TAXATION AND REPRESENTATION:
NON-NATIVE LEASEHOLDERS ON INDIAN RESERVES

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This paper has been prepared to provide background and ideas for a conference sponsored by the Indian Taxation Advisory Board on the issue of non-native leaseholder representation in First Nation decisions concerning taxes levied on leaseholds and services delivered to leasehold lands. The paper is divided into six parts. Part one provides a brief description of the problems the assumption of jurisdiction over property taxation on reserve leaseholds was designed to resolve and some problems that have arisen from the solution. This summary is quite brief but appendices and references[2] provide additional information for persons unfamiliar with the pre-First Nation taxation situation.

The second part explicitly describes the objectives that must be met in order to satisfy the important objectives of both leaseholders and First Nations. These objectives include both processes and outcomes.

The third part provides an explicit explanation of selected concepts from the intellectual framework that underlie the presentation of alternative approaches to the issue of representation and First Nation decision making on taxes and services for reserve lands. This section is extremely important because assumptions and evidence from institutional analysis will largely determine the prediction of outcomes to be predicted to result from institutional change. While some readers will not be familiar with the intellectual foundations of the theory of federal systems and contemporary institutional analysis upon which this analysis is based, they will have

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[1]Preparation of this paper has been funded by the Indian Taxation Advisory Board. I have 35 years experience and scholarship in taxation and institutional design and over 20 years experience and scholarship with First Nation issues funded by both First Nation and non-First Nation sources. The arguments and opinions expressed in this paper are mine and do not necessarily reflect ITAB policies. They should instead be viewed as a hard assessment in order to stimulate innovative mutually beneficial solutions to a very serious problem.

[2]The most complete analysis of representation issues is contained in Jonathan R. Kesselman, "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy," *Canadian Tax Journal* 48:5 (2000), pp. 1515-1644.

been exposed to it in many analyses, including all of my work on taxation and First Nation issues, including *Indian Government: Its Meaning in Practice* by Frank Cassidy and myself.

The fourth part applies the concepts from part three and discusses the implications of alternatives institutional arrangements for representation of non-natives in First Nation taxation decisions. The most important aspect of the alternatives is the blunt assessment as to which objectives cannot be achieved or are unlikely to be achieved with different alternatives. This makes explicit the tradeoffs that must be made in choosing from among alternatives.

Finally, parts five and six consider issues of relating the rules discussed to the objectives presented in part two and approaches to discovering solutions of mutual benefit for First Nations, leaseholders, and others within the Canadian federal system in hopes that even better alternatives can be identified for consideration.

I. BACKGROUND[3]

Prior to the adoption of First Nation taxation in British Columbia, municipalities, other local governments and the provincial government levied property taxes on leasehold lands on native reserves. Most other provinces had vacated the field. The major initiative for ending taxation by non-native governments came from those First Nations where the taxation extracted significant amounts of revenue but services were not provided to the taxpaying leaseholders similar to the services provided to taxpayers paying identical taxes but located off-reserve. This was frustrating to First Nations because the value and potential for development of reserve lands was reduced by taxation and lack of services by other governments and because the First Nation government had no jurisdiction over this issue in spite of the taxation occurring on reserve lands. Many non-Native leaseholders were also dissatisfied because they were paying taxes for services which were not generally received (A 1987 survey indicated that within municipalities leaseholders received only 25% of the services provided to non-reserve taxpayers). Outside of municipalities where the provincial government levied its rural property tax, the provincial government generally did not provide roads and road paving for leasehold lands, snow ploughing practices depended on the local Ministry of Highways foreman, and policing was provided by the RCMP provincial force, which is partially subsidized by the national government–all services

[3]A summary of issues surrounding the introduction of First Nation taxation is included in Robert L. Bish, "Implementing Aboriginal Self-Government Taxation and Service Responsibility in British Columbia," *Canadian Public Administration* 36:3 (Fall 1996), pp. 451-460.

financed partially by rural property taxes. It should be noted that the leaseholders had full voting rights in the non-Native government but they were a minority with little impact in most jurisdictions.

Not all taxpaying leaseholders were deprived of services. Within some municipalities leaseholders received almost all the same services as residents off reserve, including situations where municipalities enforced municipal by-laws (animal control for example) without legal authority because the First Nation had not passed the necessary legislation even though the First Nation government was satisfied with the situation. In many of these cases the First Nation had a contract for service delivery with the municipality that was part of an initial development agreement (Musqueam), in others a developer made an agreement without First Nation government participation (Tsawassen), and in others the municipality simply provided most services.

The introduction of amendments to the *Indian Act* providing for First Nations to assume jurisdiction over property taxation on reserve and vacating the field by British Columbia governments where First Nations assumed jurisdiction has clarified the legal situation on reserve, resolved some problems and created others.

Among the problems resolved is the removal of revenues from the reserve without explicit agreement by the First Nation, which is now clearly responsible for service delivery to taxpaying leaseholders. Among problems created is that leaseholders have no formal voice in decisions by First Nations on the taxes they pay and the services they receive. Those decisions are made by the council of the First Nation government, which is elected by First Nation members. First Nations may chose to delegate such decisions to an organization of leaseholders (Townsite of Redwood Meadows) or create an advisory committee–but such discretion lies completely with the First Nation government. The only restrictions on First Nation taxation of non-Native leaseholders is provided by the Indian Taxation Advisory Board and the requirement for approval by the Minister of First Nation assessment, taxation and expenditure by-laws. Leaseholders do vote for their MP and ITAB is charged by the Minister to be sure that First Nation taxation is "fair."

During the initial introduction of First Nation taxation, and during the first three years for any First Nation just beginning taxation, First Nations were required by ITAB to adopt the tax rates of the municipality formerly levying taxes on the reserve, or of a nearby municipality for First Nations outside municipal boundaries. This regulation smoothed the transition process.

The provincial government also allowed the First Nation to retain "school" (really a provincial property tax where revenues go into the general fund) property taxes. This provided additional revenues to First Nations so they could continue to pay municipalities for services and still have revenues left over for the First Nation. In the majority of First Nations the entire process has gone well.

As with any significant institutional change there will be unanticipated consequences and new problems will be created. Among the problems that have arisen include three critical ones.

First are complaints over taxation decisions by First Nation councils with which leaseholders disagree and the leaseholders have no voice in the First Nation decision. Leaseholders may complain to ITAB or the Minister and some have sought recourse through the courts. Leaseholders would prefer to have a voice in the initial decisions by the First Nation rather than having to bear the costs of recourse elsewhere. While "taxation without representation" is an American slogan, it is, as in the United States, very much a part of the British tradition brought to Canada as well as the U.S.

Second is the abandonment of market based tax assessments by some First Nations[4]. The abandonment of market based assessments on reserves and substitution of values from off-reserve properties for physically similar properties on reserve permits First Nations to adopt policies which significantly reduce the value of investments made by leaseholders, and hence the market value of the property they occupy, without any sacrifice of tax revenues to the First Nation. If market value assessments were in place an increase in tax rates would be necessary to maintain revenues and any significant rate increases would need to be justified for approval by ITAB. The abandonment of market based assessments can let a First Nation escape from ITAB's supervision. Many leaseholders interpret such First Nation policies as not only taxation without representation, but expropriation without compensation. It should be noted that ITAB and the Minister approved the by-law amendments which abandoned market-value assessments on reserve.[5]

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[4]Several First Nations have abandoned market based assessments on reserve by designating that comparable off-reserve values be use instead. This issue is examined in "'Market Value' on Reserve: Musqueam Indian Band *V.* Glass and the Implication for Property Assessments," by Robert L. Bish in Appendix A. Kesselman provides a similar critique.

[5]I doubt that the ITAB board realized the implications of what they were doing when they permitted assessments to be based on comparisons with properties outside the reserve and thus permit the Assessment Authority to not consider features of properties on reserve that affect

Third, well publicized criticism's of First Nations whose policies resulted in major reductions of the market value of leaseholds on reserves make it difficult for other First Nations to find investors to commit funds to develop their leasehold lands. The issue is simple: would you invest millions of dollars in a commercial development or make your largest single investment , a residence, on a reserve where you had no voice in tax and service decisions and you were aware that on another reserve leaseholder values had been significantly reduced by First Nation actions? And furthermore, even if you were satisfied and trusted the First Nation council where you invested, how would you consider the risk that if you wanted to sell your lease and the improvements you made, the actions of some other First Nation may make it difficult to find a buyer who had the same trust you had. It is critically important for all First Nations that want to develop reserve lands in cooperation with leaseholders that taxation regimes be viewed as fair by leaseholders everywhere–and the question of "fairness" is at the heart of the representation issue.

The problems noted above have all occurred under First Nation taxation. These problems need to be resolved, but at the same time it is important to note that most of the problems First Nation taxation was designed to resolve relative to pre-First Nation taxation have been resolved. The problem of institutional design is to simultaneously resolve many issues which are of different importance to differently affected parties.

II. OBJECTIVES

First Nation governments appear to have two primary objectives when introducing taxation. One is to assume jurisdiction over an important government function and exclude the exercise of similar jurisdiction by non-Native governments on reserve lands. A second objective is to increase the value of reserve lands. This value includes not only income from leases and taxes, but increased economic development which provides employment and investment opportunities for the First Nation and its members. The first objective is very much a "process" objective; the latter an outcome. The emphasis on the different objectives varies among First Nations.

Leaseholders place different weight on objectives as do First Nations. One objective is to

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market value and would be taken into account for the assessment of all other properties in the province.

have a voice in the decision processes through which taxation (and leasehold servicing) decisions are made. A second objective is to receive net benefits from the services provided from the taxes paid. Again, representation is a process; net benefits from taxation and servicing an outcome[6].

There is a conflict in the process criteria as First Nation jurisdiction (decision by First Nation Council) excludes non-Native leaseholders, while a decision by leaseholders only would remove decision-making from the Council. There is, however, compatibility between the output objectives of most First Nation's and leaseholders. Each would like to achieve a tax-service package which provides the greatest net benefits to leaseholders. The higher the net benefit to leaseholders the higher the value of leaseholds will be. This can permit lower tax rates to provide the same services and this will result in higher values for the leases. Thus leasehold revenues will be higher–and no non-Natives are requesting any representation as to how First Nation Councils spend their leasehold revenues. It should also be recognized that it is leasehold revenues that are the most significant and should generally be five or more times the amount of property taxes collected. (Property taxes are generally less than 1% of market value; leasehold revenues should generally be at least 5%). The major exception to the coincidence of interests occurs when reserve lands are fully developed with pre-paid leases and there is a significant amount of time before leases expire.[7] In this situation it may be in the interests of the First Nation to extract as much tax revenue as possible from the leaseholders. With such a policy the market value of leasehold lands would decline and the First Nations would face the problem of raising tax rates to obtain even the same revenue and this may lead to ITAB scrutiny. However, higher tax rates necessitated by lower market values can be voided by abandoning market values for assessment purposes and basing assessments on properties in a jurisdiction whose practices are not reducing property values.

While the process and outcome objective can be conceptualized separately, they are potentially related. First, decisions by council to maximize property value requires that council

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[6]It is important to note that achieving the process objective does not guarantee achieving the outcome objective. In institutional analysis the emphasis is on identifying the relationship between processes and outcomes; in political science processes (i.e. representation, voting, etc.) are often viewed as ends in themselves.

[7]Kesselman provides a good analysis of the difference between incentives on fully developed compared to undeveloped reserves. The critical problem for all First Nations is that a policy of exploiting taxpayers on a fully developed reserve will create a negative image of First Nation taxation and thus reduce the opportunities for other First Nations to develop their reserves.

members understand just what the preferences on taxes, services and other policies of leaseholders are. Some kind of participation by leaseholders may result in better policies. Second, property values will be enhanced not only by desired outcomes regarding taxes and services, but leaseholders must trust the council to provide them with what they desire. Achieving this trust may also require some kind of meaningful inclusion of leaseholders in decision processes.

While recognizing that differently affected parties will place different weights on the different objectives, two questions stand out. First, can First Nation councils make tax and spending decisions that will maximize their leasehold property values without including leaseholders in the decision making process? And second, will leaseholders trust the council to make good decisions without meaningful inclusion of the leaseholders in the decision process.

These two questions are nearly identical to two of the most important questions in political theory and institutional design. First, how are citizen preferences translated into government decisions? Second, what can prevent the government itself, or groups of citizens, from using political power to enhance their own interests while neglecting or exploiting other citizens in a political system? It is useful to examine observations on these issues to better understand the implications of different solutions to these problems for First Nations and their leaseholders.

III. FEDERALISM AND INSTITUTIONAL ANALYSIS

Contemporary institutional analysis in political science and economics builds on the theory of federal systems, much of which was presented in *The Federalist*[8] papers, supplemented by the economic analysis of public goods and collective action. *The Federalist* papers lay out a framework for creating a new government in the United States of America following the failure of the first American government, the confederation. Among the dilemma's specifically analyzed include three critical issues of importance to the representation issue on reserves. They include: 1) how to prevent a government from abusing its authority; 2) how does one prevent the

[8]Alexander Hamilton, John Jay and James Madison, *The Federalist*. New York: Modern Library. First published as a series of newspaper articles in 1887. One of the best analysis of the assumptions and most important precepts contained in *The Federalist* is presented in Vincent Ostrom, *The political Theory of a Compound Republic.* Originally published by the Public Choice Society in 1971 and since republished by the University of Nebraska press.

use of government by some to exploit others, and 3) how do governments obtain information about citizen's preferences. *The Federalist* solution to all of these dilemma's was multiple overlapping governments–which they called federalism. The rules upon which their institutional analysis and proposals were based are listed in Appendix B.

The critical aspects of federalism include 1) a division of jurisdiction among different governments; 2) that the division of jurisdiction is well understood and usually provided for in a constitution which no government can unilaterally alter; 3) citizens are citizens in more than one government simultaneously, and 4) there are institutions such as courts which are sufficiently independent of any single government to fairly adjudicate disputes among governments. In the history of political theory the origins of these approaches can be found in pre-Westminister system England where there where checks and balances among the Crown, Lords and Commons. The British system, however, has evolved into a "commons dominant" system lacking the checks and balances of a federal system. Canada contains elements of both systems but federal characteristics are dominant overall even though the national and provincial governments are "commons dominant" rather than possessing internal checks and balanced as do national and state governments in the United States. An important subtlety in *The Federalist* is that in spite of different governments having jurisdiction over different issues there was always enough overlap among jurisdictions that governments would have incentives to cooperate on some issues and be rivals on others[9].

Within the theory of federalism the solution to preventing the abuse of government authority by government officials was to be sure that there were other governments that citizens could have recourse to prevent the abuse. "Ambition was to counteract ambition." Such alternatives are not available within unitary systems.

The attempt to prevent some groups to use government authority to exploit other groups was also grounded in multiplicity and constitutional constraints on governments actions that could be upheld by the courts. Groups which acted in their own self interest and clearly harmed other groups were called "factions." Factions which comprised a minority would be constrained

[9]Overlap and rivalry among governments, not two mutually exclusive lists of jurisdiction, is a critical aspect of federalism. The theory of federalism is very similar to the theory of markets, where both competition and cooperation are critical to the system. For a comparison of the approaches see Robert L. Bish, "Federalism: A Market Economics Perspective," *Cato Journal* Vol 7, No. 2 (Fall 1987).

by majority vote in elections; factions which comprised a majority would be constrained because the potentially exploited minority was likely to be a majority in some other government or be able to use the courts. It did not depend on being able to change the behaviour of the majority within the majority's governing process but rather from outside it, but still within the federal system. (Historically exploited minorities in unitary systems exit or seek assistance from like-minded interests in other countries, often for support of a violent revolution).

Finally, finding out what citizens really prefer is best discovered if issues are debated in more than one forum. Thus the fact that to spend public funds required legislation on a program and inclusion in the budget as well as agreement among, for example, the executive, two houses of the legislature, and was subject to court challenge, not only reduced the opportunities to exploit minorities, but it increased the amount of information available and was likely to lead to a superior decision.

One key point that analysts of Canadian federalism often forget is that the theory of federal systems does not prescribe only two levels of government (national and provincial). The theory of federal systems does not prescribe any particular number nor place any limits. The authors of *The Federalist* stated explicitly that "the system of each State within that State" (P. 219) was a part of a the federal system and many U.S. states provide constitutionally based jurisdiction for their local governments in their state constitutions instead of legislation than can be changed by the state government. The logic and benefits of including First Nations in the Canadian federal system as been explained in Cassidy and Bish's *Indian Government: Its Meaning in Practice*[10], ch. 8.

Two concepts from the contemporary economic theory of public goods and collective action provide some additional insight into federalism. One is the explicit recognition that there is a trade off between the costs of governmental decision-making and the potential for some citizens to be damaged by government actions[11]. In general, within voting arenas the higher the

[10]Published by Oolichan Books and the Institute for Research on Public Policy, 1989.

[11]This tradeoff is examined in James Buchanan and Gordon Tullock, *The Calculus of Consent*. Ann Arbor: University of Michigan Press, 1962. This publication was featured prominently in James Buchanan's receipt of the Nobel Prize in Economics. The application of concepts presented in Buchanan and Tullock and other public choice theory are applied to small governments in Robert L. Bish, *The Public Economy of Metropolitan Areas*. Chicago: Markham/Rand McNally, 1971.

percentage required to approve an action (51%, 66%, etc) the lower the likelihood of damaging citizens. The limit is at 100%, which is essentially voluntary consent where we would not expect anyone who expected to be damaged to agree to the decision. However, the costs of getting agreement would also rise when higher levels of agreement were required and there is some "optimum" for different kinds of issues where the high costs of requiring voluntary consent or supramajorities such as 66% are reduced in order to reduce decision-costs. The same logic applies to requirements for concurrent agreement in different governments (or branches of government). Decision costs will also be relatively low if decisions can be made in a single forum and will be more costly when agreement in multiple forums is required. Similarly, when approval must be sought in different forums there is a reduced likelihood that citizens will be damaged from the decision. In general lower decision rules are desired when time is of the essence in making a decision (national disasters, military attack) or the issue is relatively low cost (a citizen calling for a fire engine). Higher decision rules are desired for complicated issues where information is needed from different perspectives, where expenditures are large, and most important, *for changing the rules under which operating decisions are made.* While many of the rules of a federal system are contained in the Constitution, other rules for making rules exist in court decisions and in legislation for subordinate governments, such as in municipal acts for municipalities or the *Indian Act* for Indian Bands.

The second concept that has become valuable in analyzing and designing institutional arrangements is the concept of "fiscal equivalence."[12] Fiscal equivalence exists when for a government activity, the citizens who are affected make or influence the decision, the same citizens pay the costs, and the same citizens receive the benefits. Only when citizens see both the costs and benefits of their decision are there incentives to obtain better information about the consequences of the policy and to chose policies where benefits exceed costs to be efficient. The ideal situation of fiscal equivalence exists when all citizens have very similar preferences for a particular good and are willing to share the costs to pay for it. Fiscal equivalence is most obviously lacking where one group can make decisions and obtain benefits and the costs are paid by others. In the extreme this occurs when there are permanent majorities and permanent minorities within a government and the majority simply exploits the minority.

Analysts, including the authors of *The Federalist,* make their assumptions about human

[12]The term "Fiscal Equivalence" was first used by Mancur Olson in "The Principles of Fiscal Equivalence: The Division of Responsibilities among Different Levels of Government," *American Economic Review* 59 (May) 479-487.

motivation and behaviour explicit as indicated in the list in Appendix B.. They also assume that people will act in their own self-interest "rightly understood." Rightly understood involves the ability to understand the long-run consequences of one's actions and take other people's interests into account. The dilemma in competitive systems, however, and politics is very much a competitive arena, is that participants who do not take a pretty narrow view of their constituents interests may not be the winners of the competition. Thus, just as in private markets, we need institutional arrangements whereby individuals seeking their own self interest also advance the interests of others.

Examples of the applicability of the characteristics of federal systems, different decision rules for different activities and fiscal equivalence are numerous in the Canadian system. The concepts described are but a few very important ones that have been selected for their relevance to the problem of representation of leaseholders in taxing and spending decisions on leaseholds within First Nation reserves. In the next section they will be applied directly to the problems that have arisen.

IV. NON-NATIVE REPRESENTATION IN TAXATION ON RESERVES: A FEDERALIST PERSPECTIVE

Taxation is a critical function of government. There are many historical phrases including "the power to tax is the power to destroy," and "no taxation without representation." There are also constitutional constraints, including for small governments, rules specifying the taxes that can be imposed and the decision-rules that must be used that cannot be changed by the smaller government itself.[13]. Courts have also been active in interpreting taxation law and regulations at all levels of government.

The organization of this section will proceed from the current situation which includes ITAB and Ministerial oversight, through a spectrum of higher and higher decision-making costs. The kinds of decision frameworks considered are those where by incurring higher decision-making costs, more information to aid in decision-making is produced and the opportunity to exploit minorities are reduced. Each major alternative will also be examined in terms of how it

[13]Historically it was common for provincial governments to require that all municipalities in lower (smaller) classes have their bylaws reviewed and approved by the provincial government. In recent years such restrictions have been eliminated except for bylaws concerning debt creation. Provincial approval of debt creations remains because a default in debt repayment by one municipality would have an adverse affect on the borrowing costs of other municipalities.

relates to the objectives described in Part 2. These objectives include meaningful participation in decisions by both First Nations and leaseholders and maximizing leasehold land values.

FIRST NATION COUNCIL WITH ITAB/MINISTERIAL OVERSIGHT

The current situation whereby First Nations make taxation-spending decisions, obtain a recommendation from ITAB and approval by the Minister most likely meets legal requirements for taxpayer representation as they have the opportunity to vote in national elections whereby the Minister is selected. This process however, provides only very weak representation for the leaseholders and most institutional analysts would not consider it meaningful participation. One should remember that leaseholders and First Nation members had similar voting participation when non-Native governments taxed leasehold lands while neglecting to provide services to those lands, thus exploiting taxpayers and reducing the value of First Nation reserve lands.

A representation process via the election of MP's and the Minister's approval also does not provide for information about the preferences of leaseholders nor does it prevent their interests from bing ignored unless the First Nation acts in a way that presents so much harm that lobbying the Minister is undertaken or the First Nation comes under scrutiny because it exceeds ITAB guidelines for tax increases. ITAB guidelines also do not provide much of a constraint as they are based on tax rate increases, not tax revenue increases. Because most revenue increases from property taxation comes from increased assessments, not rate increases (rates in North America have been around 1% for decades) a regulation based on rates only is insufficient if regulation is to be meaningful. A second problem is that ITAB has recommended approval of bylaws that abandon market-based assessments and permitted First Nations to use off-reserve values to value on-reserve properties and to ignore the decline in on-reserve market values due partially to the policies of the First Nation. The current situation has worked for most reserves but has demonstrated serious deficiencies for others. Unfortunately where problems have arisen they have received sufficient publicity to negatively affect other First Nations.

PUBLIC PARTICIPATION IN COUNCIL SYSTEMS

Electing council members every two or three years does not provide an opportunity for citizens to be very precise in indicating preferences on taxing and spending. This has led to procedural requirements for annual budgeting processes that involve public meetings, public hearings and other opportunities for citizens to make their preferences known directly on specific issues. These requirements are generally imposed on smaller governments by either the

provincial or national government, but it also common for governments to create their own procedures that go beyond minimal requirements. Such processes should also be a part of the budget decision-making process for leaseholders regardless of what council is making the final decisions.

NON-NATIVE MEMBERS ON FIRST NATION COUNCILS

Virtually all councils make use of committees. Within municipalities committee assignments are made either by majority vote or appointment by the mayor. The purpose of committees is to divide up the work of the council and facilitate some council members to become more knowledgeable in some subject areas. All councils recognize that committees need to be representative of the council as a whole because if a committee is not representative its reports will not meet the preferences of non-committee members and the entire council will end up having to reconsider committee recommendations. Use of committees is a way to increase information in decision-making over what would be created if the entire council had to consider every issue. Any First Nation council that has to deal with leasehold lands should probably have a committee for that purpose.

In municipalities it is non unusual for committees of council to include non-members. Thus a First Nation could appoint a leasehold lands committee that included non-native leaseholders as members. The participation of leaseholders would increase the level of information about leaseholder preferences for the council, but the First Nation council would still be the decision-maker on leasehold taxation and spending issues. This is essentially what municipal councils expect from the appointment of non-members to the committee–better information. Appointing non-native leaseholders to the council committee would help the First Nation obtain better information but it is a very weak form of representation. One way to strengthen representation would be to provide that committee recommendations, including minority recommendations, be forwarded to ITAB along with the First Nation councils final decision. This would provide some information on how First Nations respond to leaseholder preferences and may raise questions which ITAB would need to investigate more fully. This would imply an increase in ITAB review jurisdiction, perhaps into a mediator or arbitrator role as discussed below when examining enforcing the rules.

CONSTRAINED DECISION-MAKING (COPY YOUR NEIGHBOUR)

I use the term constrained decision-making as introduced by Kesselman in his discussion of First Nation taxation options. It refers to First Nations being required to follow similar assessment practices and set tax rates the same as some other jurisdiction, usually an adjacent municipality. This is how First Nation taxation was begun in B.C. and it remains an ITAB requirement for the first three years after a First Nations assumes tax jurisdiction.

Constrained tax decision-making restricts the ability of a First Nation council to exploit its own leaseholders, but by itself in provides for no information on leaseholder preferences or any mechanism for leaseholder or First Nation representation in the setting of the tax rates. Its is, however, a very low cost decision-making mechanism for setting tax rates.

There are two situations where constrained tax rate setting has more virtues. One is where the reserve is within a municipality and the First Nation has a full service contract with the municipality with a tax equivalency payment. In this situation the leaseholders are no different from other citizens in the municipality in that they vote for the municipal council that sets tax rates and pay the same taxes and receive almost[14] the same services as other municipal residents. In this situation it also makes sense that the provincial property tax (school tax) be levied at the same rate as in the municipality but the revenue may be returned to the First Nation where the First Nation would use part of it to provide homeowner grants so that its leaseholders are treated the same as non-reserve taxpayers in the municipality. While there are no perfect service equivalency situations, there are situations where they are close enough to make this an useful approach.

The second area where constrained taxation may be appropriate is for First Nation taxation of pipelines, transmission lines, railroads and other uses of property on the reserve but which do not involve local business activity or residents. These properties essentially have no voters and no scheme of voting for council provides them with representation. The lack of representation is precisely why municipal property taxes on railroads in B.C. became the highest in North America and the provincial government was forced to roll them back. The interests of owners of these kinds of property have province-wide concerns and appear better able to lobby

[14]Municipalities cannot impose regulations (planning, zoning, animal control,) on reserve unless the First Nation passes the relevant bylaws and none have done so for land use planning. This is generally not a large budget item nor very relevant to leaseholders.

the provincial government than each municipality or First Nation separately. Excessive taxation of these properties can also place B.C. at a competitive disadvantage relative to other locations– as happened with the very high rail shipping costs which are part of the reason why more containers from Asia enter Canada through the U.S. port and rail system than through a Canadian port. These properties also do not require the kinds of municipal services that are required by other businesses or residents and representation on services is not as important. A requirement for a constrained tax rate (perhaps the provincial rural tax and "school" tax rate may be appropriate for all small governments, including municipalities as well as First Nations.

LEASEHOLDER PARTICIPATION VIA VOTING

Voting has an almost sacred status, but it has many limits as an effective way to provide information or prevent the exploitation of minorities. Majority voting regimes on councils also do not produce logically consistent results but that seems to bother scholars more than it does council members who really do not understand how they got a result where a majority preferred a different outcome than the one that resulted. It is best to recognize that voting should be viewed in terms of the outcomes it facilitates–not as an end in itself. A variety of voting settings will be described below. All assume that leaseholder involvement is only on issues affecting leaseholds and leaseholders. Exclusively First Nation business would only include First Nations councilors.

Leaseholder Council with ITAB/Ministerial Oversight

The Tsuu T"ina First Nation has recognized a non-profit organization (the Townsite of Redwood Meadows) and delegated to the council elected by the townsiste decisions over taxation and spending on the leasehold lands. The townsite is a well established residential community surrounding a golf course. It has also been recognized by the Alberta provincial government as equivalent to a municipality and made eligible to receive provincial grants similar to those received by other Alberta municipalities.

The Redwood Meadows situation provides for the same kind of decision-making that would occur in any municipality. Its homogeneity means getting agreement on taxes and spending should be relatively low cost. There have been disputes over the taxation of pipelines where the Band wants to collect the tax revenue, but the system seems to work well. The uncertainty that exists revolves around the whether or not the Band has the discretion to change the agreement unilaterally and how that would be viewed by ITAB or the Minister.

The Redwood Meadows situation would not fit as easily in British Columbia because in B.C. the property tax is also used by the provincial government to raise funds that are labeled school taxes but which go into general revenues. When the provincial and municipal government vacated the property tax field on reserves where First Nations assumed tax jurisdiction, the province left the school tax revenues to the First Nation. It is not clear just how these revenues should be viewed, but most First Nations would not want to leave them to a homeowners organization instead of gaining some benefit for themselves. This implies that First Nations would want to continue to have a voice in taxation-spending that was not needed in Alberta.

First Nations Council with Leaseholders for Public Functions

One approached suggested for introducing leaseholder representation to taxation-servicing decision-making is to have councilors elected from among leaseholders who participate only in decisions on taxing and spending as it affects those leaseholders. This would provide for representation and increase the amount of information on the preferences of leaseholders. There are major deficiencies for this arrangement however. If majority voting is used as the decision-rule it is likely that the council will have well defined majorities and minorities with potentially different interests.

One dimension of this difference is that the First Nation councilor represents citizens who do not pay property taxes. The other is that many services may be unique to the leaseholders. The one situation where this may work is if there is vacant property on reserve that the First Nation wants to develop and the First Nations councilors understand that satisfying leaseholders is consistent with higher property values for those lands. In general, however, a council majority vote decision system cannot be anticipated to provide sufficient representation for leaseholders even though it would appear to meet criteria for representation in a widely accepted manner.

Supra-majorities or Concurrent Majorities

When councils represent well defined majorities and minorities the voting rules that prevents the neglect of minority interests are ones where the percentage to pass proposals is either so high that members of both groups must vote for a proposal, or a majority of votes is required from each defined group. For example, if a council had 8 First Nation members and 5 leaseholder representatives a voting rule of 2/3 or 66% would require 9 votes. Thus any proposal put forward by the 5 leaseholders would require support from 4 First Nation councilors and any

proposal by First Nation councilors would require at least one leaseholder vote. In practice such councils will also have many votes where neither group votes as a block. A council with this voting rule would have higher decision-making costs than one operating with a 51% rule but it would also produce much more information during deliberations because all councilors would be involved in all decisions. It would also provide a greater degree of security to the leaseholders.

Concurrent Councils

One step up from a supra-majority is to require concurrence between a majority of First Nation councilors and a majority of leasehold councilors for council decisions. An example of this situation would be in Redwood Meadows if the tax-spending decisions made by the townsite council had to be approved by the Tsuu T"ina Nation council as well. For most townsite decisions the First Nation would be a rubber stamp, but if First Nation interests were affected the two councils would have to seek a solution acceptable to a majority of both. This situation may not produce as much information as would be produced under a supra-majority but it would provide security for both the First Nation and the leaseholders. A concurrent council approach would work best where the leaseholders themselves were well organized and relatively self-contained. A single council with a supra-majority voting rule may be more appropriate where leaseholders are spread out or mixed with First Nation properties.

CREATING OR CHANGING THE RULES

An important conclusion in the analysis of federalism is that the council that implements the operational decisions on taxing and spending cannot have the jurisdiction to create or change the rules it operates under. Rules to create or change the rules are analogous to constitutional rules. Constitutional rules do not need to be embedded in the national constitution. The municipal acts passed by provincial governments are the constitution for municipalities and the *Indian Act* is a constitution for bands. Constitutional rules can come from more than one source: their important feature is that they are not established or changed with the same rules one uses for operational decisions.

There are three approaches to setting and changing constitutional rules. One is to use a supra-majority, another is by a larger superior government (e.g. a ministry for municipalities) and a third is for such changes to be approved in multiple forums, for example the First Nation council, ITAB and the Minister, and with a referendum among leaseholders.

There may be a situation where a First Nation can create the decision-making rules for operational decisions that are acceptable to leaseholders. This is when the First Nation places the rules in the leasehold contract. For example, the First Nation may describe either participation rules or constraints (e.g. taxes will be no higher than in adjacent jurisdictions) in the leasehold agreement. There appears to me to be considerable legal uncertainty under this approach if common law or the courts are relied upon for enforcement. This is because it is not clear that a government can make a property contract that limits its jurisdictional authority, and thus the First Nation council could alter the leasehold agreement unilaterally. There may be ways to get around this problem. One would be to write in that leasehold rents would be reduced (or refunded if leases were prepaid) if taxes are raised above the constraint or participation rules suspended this would keep the leasehold fees in the property contract and leave the government free to make taxation decisions. A second would be to have created institutional arrangements whereby a higher level government had the legal authority to approve First Nation actions and enforce leasehold agreements even when the lower level government's jurisdiction was involved.

ENFORCING THE RULES

In a federal system courts are often used to enforce constitutional rules. Courts are useful in that any affected party can usually obtain standing for the challenge. Courts can also be very expensive and some provinces provide alternatives for local government disputes. Both Alberta and British Columbia have processes where by the Minister can appoint a mediator for disputes involving municipalities. Their approach includes that if the mediator is not successful in obtaining a mutually agreed upon solution to the dispute, the Minister can change the mediator into an arbitrator. Knowledge that the mediator could become an arbitrator and impose a decision provides an incentive for parties to pay attention to the mediator and work to get a mutually beneficial resolution because intransigence in mediation is not likely to gain support from the mediator if he or she becomes the arbitrator. In any case, all federal settings require a dispute resolution arrangement whereby a third party can be sure that individual units operate within the rules. The issue for First Nation taxation would be whether the mediator/arbitrator would be appointed by an exclusively First Nation higher level government or a higher level government which represented both natives and non-natives.

Assignment of jurisdiction to adjudicate disputes in a federal system differs in different countries. In *The Federalist* the authors argued that because the supreme court would interpret the constitution in disputes between states and the national government, supreme court justices had to be approved by both the states and the national government. The result was that the

United States national government executive recommends justice appointments but they must be ratified by a majority of the Senate, which is comprised of two members from each state. Originally Senators were appointed by their state legislatures and were considered ambassadors from the states and thus the Senate was the forum to take state interests into account. The Senate must also ratify other actions of the national government such as treaties with foreign governments because state, as well as national government, jurisdiction may be affected. The Canadian system is different where the Prime Minister appoints justices to the supreme court unilaterally–a reflection of the Westminster nature of the national governments and not of Canadian federalism.. The theory of federalism would indicate that enforcement of rules concerning taxation of non-natives on reserves would be by a government which included both native and non-native representation.

MIXING THE RULES

In complex systems and in governments with a wide variety of activities it is common to find many different rules developed over time. One size does not fit all. It may even be desirable for a single First Nation to have different rules for different situations. Three kinds of distinctions that may deserve different rules are 1) existing versus new leaseholders; 2) land uses where leaseholders are on-site such as residents and businesses in contrast to uses such as pipelines, transmission lines, railroads and other uses of property on the reserve but which do not involve local business activity or residents and there are no on-site representatives and not much need for specific services, and 3) decisions of different magnitude, for example a referendum in addition to council approval may be required for large tax changes or capital projects that involve debt creation. Each of these situations will be described in turn.

Existing versus new leaseholders.

Leaseholders, prior to the assumption of tax jurisdiction by First Nations, entered into a contract where the leasehold fee was the entire price in provinces where no property taxes were levied by non-native governments. In British Columbia leaseholders expected to be taxed at the same rates as other citizens in the non-native government that overlapped the reserve. The leasehold contracts were as long as 99 years. Initial Fist Nation taxation in B.C. was constrained so as not to substantively change taxes levied on leaseholders, but with Budget Based Tax Rate Setting tax rates may differ from those in overlapping governments. The assumption of First Nation jurisdiction has had both benefits and costs, with benefits being the move toward providing services that were not previously provided by the taxing government and removing

non-native government jurisdiction from taxation on the reserve. The costs have been some significant increases in taxes for some leaseholders without any change in services. The cost to all First Nations have been adverse publicity resulting from unfair treatment of some leaseholders which has made other non-natives reluctant to invest on reserves.

Attempts to overcome some of the bad publicity has resulted in some First Nations creating constraints in their new leases. Clauses are inserted in leasehold agreements, for example, that constrain the First Nation from raising taxes above a certain amount, often the rates of an adjacent or overlapping government. The enforcement of these agreements is questionable under the current system but they provide explicit recognition that if First Nations want to maximize the value of their reserve lands the institutional arrangements created must assure leaseholders that the tax regime will be a fair one. All First Nations that wish to proceed with the leasing of land to non-natives should consider the full range of options for leaseholder participation and/or constraints as this is precisely the time when the First Nation and leaseholders want to be sure leasehold lands are most valuable, now and in the future.

Different land uses.

When leaseholders are comprised of residents and businesses where people are on the reserve regularly and need local services, participation is both feasible and useful for determining the preferences of the taxpayers. When the properties are occupied by pipelines, transmission lines, railroads, etc. meaningful participation is difficult to achieve and much less information is needed as service demands are minimal. As indicated earlier, such a situation led to the highest property taxes on railroads in North America by B.C. municipalities.

When considering rules governing taxation it is useful to consider different rules for different kinds of properties. A good case can be made that utility type properties which cross reserves be taxed at the same rates as overlapping or adjacent jurisdictions under a system of "constrained" rates.. This relieves the First Nation from designing participation rules and leaves decision-making in non-native governments where utilities are more likely to be represented. Utilities can also exercise the initiative to seek recourse to provincial governments if local governments treat them unfairly as was the case with railroads in British Columbia.

It is much more difficult to make a case for constrained rates for residents and businesses. This is because the mix of properties differs within different local governments and tax revenues need to be compared with the benefits from the services provided to determine appropriate rates.

I doubt there are any adjacent municipalities in B.C. where tax rates are identical between them. To set service levels which balance benefits and costs requires knowledge of the preferences of the leaseholders. This knowledge is best obtained by direct participation in taxation-service decisions.

Decisions of different magnitude.

Decisions of greater magnitude need greater scrutiny and there is a greater risk that some parties will be adversely affected in more significant ways. When the consequences of a decision are greater it is efficient to devote more time and energy to making the decision. In institutional analysis decisions of greater magnitude warrant the incurring of higher decision-making costs.

The most common approaches to more important decisions is to require approval by a higher voting rule (60 or 66 percent are common but some times 75% is used), approval in a referendum[15], or approval in more forums. For example debt creation in a municipality usually requires a referendum, limits are constrained by the value of its assessment base and assets, and enforcement of these rules is done through approval by the Inspector of Municipalities. Finally the Municipal Finance Authority checks the entire process. These overlapping rules make it extremely difficult for a municipality to engage in a capital project that cannot be financed and this protects both local citizens and other municipalities that would find it harder to undertake their own capital financing if one of them defaulted.

ITAB has followed a similar approach, allowing first Nations to increase tax rates up to 5% with minimal scrutiny, but requiring more substantial justification for rate increases above that amount or for several increases approaching 5% in a row. When the First Nation Finance Authority is expanded to include debt creation, to assure benefits for all its members it is going to have to introduce regulatory rules similar to those imposed on municipalities by provincial governments. Those rules are likely to vary between existing leaseholds and new leasehold development, with the former involving requirements for participation in the debt creation decision process.

[15]Referendum results tend to be the same as council voting results if the same rules are used, i.e. both use 51%. The public debate over referenda, however, produces much more information about the proposal. In many U.S. jurisdictions referenda on debt finance require 60% approval. In some jurisdictions all tax increases require a referendum.

V. OBSERVATION ON RELATING RULES TO OBJECTIVES

In a discussion of all the different kinds of institutional arrangements used within federal systems it is easy to lose sight as to how simple the objectives are: First Nations want to protect jurisdiction and achieve high values for their land. Leaseholders want to be treated fairly, which generally means meaningful participation, and have their preferences for taxes and services met, which in turn makes their lease more valuable. Both First Nations and leaseholders need decision processes which produce the necessary information to make appropriate decisions. The achievement of the objectives is taking place within one of the most important areas of government jurisdiction: taxation. Slogans such as "no taxation without representation" and "the power to tax is the power to destroy" have real meaning. First Nation and leaseholder objectives regarding property values are compatible, but there are significant differences with regard to the rules for making taxation-spending decisions.

Attitudes of leaseholders are reasonably clear. They have many opportunities to locate their businesses or residents on non-reservation lands and simply participate in the full range of Canadian governments. First Nations are much more constrained in that their territory is limited and they are in competition with many non-reserve locations. This means that they must provide a governance environment that is acceptable to leaseholders if they are to get the most value from their lands. This is a very practical constraint on those First Nations that want to pursue development jointly with non-native leaseholders on their reserves. This environment does not prevent a First Nation from simply deciding that it wants to retain all decision jurisdiction over its reserve lands. That decision, however may foreclose some opportunities for development if other First Nations do not want to take the risk of having a First Nation make a mistake and harm leaseholders in a way that harms other First Nations.

There is no single answer for First Nations. The issues will be irrelevant for some because they chose to exercise complete control over all decisions on their lands and are not interested in leasing land to non-natives. Some of these first nations may be committed to separate model of governance and not be interested in participating in the Canadian federal system. Other First Nations will want to enhance the welfare of their citizens by participating as fully in the Canadian system as is compatible with maintaining First Nation identity and control over issues that they view as unique to aboriginals. If such participation is to include economic

development and non-native investments on reserve lands–it will also be necessary to be part of the Canadian system of governance. The approaches described above have been presented as a basis for consideration what such integration implies.

VI. OBSERVATIONS ON THE CREATION OF MUTUALLY BENEFICIAL INSTITUTIONAL ARRANGEMENTS

The design of governing institutions is an extremely difficult task and it has not been successfully achieved in many parts of the world. The parliamentary system, without effective checks and balances, introduced in sub-Saharan Africa has been an absolute disaster, for example. The winner of the first election simply uses its government power to eliminate the opposition, and when the opposition gets sufficiently frustrated it forms a coalition with a neighboring government for a military attempt to overthrow its government. For nations comprised of diverse geographic areas and diverse people federal systems have been most successful. Europe is also slowly introducing a federal system.

Even a federal system, however, cannot guarantee fairness to all people as was demonstrated by Canadian national and provincial government violation of British law with regard to First Nations and treaty requirements. Federal systems, however, seem to be better than alternatives and within these systems recourse to the courts has provided an alternative path for remedies to past wrongs. It is also useful to recognize that the theory of federal systems was developed by thinkers who themselves had been minorities in government where they were treated unfairly. This included the original settlers to North America, the religious refugees, escaping from religious persecution, to the colonists who resented "taxation without representation" when British law itself required that citizens have a voice in taxation decisions[16]. The theory of federal systems is also helpful in understanding how First Nations can be included in the system while retaining their identify as First Nations. It also sheds insight into the issues surrounding the participation on non-native leaseholders in First Nation taxation decisions.

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[16]Legally the British Crown should have created legislatures in the colonies where those legislatures replaced the British commons for passage of legislation, or as was done by France, the colonials should have elected representatives directly to the House of Commons. The colonials ultimately had no resource except to war when the British Commons refused colonials any form of representation. Canada's evolution of separation from Britain reflects British law where the Canadian House of Commons replaced the British House of Commons for legislation while initially retaining the British Crown..

The issue of representation of taxpayers in taxing decisions is an important one. It is that because the issue of the taxation of leaseholders without their representation is so important that the authors of *The Federalist* would argue that proposals for resolving this problem need to be considered from many perspectives. Those perspectives should include all affected interests. This obviously includes the First Nations and the leaseholders, but it also includes non-taxing First Nations who may want to develop reserve lands in cooperation with leaseholders in the future and it includes non-direct participants who are concerned with the fairness and efficiency of the Canadian federal system. Issues of such importance need to be considered in multiple forums, including within individual First Nations, by organizations of First Nations, by leaseholders, and by higher level governments that represent both natives and non-natives. The more perspectives can be brought to bear on this issue, the greater the opportunity to discover mutually beneficial solutions. The analysis provided in this paper is one perspective and other perspectives need to be brought to bear as well.

Finally, it must be emphasized that no analysis by a non-affected party can be definitive, and no single interest should be the judge in its own cause. This means that ultimate solutions must be discussed and debated so that a solution can be discovered that comes as close as possible to one that all the affected parties can agree upon.. To the extent that agreement cannot be achieved, and a solution is imposed, the discussion in this paper should also provide a basis for predicting the consequences. A scholar can provide analyses and suggestions, like a shoemaker can fix shoes, but only the affected parties can judge the adequacy of the suggestions, just like only the wearer knows whether the shoe fits.

APPENDIX A

"MARKET VALUE" ON RESERVE: MUSQUEAM INDIAN BAND *V.* GLASS[17] AND THE IMPLICATIONS FOR PROPERTY ASSESSMENTS

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While the Canada Supreme Court decision on the market value of leasehold land on the Musqueam reserve was for the purpose of determining leasehold payments, and not assessments for property taxes, it is useful to understand the basis of the court's decision and its implications for assessment practices. First, the two most important aspects of the courts judgment will be explained; second, the implications of using off-reserve values to value reserve lands will be examined.

THE COURT DECISION

The most important aspect of the decision was whether or not the location of land on a reserve makes a difference in its market value. The primary difference in judge's opinions related to two issues: first, whether restrictions on reserve leasehold lands were analogous to government restrictions on fee simple lands or analogous to restrictions contained in a lease between a private lessor and lessee, and second, what other conditions on a reserve could result in transactions between willing sellers and willing buyers at prices different from those for similar land off reserve. Each of these issues will be briefly summarized below[18].

RESTRICTIONS ON LAND: GOVERNMENTAL OR LEASE CONDITION?

When leasehold properties are valued it is the property that is being valued, not just the share held by the lessee. Thus one is interested in the sum of the value to the lessee and lessor and restrictions on the use of the property stipulated in the lease document itself are not taken

[17] 2000 **SCC 52.** File No.: 27154

[18] The case also dealt with whether or not infrastructure improvements were part of market value for contractual payment purposes. This is not an issue with property assessments for taxation where the value of all improvements is included in the assessment.

into account in determining the property's value. In contrast, restrictions placed on the use of the property by a government are taken into account.

For example, if a lease document stipulates that a property may be used for residences only, but the property is zoned for a more valuable use, the assessment may reflect the value of the more valuable use. However, if the property is zoned for residential use only by the government, even if it would be more valuable in a different use, the assessment will be based on the value of the property in residential use.

In the Musqueam case all judges understood this distinction, but some took a different view as to what was a lease restriction and what was a government restriction as Musqueam Indian Band (and the Federal government) were both the lessor and the government at the same time.

Those justices that took the position that all restrictions should be viewed as those of a lessor, concluded that the property was worth just as much as fee simple property off-reserve because the Musqueam Indian Band could, as **owner of the property**, remove it from the reserve and sell it as fee simple if it so desired. The majority of justices, however, viewed the restrictions on the sale of reserve lands as **government restrictions** to be taken into account in determining value. They concluded that the restrictions associated with reserve lands could, and in this case, did, lower its market value to below that of off-reserve fee simple properties. Their decision is correct if one views **land management as a role of the Musqueam government in its capacity as a government and not just as a simple property owner**[19].

OTHER CONDITI0ONS AFFECTING MARKET VALUE

In addition to the issue surrounding government and lease restrictions, the trial court judge indicated that in a market of knowledgeable willing sellers and buyers, any number of conditions related to location on an Indian Reserve could influence market value. Among factors

[19]Lease conditions include both those that a property owning lessor would want to include and conditions placed on the use of the property by the First Nation as First Nation's do not generally use separate land use regulations and zoning to control the use of land. Because the First Nation government can, as a government, in effect, unilaterally change lease conditions from those agreed upon initially by the lessee by using its governmental authority, lease conditions are most appropriately viewed as imposed by a government. While governmentally imposed changes can occur with off reserve lands as well, the leaseholders off-reserve are represented in the government while they are not represented in the First Nation government.

he cited were uncertainly related to property taxation, publicized unrest, and limitations on non-natives entitlement to stand for election to the reserve's governing body. Any of these factors could make offers from willing buyers lower than they would be willing to make for similar properties off reserve. These factors may be regarded as very subjective as attitudes toward them differ among individuals, but all of these and other factors buyers and sellers feel are relevant to them are important determinants of market value. While they may not be explicit they all enter into identification of assessed value for property tax purposes and a majority of Supreme Court justices agreed.

Without a review of the trial court decision, it is impossible to determine whether or not the decision that undeveloped land within the Musqueam Reserve was worth 50% of the market value of land outside the reserve is the best estimate, but it is clear that a majority of the Supreme Court got it right in recognizing that government restrictions on the use of land and conditions on a particular reserve have the potential to make the market value of reserve lands different from that of fee simple lands off-reserve. It is also important to note that the Supreme Court also indicated that reserve lands could also be worth the same, or even more, than off-reserve lands, depending on conditions on the particular reserve. In summary, the Supreme Court got its urban land economics and property assessment theory right.

LEGISLATING COPYING OFF-RESERVE VALUES

It can be administratively difficult to determine market values on reserve. This has led to recommendations that the First Nations simply write into their assessment bylaws that off-reserve values are to be used for valuing similar reserve properties.

Outside of the reserve context, the valuing of leasehold properties by comparing them with fee simple properties is common assessment practice. This practice generally works well as the leasehold properties are in the same government jurisdiction and subject to the same governmentally imposed restrictions as adjacent fee simple properties. This is not the case for reserve leasehold properties. Reserve leasehold properties, by virtue of being on reserve and under reserve government jurisdiction, possess different government restrictions than off-reserve properties. These differences, as well as differences in other conditions, mean that to write an assessment bylaw to require the use of values of off-reserve property for reserve properties is to abandon market value assessment as the basis for the assessment of property for taxation purposes on reserve. This abandonment has significant political and policy consequences that First Nations should be aware of. It is not a step to be taken lightly.

POLITICAL IMPLICATIONS

High leasehold values on reserve depend on users of the property trusting the First Nation government and feeling that they are treated fairly. Market values are the agreed upon approach for assessments for property taxation purposes and British Columbia is one of the leaders in this approach. The most dramatic implication of abandoning a market value approach is that lessees are going to be told that their assessments are equivalent to those of similar properties off reserve because that is what the band bylaw says, even though the Supreme Court of Canada has ruled that market values may be as much as 50% lower. The political impact of such a position will be devastating for reserve leasehold values regardless of the legality of the position.

A second implication of legislating the application of off-reserve values is that it reduces the responsibility and the incentive for the First Nation Chief and Council to manage reserve lands to make them more valued by leaseholders. Given that leaseholders cannot vote in First Nation elections, the incentive to enhance leasehold values is an important incentive that leaseholders depend on to be treated fairly. The removal of such an incentive is not good for either the First Nation council or the leaseholders. In fact, attempts to legislate artificially high market values for taxation will itself generate distrust among leaseholders have the opposite effect: leasehold lands will be viewed as less valuable by willing buyers.

The political implications of applying off-reserve assessment values for on-reserve assessments are clearly negative.

POLICY IMPLICATIONS

In addition to political implications, there are significant policy implications for applying assessments from off reserve to leasehold lands.. First is that the relationship among values assigned to different classes of property are likely to be changed because the difference between on-reserve and off-reserve values are likely to be different for different classes of property.

For example, the valuation of utilities, industry and business or rental residential properties are unlikely to differ significantly on and off reserve. This is because these properties will be valued in relation to the income they generate (capitalized value), and many occupiers will have short term lease arrangements with a head leaseholder. In contrast, owner occupied residential property is likely to have the largest difference. For homeowners, their home is often their single largest investment and they are most likely to be sensitive to the fact that they have no political voice and to any uncertainties associated with First Nation jurisdiction. Thus, using

off reserve values for all properties is likely to result in equivalent assessments for non-residential property, but if there any problems on reserve, it will result in over-assessment relative to market value for residential home owners. While such relative changes in the value of different classes of property can be adjusted through variable tax rate setting, to start out by sending residents assessment notices that they recognize are higher than market value can be assured to generate significant unnecessary protest.

THE IMPORTANCE OF BUDGET BASED TAX RATE SETTING

First Nations are now required to move to budget based tax rate setting. This move provides the opportunity to overcome all of the problems of assessments on reserve. Market based assessments and budget based tax rate setting involves assessing all properties at market value, or as close to it as is administratively feasible, with the most important factor being that properties on reserve are assessed fairly relative to one another. Then, after expenditure requirements are budgeted, the tax rates can be set to raise the necessary funds to provide the services. It does not make any difference if the assessments are lower or higher than off-reserve properties--only that the assessments fairly reflect differences among the properties on the reserve. This is because if assessments are lower, tax rates will have to be higher, or if assessments are higher, tax rates can be lower.

CONCLUSIONS

The most appropriate policy approach for First Nation taxation is to maintain a focus on market value assessments on reserve. There may be cases where off-reserve values are appropriate but there may be others where they are not. The first priority should be that market value is attempted with great effort devoted to seeing that the different assessments on reserve reflect differences among the properties on the reserve. This approach is consistent with that of the Supreme Court of Canada in defining market values on reserve, and it provides an opportunity for First Nations to manage their leasehold properties so that their values are actually higher, rather than lower, than off-reserve values. Finally, it is an approach that is consistent with assessment practices across Canada and it is one that will receive the best reception from leaseholders. Treating leaseholders fairly, in the long run, is the real way to maximize the value of reserve lands.

January 2001

APPENDIX B

BASIC RULES FOR THE DESIGN OF POLITICAL INSTITUTIONS: EXERPTS FROM *THE FEDERALIST* AS SUMMARIZED IN *THE POLITICAL THEORY OF A COMPOUND REPUBLIC*

"To secure the public good and private rights against the danger of such a majority faction and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."

1. Every man is presumed to be the best judge of his own interests.

2. No man is a fit judge of his own cause in relation to the interests of others.

3. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.

4. Ambition must be made to counteract ambition.

5. The interest of the man must be connected with the constitutional rights of the place.

6. The means ought to be proportional to the end; the person from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.

7. In every political institution a power to advance the public happiness involves a discretion which may be misapplied and abused.

8. The constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other–that the private interests of every individual may be a sentinel over the public rights.

9. The accumulation of all powers...in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective will lead to tyranny.

10. By a faction, I understand a number of citizens...are united and actuated by some common...interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

11. Liberty is to faction what air is to fire.

12. If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.

13. When a majority is included in a faction, the form of popular government enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.

The Federalist by Alexander Hamilton, John Jay and James Madison is a collection of essays written in support of the proposed United States Constitution in 1787. Its 85 papers provide an extremely detailed analysis of consequences to be predicted to result from different governing arrangements.

The Political Theory of a Compound Republic by Vincent Ostrom, was published in 1971 by the Center for the Study of Public Choice. A second edition was published by the University of Nebraska Press and a limited number of copies are available from the Institute for Contemporary Studies, San Francisco.