taxpayers should not be subject to increased levels of taxation as a result of the introduction of Indian government taxation. But the burden of taxation borne by these taxpayers should be reasonable in all circumstances, both in relation to the extent that the First Nation government assumes responsibility for providing services, and in respect of the level of taxation borne by taxpayers in similar economic circumstances elsewhere in Canada. Again, this element of the framework becomes increasingly important where the potential taxpayer does not have access to political representation in the government seeking to impose the tax.[203]

Analysis

The federal working paper contemplates sharply expanding First Nations tax powers to include all types of direct taxation, which go far beyond the current section 83 property tax powers. New First Nations taxes could include, among others, personal and corporate income taxes and sales or transactions taxes, all of which are significantly more complex to operate than a property tax. Hence, the likelihood is that First Nations wishing to assume these additional taxation powers would need to rely on the tax administration and collection machinery of federal and/or provincial governments. As the working paper noted, there are over 600 bands across Canada with an average resident membership of only about 500, and the practical needs and costs of collecting more complex taxes would stretch their resources. As a result, the working paper hinges the federal government's intentions to protect the interests of its "citizens," the locally disenfranchised non-members residing on First Nations lands, on the likely need of those First Nations to get the cooperation of external governments to collect any new taxes.[204]

The working paper takes a strong position on the issue of discrimination by taxing First Nations. It states that any negotiated agreement over taxing powers

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202 Ibid., at 7-8.

203 Ibid., at 27.

204 The working paper refers solely to the distinction between members and non-members of bands, focusing on the disenfranchised taxpayer regardless of ancestry. Our analysis considers the

"should ensure that the First Nation government does not tax non-members of the First Nation at a more burdensome level than it taxes First Nation members in the same circumstances." It also cites discriminatory tax treatment as a basis for legal recourse. Yet, given the highly discrepant income and wealth levels typically found between aboriginal and non-aboriginal reserve residents, a formal restriction of this kind does not ensure balanced treatment of the non-aboriginals. Taxes can be imposed on kinds of goods that only leaseholders have (for example, swimming pools), and tax rate schedules can be given a highly progressive tilt to exempt all at lower levels of income or wealth while steeply taxing those at higher levels. The federal government could hardly insist that First Nations use any particular tax rate schedule, as it will now accept for tax-collection agreements any provincially designed rate schedule. The working paper's injunction against "punitive" or confiscatory levels of tax has little practical meaning, short of rates that approach or exceed 100 percent. Hence, the main protection against abusive tax powers with respect to non-aboriginal taxpayers would have to come through a First Nation's self-interested calculation of the economic damage that might result via dampened prospects for reserve leasehold development.

In contrast to its strong position on non-discrimination in First Nations taxes, the working paper is silent on the issue of representation rights in local government on reserves. The paper does not even suggest that advisory bodies for non-aboriginal residents should be required in tax negotiations with First Nations. Perhaps the federal approach on this topic was restrained out of concern for the implied intrusion into the aboriginal rights of self-government. The reasoning in the working paper appears to be that Parliament would act to protect the rights and legitimate interests of non-aboriginal taxpayers subject to First Nations taxation, and it would seek to accomplish this through the legislation and administrative arrangements with external authorities that would be needed by a First Nation to collect its taxes. In effect, Parliament would become the body representing the interests of non-aboriginal residents on each reserve. Yet, this view appears extremely unrealistic, since Parliament represents the voters for the country as a whole and not the needs or interests of any small group of leaseholders on any particular reserve. Moreover, even with taxation arrangements in place, Parliament cannot offer any assurance that a First Nation government will be efficient and responsive in its supply of local services to the affected but locally disenfranchised taxpayers.

What would happen if a First Nation sought to expand its direct taxing powers and operate the full tax-collection apparatus itself? It could then choose to apply taxes in a discriminatory fashion and/or at higher rates than those used off

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aboriginal versus non-aboriginal distinction, even though some aboriginal residents are non-members and thereby both disenfranchised and potentially liable to the same taxes as non-aboriginal residents.

reserve, and the external governments would be unable to protect the affected non-aboriginal residents. Unless there were some form of agreement by the relevant external government, the non-aboriginal residents of reserve lands would still be subject to the other taxes as well. Such double taxation would be adverse to the economic interests of the First Nation, at least to the extent that it had available additional lands for future leasehold development, and that might be sufficient incentive for First Nation governments to avoid this situation. But if a First Nation nevertheless pursued this route, it is unknown whether the courts would uphold or reject the unilateral exercise of First Nation taxing powers, with or without discriminatory provisions, as an allowed form of the inherent right of self-government.

The working paper suggests one way to generate revenues for First Nations would be to redirect some or all of the taxes paid by resident aboriginals on their off-reserve earnings or purchases. A similar tax "redirection" method could be applied to the earnings or purchases of resident non-aboriginals.[205] This could be one way of implementing a system of concurrent taxation by First Nations and other governments in Canada. It would be a form of revenue sharing, and the participating governments could constrain the tax procedures, rules, and rates to be identical to those applied elsewhere in that province. The share of the total taxes paid by non-aboriginal residents that would go to the First Nation would be a matter of negotiation among the governments. As far as the reserve-resident taxpayers were involved, there would be no tax compliance burdens differing from those faced by off-reserve taxpayers, except the need to supply the First Nation with their social insurance numbers so that their taxes could be counted for revenue sharing. This method of revenue sharing would ensure full harmonization of First Nations direct taxes and equality of the total tax rates faced by reserve residents with off-reserve residents in their province, where they do have a vote affecting government policy.

A First Nation might find the redirection method attractive in terms of its access to additional revenues, which would be substantial for those bands having large leasehold developments. The First Nation might not like the implied constraints on its autonomy over tax policy, but that is simply a cost of accessing the revenues. This point has not been a barrier in the cases where First Nations have negotiated GST or sales tax agreements with the federal or provincial authorities. Strictly speaking, those agreements do not redirect taxes from other governments but coordinate taxes imposed by the First Nations, although they do represent a loss of revenue to the other governments. Perhaps the biggest hurdle with tax redirection or coordination for some First Nations is the federal insistence on non-discrimination, which requires giving up the section 87 tax

205 This analysis draws on "Musqueam/Salish Parks Residents' Association: Analysis and Comments on 'A Working Paper on Indian Government Taxation,' " submission to Indian Taxation Policy Group, Department of Finance, September 1993.

exemption on reserve-related earnings and purchases by aboriginals. Given the attractions for First Nations of accessing additional tax revenues, the federal government could also require as a condition for these agreements that there be effective means for the political representation of all taxpayers at the level of each participating First Nation.

The federal government has already proceeded with arrangements for tax collection and coordination that require non-discrimination by the First Nation taxing authorities. In addition to the several GST agreements, agreements have been reached on personal income tax between the federal government, the government of the Yukon Territories, and all seven self-governing Yukon First Nations. As of 1999, all Yukon residents, including members of all 14 First Nations in the Yukon, are subject to federal and territorial income taxes.[206] For those residing on lands of the participating First Nations, 75 percent of their basic federal tax (with a planned increase to 95 percent after 10 years) plus 95 percent of their net Yukon tax is remitted to that First Nation. Taxes are properly allocated by the individual taxpayer denoting on the tax return the Yukon First Nation where he or she resides, and tax credits are applied against the federal and territorial taxes. The legislation that underlies these arrangements is open to other First Nations willing to extend personal income tax to their members and able to negotiate tax-sharing terms with the other governments.

The federal agreements with First Nations over GST and income taxes both involve a loss of federal revenues when the First Nations assume taxing powers over resident non-aboriginals. However, in these agreements the federal government insists that members of the First Nation also be subject to tax. Clearly, the federal goal is to encourage bands to begin taxing their own members; the incentive for First Nations to agree is the tax revenues they can derive from non-members. The federal position appears to be that First Nation taxes implemented in this manner will be geographically based, not racially based. All persons making purchases or earning incomes within the First Nations boundaries will be equally taxable. While the federal government has not sought representation powers for taxed non-members in the First Nations, it does require that the First Nation tax rules and rates parallel those in adjoining jurisdictions. Similar requirements (non-discrimination and equivalent tax rules and rates) were not embedded in section 83 of the Indian Act, perhaps reflecting the later evolution of this position by the government.

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206 These provisions are being implemented through amendments to section 120 of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended, via section 27 of Bill C-25 (Income Tax Amendments Act, 1999, SC 2000, c. 19). Canada's position is that under the Yukon First Nations Umbrella Final Agreement and the Yukon Land Claim Settlement Act, the section 87 tax exemption ceased to apply everywhere in the Yukon including on reserves. The issue of whether the exemption has ended for Yukon First Nations that have not reached a final agreement is currently before the courts.

Royal Commission on Aboriginal Peoples (1996)

In its five-volume report of 1996, the federal Royal Commission on Aboriginal Peoples (RCAP) articulated a sweeping and ambitious vision of self-governance arrangements for First Nations. This report embodied a First Nations perspective on the issues and future of aboriginal governance. Its proposals for financing First Nations governments included equalization payments, revenue sharing, conditional and unconditional transfers, and broad powers of taxation. The precise financing approach supported by the commission would hinge upon the model chosen for developing aboriginal governments. Regardless of those details, the report argued that

> [t]he core of Aboriginal jurisdiction includes all matters that:
>
> • are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;
>
> • do not have a major impact on adjacent jurisdictions; and
>
> • are not otherwise the object of transcendent federal or provincial concern.[207]

It then proceeded to classify taxation among these "core" areas of aboriginal jurisdiction, and it argued that First Nations governments "will exercise taxation authority, including decisions on the level of taxation on their territory."[208]

The commission identified the objectives that should be pursued in First Nations' public financing arrangements. These objectives included self-reliance, equity, efficiency, accountability, and harmonization. In the context of First Nations taxing non-aboriginal residents who would lack electoral rights in their government, the RCAP's view of equity and accountability are particularly germane:

> In the design of new funding arrangements, we would emphasize the importance of (1) equity among the various Aboriginal governments that make up the third order of government in Canada, (2) equity between Aboriginal and non-Aboriginal people as a whole, and (3) equity between individuals. . . . Governments with the authority and responsibility to spend public funds for particular purposes should be held accountable for such expenditures, primarily by their citizens and also by other governments from which they receive fiscal transfers. . . . This taxing authority, when recognized, will be an important step toward increased fiscal autonomy for Aboriginal governments and will also encourage greater fiscal accountability and citizen participation.[209]

Non-aboriginal residents of First Nation lands would be excluded from the "citizens" to whom those governments would be accountable. While the commission

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207 RCAP, at 2/3/2.3.

208 RCAP, at 2/3/3.2. The report discusses the possibility that First Nation governments may choose to use lower levels of taxation than other governments to stimulate economic activity, and the related issue of creating tax havens, but it does not discuss the case where First Nation governments choose to impose higher tax rates.

209 RCAP, at 2/3/3.2.

advocated full autonomy for First Nations' taxation policies, it acknowledged the need for harmonization of some policies with other governments in Canada.[210]

The RCAP envisioned that First Nations might employ the full panoply of taxes, including:

> (a) personal income tax, which in the case of Aboriginal governments could apply to Aboriginal citizens and to non-citizen residents within an Aboriginal-controlled territory; (b) corporate taxes on private businesses, both Aboriginal and non-Aboriginal; (c) sales or consumption taxes; and (d) taxes or lease fees on land and property.[211]

So long as First Nations governments are territory based, it advocated a residence basis for taxing both aboriginal and non-aboriginal residents:[212]

> It can be expected that Aboriginal governments will tax the personal income of all residents on their territory, whether or not a resident is a citizen under the nation government model. Income tax will likely be levied regardless of whether a resident's income was earned on the territory or elsewhere. Citizens of an Aboriginal nation residing off the territory can expect to continue to pay personal income tax to the governments in whose jurisdiction they reside. . . . The Commission proposes that residents on an Aboriginal nation's territory would pay all income tax to the Aboriginal government and not, as is the case with other residents of a province, to the federal and provincial governments.[213]

The commission unequivocally argued that aboriginal people should be "subject to taxation levied by their own governments," despite their exemptions from certain taxes levied by other governments. It justified this position, which could be a contentious item for grassroots aboriginal people, as follows:

> The current tax exemptions leave room for taxation that could be taken up readily by First Nations governments. Doing so would not be an infringement of Aboriginal rights, and the issue of compensation therefore does not arise. Some would argue further that the exemption is a reflection of the original autonomy of Aboriginal rights, and should be seen as being closely linked to the inherent right of self-government.[214]

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210 The RCAP recognized that personal and corporate income taxes are costly to administer and proposed that First Nation governments enter into tax-collection agreements with the federal government.

211 RCAP, at 2/3/3.2.

212 The report also discussed possible options for how personal income taxes might be applied to non-aboriginal residents, in terms of the portion of their taxes that would go to the First Nation government as opposed to the federal and provincial governments.

213 RCAP, at 2/3/3.2. It also distinguished this case from where there was an "Aboriginal public government," where residents would continue to pay income tax to the federal and possibly the provincial government.

214 RCAP, at 2/3/3.2.

At no point in its report does the RCAP appear to advocate the imposition of any First Nation taxes solely on non-aboriginal individuals or businesses resident on the territory.

The commission's report gave cursory attention to the issue of how resident non-citizens, mainly but not entirely non-aboriginals, would have input into the First Nations government process. Immediately following its discussion of how income taxes could be applied to non-aboriginal residents, the report observed:

> Measures will have to be taken to ensure that non-Aboriginal residents are represented in the decision-making processes of the Aboriginal nation government. In the case of the Sechelt Indian band government in British Columbia, this was accomplished through provincial legislation. . . . Among other matters, the legislation provides for the creation of an advisory council, which is the primary mechanism for non-Aboriginal residents on Sechelt lands to participate directly in the affairs of the district.[215]

The RCAP then recommended that "[n]on-Aboriginal residents be represented effectively in the decision-making processes of Aboriginal nation governments." It offered no details on what institutional arrangements would satisfy the need for "effective representation," but by implication an advisory council along the lines of Sechelt was regarded as sufficient.

Analysis

The government's official response to the RCAP report was embodied in a 1997 document titled *Gathering Strength—Canada's Aboriginal Action Plan*.[216] This paper was silent on most of the numerous specific ambitious recommendations of RCAP for implementing self-governance. As to the commission's proposals for greatly expanded First Nations taxation powers, the official response simply supported "enhancing First Nations own-source revenue capacity." This approach followed an earlier federal government "policy guide" on aboriginal self-government, which had stated that

> [t]he Government views the scope of Aboriginal jurisdiction or authority as likely extending to *matters that are internal to the group*, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution. . . . [T]he range of matters that the federal government would see as subjects for negotiation could include all, some, or parts of the following: . . . taxation in respect of direct taxes and property taxes *of members*. [Emphasis added.][217]

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215 Ibid.

216 Canada, Department of Indian and Northern Affairs, *Gathering Strength—Canada's Aboriginal Action Plan* (Ottawa: the department, 1997).

217 Canada, Department of Indian Affairs and Northern Development, *Federal Policy Guide—Aboriginal Self-Government* (Ottawa: the department, 1995), 5-6.

In contrast to the RCAP's assertion of First Nations jurisdiction over taxation of all persons residing on aboriginal lands, the government referred to aboriginal taxation powers over "members."

The government policy guide also addressed the issue of First Nations jurisdiction over non-members:

> Negotiations with Aboriginal groups residing on a land base must address the rights and interests of non-members residing on Aboriginal lands. . . . Where the exercise of Aboriginal jurisdiction or authority over non-members is contemplated, agreements must provide for the establishment of mechanisms through which non-members may have input into decisions that will affect their rights and interests, and must provide for rights of redress.[218]

As of 1999, more than 80 self-government agreements with First Nations were in various stages of negotiation across the country. However, their taxation provisions have not been publicly described, nor has there been disclosure about their provisions for the participation in governance of non-aboriginals and other non-members residing on the reserves.

It is notable that the RCAP report, despite its extensive analysis of issues that arise with aboriginal taxation, offered no discussion or citation of the Department of Finance 1993 *Working Paper on Indian Government Taxation*. This may not be surprising in view of the Finance paper's strong emphasis on the need to harmonize and coordinate the taxes of First Nations with the taxes of other Canadian governments. The Finance paper's concern over the needs of protecting the interests of non-members subject to First Nations taxes may also have been unacceptable to the RCAP. And it is most remarkable that the RCAP report, despite its voluminous discussion of aboriginal governance and taxation powers, gave such scant attention to the situation of politically disenfranchised taxpayers. Its only coverage of this issue is tucked into a single footnote:

> This point was made forcefully presented to the Commission during its public hearings. . . . The brief of the Musqueam/Salish Parks Residents' Association . . . states . . . :
>
> > *The non-native leaseholders on Reserve land have been disenfranchised. We are taxed without representation!* Needless to say, we do not elect members of the Band Council nor can we be elected to the Band Council. We believe that the principle of no taxation without representation is fundamental in a democratic system of government. [Emphasis in original.][219]

Other than citing this grievance, the RCAP report did not address it in any fashion besides its suggestion that such non-members be given some unspecified form of advisory input.

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218 Ibid., at 11-12.

219 RCAP, at 2/3/note 246.

Indian Taxation Advisory Board (1999)

In August 1999 the ITAB issued a major proposal that it be transformed into a statute-based, autonomous First Nations Taxation Commission (FNTC).[220] ITAB is presently established as an administrative body of DIAND, and its recommendations on proposed First Nations taxation and expenditure bylaws require approval of the DIAND minister. A key component of the FNTC proposal is to assume final approval authority from DIAND, although the document mentions that "in certain prescribed circumstances, . . . the Minister of Indian Affairs [will be able] to appeal an approved by-law."[221] ITAB asserts that it

> must become an independent national First Nation institution, established by federal legislation. A new First Nation institution is needed with legislative powers to ensure that First Nation property tax authorities operate in a fair and business like manner, inspiring the confidence of investors and taxpayers on reserve lands, and promoting good relations between First Nation communities and provincial municipal institutions.[222]

ITAB further motivates its FNTC proposal as follows:

> First Nations wish to defend their tax systems and promote their formal assumption of jurisdiction over property tax. First Nation tax authorities require services to ensure their tax systems are run efficiently and to develop further capacity. First Nation tax authorities want an organization that can address adverse media attention, enhance their investment climate, and otherwise ensure they derive maximum benefit from their property tax systems.[223]

The proposal includes a range of new or expanded functions for the FNTC, building on the facilities and experience of the ITAB. Foremost among these functions are several that relate to dispute prevention and dispute resolution, where ITAB has already played some role. For example, the FNTC would have a formal process for hearing appeals in relation to taxation bylaw approval. It would have an expanded dispute resolution capacity, which would include mediation and other dispute resolution methods. The FNTC administrator would have the power to order hearings for matters that could not be resolved through such methods. The FNTC would have regulatory powers that could constrain the acceptable range of taxation and related expenditure practices by First Nations. It would also have increased capacity for research and policy development relating to First Nations taxation. In addition, the FNTC would have expanded powers of public education and training for First Nation tax administrators relative to those exercised by ITAB. The document refers to the future extension of First Nations

220 *Responding to Challenges*, supra footnote 68.

221 Ibid., at 13. At another point the proposal states that "[t]he FNTC will continue and expand this function [of bylaw review] to include actual allowance or disallowance of by-laws, without recourse to the Minister." Ibid., at 8.

222 Ibid., at 1.

223 Ibid., at i.

taxing powers beyond the property tax and the role that the FNTC could play. The proposal offers preliminary estimates for an FNTC budget of about $3 million per year, including the costs of an appeal process, which is roughly double the current budget of ITAB.[224]

The FNTC proposal includes several channels for increased participation by the affected parties, including taxpayers as well as the taxing First Nations. A prime example of this is provision for a board of ten commissioners, with one aboriginal member drawn from each of the six regions, one head commissioner, and three taxpayer representatives. The head commissioner would be appointed directly by the federal government, which would also nominate the taxpayer representatives, and the regional commissioners would be nominated by the Assembly of First Nations. The proposal does not describe how the commissioners would be chosen from the nominees. All of these individuals would "have to meet qualifications that will be specified in the legislation . . . [and have] prerequisite knowledge . . . [and] a broad understanding of the issues and affected interests with respect to First Nation property taxation."[225] In addition, in developing FNTC regulations and policies, "working committees may be struck with affected stakeholders as members to assist."[226] At the same time, the proposal accepts as a given that taxpayers will continue to lack any representation at the level of the individual First Nation:

> [T]axpayers' interests cannot be met through the privilege of voting in First Nation elections. . . .
>
> [FNTC regulations] must reassure investors they will be protected despite the taxation and representation issue. . . . When taxpayers cannot simply vote against policies they do not like, these bounds become very important.[227]

The ITAB document makes repeated references to the "fair" treatment of taxpayers, balancing their interests with those of First Nations, and problems of adverse coverage by the media of First Nations taxation. For example, it states:

> The FNTC can . . . reconcil[e] the seemingly divergent interests of taxpayers and First Nation tax authorities. . . .
>
> Review ensures that by-laws: conform with existing legislation, including the Charter of Rights and Freedoms; are comprehensive; comply with the principles of equity and natural justice; are fair. . . .
>
> Standards and guidelines serve both taxpayers and First Nation tax authorities; they protect taxpayers from unjustifiable changes in rates or service quality.[228]

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224 Ibid., at 16.

225 Ibid., at 15.

226 Ibid., at 7.

227 Ibid., at 3 and 9. However, ITAB is currently investigating possible means for taxpayer representation at the local level, according to correspondence from Chief Manny Jules (July 19, 2000).

228 Ibid., at 3, 8, and 9.

On the issue of media coverage, the document states:

> First Nation property tax jurisdiction, and by extension other forms of practical self-government, are now meeting political resistance. Adverse media attention generated in specific situations has generated apprehension in the non-native public concerning self-government. Many people believe that financial mismanagement is the norm on First Nation lands, or that the rights of non-natives are routinely trampled. . . .
>
> Court cases are expensive to all parties and tend to generate adverse media attention.[229]

Another key theme in the FNTC proposal is that a stronger institution could enforce high standards of behaviour by First Nations taxing authorities and that this is needed to achieve the maximal benefits for land development. It argues that fostering the confidence of investors and taxpayers is critical if First Nations are to reap the greatest benefits:

> This public misapprehension has directly affected the operations of the First Nation property tax system. Many investors have been spooked by the perception of political unrest and instability in First Nation communities, and this is causing all First Nations to lose potential investment projects, and in some cases reducing the value of existing ones. . . .
>
> [I]t is sometimes assumed that First Nation interests are best served by charging maximum property tax rates to existing taxpayers. This would suggest that taxpayer interests are directly opposed to First Nation interests. This strategy is wrong because it frightens investors and shows no regard for the effects of this strategy on the interests of other First Nations.[230]

The proposed FNTC, it asserted, could protect the best interests of all First Nations by ensuring that no individual First Nation abused its taxing powers and thereby damaged the general reputation of First Nations as a good place to invest. The FNTC would act as a regulatory body to ensure that individual First Nation taxing policies were responsible with respect to the interests of both other First Nations and the taxpayers.

Analysis

Most features of the FNTC proposal are incremental extensions to ITAB's powers and functions, but one constitutes a fundamental change.[231] That is the proposal to shift the final authority for approval of First Nations tax bylaws from the minister of DIAND to the FNTC, described in the document as "an independent

229 Ibid., at 2 and 6.

230 Ibid., at 2-4.

231 Parts of this section's analysis draw upon a submission from Salish Park leaseholders on the Musqueam Indian Reserve to ITAB: C.W. Albert, W. Erwin Diewert, and Jonathan R. Kesselman, "Commentary: 'Responding to Challenges—The Future of the ITAB,' " January 3, 2000.

national First Nation institution."[232] This change would undermine what has often been cited by federal and provincial officials as the legitimization for First Nations taxation of non-aboriginal residents without any more direct form of representation. Moreover, there are legal and constitutional questions about the permissibility of delegating the power to make or approve tax laws to an entity that is not a federal or provincial legislature and further is not directly accountable to either.[233] Some related issues were raised in legal cases such as *Eurig Estate* and *Canadian Pacific Ltd. v. Matsqui Indian Band*, examined in earlier sections on the issues of representation and discrimination. One judge, in the *CP-Matsqui* case at the Federal Court of Appeal, asserted that "any such fear [of abusive exercise of power] should be greatly alleviated by the realization that all such taxing by-laws must be approved by the Minister of Indian Affairs."[234] The view that the current ministerial approval is sufficient to satisfy the constitutional requirements appears somewhat tenuous, but shifting the final approval authority further from Parliament to "an independent national First Nation institution" might stretch matters to the breaking point.[235]

The ITAB document avoided any substantive analysis of or remedy for the issues of representation and discrimination. A review that proposes expansion of ITAB's powers would be an opportune time to examine these critical issues in depth. There is not a single mention of the aboriginal tax exemption, or what discriminatory tax provisions imply for First Nations taxation and governance issues where almost all taxpayers have been disenfranchised.[236] The few mentions

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232 *Responding to Challenges*, supra footnote 68, at 1. Elsewhere, ITAB describes its accomplishments as "protecting and defending First Nation property tax jurisdiction . . . [against challenges] from municipal, provincial and federal jurisdictions and the courts." In many cases these challenges stem from the taxpayers themselves. *Annual Report, 1998-1999*, supra footnote 3, at 2.

233 The proposal does contend that the FNTC "will be directly accountable to the federal government through Parliament," with annual reports on its progress through performance measures. *Responding to Challenges*, supra footnote 68, at 14. However, it appears that Parliament would not be given any final powers to approve or disallow First Nations taxing bylaws or regulations, so that it is unclear how accountability would be effective.

234 Supra footnote 159, at 354.

235 In ITAB's view, as argued in a letter by Chief Jules (July 19, 2000), "By-law approval authority will provide an important enforcement mechanism for the FNTC that will allow it to better protect taxpayer interests. This authority will also provide a framework that promotes and makes the First Nation tax system more efficient."

236 The ITAB position has been that each First Nation may choose not to tax its own members, even if it chooses to tax non-members. As noted by Chief Jules in a letter (July 19, 2000), "When a First Nation taxation bylaw is enacted on leased land, to our knowledge, all citizens regardless of race pay property tax. On communal lands, most First Nations have chosen not to tax their own members." However, aboriginals typically hold their land by certificate of

of taxpayers' lack of representation are not followed up with any analysis of the implications. The proposal's only nod to the issue of taxpayer representation is its provision that three out of ten commission members be chosen to represent taxpayers (though just one of the three would represent residential interests). But it should be noted that these individuals would not be elected by the taxpayers; they would be chosen by an unspecified process from persons nominated by the federal government; and their prime qualification would be familiarity with First Nation taxation matters rather than their connections to the taxpayer community. One might at least expect the non-aboriginal commission members to be chosen through an electoral process by the taxpayers they represent, and it might be appropriate that their representation on the commission constitute a bare minority of the total.[237]

The vision espoused for the FNTC is one of a technocratic body administering and regulating the taxing bylaws and practices of First Nations. This body would oversee the formulation of bylaws, regulate their permissible bounds, train the tax administrators and supply them with requisite software, and mediate among the contending parties to ensure "fair" outcomes. Appeals for taxation bylaw approval would be through "a quasi-judicial administrative tribunal . . . headed by a legally trained judge."[238] This approach stands in stark contrast to the reality in all democratic societies that taxes and decisions about tax policy are innately and intensely political matters. These matters are determined by the interplay of competing interests, both prospective gainers and losers, and differing visions, both about taxes and public spending. Almost all tax policy decisions in the real world are made by politically astute, calculating legislators, not by accountants, economists, and lawyers expert in taxation.[239] There is no reason to expect that the tax policies chosen by each First Nation would be immune from the political forces there. This technocratic view of the tax policy functions to be assumed by the FNTC also explains its heavy emphasis on the prevention and mediation of disputes. In the customary democratic

possession, which is a form of individual title, but are still exempted from tax; non-aboriginals are barred from holding land in this manner.

237 If there were seven aboriginal commissioners, then there would be six from the taxpayers. See the earlier section on representation with respect to lessee representation in First Nation public government.

238 *Responding to Challenges*, supra footnote 68, at 13.

239 This view of the tax policy process is widespread in the literature on tax policy but well exemplified by W. Irwin Gillespie, *Tax, Borrow and Spend: Financing Federal Spending in Canada, 1887-1990* (Ottawa: Carleton University Press, 1991) and Walter Hettich and Stanley L. Winer, *Democratic Choice and Taxation: A Theoretical and Empirical Analysis* (New York: Cambridge University Press, 1999).

process, opposing interests and views are a normal part of life, to be resolved at the ballot box and in the legislative chambers.

The ITAB document repeatedly stresses fairness and balance in the processes by which First Nation taxes are exercised, including appeal processes, but it leaves little role for taxpayers in decision making over the substance of tax policies. The very makeup of the FNTC commissioners is one illustration—with a more than two to one majority by aboriginal members and the choice of taxpayer commissioners by the federal government rather than the taxpayers themselves. In another example, the proposed FNTC appeal process for bylaw approval is intended primarily for the First Nations. The document does concede that "it may be appropriate that taxpayers have access to the appeal process regarding some specific issues," but it does not specify the types of issues that would be open to taxpayers and further warns that "this be structured so as to not generate frivolous appeals or disrupt the administration of the tax system."[240] An equally basic question is how the FNTC can exercise fairness and balance toward the taxpayer community when it is primarily accountable to First Nations institutions, such as the Assembly of First Nations that would nominate most of the commissioners.

The proposal misses a major opportunity for improving the representation of non-aboriginal residents at the level of the individual First Nation where they reside. Even if the FNTC could exercise some balance for First Nations taxation policies, it is at the individual reserve level where the numerous decisions about local public services are made. Fair treatment of taxpayers requires not only that their taxes be of kinds and levels that they support, but also that public services accord with their preferences and be delivered with adequate quality and reliability. If resident taxpayers find, for example, that their garbage is not being picked up properly or often enough, are they to seek remedy through the FNTC? Of course, for these many essential aspects of public services, they will have to rely on their local First Nation, but their position is quite compromised if they do not have effective political participation at the local level. With respect to taxation and spending bylaws, the taxpayers could at least play a role in the bylaw review process. It could be required that each First Nation draft bylaw be sent for a plebiscite to every registered lessee. The taxpayers' vote would not be binding but would have to be considered by the ITAB or FNTC in its review of each proposed bylaw.[241]

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240 *Responding to Challenges*, supra footnote 68, at 13. No similar concern is expressed with respect to First Nations appeals.

241 Based on the Musqueam experience, described earlier, it is essential that the lessees be given the draft bylaw in its final form and that they be consulted further if there are subsequent changes to the draft.

The ITAB document sees a congruence of the interests of taxing First Nations and their lessees arising through their joint interest in maintaining the value of investments on reserve lands. It states that the FNTC approach

> allows the interests of taxpayers, investors, the federal government, and First Nation tax authorities all to be served by essentially the same strategy—building an attractive investment climate.[242]

A previous quotation from the proposal argued that this joint interest could act to restrain any First Nation from imposing excessive tax burdens on its lessees. The mechanism for this congruence of interests is that excessive taxes, or poor value in the public services delivered relative to the taxes collected, will diminish the lease revenue that the First Nation can earn and thereby be self-defeating. However, as noted earlier in this study, any such joint interest could break down under various conditions (see table 3). First, for a First Nation that has already leased most of its available lands on long terms, there will still be an incentive to extract additional taxes from lessees without any near-term diminution in lease revenues. Second, for a First Nation where most of the leased land is owned by individual members of the band rather than by the band collectively, any adverse impact on lease rentals from the imposition of higher taxes will not diminish the band's total revenues but rather private incomes. Additionally, a band facing financial pressures might still act to raise taxes even if this will adversely affect its lease revenues in the not-distant future.

In summary, some of the proposed expanded or new functions for a FNTC would be useful additions, whether to the existing ITAB or to a newly named entity. The proposal that the FNTC assume final bylaw approval authority, though, raises fundamental issues of representation as well as constitutional propriety. The fact that the minister of DIAND has, to date, not disregarded any bylaw recommendations of the ITAB suggests that there is no pressing need to transfer the authority, in any case.[243] The proposed addition of taxpayer members to the governance of the FNTC is well-grounded, though their proposed numbers and selection method are deficient, and this reform could be achieved even with the existing ITAB. A more fundamental failing of the ITAB document is its refusal to consider the issues of representation and discrimination, or how the institutions for First Nation taxation can be made more accountable to the taxpayers. The document proposes that the FNTC be established in statute with provisions that are "flexible enough to allow for the assumption of new [tax] jurisdiction by the FNTC in the future."[244] Yet, it offers no analysis of the issues

242 *Responding to Challenges*, supra footnote 68, at 4.

243 Ibid., at 1, states that the minister's authority "has been without exception exercised in keeping with the recommendations of ITAB."

244 Ibid., at 17.

that arise when considering First Nation taxes beyond the property tax, and any expanded powers of ITAB or an FNTC with respect to other types of taxes should be preceded by a careful examination of those issues.

BC Treaty Process

The first modern treaty settlement in British Columbia, that for the Nisga'a Nation, did not include any aboriginal taxation powers over non-aboriginal residents. Yet, the treaty provided that,

> [f]rom time to time, Canada and British Columbia, together or separately, may negotiate with the Nisga'a Nation, and attempt to reach agreement on . . . the extent, if any, to which Canada or British Columbia will provide to Nisga'a Lisims Government or a Nisga'a Village Government direct taxation authority over persons other than Nisga'a citizens, on Nisga'a lands.[245]

Thus, while the Nisga'a did not assume tax powers over "non-citizens" (non-aboriginals and non-member aboriginals) at the outset, their treaty does anticipate this as a possible future development. The treaty also removed the Nisga'a people and lands from the Indian Act and provided for a phased elimination of the section 87 tax exemptions for Nisga'a citizens and other status Indians residing on the former reserve lands. The exemption for sales taxes is to disappear 8 years after the treaty takes effect, and the exemption for income tax is to disappear after 12 years. During this transitional period, resident aboriginals will be given a remission of tax otherwise payable, applied to yield the same outcome as if the land had remained reserves.

Analysis

The BC treaty process offers useful insights into the views of governments on the issue of aboriginal taxation of non-aboriginal residents. The BC government had stated in an earlier position paper on its approach to fiscal arrangements in treaties:

> In addition to existing powers of property taxation, First Nations will be able to levy other taxes on their own members on their own lands. . . . Other tax powers may be negotiated at the same time as treaties, or be delegated from time to time by Canada or the Province. These will exist concurrently with federal and provincial powers. Any First Nation tax systems which affect non-members must be comparable to provincial taxes and must be non-discriminatory. This means they must apply to First Nation members as well as non-members.[246]

245 Nisga'a Final Agreement, initialed by Canada, British Columbia, and Nisga'a Nation, August 4, 1998, 217.

246 British Columbia, Ministry of Aboriginal Affairs, "British Columbia's Approach to Treaty Settlements: Fiscal Arrangements for Treaties" (mimeograph, Victoria, March 28, 1996), 3-4.

The minister of DIAND addressed this issue as follows:

> Possible future arrangements for taxation of residents who are not Nisga'a citizens is speculative. . . . The province will exercise its property tax jurisdiction and may choose to delegate that authority, but provincial officials have clearly indicated that any future delegated authority would be conditional on resolving issues [of taxpayer representation]. . . . They have made it very clear that any form of taxation without representation will not be acceptable.[247]

The context for the Nisga'a treaty with respect to taxing non-aboriginal residents differs sharply from that on more urban reserves, particularly those with many resident non-aboriginal leaseholders. Non-aboriginal residents on the remote Nisga'a lands are few, and their potential tax revenues correspondingly limited. It may be that the tax issue simply was not worth risking any controversy over the representation rights of taxed non-aboriginals, given the heated public debate over the treaty. The chief federal negotiator in the Nisga'a treaty talks wrote insistently:

> As for the notion that the agreement leads to taxation without representation, I should make it clear that the Nisga'a government has the power to tax only Nisga'a citizens on Nisga'a lands. Other citizens will continue to pay their taxes to the various levels of government to which they elect officials.[248]

The BC premier also took pains to stress this point:

> The Nisga'a treaty doesn't create taxation without representation. . . . The Nisga'a can only tax their own people living on Nisga'a land.[249]

The dynamic will be very different for more urban bands that have a large leasehold land base, when they negotiate treaty taxation powers.[250] Still, in connection with negotiations for the Tsawwassen treaty, the chief treaty negotiator for the BC southern region asserted:

> It's a fundamental principle of ours that people who live on land controlled by a First Nation won't have to park their democratic rights at the entrance. . . . We're not going to agree to anything that takes away people's democratic rights. How could we?[251]

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247 Letter from Jane Stewart, Minister of DIAND, to C.W. (Chuck) Albert, President of Musqueam/Salish Parks Residents' Association, December 8, 1998.

248 Tom Molloy, "Inside the Nisga'a Treaty," *The Globe and Mail,* July 28, 1998.

249 Glen Clark, "The Aim Is Justice, Reconciliation and Certainty, the Premier Says," *The Vancouver Sun*, August 8, 1998.

250 As one indication of this, the chief of the Tsawwassen First Nation, which has large leasehold lands and tax revenues, made no mention of the tax powers it sought in a treaty but cited "the need to create appropriate consultation representation mechanisms for non-members and non-citizens." Speaking Notes of Chief Negotiator Kim Baird, Tsawwassen First Nation, Main Table Meeting, Tsawwassen Community Hall, July 30, 1999.

251 "Tsawwassen Treaty Faces Unique Residency Challenge," *The Vancouver Sun*, April 5, 1999.

It is revealing that the BC government, following its stance since the 1980s plans for Sechelt Indian government, has insisted on some form of representational rights of taxed non-aboriginals. The federal government, in contrast, has not offered such assurance but merely referred to the official BC position with respect to provincial taxes. Neither Bill C-115 nor the provincial enabling legislation included a requirement for even advisory rights of taxed non-aboriginals. However, in the treaty context, the BC government has taken a much stronger position on taxpayer representation, as opposed to other taxpayer protection methods such as non-discrimination or comparability with neighbouring jurisdictions. The Nisga'a treaty does not delegate taxation powers over non-members, and the province retains discretion over the terms of any future tax delegation, including representation rights and the amount of tax room granted. Moreover, the BC government has not offered a property tax delegation in any of its recent treaty offers, and some bands have been told that they should not assume they will be ceded all of the tax room (unlike with the ISGEA).[252]

Other Commentaries

Other individuals and organizations have also offered commentaries on representation and discrimination issues that arise with First Nations taxation of non-aboriginals. The co-chair of RCAP testified before the Commons Committee on Aboriginal Affairs:

> On aboriginal lands, if there are to be extended lands, as Georges [Erasmus] said, people are marrying out in the proportion of 50%, but in addition there are likely to be more and more non-aboriginal people living on those lands. We're very clear that these people, even with a nation-base model of self-government, should be given a right of representation, of influence, if they are going to be taxed and subjected to the laws on these territories.[253]

Of course, this point still leaves unsettled what institutional requirements would be needed to ensure meaningful participation by non-aboriginal residents in the means of governance.

Some have noted the potentially divisive and contentious consequences of providing First Nations governments taxing powers over disenfranchised taxpayers. A policy analyst for the Shuswap Nation Tribal Council expressed these concerns as follows:

> [T]he extension of First Nation taxation jurisdiction to . . . non-status residents, and/or non-Aboriginal persons whose source of income is on First Nation land,

252 Note also that under the agreement-in-principle for the Sechelt Indian Band, the province continues to retain the school portion of property taxes. These observations were provided by Duncan Jillings, Tax Policy Branch, BC Ministry of Finance and Corporate Affairs.

253 Testimony of René Dussault to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Meeting no. 27, February 11, 1997.

> will certainly raise concerns about taxation without representation. These taxpayers currently do not have a vote in First Nation elections. A number of alternatives must be explored such as setting up local tax boards to address this most volatile of issues. Interested First Nations should prepare for a public relations battle on this matter.[254]

Policy analysts examining the provisions for First Nations property taxation in British Columbia offered the following observation:

> With the implementation of Bill C-115, Indian governments are now in the position of governing others in a most critical area of government authority—taxation. . . . No matter how "good" the service may be, if it is not what is wanted, the leaseholders will resent being taxed to pay for it. Additional resentments could arise because of the fact that the leaseholders have no vote in the election of the band council and are therefore subject to "taxation without representation."[255]

Based on a complaint lodged in 1999 by leaseholders in the Salish Park subdivision of the Musqueam Indian Reserve, the BC Civil Liberties Association examined the issues of representation. In 2000, their board approved several resolutions:

> Aboriginal authority to impose property taxes on non-Band/First Nation leaseholders under the Indian Act raises civil liberties concerns. Such authority is an example of a First Nation acting qua government authority rather than being simply a private matter between contracting parties. This authority reflects a trend to provide First Nations with greater autonomy culminating in treaties for self-government. Civil libertarians are concerned about the implications for democratic participation of non-Band/First Nation members in this trend.
>
> Non-Band/First Nation residents within aboriginal jurisdictions (Indian reserves and treaty territories) have a right to participate meaningfully in decision-making within those jurisdictions regarding matters that significantly and directly affect them. . . . Canadian citizens who are not members of a Band/First Nation have a right to participate in governmental decision making that affects them within aboriginal jurisdictions because they retain some significant degree, though it may be necessarily attenuated within aboriginal jurisdictions, of their sovereign status throughout Canada. The right of citizens to participate meaningfully in decision-making that affects them is a fundamental characteristic of Canada's democracy. . . . To balance the competing principles of aboriginal self-government and non-Band/First Nation residents' right to participate meaningfully in decision making that

254 André LeDressay, "A Brief Tax(on a me) of First Nations Taxation and Economic Development," in Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance*, Report of the National Round Table on Aboriginal Economic Development and Resources (Ottawa: Supply and Services, 1993), 215-46, at 231-32.

255 Robert L. Bish, Eric G. Clemens, and Hector G. Topham, *Indian Government Taxes and Services in British Columbia: Alternatives Under Bill C-115 and Bill 64* (Victoria, BC: University of Victoria School of Public Administration, Centre for Public Sector Studies, April 1991), 9. Professor Bish has been a long-time consultant to ITAB and DIAND on taxation matters.

> significantly and directly affects them, when the non-Band/First Nation population is close to, equals or outnumbers the aboriginal population within an aboriginal jurisdiction, then decision making procedures will be weighted in order to respect the principle of aboriginal autonomy and self-determination.[256]

The association has taken an interest in the issue not solely based on the Musqueam complaint but also because of others subject to First Nations taxes and the growing numbers of non-aboriginals who could be involved on treaty settlement lands. The BC Civil Liberties Association had earlier issued a position paper that supported the Nisga'a treaty's various provisions for input by non-aboriginals who reside there and are subject to Nisga'a school and hospital authorities (but not taxes).[257]

An adviser to many BC First Nations on treaty matters has offered a positive view of the potential for inclusive, representative government on aboriginal lands:

> Jurisdiction is linked to the degree of democratic input by residents. For example, the more non-treaty residents participate in First Nation government, the greater jurisdiction the government will have. For instance, if a First Nation allows non-treaty residents the right to vote and hold office in its government, it will be able to tax those residents. . . .
>
> Of course the problem with giving non-treaty residents these rights is that the treaty government and rights could be watered down as a result. This problem can be avoided by providing mechanisms in the government model that protect treaty rights. For example, public government non-treaty politicians or voters may be excluded from decisions that will affect treaty rights. Their involvement will be limited to public government matters, such as taxation and the provision of services to them.[258]

His view is that there is no need to compromise the representation rights of non-aboriginal residents on First Nations lands with respect to the public functions of government:

> [T]he First Nation government's jurisdiction extends to all residents regardless of citizenship. However, the First Nation's constitution would prohibit a non-citizen from voting on treaty matters. Only treaty beneficiaries could vote on such matters (harvesting rights, sale or lease of land, royalties, use of settlement moneys, etc.). Other residents could have the usual democratic input on matters of a public government nature.[259]

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256 BC Civil Liberties Association, Board Meeting Minutes, May 8, 2000 and September 18, 2000.

257 BC Civil Liberties Association, "Civil Rights Group Supports Nisga'a Treaty, Opposes Referendum," *News Release*, December 3, 1998.

258 Robert A. Reiter, "Aboriginal and Treaty Rights: A Survey of Case Law and Future Directions in Law and Policies" (2000), vol. 48, no. 4 *Canadian Tax Journal* 1193-1231, at 1224-25.

259 Ibid, at 1225.

RESOLVING THE ISSUES

All the central issues for First Nations tax policy with respect to non-aboriginal residents—representation, discrimination, and accountability—are interconnected. Appropriate provisions for representation and non-discrimination are needed to achieve accountable government. At the same time, aboriginal rights to self-government—often expressed as First Nations sovereignty or autonomy—must be respected. The issues of representation and discrimination were assessed in earlier sections; some considerations in balancing the interests of non-aboriginal representation with aboriginal autonomy were examined. Here, three alternative approaches to resolving all of these issues are proposed. The approaches are delegated governance, joint governance, and constrained governance. Any real-world solution may need to draw elements from more than one approach. Various approaches to resolving the representation issue place different demands on the removal of discriminatory taxing provisions. Additionally, the objective of governmental accountability applies for aboriginal residents as well as non-aboriginal residents, and both groups might gain from appropriate institutional changes. Diverse value judgments will be involved in selecting the best way to resolve these issues. Most of the proposed solutions would require statutory amendments to the Indian Act.

Delegated Governance

The simplest solution to these issues is one of delegated governance, following the model set by the Redwood Meadows Townsite on the Tsuu T'ina Nation in Alberta.[260] In this approach, the non-aboriginal residents establish their own institutions for governance on the leasehold area within the reserve. The First Nation delegates to its lessees the powers to collect all taxes within the leasehold area and to pay for local public services used in that area. This approach requires no provisions for representation of non-aboriginal taxpayers in the First Nation government, since the lessees institute their own government for local purposes.[261] It also does not require that the First Nation members relinquish their existing exemptions from property tax. Because the two communities then obtain their public services from different institutions, financed in different ways, there is no longer any issue of discrimination in the application of taxes. This approach is currently pursued on Tsuu T'ina under the Indian Act, but a recent ruling by a provincial body suggests that the First Nation retains its right to tax within the leasehold area and that it does not have the authority to delegate "taxation" powers to its lessees, only the power to collect the cost of

260 See the description of Redwood Meadows in the section on "other reserve leasehold experience," following the account of the Musqueam experience.

261 Of course, these arrangements still leave the leasehold residents subject to various zoning and land-use decisions on the adjoining parts of the reserve and general bylaw-making powers of the band.

providing public services. If that position is correct, then appropriate amendments to the Indian Act would be indicated.

Delegated governance would provide a clean separation between the governance of the lessees by their own institutions and aboriginal self-governance through their First Nation. Clearly, this approach might be construed by many First Nations as diluting their powers of government or sovereignty within their territories. That might make them resistant to adopting this approach, and indeed the situation leading to the Redwood Meadows scheme was somewhat unique. Still, delegated governance would offer benefits to both First Nations and non-aboriginal lessees. This approach would avoid the potential for friction and perceptions of disadvantage that can arise for lessees under current First Nation taxing arrangements. It would also facilitate a clearer distinction between the taxes and the lease payments that lessees have to pay to the First Nation. First Nation taxes can be levied with discretion and increased *ex post*, unlike lease payments that must be mutually agreed upon. If the possibility of raising lessees' taxes disproportionately to their services is removed, then the leaseholds become more attractive and they can yield higher lease revenue to the First Nation. In the context of British Columbia (and some other provinces), this approach could also yield substantial revenues to the First Nation. In British Columbia, for example, the tax room that has been created for First Nations by the province would be reflected in tax collections by the lessee entity from its members and remitted to the First Nation government.[262]

Joint Governance

Of the three methods proposed here, the joint governance approach poses perhaps the most challenges for successful implementation. It would involve First Nation public government that was jointly operated by aboriginal and non-aboriginal residents of the reserve lands. In the earlier discussion of representation, an analogy of this situation with the representation rights of off-reserve band members was made. As in the solution proposed in the decision of *Corbiere v. Canada*, an initial step is to distinguish between the areas of governance that concern each of the two groups. Then institutions setting the rules for voting, numbers of representatives, and the like, must be devised to accommodate the situation. In *Corbiere*, the Supreme Court suggested several possibilities, such as special seats on a band council for non-residents. It then stated that

> [m]any other possibilities can be imagined, which would respect non-residents' rights to meaningful and effective participation in the voting regime of the community, but would also recognize the somewhat different interests of residents and

262 Presumably, the terms would be contractually fixed between the lessees and the First Nation, and the assessment methods would parallel those used off-reserve in the province and the tax rates (other than that needed to service the reserve leasehold area) would be constrained to mirror those of the off-reserve taxing authorities.

> non-residents. However, without violating s. 15(1) [of the Charter], the voting regime cannot, as it presently does, completely deny non-resident band members participation in the electoral system of representation. Nor can that participation be minimal, insignificant, or merely token.[263]

Note that the court did not feel advisory input was sufficient but stipulated "participation in the electoral system of representation." A close analogy can be drawn to the circumstances facing non-aboriginal residents on reserves who are subject to First Nation government.

Most likely the joint governance approach would not include seats on the band council for non-aboriginal residents but rather a separate public government body for the First Nation. Band governance functions affecting solely aboriginal matters would be retained by the band council. This scheme is similar to the division of powers provided in the Sechelt Indian Government District, except that for Sechelt only band council members sit as members of the public government body, and non-members have merely advisory input. Joint governance could be applied without eliminating discriminatory application of taxes. This would still provide greater governmental accountability to taxpayers than the current regime. It might also necessitate some form of constraints on the tax rates and assessment methods that can be applied. However, eliminating discriminatory taxes—with relieving provisions for individuals at low income or wealth—would provide the greatest degree of governmental accountability. It would make First Nation government more accountable and responsive to its own members' wishes as well as those of non-aboriginal residents. This approach to governance could foster the evolution of healthy interaction between the two communities living in a First Nation. Each of the other two approaches tends to increase the separation between the two communities.

A possible barrier to the adoption of joint governance might be First Nation concerns about the weakening of aboriginal autonomy. Even with limits on the number of seats in the decision-making body set aside for non-aboriginals,[264] there could be nervousness about the sharing of power and upsetting existing balances of power among band factions. Still, the band council would continue to exercise all powers in areas that involved strictly aboriginal matters, and it would continue to manage the band's lands, funds, and economic development projects. Joint governance would not simply recognize the representation rights of non-aboriginal residents on reserves. It also acknowledges that no government's autonomy is absolute or unconditional. First Nations like other jurisdictions cannot neglect their interdependence and their responsibilities to others, particularly those with whom they do business and live as neighbours. One

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263 *Corbiere*, supra footnote 148, at 273.

264 In the earlier subsection on the issue of representation, one possible approach was to give a bare minority of seats to non-aboriginal residents when they outnumbered aboriginal residents.

might further argue that aboriginal sovereignty is not identical to and can be in conflict with the accountability of First Nation governments to their own members. There have been many incidents of mismanagement of band funds by chiefs and councils, where the grassroots aboriginal residents have been deprived of access to their rightful resources.[265]

Constrained Governance

The final approach is constrained governance. It addresses the issues of representation and discrimination in an indirect way. Rather than providing non-aboriginal residents with representation or removing aboriginals' tax exemptions, it seeks to constrain the degree to which First Nation governance can be exercised unilaterally at the expense of the resident lessees. For example, on the taxation side of local governance, First Nation property taxes could be constrained to use assessment methods identical to those used in the province at large and tax rates equal to those in surrounding municipalities or rural districts. On the servicing side of the equation, there could be a requirement that leasehold areas of a reserve be locked into a long-term service agreement with an adjoining municipality or that they receive services comparable to surrounding areas, whether provided by the band or another jurisdiction. As with delegated governance, this approach does not provide any direct guarantees to lessees that they will be insulated from the zoning, land-use, and general bylaw powers of the First Nation where they reside. As its name suggests, constrained governance would exercise some constraints on First Nation autonomy, but it would do so in a way that might be perceived by some as less invasive than joint governance.

Constrained governance offers a form of indirect representation for non-aboriginal lessees. They can vote for members of their provincial legislature who draft the laws on property assessment in the province, and in many cases they can still vote in the elections of a municipality within which a reserve is located. Even where they cannot vote in a municipal election, their interests and concerns vis-à-vis the tradeoff between tax rates and public services might be better reflected in the tastes of municipal voters than those of their local band council. Municipal voters are subject to the taxes needed to finance their public services, whereas voters in band council elections do not face this taxpayer discipline. If constrained governance is fully applied, this reduces any concern over the discriminatory application of taxes by First Nations. In effect, the non-aboriginal lessees obtain a package of public services and tax burdens closely

265 For example, "No Records for Millions of Dollars at Alberta Reserve," *The Globe and Mail*, May 22, 2000 and "Band Spending a Concern Across Country," *The Globe and Mail*, May 22, 2000. The latter article cites reports of the misuse of band funds on more than 230 reserves across Canada. Also see "Indian and Northern Affairs Canada—Funding Arrangements for First Nations: Follow-Up," chapter 10 of Canada, *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Supply and Services, April 1999).

mimicking what they would receive if they were not subject to aboriginal jurisdiction. How the First Nation chooses to finance the services for its own members is, in that case, not a matter of legitimate concern for the lessees.[266]

In fact, a form of constrained governance was practised in the early 1990s under policies endorsed by ITAB and followed by most taxing First Nations. Assessments were done using on-reserve freehold-equivalent values, and ITAB had a "comparable rates" policy for First Nation property taxes. With the shift of ITAB's policies to assessments by "fee-simple *off-reserve*" values and "budget-based" tax rates, these constraints on First Nations taxing powers are being eliminated. Also notable is that the federal government's stance on First Nation taxation, expressed in its Department of Finance paper and its subsequent policies, contains a version of constrained governance. Insofar as First Nations seek broader taxing powers, such as income and sales taxes, they will have to rely on other governments to collect those taxes. The federal government has offered to enter into tax-collection and revenue-sharing agreements with First Nations but only if they apply the same tax base and tax rates. Through the leverage of tax collection, the government thus may constrain the taxing powers of First Nations with respect to disenfranchised residents.[267] In the property tax arena, such constraints on First Nation tax practices would have to be embedded in ITAB policy (as they were previously), regulations made under section 83(5) of the Indian Act, or amendments to the act.

SUSTAINABILITY OF THE STATUS QUO

The situation facing non-aboriginal lessees on the lands of First Nations that have exercised their section 83 taxing powers combines lack of representation and discriminatory taxation. While this situation has not universally led to major problems or disadvantage for lessees, it does raise questions about their Charter rights. In particular, their representation rights and equality rights have been violated, and whether this can be justified by aboriginal autonomy rights has not yet been tested in the courts. The discrimination issue has been contested only in the context of a corporate entity subject to First Nations tax, and the case was based on delegation of authority to discriminate rather than Charter matters. At trial of the *CP-Matsqui* case, the judgment clearly rejected such discriminatory treatment. On appeal of the case, two of the three judges accepted that there was adequate delegation of authority to discriminate, but one of those joined the third judge in asserting that the discriminatory tax treatment of aboriginal and non-aboriginal interests was not acceptable. Hence, further court testing will be

266 In support of this point is the observation that Musqueam Reserve leaseholders became upset over the band members' property tax exemptions only after the lessees' property taxes jumped following a change in assessment methods.

267 As noted in the earlier section reviewing the Finance Department working paper, the federal government is also insisting on non-discrimination as a condition for tax collection arrangements.

needed to determine whether the existing terms on which First Nations apply their taxes are legally sustainable.

It is illuminating to observe the existing provisions for First Nations taxation that exist outside of the Indian Act. The Sechelt Indian Government District, established by special federal and BC legislation, applies property taxes to all interests in land without any discrimination; it also requires a formal advisory body for non-aboriginal residents but no representation in the decision-making body. The Nisga'a treaty contains no provision for immediate taxing powers, but it does specify that tax powers over non-aboriginal residents may be granted in the future through agreement with the federal and BC governments. The federal government has strongly asserted that it will accept future First Nations taxation jurisdiction only on the condition of non-discrimination.[268] The BC government has stated that it will require non-discrimination and additionally representation rights for all persons subject to tax. Tax-collection agreements that the federal government has negotiated with several First Nations for GST and the Yukon First Nations for personal income taxes also embody these principles. Both arrangements apply without discrimination to all persons living on the First Nation lands, and both taxes are applied at the same rates and on the same terms as for other Canadians residing on adjacent non-reserve lands. That approach acts as a proxy for representation rights, following our model of constrained governance.

Proposals for non-discrimination and representation rights of all persons subject to First Nations taxation have also received support within the First Nations community.[269] The Report of the Royal Commission on Aboriginal Peoples stated that First Nations taxing powers should apply equally to all persons residing on aboriginal territories. It viewed this both as a matter of equity between aboriginal and non-aboriginal residents and as a natural expression of the aboriginal exercise of self-government. Removing the tax exemption for aboriginal residents would have an added benefit, beyond eliminating discrimination. It would enhance the accountability of First Nations governments to their primary population. Tax credits could be applied to relieve those residents, both aboriginal and non-aboriginal, unable to pay their property taxes. The commission further stated that non-aboriginal reserve residents subject to First Nations governance and taxation should be effectively represented in the decision-making processes of aboriginal governments, but it appeared to accept advisory input as sufficient.

The sustainability of the status quo for section 83 tax powers could be strained by the actions of a small number of taxing First Nations. By exercising tax

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268 This federal position had not been formulated at the time of Bill C-115, which amended section 83 of the Indian Act to allow First Nations to tax leasehold interests but did not clearly require non-discrimination.

269 Also see the statement by an adviser to many BC First Nations, Robert Reiter, in the section on "Other Commentaries."

powers in a heavy-handed manner, they could undermine the reputation of other First Nations as responsible and restrained governing authorities. If there grows to be a wider perception that leasing lands from First Nations carries a unique risk stemming from their taxation jurisdiction, this will depress the lease rental revenues that any First Nation can obtain regardless of how responsibly it has managed its tax regime. This concern was cited by ITAB as one reason to expand its powers under a First Nations Taxation Commission.[270] However, such a body would be mainly accountable to the First Nations community rather than to non-aboriginal reserve residents or the wider Canadian public. That fact would not instill the confidence needed to ensure the optimal conditions for First Nations to develop their lands in an economically beneficial manner. Potential lessees would have much better assurance if they knew their interests would be protected in the same way that they are in the rest of the country—through customary rights of voting, representation, and equal treatment under the law.

One possible barrier to resolving these issues might be concern over limiting First Nations' ability to pursue economic development on reserves. Yet, this concern appears to be misplaced. Band members living on reserves will obtain maximum long-run economic benefit by maximizing land values on the reserve.[271] Leasehold land values can be maximized in the market only by giving lessees certainty in their property rights and effective voice in decisions on the taxes they pay and the public services they get for those taxes. Delegated governance or joint governance without discrimination could achieve those objectives. Alternatively, constrained governance with respect to taxes, public services, and land use could provide lessees with the requisite measure of certainty. While any of these approaches will limit First Nations' access to taxation revenues, and tie them closely to the public services provided, they will generate the maximum lease revenues for use as the band government chooses. In short, unlimited and exclusionary aboriginal governance will not bring First Nations their highest economic benefit but rather will deter potential business partners and depress land values.

Extending genuine representation rights to non-aboriginal residents would improve governance and foster healthy relationships between the two groups living on a reserve. The division of governance between issues of band and public government will protect First Nations autonomy. Uniquely aboriginal issues will remain the preserve of the band council, while issues of public

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270 "[C]harging maximum property tax rates to existing taxpayers . . . is wrong because it frightens investors and shows no regard for the effects of this strategy on the interests of other First Nations. . . . [T]his apprehension is directed at all First Nations and all First Nation issues regardless of the particular source of the unease." Indian Taxation Advisory Board, *Responding to Challenges*, supra footnote 68, at 2-4.

271 As discussed earlier and in table 3, some bands may have a shorter-run economic incentive to maximize their tax revenues.

governance, including taxes and general public services, will be open to participation by all affected residents. In only a handful of reserves across Canada (almost all in British Columbia) do non-aboriginal residents outnumber aboriginal residents, so that any concerns about diluting aboriginal autonomy even in the area of public governance are unjustified. And in those few cases, any residual concerns could be addressed through methods such as delegated governance or joint governance in which representation of non-aboriginal residents in the decision-making body is restricted to a bare minority. Hence, there are solutions to First Nations governance that will ensure the representation and equality rights of non-aboriginal residents while simultaneously enhancing governmental accountability and respecting aboriginal autonomy.

APPENDIX: TAX ASSESSMENT OF RESERVE LEASEHOLDS

For property taxes in the First Nations context, the basic question for assessments is how to value a leasehold interest in land on a reserve.[272] This matter involves both conceptual issues and practical issues of implementation or measurement. However, as our analysis shows, it is critical that measurement concerns not overshadow the choice of a conceptually correct base for the tax. The treatment here examines the conceptual basis for all property assessments and applies it to leaseholds whether on or off reserve. It then reviews the various assessment methods that have been used for reserve leaseholds and the related jurisprudence. This is followed by an analysis of the issue, including a critique of the assessment practices that have been used and their legal precedents. The practices and case law cited here rely on experience in British Columbia, where most First Nation property taxes have been levied. Similar issues arise elsewhere in Canada, and the conceptual issues will be identical even if the case law differs.

Conceptual Basis

Assessment for property tax purposes seeks to achieve an equitable and efficient allocation of the total tax burden across individual properties. It is common practice for authorities to apply tax rates differentiated by the class of a property, distinguishing among residential, commercial/industrial, agricultural, and public utility uses. Within each property class, a uniform tax rate is typically applied, and a goal of the assessments is to determine the relative values of properties within the class. This approach aims to spread the tax burden based on the comparative values or utilities associated with the respective properties. It is both fair and efficient to assess for tax purposes the full value of the property, whether it is held in fee simple (freehold) or as a leasehold. For leaseholds, there are two interests in the property—that of the lessee as measured by market value

272 Another relevant assessment issue, not addressed here, is how to value resident band members' interests in their homes held by way of certificate of possession. This issue would arise if the First Nations property taxes were extended to band members.

of the leasehold interest and that of the lessor. The latter is the present value of the lessor's rights to the property when its lease expires, called the reversionary interest. If one failed to include the lessor's interest in a leasehold for tax assessment purposes, this would be inequitable relative to those holding comparable properties in fee simple. It would also pose inefficient incentives for people to undertake rental or leasing arrangements aimed primarily at property tax avoidance.

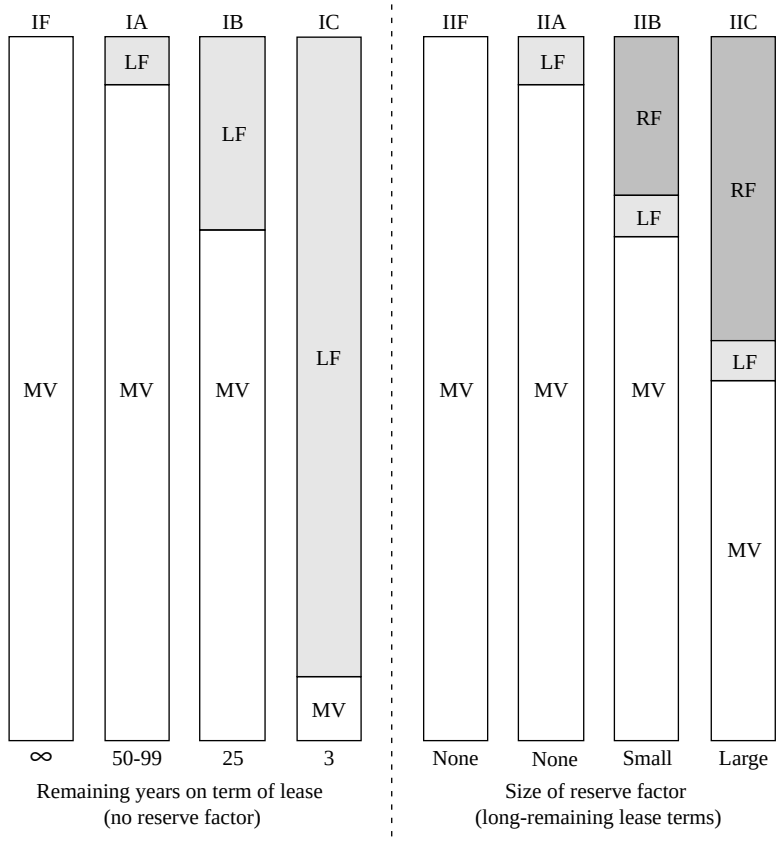
The need to include the lessor's interest for proper relative assessments of leaseholds and freeholds can be seen in figure 3. The left panel of the figure shows three physically identical leasehold properties (denoted IA, IB, and IC) with varying numbers of years remaining on their terms. All are assumed to be fully prepaid leases,[273] and they are also assumed identical in their neighbourhood and jurisdictional attributes. For example, they could be located side by side with the only difference being the number of years left until their leases expire. One can further postulate that situated adjacent to them is a freehold property (depicted as IF), also identical in its physical, neighbourhood, and jurisdictional attributes. Since all four properties are identical in every tangible respect (except for their lease terms), it is reasonable to assume that each carries the same value or utility. Hence, the four properties should all be assessed as identical in value for property tax purposes at a sum equal to that of the identical freehold. For the leaseholds, variations in the proportion of the total value held by the lessee (MV for market value of the leasehold interest) and by the lessor (LF for leasehold factor, representing the reversionary interest) should be disregarded when assessing the full property value.

The right-hand panel of figure 3 again depicts a freehold property along with three physically identical leaseholds all having the same long time to expiry. What varies across the properties in this case are attributes other than the physical features of the property itself.[274] All these other attributes are called the "reserve factor" (RF), which encompasses the impact on a leasehold's market value relative to a physically identical freehold that stems from differential neighbourhood and jurisdictional attributes. Potentially this reserve factor can be non-existent, small, or large, depending on the differences that exist and how home buyers value them. It is also possible for RF to be negative (not illustrated) if the leasehold has neighbourhood and/or jurisdictional attributes that the market finds superior to those of the freehold. Clearly, as before, if there is no reserve factor (no differentiating attributes between the leasehold and the freehold), the leasehold should be assessed at the same value as its counterpart

273 Leaseholds with ongoing rental payments will be considered later.

274 The phrase "the properties' physical attributes" refers to characteristics of the land, such as lot size and shape, grade, subsoil conditions, drainage, vegetation, view, etc. The analysis can ignore characteristics of the structural improvements, since the methods for assessing them (such as depreciated construction cost) are well-established and non-controversial.

Figure 3 Comparison of Physically Identical Prepaid Leasehold Properties in Varying Conditions[a]



MV = market value of lessee's interest in the property.

LF = leasehold factor, or present value of lessor's (reversionary) interest in the property.

RF = reserve factor, or impact on market value of the reserve property vis-à-vis a physically identical off-reserve property, which reflects differential neighbourhood and jurisdiction effects.

[a] All properties are identical in their physical attributes and are fully prepaid leaseholds, except for IF an IIF, which are freeholds. Properties IA through IC (left panel) all have no discount from "reserve factor" but vary in their remaining lease periods. Properties IIA through IIC (right panel) all have the same long-remaining lease period but vary in their market discount from "reserve factor."

freehold, even if they are located in different neighbourhoods and subject to differing governmental jurisdictions. Thus, IIF and IIA should be assessed at the same values, and the market value of an identical freehold is one method that can be used to assess the fee-simple equivalent value of the leasehold.

Where a positive reserve factor affects the market value of a leasehold, one cannot simply use the market value of a physically identical nearby freehold to

assess the leasehold. This follows from the assessment standard of equating properties with the same value or utility. Properties with a positive reserve factor have conditions (neighbourhood and/or jurisdiction) that make them less valued and lower in utility for home buyers and owners than those with no reserve factor. The two most common methods used to assess residential properties—the comparable sales approach and the cost approach—both hinge on the choice of comparison properties "with equal desirability and utility."[275] Leasehold properties IIB and IIC are not equal to IIA or IIF in their desirability or utility, as evidenced by their lower market values. Naturally, home buyers care about the amenities of a home's neighbourhood and the quality and reliability of the local government in terms of its public services and tax burdens, just as they care about the strictly physical attributes of the home. Even after adding back an amount for the finiteness of the lease (LF), one does not obtain values that equate with the freehold or a leasehold not subject to the same reserve factor.

Of course, one could still assess the leasehold by selecting a comparison freehold that had the same neighbourhood and jurisdictional attributes. But given the unique aspects of First Nations jurisdiction facing reserve leaseholds, and the sometimes unusual neighbourhood attributes, this would be a difficult exercise. To find suitable comparison properties, one might have to look very far from the reserve location, and then there would be the added difficulty of controlling for the market effects of location differences (such as size of municipality or distance of commute to business centre). A more reliable method of assessing leaseholds such as IIB and IIC would be to take their market values (or that of similar leasehold sales) and to add a computed adjustment for the leasehold factor (LF). This approach assumes that, other than items that might enter the jurisdictional component of the reserve factor, the only factor that differentiates a prepaid lease from a freehold is their differential term. A fee-simple property has an unlimited or infinite term on its holding, whereas the counterpart leasehold has a fixed period for the lessee to enjoy its use. If there are any other lease restrictions on the use of the property (besides finiteness of the lease), their impact on market value should be considered in the assessment.

Assessment in Practice

When leasehold properties are found on non-Crown, non-reserve land, they are properly assessed by taking the market value of an identical or very similar freehold that is subject to the same neighbourhood and jurisdictional conditions. For example, if a leasehold lot and a freehold lot of identical size, dimensions, grade, and view are located side by side, they should be assessed at the same value—

275 This is a common definition and conceptual basis for property assessments. See any reference work on the subject, such as "Valuation of Property," in *British Columbia Real Property Assessment Manual, 2000 Update* (Vancouver: Continuing Legal Education Society of British Columbia, 2000).

namely, the recent selling price of the freehold lot. This approach is followed in British Columbia and many other jurisdictions.[276] If the leasehold property is located on Crown land, a similar approach should be employed. However, in this case any adjacent properties that might be used for comparative valuation purposes are also located on Crown land and hence not fee-simple properties. In this case, the choice is to use either a computational adjustment for the leasehold factor (LF) or else to take a comparison property that is a very similar freehold not on Crown land. The practice in British Columbia is to take non-Crown freehold comparisons, but such properties must be carefully selected for similar neighbourhood attributes. While the jurisdiction cannot be identical in both cases, it is very similar in that the lessee has normal voting and representation rights just as does the owner of the fee simple property not on Crown land.

Assessing leaseholds on Indian reserves raises issues similar to those in assessing leaseholds on Crown lands. Still, there is a potential difference from the Crown leasehold analogy if the market perceives a "reserve factor" based on the differing jurisdictional attributes of reserve leaseholds. Even before the passage of Bill C-115 in 1988 and the assumption of taxing powers by First Nations beginning in 1991, there were jurisdictional differences between Crown and reserve leaseholders. Like the Crown lessees, the reserve lessees were taxed by the provincial and often municipal governments; they could vote freely and be represented in both governments. However, the reserve leaseholds often did not receive much in services from the municipalities, which also lacked legal authority for planning, zoning, and other regulatory activities on reserves. With the advent of First Nations taxing powers, such lessees became subject to taxation, public servicing, and local governance by an entity in which they had no vote or representation. Additionally, they became subject to tax and spending decisions by a band council, which was elected by band members who had exempted themselves from those taxes. This is a sharp difference in jurisdictional attributes from those with Crown land leases as well as those on freeholds.

Based on the earlier review of several taxing First Nations, it is apparent that they have had differing outcomes with respect to the emergence of a reserve factor, particularly a discount in market values attributable to jurisdiction. For the Westbank Reserve there appears to be little or no significant reserve factor; for the Tsawwassen Reserve there is a discount ranging up to 30 percent; and for the Musqueam Reserve the discount has approached half. Given that the cited discounts apply to the combined value of the land and improvements, the actual discount on the land values is even larger—nearly two-thirds in the case of Musqueam. The reason for these differing discounts is not known with certainty, but it is likely related to whether there is harmony or division between a First Nation and its lessees. Also, the few cases of substantial discounts arise with

276 An example of two adjacent properties in Vancouver, one a leasehold with the city and the other a freehold, was cited by the assessor's expert witness in the *Huyck-Lyman II* hearings.

upscale properties in urbanized areas, such as Tsawwassen and Musqueam. Moreover, once a discount is established, it will tend to persist even if its original cause has passed; home buyers may interpret the existence of a discount as evidence that there remain jurisdiction-related risks. Before the change in taxing and governance jurisdiction on the Musqueam Reserve, the leaseholds displayed no significant discount or reserve factor (see figure 2).

The actual methods used in British Columbia to assess reserve leaseholds have varied over time. In the 1980s, court and administrative rulings (described below) established that such leaseholds were to be assessed in the same manner as Crown leases—namely, by taking market values of comparable freeholds. This principle was not uniformly applied in practice. When First Nations assumed property taxation, the valuation principles to be followed were specified in their assessment bylaws. Even though almost all of the taxing BC First Nations used the BC Assessment Authority (BCAA) to undertake their assessments, the authority was obliged to apply the terms of the band's own bylaw rather than the BC Assessment Act. A widely stated intention was for First Nation assessment bylaws to parallel closely the provisions of the BC act. One First Nation stated:

> [T]he intent was and remains to make assessments done on Musqueam the same as the assessments that would have been done if Musqueam had not chosen to enter into the field of assessment and taxation.[277]

However, in practice, the assessment valuation provisions of the taxing BC First Nations vary markedly.[278] Also, over the course of the 1990s, many of the bylaws were amended in reaction to a series of events and rulings.

The account of property assessments in the case study of the Musqueam Indian Reserve is useful to illustrate the issues and also because of the significance of rulings from the Musqueam Board of Review for assessment practices of other BC First Nations. Before the band's assumption of taxing powers, the reserve leaseholds were assessed at figures close to those of comparable off-reserve leaseholds. Because at that time there existed little or no reserve factor, and because of the long remaining terms of the leases, these figures also closely approximated the actual market values of the prepaid leaseholds. In the first two years of Musqueam taxing authority, 1991 and 1992, the assessed values remained close to the leaseholds' market values despite the fact that a reserve discount had emerged. In 1993, the assessed values were raised steeply—by nearly two-thirds—to bring them back into line with the comparable off-reserve freeholds. These much higher assessed values were applied despite the absence of any

277 *Musqueam Taxation Newsletter*, issue no. 3, April 4, 1997, 2.

278 One property assessment manual for British Columbia states that "[e]ach Indian Act assessment and taxation bylaw package is potentially unique, different from the provincial legislation and different from the bylaws of other bands. . . . [E]ach bylaw should be examined individually to determine its meaning and legality." "Indian Taxation," in *British Columbia Real Property Assessment Manual, 2000 Update*, supra footnote 275, at 10-3.

change in the Musqueam assessment bylaw or much change in the leaseholds' market values. The Musqueam Board of Review, in its decision of *Huyck-Lyman I*, ruled that the assessments should be rolled back to reflect the market values of on-reserve prepaid leaseholds. As shown in figure 4, this is assessment method A. The board's ruling hinged on two passages in the Musqueam Assessment Bylaw that differed from the counterpart provisions in the BC Assessment Act.

Following the *Huyck-Lyman I* decision, several First Nations amended their original assessment bylaws to avoid the effects of that ruling. The amendments have taken a variety of forms but essentially aim to ensure that fee-simple off-reserve valuations are used. First, in 1995, the Columbia Lake Indian Band amended its bylaw to state that the leaseholds should be valued as "if held in fee simple off Reserve."[279] Using this new bylaw, the band's board of review upheld assessments based on the value of comparable properties off the reserve. Similar amendments to their assessment bylaws were made in 1995 and 1996 by the Seabird Island Indian Band, the Osoyoos Indian Band, the Songhees First Nation, Tsawout First Nation, the Westbank First Nation, and the Musqueam First Nation. In some of these cases the change was implemented by revising the wording in the bylaws' definition of "actual value." This follows the ITAB's "Sample First Nation Property Assessment and Taxation Bylaw":

> "actual value" means the market value of the interest in land as if it were held in fee simple *off reserve*; "assessed value" means the actual value of interests in land as determined under this bylaw. [Emphasis added.][280]

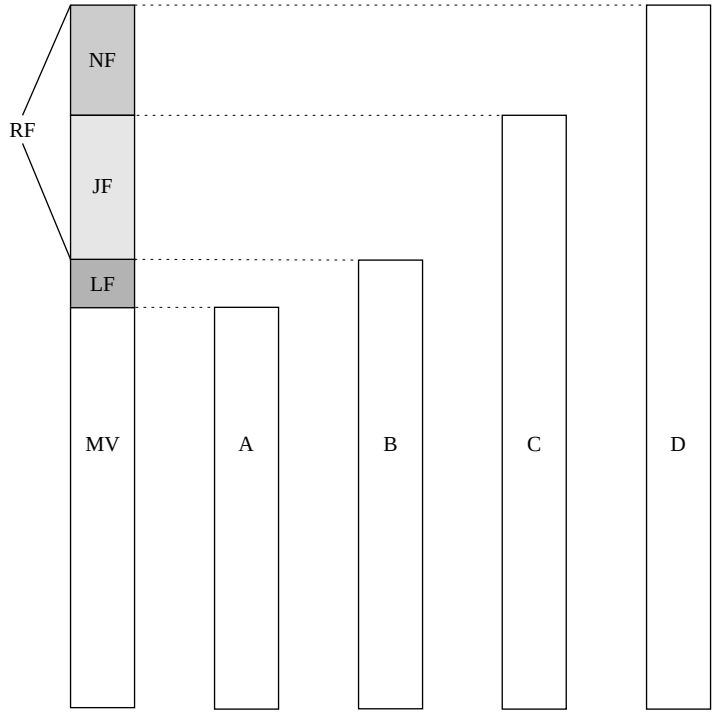
The Musqueam-amended bylaw departed slightly in its wording: "as if the interest holder held a fee simple interest *located* off reserve" (emphasis added; see table 5). Still, many of the taxing First Nations have not amended their bylaws and refer to "fee-simple interest" without any reference to "off reserve."

After Musqueam's bylaw amendment, the sharply increased assessed values of the leaseholds were appealed to the Musqueam Board of Review. In its 1998 ruling in *Huyck-Lyman II*, described earlier, the board upheld the assessor's valuations using off-reserve comparable properties without adjustments for the differential neighbourhood amenities or the differing jurisdictions. Musqueam's amended bylaw departed from those of most other First Nations in that it explicitly referred to the possible consideration of "jurisdiction, community facilities and amenities, and any other circumstances affecting the value of the land" on the reserve (see table 5). But the board ruled that these elements could not be considered because of the way the bylaw was drafted. Hence, the assessor was upheld in his view that even various neighbourhood conditions (such as distance to nearest schools, shopping, public transit, and the presence of some unkempt

279 The information on this and other First Nations' bylaw amendments is taken from the *Huyck-Lyman II* decision, at 11-12.

280 Supra footnote 187, at 43.

Figure 4 Alternative Assessment Methods for Reserve Leaseholds



MV, LF, and RF are defined in figure 3 (note: RF = NF + JF).

NF = neighbourhood factor, market discount of on-reserve leasehold vis-à-vis off-reserve freehold due to inferior neighbourhood attributes.

JF = jurisdictional factor, market discount of on-reserve leasehold vis-à-vis off-reserve freehold due to inferior jurisdictional attributes.

Assessment method	*Off-reserve freehold vis-à-vis on-reserve leasehold*
A: Assess at MV "on-reserve leasehold" (*Huyck-Lyman I*)	Inferior physical attributes Same neighbourhood attributes Same jurisdictional attributes
B: Assess at MV + LF "on-reserve freehold" (correct procedure)	Same physical attributes Same neighbourhood attributes Same jurisdictional attributes
C: Assess at MV + LF + JF "off-reserve freehold with same neighbourhood attributes"	Same physical attributes Same neighbourhood attributes Superior jurisdictional attributes
D: Assess at MV + LF + JF + NF "off-reserve freehold" (*Huyck-Lyman II*)	Same physical attributes Superior neighbourhood attributes Superior jurisdictional attributes

properties in the neighbourhood) could not be considered when assessing the reserve leaseholds. As a result, the decision implied an approach depicted as assessment method D in figure 4.

Despite the early attempt in First Nations assessment bylaws to parallel the approach of the BC Assessment Act, and the BCAA's position that reserve leaseholds should be assessed as off-reserve freeholds, this has not been done uniformly in practice. For example, the Tsawwassen leaseholds, even with their substantial discount to comparable off-reserve freeholds, have been assessed at close to their on-reserve market values. Until recently the Tsawwassen assessment bylaw specified that properties were to be assessed as "if the land was held in fee simple" but did not restrict this to off-reserve comparisons. Amendments to the bylaw approved in 2000 add to the definition of "market value" the phrase "without any reduction in value by reason of being situated on the reserve."[281] The new wording may have been intended to allow the assessor to consider neighbourhood attributes but not jurisdictional factors in valuing reserve leaseholds; this would give rise to assessment method C in figure 4.

Related Jurisprudence

A body of jurisprudence has developed with regard to the appropriate way to assess leaseholds on Crown and reserve lands in British Columbia. This is embodied in decisions of the BC Assessment Appeal Board, First Nations review boards, the BC Supreme Court, and the BC Court of Appeal. Appeals to decisions of the BC Assessment Appeal Board must be made by way of stated case to the BC Supreme Court, and they can raise only questions of law. Two important cases involving Crown leaseholds were *Re Lynn Terminals* (1963)[282] and *Northwest Holding Society v. The Corporation of Delta* (1966).[283] The former case reaffirmed that a non-reserve Crown lease should be assessed as a fee-simple interest, regardless of some complications in then-existing legislation. The latter case concerned the proper assessment of leased land on the Tsawwassen Indian Reserve; reserve lands must be surrendered to the Crown before leasing, so that they become Crown lands. These leases were for residential purposes for a period of 30 years with recurring rentals adjusted every five years. The leaseholds were assessed at fee-simple values but with an allowance for specified adverse neighbourhood attributes and lease restrictions. These assessments were upheld by the BC Supreme Court and further upheld by the BC Court of Appeal. The latter court asserted that

281 Tsawwassen First Nation Assessment By-Law, 1994, and Tsawwassen First Nation Assessment By-Law Amendment By-Law 1999.

282 [1963] 44 WWR (NS) 604; [1963] BC Stated Case 38 (SC) (the stated cases are published in British Columbia Assessment Authority, *Stated Cases* (Victoria: BCAA) (looseleaf)).

283 [1966] BC Stated Case 50 (SC) 263; upheld in the BC Court of Appeal, [1966] BC Stated Case 50 (CA) 266.

> it is inescapable that the assessment of the leasehold interests in the Indian lands referred to "at the actual value of the lands and improvements," being substantially the value of the freehold, was an assessment on proper principles.[284]

The quintessential case involving the assessment of reserve leaseholds in British Columbia arose in *Assessment Commissioner v. John Wayne Ryan* (1979).[285] This case, which affected 12 almost identical appeals, concerned leased lands on the Little Shuswap Indian Reserve that had only three years remaining on a long-term lease. The lessee submitted that he had recently purchased the leasehold interest for an amount far below the assessed value. The stated case posed the question: "what weight should be given to evidence of market value of an assessed interest in Crown land when that evidence indicates a value below the assessed value arrived at by assessing it as a private freehold[?]"[286] Citing the *Northwest Holding Society* case as a precedent, the judge ruled that

> the assessment of leasehold interests in Crown lands must be based on the actual value of the lands and improvements as if such lands were owned in fee-simple by the occupier rather than merely being leased.[287]

However, significantly, the judge declined to answer one question posed in the stated case: "Did the Board err in law when it found on the evidence that a 'Crown fee' is not a private fee and is not comparable with it?"[288]

The *John Wayne Ryan* case has been frequently cited by the BCAA and the BC Assessment Appeal Board and figured prominently in band-level assessment appeals after the start of First Nations taxing powers. For example, the BC Assessment Appeal Board relied on the case in several appeals where bands had not obtained taxing authority.[289] The case was cited by the Musqueam Indian Band's assessor in supporting the jump in leasehold assessments in 1993 and in the associated *Huyck-Lyman I* hearings. *John Wayne Ryan* was pivotal in sustaining assessed values in 1995 for the Columbia Lake Indian Band, one of the first to amend its assessment bylaw to specify "off-reserve" fee-simple values. The case was also cited by the Musqueam Indian Band's assessor in the *Huyck-Lyman II* proceedings and used in the board's decision to uphold the assessed values, which ignored both the neighbourhood and jurisdictional dimensions of the reserve factor. The Musqueam board decision stated:

> It is important to note this method of valuing leases is applied by the British Columbia Assessment Authority in all leases of Crown land (and there are thousands of them in the Province), in valuing leases of interest holders on Indian

284 Ibid., at 268 (CA).

285 [1979] BC Stated Case 124 (SC) 733.

286 Ibid., at 734.

287 Ibid., at 737.

288 Ibid., at 734.

289 For citation of the cases, see *Huyck-Lyman II* decision, at 7-9.

Reserves which do not have separate taxing authority, of leases of interest holders on Indian (or First Nation) Reserves that have independent taxing authority, and within land leased by the City of Vancouver.[290]

Analysis of the Issue

Given this conceptual basis and review of practices and jurisprudence, the problem is to reconcile the various elements and determine the correct method for assessing leaseholds on reserve lands. It appears that practices of the BCAA, as well as rulings of some First Nation assessment appeal bodies, have departed from the guidance in court decisions on the valuation of Crown and reserve lands. They have similarly strayed from basic standards for assessing properties at large. To explain this inference, we must return to the underlying concepts for assessments and gauge the recent practices against them. The cited court cases must also be re-examined to discern their intended guidance for assessing reserve leaseholds. Based on this analysis, it is useful to derive principles that can be translated into practical assessment methods for leaseholds. These methods must be able to handle cases of leaseholds with recurring rental payments and prepaid leases with relatively short periods until their expiry as well as long-term prepaid leases.

When the BCAA sharply raised the assessments for leaseholds on the Musqueam Indian Reserve in 1993, it was applying an approach to valuing reserve leaseholds based on its interpretation of the *John Wayne Ryan* precedent.[291] It used the market values of off-reserve freehold properties that were comparable in their physical characteristics to the reserve leaseholds and not far from the reserve area. An allowance was made for restrictions on use of the leasehold lands, but there was no allowance for neighbourhood or jurisdictional attributes. This "off-reserve freehold" approach is shown as assessment method D in figure 4. The deficiency of this method, as shown below the figure, is that it values the reserve leaseholds based on the market values of freeholds that have the same physical attributes but superior neighbourhood and jurisdictional attributes. This approach departs from common assessing practices, in British Columbia and other jurisdictions, of considering the impact of neighbourhood and jurisdictional factors when assessing both leased and fee-simple properties not located on reserves or Crown lands. That is, in other settings, the assessor does not value

290 Ibid., at 9.

291 The Musqueam Band's assessor (the BCAA) cited the *John Wayne Ryan* case as its basis for using the value of off-reserve freeholds to value the reserve leaseholds. Of course, this does not explain why the BCAA used much lower assessed values for the same leaseholds for the previous two years, under the same band assessment bylaw, and with little change in market values of the properties over that period. An official of the BCAA explained this by the uncertainty in the early period of Musqueam taxation. See "Meeting of Area Assessor with Taxation Advisory Council," attachment to Minutes of Musqueam Taxation Advisory Council, meeting no. 13, May 21, 1993.

properties based on comparison properties that are more highly valued because they are located in "better" neighbourhoods and/or "superior" jurisdictions.

The Musqueam Board of Review's ruling in *Huyck-Lyman I* adopted a standard of "on-reserve leasehold" for assessing the reserve leaseholds. Figure 4 depicts this approach as method A. Just as the "off-reserve freehold" approach yields too high a valuation for reserve leaseholds, the "on-reserve leasehold" approach yields too low a valuation. It omits the leasehold factor, which is the amount that must be added to the market value of a leasehold in order to include the lessor's reversionary interest in the property. This error, however, will be much smaller than the error of the off-reserve freehold approach when the lease is prepaid with a long-remaining term (and hence LF very small) and there is a large reserve factor (RF). The on-reserve leasehold value can be compared with that resulting from use of the analytically correct method; based on our earlier conceptual finding, this is an "on-reserve freehold" as shown by method B in the figure. The on-reserve leasehold approach yields a value equal to an off-reserve freehold with the same neighbourhood and jurisdictional attributes but inferior physical attributes. This approach also departs from the principles used to assess various properties off reserves.

When several First Nations amended their assessment bylaws, likely as a reaction to the *Huyck-Lyman I* decision, they specified valuations based on a fee-simple off-reserve property. The assessed values resulting from these new bylaws, as applied by the BCAA, were challenged in the respective bands' assessment appeal boards. The use of off-reserve freehold values for physically comparable properties was sustained in decisions for the Columbia Lake Indian Band (1995), Little Shuswap Indian Band (1997), Adams Lake First Nation (1997), and the Musqueam Indian Band (1998).[292] In three of these four decisions, *John Wayne Ryan* was cited prominently, along with *Lynn Terminals* and *Northwest Holding Society*. The Columbia Lake Band decision stated that those cases

> held that the *assessment of leasehold interests in Crown lands must be based on the actual value of the lands and improvements as if such lands were owned in fee-simple by the occupier rather than merely being leased*. [Emphasis in original.][293]

This interpretation appears to support method B, the on-reserve freehold value, but in fact the rulings were used to sustain assessments based on off-reserve freehold values. Of course, if there was no reserve factor present, then the two would yield the same results.

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292 Columbia Lake Indian Band Board of Review, appeal no. 95-01, October 24, 1995; Little Shuswap Indian Band Assessment Board of Review, appeal no. 97-50-LS02, May 6, 1997; Adams Lake First Nation Assessment Board of Review, appeal no. 97-50-AL06, May 6, 1997; Musqueam Indian Band Board of Review, appeal no. 98-001, July 1998.

293 Columbia Lake Indian Band Board of Review, supra footnote 292, at 8. Note that this board was chaired by the same individual as the chair of the Musqueam Board of Review in *Huyck-Lyman II*, D.L. Brothers.

In the first three of the appeal cases, it is not clear from the record whether there was an adjustment made for any differences in neighbourhood attributes between the subject leaseholds and the comparison freeholds.[294] One way to achieve this would be to choose off-reserve freehold properties with neighbourhood attributes very similar to those of the subject leaseholds. In the Musqueam case, it is unequivocal from the hearing transcript and decision that both neighbourhood and jurisdictional attributes that differed between the reserve and off-reserve properties were disregarded. Hence, the *Huyck-Lyman II* decision supported an "off-reserve freehold" standard, depicted by method D. As discussed in the case study of the Musqueam Indian Reserve, this outcome was based on the wording of Musqueam's amended bylaw; the board of review agreed with the band's assessor that both neighbourhood and jurisdiction attributes were not admissible in valuing the reserve leaseholds. Surprisingly, this view disregarded the position taken by the Musqueam Band's surveyor of taxes in a submission to the board:

> [T]he phrase "fee simple located off reserve" should be interpreted as simply a description of, or reference to, the deemed interest to be assessed rather than a limitation upon the comparables that can be used in making an assessment under the meaning of the [Musqueam] Property Assessment Bylaw.[295]

The band had also advised its lessees that under the amended bylaw "[o]ne could still argue assessment issues such as jurisdiction and neighbourhood characteristics."[296]

These events raise questions about the meaning of the fee-simple off-reserve concept adopted in bylaw amendments by some First Nations as well as the interpretation by the BCAA of the chief legal cases on valuation of reserve leaseholds. A related question is whether it was intended to distinguish between neighbourhood and jurisdictional attributes and to allow for one but not the other in valuing reserve leaseholds. The *Northwest Holding Society* decision explicitly allowed for neighbourhood attributes in the valuation of reserve leaseholds, which would support at most method C if not method B. That would leave at issue only whether the market effects of differential jurisdiction on reserve leaseholds should be considered or disregarded in assessments. The *Northwest Holding Society* and *John Wayne Ryan* appeals related to properties having short periods to the adjustment of recurring rentals (the former) or to the expiry of a long-term prepaid lease (the latter). Hence, it appears that off-reserve freehold properties were used for valuation purposes to obtain a measure of the leasehold

294 Hence, it is unknown whether the assessor for those bands used an approach closer to method C or D.

295 Memorandum from Lawrence Fast, Musqueam Surveyor of Taxes, to the Musqueam Board of Review, March 19, 1997, entered as exhibit 12 in Musqueam Indian Band Board of Review hearings of *Huyck-Lyman II*.

296 Minutes of Musqueam Taxation Advisory Council, meeting no. 23, January 19, 1995.

factor, not by any expressed intent to ignore the market effects of a reserve factor, if one did exist in those cases. That is, the courts in those cases were referring to the situation depicted by IC and not IIC in figure 3.

This conclusion is further supported by several other observations. First, the judge in *John Wayne Ryan* declined to address the issue whether a Crown fee is comparable to a private fee-simple interest. His decision, and that of the other key cases, address only the issue whether the lessor's reversionary interest (the leasehold factor) should be included in the assessed values of leaseholds. Second, in amendments to its assessment bylaw, the Musqueam Indian Band explicitly included jurisdiction and community amenities as factors that can be used in assessing the reserve leaseholds; only the band's assessor and its board of review read the bylaw in a contrary manner. Third, the Musqueam Band and ITAB have consistently argued that First Nation assessments should be conducted in a way that closely follow the respective provincial practices. For example, ITAB stated:

> [T]he key evaluation guideline of a First Nation's proposed assessment method is the degree to which it conforms to the market value assessment systems used by neighbouring jurisdictions.[297]

The use of an off-reserve freehold rather than an on-reserve freehold basis for assessing reserve leaseholds would, as shown earlier, depart radically from the general principles for assessing properties.

The First Nations that have amended their assessment bylaws by referring to "off-reserve" fee-simple values have deviated from the BC Assessment Act, which states that " 'actual value' means the market value of the fee simple interest in land and improvements."[298] The act makes no reference to "off reserve" or any other related concept. Were the First Nation amendments intended to depart from the BC Assessment Act and accepted methods of assessing Crown and reserve lands? Or was this simply an attempt to clarify that the fee simple values of leaseholds should be used, and not the leasehold market values as dictated in the *Huyck-Lyman I* decision? In this evolving series of events, the bylaw amendments approved for the Tsawwassen First Nation in 2000 may shed some insight. Before amendment, the Tsawwassen Assessment Bylaw specified "fee-simple" valuation but made no reference to "off reserve." The BCAA has assessed the Tsawwassen Reserve leaseholds in a way that reflects their depressed market values due to reserve factors.[299] This approach suggests that the BCAA believes that, at most, an on-reserve freehold method is justified unless there is specific

297 *Annual Report, 1998-1999*, supra footnote 3.

298 Assessment Act, RSBC 1996, c. 20, as amended, section 19(1).

299 Given the long remaining periods of the leases, and the correspondingly small size of the lease factor, one cannot infer clearly whether this has been done on an "on-reserve leasehold" or an "on-reserve freehold" basis.

reference to "off-reserve" values in a band's bylaw, although this is contrary to the way the BCAA sought to assess the Musqueam Reserve leaseholds in 1993. Tsawwassen's bylaw amendment in 2000, which specified that assessed values should not be reduced "by reason of being situated on the reserve," suggests the method C variant of off-reserve freehold valuation.

Practical Implementation

If one accepts that the on-reserve freehold concept, shown as method B in figure 4, is the correct basis for assessing values of reserve leaseholds, this still leaves the issue of how to implement the measure. Either of two alternative approaches can be used. First, one can begin with the market value (MV) of similar leaseholds based on actual sales on the same reserve and add a computed figure to approximate the leasehold factor (LF). Alternatively, one can take comparable off-reserve freehold properties and apply the requisite adjustments for the two components of the reserve factor (RF)—the neighbourhood factor (NF) and the jurisdictional factor (JF). Both approaches carry a range of potential error, and the relative reliability of the two will hinge on the nature of the leases and the existence and magnitude of any jurisdictional effect on the leasehold values.

To implement the first approach, an adjustment for the leasehold factor needs to be calculated and applied to scale up the market value of the land component of the leasehold property. The leasehold factor represents the portion of the land's value that is held by the lessor, which is the present value of the reversionary interest. The adjustment for the leasehold factor is readily computed for fully prepaid leases, based on the number of years left on the lease and the real rate of discount for valuing future returns (the nominal rate of return less the inflation rate). Table 6 shows the resulting adjustment rates that are implied for a range of years from 99 to 1 and discount rates ranging from 5 to 7 percent.[300] The former discount rate is applicable to an investment portfolio of mostly fixed-income assets, while the higher rate applies to a portfolio more weighted toward equities. Discount rates outside of that interval could also be considered, but our point here is to show the relative sensitivity of the LF adjustment to the assumed discount rate for different terms of leases. Clearly, at 75 years or more remaining on the leases, variations in the discount rate have only minor impact on the adjustment for LF; at 50 years, the effect is still relatively modest, at about 6 percent difference (as a percent of the market value of the leasehold land) and at 40 years still under 10 percent. Hence, this approach is best suited for assessing prepaid leaseholds that have relatively long terms remaining.

300 This was the range of discount rates assumed in the report by the expert witness for the appellants in the *Huyck-Lyman II* case. It also accords with financial evidence on long-run rates of return after adjusting for inflation. The formulas given in the notes to table 6 are standard derivations.

Table 6 Prepaid Leasehold Values Relative to Freehold Values, for Varying Discount Rates and Terms Remaining

Years	Leasehold discount to freehold[a] with discount rate of		Freehold premium to leasehold[b] with discount rate of	
	5%	7%	5%	7%
99	0.8	0.0	0.8	0.1
75	2.6	0.6	2.6	0.6
50	8.7	3.4	9.6	3.5
40	14.2	6.7	16.6	7.2
30	23.1	13.1	30.1	15.1
20	37.7	25.8	60.5	34.8
15	48.1	36.2	92.7	56.8
10	61.4	50.8	159.0	103.4
5	78.4	71.3	361.9	248.4
3	86.4	81.6	634.4	444.4
1	95.2	93.5	2000.0	1428.6

[a] Based on derived formula $100/(1 + r)^t$, where t = years, r = real discount rate (nominal rate of return minus inflation rate). [b] Based on derived formula $100/[(1 + r)^t - 1]$.

For remaining terms of 30 years and shorter, and particularly under 20 years, the LF adjustment approach shows much greater sensitivity to the assumed discount rate. When there is only a very short period remaining, the method becomes wildly sensitive to the rate of discount used. For example, with three years remaining (as in the subject property of the *John Wayne Ryan* case), the market value of the leasehold land must be increased by either 634 percent or 444 percent, depending on whether the applicable discount rate is 5 percent or 7 percent, respectively. This point explains why an assessor might seek to avoid this method for valuing prepaid leaseholds with short terms to expiry. For similar reasons, leaseholds with ongoing rental payments are also difficult to value through any system of adjustment to their market values. When those lease payments are also subject to periodic adjustment, whether scheduled or negotiated, the uncertainties become still greater. The leaseholds in the *Northwest Holding Society* case had annual lease rental payments that were subject to adjustment every five years.

With the leaseholds in the *John Wayne Ryan* and *Northwest Holding Society* cases, it was natural for the assessor to look off the reserves at the market values of comparable freehold properties rather than place much reliance on the reserve market values. The court decisions upholding the assessments in both instances were seeking to get the best measure of the reversionary interest in the land, not to ignore the effects of any neighbourhood or jurisdictional differences between the leaseholds and the freeholds selected for comparison. The hazard of this approach is that it can fail to account for a reserve factor and thereby overvalue the reserve leaseholds. With respect to the neighbourhood component of the reserve factor, the best that can be done is to select freeholds with a very similar

matrix of neighbourhood attributes as the leaseholds on the reserve. There may be instances where closely comparable conditions do not exist in the same region off the reserve, which clouds the valuation process.

It is considerably more difficult to determine whether there exists a jurisdictional differential in market values between the reserve leaseholds and the off-reserve freeholds. Of course, this can be done for shorter-term or non-prepaid leaseholds if the same reserve also contains long-term prepaid leaseholds. In that case, the first approach can be used for those properties, and the resulting assessed values can be compared with the market values of comparable freeholds. If that approach finds that there is no jurisdictional differential, then the second approach can be applied with greater confidence to valuing the shorter-term leaseholds. Where there are no longer-term leaseholds available, then at least some tests of consistency should be undertaken to determine whether a jurisdictional effect does exist. This can be done by using the second approach and as a cross-check also using the first approach with a relatively low discount rate. If the LF adjustment approach yields a lower assessed value even with a low discount rate, this is prima facie evidence of the existence and magnitude of a jurisdictional factor. Another approach for short or frequently renewed leases is to assess the land value by capitalizing the rental rate, which if freely bargained will reflect the market impact of any jurisdictional factor.[301] Failure to adjust the assessed value of a reserve leasehold for this impact is analogous to assessing a freehold on the assumption that it is located in a more attractive jurisdiction than its actual location.

301 However, a deficiency of this approach arises where the lessee has made an investment in an immovable structure on the land; in that case, the lessor is able to bargain for a rental rate that exceeds the value of the land alone. One way to resolve this problem is to have lease agreements that require the lessor to purchase the structure at its appraised value at the termination of the lease.