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**LMTAC Discussion Paper: Local Government Issues and Interests
on the
First Nations Commercial and Industrial Development Act
and the
*First Nations Certainty of Land Title Act***

Executive Summary

The *Lower Mainland Treaty Advisory Committee* (LMTAC) has been monitoring the development of the *First Nations Commercial and Industrial Development Act* (FNCIDA) and the *First Nations Certainty of Land Title Act* (FNCLTA) since the latter received Royal Assent in the summer of 2010. The purpose of the two acts is to reduce the regulatory gap on commercial, industrial and residential market developments on reserve lands. As there has yet to be a project completed in British Columbia using FNCIDA and FNCLTA, there is a large amount of uncertainty regarding how the Province will implement projects and what the effect will be on local government. LMTAC has prepared this paper to address potential issues that should be considered in the implementation of any FNCIDA projects. The paper discusses the following issues:

- Implementation and administration of FNCIDA agreements;
- Implementation of an equitable property assessment system;
- The effect of growing non-aboriginal populations on reserves, including the inequity of not charging school, hospital (TransLink) and regional district taxes;
- Impact on existing service agreements;
- An increase in *Additions-to-Reserve* (ATR) applications;
- Cross-boundary impacts of large-scale FNCIDA developments; and
- Impact of FNCIDA legislation on the *BC Treaty Process*.

LMTAC recognizes the potential for FNCIDA and FNCLTA to encourage socio-economic development on reserves and the potential for market development on reserves to be mutually beneficial for First Nations and neighbouring local governments. The purpose of this paper is to ensure that both the provincial and federal governments understand and consider the complex nature of the impacts that FNCIDA projects will have on local government, and emphasise the need for developing a comprehensive implementation strategy that addresses the issues and concerns identified herein, and supports the BC treaty process.

Introduction

The *First Nations Commercial and Industrial Development Act* (FNCIDA) process of *Indian and Northern Affairs Canada* (INAC) and its implications for municipalities and regional districts have gained increased profile with Lower Mainland local governments. Reasons for heightened local government interest in FNCIDA include:

- Bill C-24: the *First Nations Certainty of Land Title Act* (FNCLTA), that provides amendments to FNCIDA, received Royal Assent on June 30th, 2010;
- The *Squamish Nation*, a key proponent of Bill C-24 and one of the five First Nations in Canada promoting the original FNCIDA initiative, plans to use FNCIDA to develop condominium units on undeveloped reserve lands in both Vancouver and West Vancouver which potentially could increase the non-aboriginal population living on *Squamish Nation* reserves by up to 25,000 residents over the next 20 years; and
- Potential linkages between the *Additions-to-Reserves* (ATR) process and FNCIDA exist. A number of local government concerns have been recently identified around the ATR process in LMTAC's discussion paper "*Local Government Issues and Interests on the Federal Additions-to-Reserves Process*," some of which brought-up the need for further discussion on FNCIDA and its impacts on local governments.

Background on Federal FNCIDA and FNCLTA Legislation

The FNCIDA went into force in 2006. It was developed as a cooperative effort between the *Government of Canada* and five First Nations, including the *Squamish Nation*. Its purpose is to increase the competitiveness of commercial and industrial development on Indian Reserves¹ by allowing for the replication of relevant provincial regulations, on a project-by-project basis. However, FNCIDA did not allow for the duplication of provincial land title registration systems, which has limited its effectiveness. Land interests on reserves are registered under the federal *Indian Lands Registry System* (ILRS), which contains two registration systems: the *Reserve Land Register* (RLR) and the *Surrendered and Designated Lands Register* (SDLR). Both the RLR and SDLR are deeds-based systems that do not guarantee legal protection to the same level as the provincial Torrens-based system.² The FNCLTA was proposed to address this shortcoming by allowing participating First Nations to request the establishment of a regulatory system equivalent to the provincial land title system.

The *Squamish Nation* was at the forefront of the FNCLTA legislation as it is the only one of the original five partnering First Nations that has proposed land development through FNCIDA.

The FNCIDA Process

The FNCIDA process is initiated by the First Nation³ and follows the four steps described below:⁴

¹ An Indian Reserve can be described as the area of land that is held in trust by the Federal Crown for the use and benefit of an Indian Band (First Nation). As Federal land held under section 91(24) of the *Constitution Act, 1867*, local government bylaws and provincial land use legislation are of no effect on Indian Reserves.

² Registration under a Torrens System provides indefeasible title.

³ It should be noted that only Chiefs and Council make the decision to request a project, not band members.

⁴ *Indian and Northern Affairs Canada*, "FNCIDA Process, Roles and Responsibilities," <http://www.ainc-inac.gc.ca/ecd/cid/prr-eng.asp>

1. Project Identification and Proposal
 - a. The First Nation develops a formal written proposal describing the project and requested regulations;
 - b. The First Nation, the INAC Regional Office, and key stakeholders hold exploratory discussions to determine project eligibility; and
 - c. The First Nation passes a Band Council Resolution requesting the development of regulations under FNCIDA.
2. Project Review and Selection
 - a. The First Nation works with INAC to perform a legal risk assessment and cost-benefit analysis;
 - b. INAC undertakes a detailed evaluation of the proposed project to determine its feasibility and eligibility. In order for a project to qualify under FNCIDA, a positive answer must be given to the following five questions:
 - i. Do the lands involved in the project meet all the requirements (legal, policy, etc.) so that INAC is able to issue land tenure?
 - ii. Is there currently a lack of regulations to deal with environmental or health and safety issues, regardless of the degree of possible impact?
 - iii. If there is a lack of existing regulations, and, if so, is it preventing economic development and is there no other regulatory regime that could be used to implement the project?
 - iv. Have all other alternatives for regulating the project, including the *Indian Act*, been considered and ruled out, and is use of FNCIDA the only possible approach?
 - v. Is the province supportive in-principle of the project, and will the province be willing to play a role in the administration and enforcement of the regulations that would be developed under FNCIDA?
3. Negotiation and Drafting Stage
 - a. The following project work plans are developed:
 - i. Resources required for project implementation;
 - ii. List of key milestones;
 - iii. Stakeholder engagement plans;
 - iv. Risk management strategies; and
 - v. Timelines.
 - b. Close consultation between the *Government of Canada*, the First Nation, and the Province occurs in order to develop the following three documents:
 - i. The Regulations;
 - ii. The Tripartite Agreement; and
 - iii. The Land Tenure Instruments.
4. Administration, Monitoring, and Enforcement
 - a. Construction and operation of the project begins;
 - b. The Province administers, monitors, and enforces the regulations as agreed to in the *Tripartite Agreement*; and
 - c. Administration, monitoring, and enforcement are ongoing until the conclusion of the project.

Identification of Local Government Issues and Concerns

The FNCIDA legislation and FNCLTA amendments appear to be excellent tools for First Nations to attract residential, commercial and industrial development to their communities in support of socio-economic development. The goals of FNCIDA and FNCLTA deserve to be supported. However, as with any new program or legislation, it is a prudent practice to analyze FNCIDA and FNCLTA to identify any potential issues that might arise during the implementation process. Based on a review of the FNCIDA and FNCLTA policies and legislation, and feedback received from several Lower Mainland local government jurisdictions, including those that might be directly affected by potential FNCIDA projects, the following issues and concerns have been identified:

Concern #1: Implementation and Administration of FNCIDA Agreements

- FNCIDA is federal legislation but, as part of the tripartite agreement signed in Stage 4 of the FNCIDA process, it is implemented and administered by the participating provincial government. The Province determines how it will approach the implementation and administration of any FNCIDA agreement. As no FNCIDA agreements have been completed thus far, it is uncertain how the Province will implement future FNCIDA projects undertaken in British Columbia. As regulations for FNCIDA projects need to be developed on a project-by-project basis, the FNCIDA process is one that will be time consuming and expensive. As such, it is important that the Province clarify how it will implement and administer FNCIDA projects in BC. Specifically, clarity is needed regarding the following issues:
 - Which provincial body will be responsible for FNCIDA agreements? Will the Province designate a specific body for all future agreements, or will it vary on a project-to-project basis?
 - How will the Province ensure that new residential, commercial, and industrial development on reserve lands is planned in consultation and coordination with neighbouring municipalities and regional districts?
 - How will the Province ensure application of construction (BC Building Code), workplace (WorkSafeBC), and environmental standards for FNCIDA projects?
 - How will the Province ensure implementation of a property assessment system equivalent to *BC Assessment* (BCA) for FNCIDA projects? and
 - How will the Province ensure that developments on reserve lands, particularly non-aboriginal market housing, pay appropriate taxes including hospital (TransLink), school, and regional district taxes.

Concern #2: The Implementation of an Assessment System Equivalent to the BCA

- An accurate property assessment roll system is a necessary prerequisite for FNCIDA projects as it will be used to determine costs of services when negotiating future service agreements/contracts with the applicant First Nation (FN), as well as appropriate taxation levels on any new industrial, commercial or residential development.
- Under provincial legislation — the *Indian Self Government Enabling Act* (ISGEA) — all First Nations in BC have opted to implement independent taxation systems. Independent taxation authority has removed provincial taxes from reserves, allowing First Nations to

implement their own taxation and property assessment bylaws. First Nations taxation bylaw systems are developed under one of two federal legislation options and are subject to approval by the federal government or the *First Nations Tax Commission* (FNTC), depending on which legislation is used. For property assessment services, First Nations have three options: contract with *BC Assessment* (BCA), hire a tax agent to prepare the assessment roll, or prepare the assessment roll on their own. Most First Nations (61%), including the *Squamish Nation*⁵, have opted to contract with BCA for maintaining their property assessment rolls. Notwithstanding, the experience of several Lower Mainland local governments is that FN assessment rolls have been an issue when negotiating servicing agreements with First Nations.

- **How will FNCIDA projects utilize either the BCA system or an equivalent system for property assessment rolls?** The purpose of the FNCLTA amendments is to allow FNCIDA projects to be registered under regulations equivalent to the rest of the province. However, there are no measures contained within FNCLTA to ensure that an equivalent property assessment roll process is used. A comprehensive and accurate property assessment roll, equivalent to that of the BCA, is necessary to ensure that the appropriate amount of taxes are levied on FNCIDA projects. The Province must ensure an acceptable property assessment system will be implemented for FNCIDA projects.

Concern #3: The Effect of Growing Non-Aboriginal Populations on Reserves

- FNCIDA and FNCLTA legislation will increase new industrial, commercial and residential development on reserve lands. Many of the new developments, such as residential market housing, will be occupied by non-aboriginals. In the Lower Mainland and Sunshine Coast, for instance, non-aboriginals accounted for an estimated 46% of reserve populations, or approximately 3,800 out of an estimated 8,200 total reserve population, in 2006.⁶ Squamish and Tsleil-Waututh reserve land is home to the largest non-aboriginal populations, each with nearly 1,200 non-member residents amounting to over 80% of the reserve population in the case of Tsleil-Waututh and over 30% in the case of Squamish.
- As the non-aboriginal population living on reserves is likely to grow as a result of FNCIDA projects, it is necessary to reiterate local government concerns regarding the representation and taxation of non-members residing in First Nations jurisdictions. Local government concerns are as follows:
 - Populations living on reserve lands do not pay school, hospital (TransLink), and regional district taxes. As a consequence, non-aboriginal residential populations living on reserve lands are being “subsidized” by their neighbouring municipal tax payers.
 - Non-member residents living on reserve land do not have the right to vote in elections for First Nation governments, but will be subjected to the laws and taxes established by those First Nation governments. In other words, there is no accountability to non-member residents living on reserve who pay taxes.

⁵ Other Lower Mainland First Nations that utilized BCA services in 2009 include: Tsawwassen, Musqueam, Tsleil-Waututh, Sechelt, and Matsqui (BCA 2009 Annual Report)

⁶ Population was estimated using 2006 Community Profiles Census Data and INAC 2006 First Nations Profiles

- There needs to be full fiscal transparency regarding taxes, fees and charges assessed to residents living on reserve land to prevent “hidden” charges being levied as taxes.
- Most First Nations do not tax their aboriginal members while at the same time imposing property taxes on non-aboriginal residents on reserve. This creates a situation of “representation without taxation” for aboriginal members living on reserve while simultaneously subjecting the non-aboriginal residents on reserve to “taxation without representation”. This concern has been addressed more in-depth in a discussion paper prepared by LMTAC in 2003.⁷
- Local governments are concerned that aboriginal and non-aboriginal residents living on First Nation reserve land are permitted to participate in local government elections of their neighbouring municipality or regional district; in other words, “representation without taxation”.
- With regard to those living on reserve, the *BC Voters’ Guide*⁸ states the following: “If the reserve is within a municipality and you are otherwise eligible to vote, you can vote in the municipal election. If the reserve is not within a municipality but within a regional district and you are otherwise eligible to vote, you can vote for the electoral area director in the election held by the regional district. **This applies to non-aboriginal leaseholders as well.**”

Concern #4: Impact on Existing Service Agreements between Local Governments and First Nations

- Increased residential, commercial and industrial development on reserves may result in the applicant First Nation desiring changes to existing service agreements with local governments. In 2008, for instance, the *Squamish Nation* expressed an interest to enter into more comprehensive service agreements. Meanwhile, the Province declared it would undertake a consultation process with those municipalities affected by the *Squamish Nation’s* desire for a change in service agreements, as well as with *Metro Vancouver* and *TransLink*.
- The *Squamish Nation* envisions replicating municipal bylaws, as part of its service agreements, using municipal officials to enforce the bylaws on a fee-for-service basis.⁹ The Province, unaware of existing agreements containing similar provisions, has been unable to identify potential implications for the participating municipalities. The Province again declared that it would consult with the affected municipalities to identify any potential issues regarding the matter.
- As regulations are developed for FNCIDA projects on an individual basis, various issues, such as the *Squamish Nation’s* desire to replicate municipal bylaws, will arise for different projects. The Province needs to develop an approach to deal with such issues in an efficient manner, one that incorporates the input of affected parties, including local governments, in the case of the *Squamish Nation* proposal.

⁷ LMTAC, “*Democracy and First Nation Self-Government: Considering Rights of Representation for Non-member Residents in First Nations Jurisdictions*,” March 2003.

⁸ “BC Voters’ Guide,” http://www.municipalelections.com/faq_elections.html#fnv

⁹ The District of West Vancouver currently processes building permits for the Squamish Nation for developments on Squamish Nation lands, but the District does not use West Vancouver’s building permit process/system — the District only processes the paperwork.

- FNCIDA does not contemplate a role for local government as regulator. However, certain utility services (e.g. sewerage) require approval from local government authorities such as the *Greater Vancouver Sewerage and Drainage District*¹⁰ (GVS&DD) board. As FNCIDA projects will take place on federal lands,¹¹ there is an issue regarding how local government will regulate sewerage from federal lands through the municipal system that ends up in the GVS&DD system. Currently, there is no way to regulate such sewerage. Furthermore, corresponding bylaws for servicing also apply regarding air quality and liquid waste control under the provincially-mandated *Liquid Waste Management Plan* and *Air Quality Management Plan*, both of which are predicated on municipal *Official Community Plans* and the *Regional Growth Strategy*, and both of which preclude servicing of developments not contemplated within the plans.
- *Metro Vancouver* undertakes permitting, regulation and enforcement for air quality and liquid waste source control,¹² while regional district staff works with the developer/operator on the site, not the landowner. This practice should not be any different for potential FNCIDA projects. It is unclear how relevant municipal and regional district authorities will be able to undertake permitting, regulation, and enforcement related to FNCIDA projects.

Concern #5: An Increase in Additions-to-Reserve (ATR) Applications

- ATR applications are designed to allow First Nations to add land to their reserves mainly to accommodate community growth as well as meet social and commercial needs. While land acquired under the ATR process is not intended to be used for market development, there are no mechanisms in place to monitor the use of the ATR lands once the application has been approved.¹³ Therefore, it is possible that land acquired under ATR could be used for commercial and industrial development under FNCIDA, including residential market housing, contrary to the original purpose of the ATR policy.
- On the INAC website, under the “Process, Roles and Responsibilities” section of the FNCIDA Process, the following appears under the information required in the project proposal to be submitted in Step 1 – Project Identification and Proposal:
“Confirmation that the land is reserve land, or that it is proposed as an addition to reserve (ATR) with an indication of the current stage of the approval process.”
- The existing link between land acquired under ATR and land available for FNCIDA projects contradicts the intrinsic purpose of the ATR policy to address land constraint issues such as expansion for band member housing. INAC must clarify this inconsistency as the ability to use ATR land for market development activities may lead to an increase

¹⁰ The GVS&DD Act authorizes the GVS&DD to “by by-law, impose development cost charges on every person who obtains from a member municipality (a) approval of a subdivision, or (b) a building permit authorizing the construction, alteration, or extension of a building or structure” (GVS&DD Act).

¹¹ As a matter of Constitutional law, certain lands and undertakings — such as “Indians and Lands reserved for Indians,” as well as airports, ports, federal government buildings, and other federal lands — are within the federal government’s jurisdiction. For the most part, municipalities do not, and are legally barred from, regulating land use and building construction on such lands.

¹² *Metro Vancouver* treats operators on federal properties the same way as it would any other operator on non-federal lands regarding both air quality and liquid waste. For example, *Metro Vancouver* has air quality permits for non-port activities that take place on federal port lands, particularly if such operations involve diesel fuel.

¹³ LMTAC, “Local Government Issues and Concerns on the Federal *Additions-to-Reserves* Process,” 2010.

in ATR applications driven by a desire to further capitalize on market development opportunities. Furthermore, a misuse of land acquired under the ATR process may lead to problems in the future when actual land constraints are being experienced, and there is far less crown land available to be added to reserves.

Concern #6: Cross Boundary Impact of Large-Scale Development

- The cross-boundary impact of large scale development on the reserves of participating First Nations will affect adjacent municipalities and regional districts. Large-scale projects already create challenges between neighbouring municipal jurisdictions regarding the servicing of new developments. Large-scale residential, commercial and industrial developments on reserves will challenge First Nations' and local governments' ability to provide proper levels of service to the growing population of non-aboriginal residents living on reserves.
- Large-scale developments lead to an increased demand for services such as water, sewer, drainage, solid waste, policing, fire protection, library, recreation, parks, roads and transit. Municipalities, regional districts and *TransLink* impose *Development Cost Charges* (DCCs) on developers as one-time fees to offset the costs related to providing these services,¹⁴ and DCCs are imposed by municipalities, regional districts and *TransLink* on every new residential, commercial, industrial, and institutional development. It needs to be clarified how, and by whom, such DCCs (or some reasonable facsimile thereof), including the provincially-mandated *TransLink* real estate / density / land lift development charges, will be collected from FNCIDA projects in order to avoid FNCIDA projects being "subsidized" by neighbouring municipal taxpayers.¹⁵ This issue has heightened importance given the large and very costly sewer, water and transit infrastructure projects anticipated within *Metro Vancouver* over the next two decades.
- *Official Community Plans* and *Regional Growth Strategies* are used to ensure that land use and development are coordinated in an appropriate manner that follow best practices and maximizes the value and utility of the specific land being developed and the surrounding region as a whole. While First Nation reserves may be legally separate from neighbouring municipalities and regional districts, the geographical connection cannot be ignored, particularly when it comes to residential, commercial and industrial market development. Therefore, FNCIDA projects need to take into account community and regional growth and servicing plans, to the benefit of both neighbouring jurisdictions and the Indian Reserves. Measures must be put in place to ensure that FNCIDA projects are implemented in a manner that is consistent with municipal *Official Community Plans* and *Regional Growth Strategies* of the neighbouring jurisdictions.

Concern #7: Impact on the BC Treaty Process

- Considering the potential benefits of the FNCIDA legislation, the *Squamish Nation* has indicated that it lacks incentive to pursue treaty negotiations. In other words, FNCIDA

¹⁴ BC Ministry of Community and Rural Development, Local Government Department

¹⁵ There is no way for the *District of West Vancouver* to collect DCC's because West Vancouver has no authority for the lands upon which the development takes place.

actively discourages some First Nations from pursuing a treaty. As treaty negotiations require a substantial financial commitment on the part of participating First Nations, some may view the economic gains from residential, commercial and industrial development on reserve to outweigh the benefits of completing a treaty, especially when the costs of treaty negotiations are considered.

- The potential abandonment of treaty negotiations by First Nations is a concern for many reasons. Finalized treaties provide certainty regarding asserted rights and title, land claims and other aboriginal interests. This certainty resolves numerous issues regarding the interaction between First Nations and various government bodies. The requirement to consult with First Nations, tribal councils, and territory groups/associations regarding activities taking place within their traditional territories is just one example of the uncertainties arising in the absence of treaties.
- It is unclear what the implications will be of concluding a treaty after a FNCIDA project is completed. The FNCIDA legislation is clear that the project must be on reserve land to be eligible for implementing the regulatory systems provided by both FNCIDA and FNCLTA. There needs to be clarity as to what will happen to those regulatory systems if a treaty is concluded and the land used by FNCIDA projects become *treaty settlement land* rather than reserve land.

Local Government Issues and Interests

LMTAC recommends that the local government issues and concerns outlined above be addressed in the FNCIDA process through consideration of the following interests:

Concern #1: Implementation and Administration of FNCIDA Agreements

- All levels of government need to take a consistent approach toward the implementation of FNCIDA and FNCLTA legislation in British Columbia. Even though the *Squamish Nation* is currently the only First Nation moving towards a FNCIDA agreement in this province, other First Nations may follow suit in the near future. Early involvement of local governments in the FNCIDA implementation process provides an excellent opportunity to shape how future FNCIDA agreements may be implemented and administered. As such, it is imperative that the Province undertake extensive consultation with local governments throughout the implementation process, so that issues that are likely to resurface during future FNCIDA projects can be identified and mitigated as early as possible.

Concern #2: The Implementation of an Assessment System Equivalent to the BCA

- An accurate property assessment roll system is a necessary prerequisite for FNCIDA projects as it will be used to determine the cost of services when negotiating future service agreements/contracts with the First Nation applicant, as well as appropriate taxation levels on any new industrial, commercial or residential development. The Province must ensure that FNCIDA projects utilize either the BCA system or an equivalent system for preparing property assessment rolls, and that the First Nation's assessment roll is maintained and up-dated on an on-going basis.

- **Assessment of property values on-reserve lands must be calculated in a manner comparable to those located off-reserve.** The value of the actual land should not be excluded from the assessment roll due to its federal ownership. Calculating only the value of the physical property results in an underestimation of the actual property value leading to discrepancies of value between comparable on-reserve and off-reserve properties. Such inconsistencies in property assessments become an issue when negotiating service agreements and levying appropriate levels of taxes.

Concern #3: The Affect of an Increasing Non-Aboriginal Population on Reserves

- The non-aboriginal population living on reserve lands must pay school, hospital (TransLink), and regional district taxes to ensure equity and fairness with their neighbours and avoid being “subsidized” by their neighbouring municipal tax payers. It should be a priority of all levels of government to ensure that the inherent rights of all Canadian citizens are protected.
- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant should consent to any FNCIDA development paying school, TransLink, hospital, and regional district taxes. Such ‘taxation’ would need to be accompanied by ‘representation’ on the regional district board.
- Regarding non-member representation on reserves, the position of Lower Mainland local governments is expressed in LMTAC First Principle #27, as follows:

27. Treaties must uphold the principle of “no taxation without representation” for all persons residing on treaty settlement lands. Mechanisms need to be developed to ensure that all persons who are living on treaty settlement lands and who are paying taxes or levies to the First Nation have access and a voice in First Nation governance systems.

LMTAC’s discussion paper titled “*Democracy and First Nation Self-Government: Considering Rights of Representation for Non-Member Residents in First Nations Jurisdictions*”, completed in 2003, provides further background information on the issues of representation and taxation regarding non-members living on reserve lands.

- While the above First Principle was created to address scenarios in the *BC Treaty Process*, the same underlying interest applies in the FNCIDA context, where an increase in the non-aboriginal population living on reserve land and potential *treaty settlement land* is expected.
- Both the provincial and federal governments must ensure that First Nations provide fair and equitable representation and property tax treatment of both aboriginal and non-aboriginal residents living on reserves to avoid situations of “taxation without representation” for non-aboriginals while maintaining “representation without taxation” for aboriginals.
- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to implement a system for non-member representation on all matters related to services and taxation to ensure some degree of fiscal accountability.

- As a prerequisite to provincial support for implementing FNCIDA projects, particularly residential market housing, the First Nation applicant for FNCIDA development should agree to implement a system for ensuring fiscal transparency regarding taxes, fees and charges assessed to non-aboriginal residents living on reserve land.
- As a prerequisite to provincial support for implementing FNCIDA projects, the Province needs to replicate relevant provincial legislation such as the *Freedom of Information and Protection of Privacy Act* to ensure transparency and accountability for FNCIDA developments. The federal government also must enact appropriate legislation to ensure transparency and accountability on Indian Reserves.
- If the contemplated FNCIDA development proposal is a residential condominium project or multi-unit commercial development, then the Province needs to replicate relevant provincial legislation such as the *Strata Property Act*. While the *Strata Property Act* usually allows purchasers to hold fee simple title to their holdings, along with a proportional fee simple holding in the common building,¹⁶ non-aboriginals cannot hold such title on reserve lands. However, the *Strata Property Act* allows for leasehold title in cases where the freehold owner is a public authority.¹⁷ As FNCIDA projects will remain part of reserves, the federal government should be able to act as the freehold owner of FNCIDA projects, allowing for leasehold interest to be applied to FNCIDA developments. The FNCLTA amendments should allow for the required land title registration and assurance funds needed to implement the *Strata Property Act*.
- If the FNCIDA development proposal is a multi-unit residential rental project, as contemplated by the *Squamish Nation* for their reserve lands in the *City of Vancouver*, then the Province needs to replicate relevant provincial legislation such as the *Residential Tenancy Act* to ensure that the rights (and obligations) of renters are protected in a manner equivalent to renters not living on reserve lands.
- The Province must ensure that both aboriginal and non-aboriginal residents living on reserve not be allowed to participate in neighbouring local government elections unless those residents living on reserve pay full municipal, regional district, school and hospital (TransLink) taxes. Such ‘taxation’ would need to be accompanied by ‘representation’ on the regional district board.

Concern #4: Impact on Service Agreements between Local Governments and First Nations

- Local governments must be consulted during the FNCIDA proposal process regarding the potential impact on existing service agreements and/or the requirement for new service agreements. This consultation should take place at the earliest possible opportunity in order to identify any technical or policy issues resulting from proposed FNCIDA projects. Issues regarding service agreements are particularly important due to the fact that multiple service agreements are currently being negotiated in the Lower Mainland.

¹⁶ Mangan, Mike “The Condominium Manual: A Comprehensive Guide to the Strata Property Act,” 2nd Ed. (Vancouver: British Columbia Real Estate Association, 2004).

¹⁷ *Strata Property Act*, S.B.C., 1998.

- The Province must determine the potential legal implications for municipalities regarding enforcement of bylaws and regulations on reserve lands as part service agreements with First Nations. Similarly, the Province must determine the legal implications for regional districts regarding permitting, regulation and enforcement of regional district regulations on First Nation reserve lands; for example, sewer district regulations, water district regulations, and air quality regulations. Operations on federal lands (in this case reserves) should be treated the same as they would be off-federal lands.
- The Province stated that it intended to consult with local governments and relevant agencies regarding issues surrounding preliminary discussions on Squamish Nation development proposals. This inclusion of local governments in the FNCIDA process also must be continued as part of the process after the *Squamish Nation* submits an official FNCIDA proposal; as well as being part of any future FNCIDA projects.
- Lower Mainland local governments support an all-in approach, or 100% cost-recovery model of service provision to First Nations that include *Development Cost Charges* (DCCs) and sinking funds for future infrastructure replacement. Lower Mainland local governments welcome an opportunity to renegotiate service agreements to this level with participating First Nations.
- As FNCIDA projects will be implemented on a project-by-project basis, the process of negotiating service agreements for every FNCIDA project will be both costly and time consuming for local governments. As such, service agreements should be negotiated following the all-in approach requiring only an increase in levels of service delivery for additional developments under FNCIDA, rather than an increase in types of services.
- Provincial and federal legislation to allow municipal and regional district authorities to implement relevant bylaws and regulations for services provided on First Nation reserve lands must be included in the Province's plan to administer FNCIDA projects.
- As a prerequisite to local governments entering into servicing agreements for FNCIDA projects, particularly residential market housing, the First Nation should agree to the application of municipal and regional district *Development Cost Charges* on FNCIDA projects, as well as the provincially-mandated *TransLink* real estate / density / land lift development charges, and also agree that the FNCIDA development will pay school, hospital (*TransLink*), and regional district taxes. Such 'taxation' would need to be accompanied by 'representation' on the regional district board.

Concern #5: An Increase in Additions-to-Reserve (ATR) Applications

- There are currently no legal mechanisms in place to prevent First Nations from using land acquired under the ATR process for market development instead of addressing land constraints regarding community use, band member housing, etc. This gap in land use monitoring needs to be addressed to ensure that ATR applications are not submitted with the intent of using ATR land for residential, commercial and industrial market development to capitalize on the opportunities provided by FNCIDA and FNCLTA.

- The federal government needs to implement a legal mechanism to ensure that First Nations do not submit an ATR application for acceptable land constraint issues, such as band member housing, only to use it for market development after the application is approved. This is particularly important due to the opportunities for residential market housing on reserve lands provided by FNCIDA and FNCLTA.
- The federal government needs to clarify the allowance of land acquired under the ATR process to be used for FNCIDA projects as ATR is supposed to be used for land constraint issues, not market development such as contemplated for FNCIDA projects.

Concern #6: Cross Boundary Impact of Large-Scale Development

- Issues regarding large-scale developments affecting multiple jurisdictions are challenges that already exist between neighbouring municipalities, and are likely to exist in regard to residential, commercial and industrial development on First Nation reserves. The Province must consult with the affected local government jurisdictions to minimize potential conflicts and issues.
- *Development Cost Charges*, including relevant *TransLink* real estate / density / land lift development charges, need to be imposed on FNCIDA projects in order to prevent a fee-exempt environment being used to provide extra incentive for developers to construct their projects on reserve land. Neighbouring municipalities and regional districts need to be compensated in order to offset the extra costs incurred when providing services to the new development.
- This compensation mechanism could involve collecting DCCs from developers of FNCIDA projects. However, municipalities and regional districts will be unable to directly collect DCCs from FNCIDA projects as they will take place on federal land, which is outside the local government jurisdiction. In order to ensure that local governments are not “subsidizing” developments on federal lands, service agreements must allow for collecting fees equivalent to DCCs.¹⁸
- As a prerequisite to provincial support for implementing FNCIDA projects, the First Nation applicant should consent to DCCs, or equivalent fees, being accounted for in service agreements, including relevant *TransLink* real estate / density / land lift development charges, being assessed against FNCIDA development projects in order to avoid FNCIDA projects being “subsidized” by neighbouring municipal tax payers.
- FNCIDA projects must be consistent with municipal *Official Community Plans* (OCPs) and also must be incorporated into *Regional Growth Strategies* (RGSs). This would enable FNCIDA projects to be incorporated into the regional district’s *Liquid Waste Management Plan* (LWMP) and *Air Quality Management Plan* (AQMP) to thereby legally permit servicing and facilitate proper regulatory management. This must be

¹⁸ An example of an agreement between local government and a federal agency is the “*Accord between the City of Richmond and the Vancouver International Airport Authority*” signed in 1994. The agreement specifically refers to the collection of DCCs. The accord stipulates that the parties agree to the principle whereby tenants and sub-tenants are subject to the same rules, regulations, and charges as if they were occupying other than federal property within the municipality.

accomplished during the FNCIDA proposal review process by consulting with the relevant municipal and regional authorities.

- Furthermore, there should be a “sunset clause”¹⁹ on proposed FNCIDA projects that ensures that they are completed in a reasonable timeframe. If development plans are delayed for a long period of time, it becomes difficult for neighbouring municipalities to consider the impact of the proposed projects on OCPs and subsequently meet their own development objectives and needs.

Concern #7: Impact on the BC Treaty Process

- LMTAC First Principle #7 declares the support of local governments for the *BC Treaty Process*, as follows:
7. Local governments strongly support the need for final treaty settlements to provide certainty with respect to Aboriginal rights and title.
- Economic development initiatives under the auspices of the FNCIDA and FNCLTA legislation should not be viewed as an alternative to the treaty process. While the legislation provides economic opportunities previously not available to First Nations, the treaty process addresses issues far beyond economic development. It is in the best interests of all parties involved to continue moving towards finalized treaties.
- The Province must ensure that residential populations living on reserve as a result of market housing developments, along with commercial and industrial business projects, pay full regional district, school and hospital (TransLink) taxes to avoid developments implemented under FNCIDA legislation being an economic disincentive to First Nations pursuing treaties in BC. Such ‘taxation’ would need to be accompanied by ‘representation’ on the regional district board.
- Both the provincial and federal governments must develop a means for ensuring a seamless transition of the regulations governing developments under FNCIDA to an autonomous *Treaty First Nation*, where treaties are completed after FNCIDA projects have already been approved. Not having a strategy in place to deal with this possibility could result in uncertainty for developers that might become an obstacle to the pursuit of future projects under the FNCIDA and FNCLTA legislation.
- All of the issues and concerns identified in this discussion paper are addressed by treaties such as the one concluded with the *Tsawwassen First Nation*. However, facilitation of FNCIDA developments without addressing the issues and concerns identified herein would be an ill-conceived half-measure that perpetuates problems and inequities, and undermines the treaty process.
- The federal and provincial governments need to give careful consideration to developing a comprehensive implementation strategy that addresses these issues and concerns, and supports the treaty process.

¹⁹ A “sunset clause” is part of an agreement that is used to repeal the agreement if certain conditions are not met within a specified period of time.

Next Steps

This discussion paper is intended to identify the general issues and interests of Lower Mainland local governments with respect to the FNCIDA and FNCLTA legislation. Individual local governments will have additional issues and interests that reflect the unique nature, needs, perspectives, and circumstances of their communities in relation to the specifics of proposed development plans under FNCIDA.

Furthermore, while the overall concept of FNCIDA (to close the regulatory gap on reserve) has its merits, the biggest drawback for FNCIDA is that it is, as yet, untested and unproven. Potential alternatives to FNCIDA should be explored if the obstacles of the single-application approach for each development/project prove to be too cumbersome. For example, under the *Indian Act*, section 4(2), the Governor-in-Council can declare the *Indian Act* inapplicable to all or a portion of any Indian Reserve lands. Pursuing such an alternative could prove to be more manageable.

Next steps should include establishing a dialogue with the Province, Federal government and First Nation entities regarding the concerns expressed in this paper, and agreeing on a mechanism to keep local governments informed and involved in the FNCIDA process, and individual development projects that arise from this process, especially the *Squamish Nation* projects, as those projects will likely have a significant impact on how future FNCIDA projects are handled in BC.