

**FIRST-NATION GOVERNMENT AND NON-NATIVE TAXPAYERS:
HARMONIZING RELATIONSHIPS**

by

Robert L. Bish

University of Victoria

I. INTRODUCTION

The power to tax is an important and essential power of any government. To have a voice in when, how and how much a citizen is taxed is an essential characteristic of democratic government.

First-Nation citizens are familiar with the argument that a government within which you are not a citizen should not tax you. This is, after all, the basis of exempting status Indians from taxation by Federal, provincial and local governments from taxes paid by citizens of Canada, when Indian activity that would otherwise be taxed occurred on an Indian reserve. When these policies were developed, partially in treaties, partially by separate legislation, status Indians were not citizens of Canada. These tax exemptions have been continued although status Indians are now Canadian citizens.

Now that Federal legislation, Bill C-115's amendments to the Indian Act, permits Band government to levy property taxes on lands within Indian reserves, new questions concerning the relationship between governments and taxation have arisen. This time it is the question as to what relationship should exist between First-Nation governments and taxpayers who are not citizens in those governments, even though they occupy real estate within the boundaries of First-Nation governmental jurisdiction? The emerging relationship between First Nations and non-native taxpayers is one of the several issues that deserves serious consideration as First-Nation governments assume expanded jurisdiction as they become more self-governing.

II. CRITERIA FOR TAXATION

There are two different kinds of criteria for taxation. One is purely a process criterion: it is that the people who are to be taxed have the right to participate in the government that taxes them. This criterion of democratic participation has a long history in Western culture. It is through democratic participation that the second kind of criteria, which is substantive, is to be achieved. These substantive criteria apply directly to the taxes themselves. For the purposes in this analysis three substantive criteria will be examined: fairness, efficiency, and predictability. The focus on substantive criteria is to see if they can be achieved without democratic participation. This is because, at present, leaseholders are not participants in Band government and thus the criteria of democratic participation is clearly not met.

A. FAIRNESS

Fairness in taxation has several dimensions. One is the equal treatment of taxpayers who are essentially in similar positions, a second is a fair relationship between taxes paid and receipt of services from the taxing government. While lawyers are quick to note that there is no legal relationship between paying a tax and any right to a government service in Canada, most analysts of government taxing and spending, especially of taxing and spending by local governments, consider the basic nexus between taxes and benefits to be an important one.

Both of the above dimensions of fairness have been invoked in the recent introduction of Band property taxation in British Columbia. The pre-Bill C-115 situation where B.C. provincial and local governments levied full property taxes on leaseholders on reserves without providing most services was unfair: an application of the latter dimension of the fairness criteria. At the same time it was considered fair that leaseholders pay similar taxes to those paid by non-leaseholders surrounding the reserve in order to maintain tax equity between residents and business on and off reserve. This similar treatment criteria of fairness was sought to be continued in Bill 64, whereby provincial and local

governments withdraw from the taxation of leaseholds on reserves only when the Band government implements its own property tax.

B. EFFICIENCY

Efficiency in taxation is a criteria that is often more important to economists than to governmental decision-makers. Efficient taxation is when the implementation of taxes does not cause taxpayers to engage in fundamentally inefficient activities just to avoid paying taxes. The best way to assure that taxpayers will not engage in such behavior is for taxes to be considered fair. If a system is designated so that all equally situated taxpayers pay similar taxes there will be no easy way to avoid taxes, and secondly, if service benefits are received for taxes paid, taxpayers will view their taxes as legitimate payments for services instead of payments to be avoided if at all possible.

C. PREDICTABILITY

The third criteria for evaluation taxation are its predictability. For no tax is predictability more important than for property taxation. Predictability for property taxation is important because real estate investments, such as the construction of a industrial plant or shopping center depends upon being able to forecast a surplus of revenues over costs over the life of the investment – which may easily be 30 or 40 years. Even home owners contemplating paying for a residence, which will probably be their largest life-time investment, want to be sure they will be able to afford to live there into the future and not have to move because of a burden of taxation becomes too great. Unless a government's taxation policies have a high degree of predictability, investors in improvements in property, which are the critical ingredient of most economic development strategies, will simply make their investments elsewhere.

III. THE B.C. PROPERTY TAX SITUATION

The use of property taxes by local governments in British Columbia reasonably meets most of the criteria presented above. Taxation is fair in that for the most part taxpayers situated similarly pay similar tax amounts; it is reasonably fair in that local property taxes are used to provide local services within the jurisdiction where taxes are collected, and by meeting the two conditions of fairness it is reasonably efficient. Over time the use of property taxes has been reasonably predictable.

There are two aspects of the use of property taxes in B.C., however, that do not meet the second condition of fairness – a reasonable relationship between taxes paid and the cost of services provided. One is the common practice of taxing non-residential property, primarily utilities, commercial and industrial properties, at tax rate two or three times higher than those imposed on residential properties. Studies of the relative costs of providing services to different kinds of properties do not justify such tax differences. Essentially in B.C. local governments use non-residential taxes to subsidize to residents.

The second unfair situation is for many, but not all, leaseholders on Indian reserves to be taxed by non-Indian governments without commensurate receipt of government services. First-Nation taxation has the potential to eliminate this unfairness but such taxation introduces the problem that leaseholders cannot democratically participate in Band government. If the process criteria, democratic participation, cannot be met it is still useful to see if substantive criteria for good tax systems can be achieved.

IV. ANALOGOUS SITUATIONS

Two situations are often presented as analogous to Band government taxation of non-citizens.

A. THE LANDED IMMIGRANT ANALOGY

Landed immigrants in Canada are permanent residents who pay all taxes and are subject to all of the same laws as Canadian citizens; however, landed immigrants do not vote and thus have no formal voice in the political processes whereby taxing and spending decisions are made. With this analogy, non-native leaseholders on Indian reserves are regarded as landed immigrants. There is a key difference, however. It is that Bands implementing property taxation are not levying taxes on their own citizens—just on the non-citizens. This contrasts to the Canadian situation where taxes, regulations and spending are basically designed for citizens, and the non-citizen landed immigrants are treated identically to the government’s own citizens who have influenced and are subject to the governments policies. Thus, while landed immigrants do not participate politically, the tax system still treats them fairly, efficiently and predictably.

B. THE LANDLORD—TENANT ANALOGY

A second analogy applied to non-citizen taxpayer—Band government relationships, is that the leaseholders are really tenants, not potential citizens, and that tenants do not “vote” on a landlord’s policies. This may be a more appropriate analogy than the landed immigrant analogy, but it still differs from leaseholder—Band government relationships in B.C.

Landlords and tenants sign contracts with one another and neither party can unilaterally change that contract to the disadvantage of the other party to the agreement. This is not the case with leaseholders and Band governments. Leaseholders may have tenure agreements with either a Certificate of Possession holder or the Band government as a landlord, but the Band government can unilaterally determine its taxation of leaseholders

without their agreement. In regards to taxation there is no contractual equality between them.

Both of the analogies that are used to justify the power of Band governments to tax non-citizen leaseholders have serious deficiencies. One deficiency is that Band governments do not need the consent of their “tenants” in order to tax them. The deficiencies, however, do not prevent a band government from understanding the analogies and proceeding to design a good tax system even though some criteria found in non-native governmental systems are missing.

V. AMELIORATING THE PROBLEMS

The ideal tax system is one that is fair in its treatment of equals, fair in relating taxes to benefits, efficient and predictable. This is usually achieved by having citizens elect their officials who in turn make decisions to tax those citizens in order to pay for the provision of benefits to those very same citizens. Because it is not anticipated that non-citizen leaseholders will be allowed to participate in voting for Band government councils, the democratic processes used to achieve good tax systems in B.C. local governments are unattainable in leaseholder--Band government relationships. If the processes are not available one must turn to examining the substantive criteria to see if the criteria for good taxation can be met in some other way.

A. FAIRNESS THROUGH EQUAL TREATMENT

It is useful to examine the equal treatment issue separately for residents and non-residential, primarily business, properties.

1. Residential properties

It is impossible to create equal taxation between Indian and non-Indian leaseholders on reserves as long as Indians are exempt from property taxation, as is the case in all Bands

which have implemented property taxation in British Columbia. Tax exemptions for Indians are part of a larger Canadian government policy so this difference in treatment is not new within the province.

Of more concern to leasehold residents on reserves, however, is their tax treatment relative to the tax treatment of similar residents in the same geographic area but outside the reserve boundaries. Residents of Musqueam Reserve lands in the city of Vancouver, for example, want to be sure that they are treated like other Vancouver citizens on nearby properties, not that they are treated like the Indian residents of nearby Musqueam Village. Band governments can create equality between non-Indian reserve leaseholders and adjacent non-reserve residents by utilizing the same residential tax rates for reserve leasehold properties as are utilized by adjacent local governments. Thus far this is the practice of all of the Band governments that have implemented property taxation in British Columbia.

2. Non-residential properties

Non-residential property tax payers, which are primarily businesses, share great concern that nearby businesses with whom they are in competition face similar conditions. One aspect of similar conditions is equal taxation. Bands can alleviate one dimension, the concern of leasehold businesses, by imposing tax rates identical to those imposed by adjacent local governments, just as they do with residences.

There is a second dimension of concern that is more difficult to deal with. It is that Indian owned businesses may also be in direct competition with leasehold businesses, and it is common for Indian-owned businesses to be exempt from property taxes just as Indian residences are. Some bands have reduced this unequal treatment for non-native businesses by imposing property taxes on Indian owned corporations and limiting tax exemption to Indian-owned non-corporate enterprises. This still gives a differential advantage to small Indian businesses but levels the playing field with equal taxes for larger business enterprises for whom the advantages of incorporation outweigh the advantages of being

property tax exempt. This is as far as Bands governments have gone in providing for business equal treatment at the present time.

B. FAIRNESS THROUGH TAXES FOR SERVICES

A basic problem prior to implementation of Band property taxation was that many leasehold taxpayers were not being provided with services by the local governments to whom they were paying property taxes. Enabling Band governments to assume property taxation jurisdiction and excluding non-Indian government property taxation on reserves is a potential remedy for this problem. Now the question is, when Band governments levy property taxes on non-Indian leaseholds on reserves, will the Band government see that services are provided to those taxpayers commensurate with the taxes those leaseholders pay? If Band governments were simply to assume property tax jurisdiction but not provide services, the situation would be no fairer than it was prior to permitting Band governments to assume taxation jurisdiction.

One way to assure that leasehold taxpayers receive services is to contract with adjacent local governments for those governments to provide similar services to leaseholders as are provided to residents and businesses in adjacent jurisdiction. If an equal service policy is enacted by the Band government, along with an equal tax rate policy, leasehold taxpayers will have the same basic taxation for service relationship as their non-Indian reserve neighbours. This would go a long way to alleviating the concern that the leaseholders do not participate in the Band government.

One should note that treatment equivalent to the treatment of non-Indian local governments does not provide a perfect match between taxpayers and services provided: Where residents are concerned they are likely to have been receiving their services at below cost. For businesses total taxes are likely to exceed the cost of their services. For Bands with significant non-residential leaseholds those surplus revenues that are used to subsidize residents by local governments can be utilized to subsidize Band member services. This opportunity is one that does not cause unequal treatment of non-residential

leaseholders relative to non-residential taxpayers in adjacent jurisdictions and it still provides surplus revenue for the Band government. Such opportunities can be pursued by Bands by promoting economic development by non-Indian commercial and industrial developments on their reserve. This will produce tax surpluses as well as other economic opportunities for band members.

Once such equal tax service policies are established, Band governments could then proceed to utilize different tax rates than are used by adjacent local governments as long as leasehold taxpayers could see that there were significant differences in the service they received compared to the services received by adjacent local government residents and businesses. Systematic changes in taxes that are related to services would still meet both dimensions of the fairness criteria.

C. EFFICIENCY

By meeting both dimensions of fairness the Band government would meet basic definition of efficiency in a tax system as long as the adjacent local governments were themselves reasonably efficient. Local governments, however, may not always be particularly efficient in their production of basic local services.

Once a band government has established a taxation system similar to that of adjacent local governments, Band officials should actively look for opportunities to provide local services at lower cost, higher quality, or both. To the extent that the Band government can identify opportunities for improving the tax-service benefit balance for its leaseholders they will be willing to pay higher leasehold fees for the rental of leasehold lands or, if Bands can provide services cheaper than adjacent jurisdictions, it could continue to impose the same tax rates as its neighbours and use the surplus for other purposes. This later policy is a sensitive one, however, as basically leaseholders will expect their tax revenues to pay for service benefits.

D. PREDICTABILITY

Investors in real property improvements want predictability. A key aspect of that predictability is: predictability that if conditions change that they will be treated similarly to other similarly situated residents or businesses, which means using similar tax rates and services as adjacent jurisdictions. This increases predictability for reserve leaseholders. If reserve leaseholders have some assurance of this kind of predictability, plus the confidence that it is Band government policy to deviate from it only when the Band government can provide a better deal, i.e. lower taxes, better services, or some combination thereof, leaseholders will have the kind of predictable environment that will encourage investments on the reserve.

E. SUMMARIZING POLICIES TO SATISFY GOOD TAXATION CRITERIA

The Band government taxation-service policies that are most likely to satisfy leasehold taxpayers that the property taxes imposed are fair, efficient and predictable is for the Band to begin its taxation with tax rates identical to the tax rates of adjacent jurisdictions (which are probably identical to the tax rates the leaseholder was formerly paying to a non-Indian government), and for the Band to contract with the adjacent government to see that leaseholders receive services comparable to those received in areas outside reserve boundaries. The exceptions to this policy should initially be to improve the level of services where ever possible, either by being sure the former taxing government actually provides such services under a contractual arrangement, or where the Band can take over the provision of services and do a better job than was being done before. This is the single best policy for replacing property taxation by non-Indian governments with Band taxation.

The policy recommended is one designed to achieve the important criteria of a good tax system while recognizing that taxpayers are not citizens in the government that is taxing them. This very important issue has not been resolved. What has been achieved is

meeting the substantive criteria for a good tax system directly instead of indirectly through political participation.

F. ADVISORY PARTICIPATION

A requirement for Bands which desire to become Indian Government Districts under the British Columbia **Indian Self Government Enabling Act** (Bill 64 – 1990) is that the Band create an advisory committee elected by leaseholders. Such a committee would facilitate communication between leaseholders and the Indian government and hence contribute to the achievement of a system of leasehold taxation that leaseholders understand and consider to be a good one from their perspective. It does not, however, meet the criteria of democratic participation as exists in local government in British Columbia because the real taxation decisions remain with the Band government.

VI. CONCLUSIONS

As presently implemented Band government taxation of leaseholders does not meet the criteria of democratic participation in taxation decisions by those leaseholders. This lack of participation does not prevent a Band government from designing a system of taxation where the substantive criteria for good taxation, fairness, efficiency and predictability, are met.

However, for meeting these criteria to achieve maximum benefits in the long run, **taxpayers must trust the Band government to pursue good taxation policy consistently into the future, and Band governments will have to earn that trust.** If such trust is earned, and good taxation policies are followed, trust in the Band government by leaseholders may be able to substitute for the criteria of democratic participation. If the Band government is not trusted, however, and good taxation policies are not followed, investments and the marked value of leaseholds will fall. Such outcomes are bad for Band members, the Band government and the leaseholders. In

contrast, all can be winners from strict adherence to meeting the criteria of a fair, efficient and predictable property tax system by the Band government. Only in this way will the full benefits of assuming jurisdiction over taxation be realizable by First-Nation governments.

Prepared for the Indian Taxation Advisory Board

February 1988.