
Democracy and First Nation Self-Government: Considering Rights of Representation for Non- Member Residents in First Nation Jurisdictions

*A Background Discussion Paper to LMTAC First Principle #27
Rights of Representation*

March 2003

*For Discussion Purposes Only- Without Prejudice
(This draft discussion paper is intended to stimulate further debate on the issues and does
not present final, defined positions.)*

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EXECUTIVE SUMMARY

The purpose of this discussion paper is to outline the specific concerns Local Governments have related to the taxation and representation of non-Aboriginal residents or leaseholders presently living on Indian Reserves and their implication, post-treaty on Treaty Settlement Lands. Representation of persons who are not members of a First Nation, but may reside on future treaty settlement lands, has been the subject of substantial public debate since the signing of the Nisga'a Final Agreement. This topic has been viewed as controversial by some because it relates to the role and function of governmental institutions, and whether future forms of Aboriginal self-government will be open to all constituents within a given territory ("public") or open to the members of the particular First Nation ("private").

Providing representation for non-members residents within First Nation jurisdiction is an issue of importance to Lower Mainland Local Governments because it is a topic currently being addressed at two of the five treaty tables in the region; in particular the Katzie and Tsawwassen treaty tables. In addition, the urban context of treaty-making in the Lower Mainland highlights a unique situation compared to the rest of the province in that it is not uncommon for the non-Aboriginal population to be numerically higher than the Aboriginal population on reserve.

This paper identifies various examples of non-member representation on both Indian reserves and treaty settlement land in British Columbia that have been identified in recent literature. The fundamental issues of representation and governance are explored within the paper and Local Government concerns and interests are identified according to each issue. The position of Lower Mainland Local Governments, as expressed through the Lower Mainland Treaty Advisory Committee (LMTAC) First Principle 27, is:

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.

Findings in this paper reveal that extending genuine representation rights to non-Aboriginal residents would improve governance and foster healthy relationships between the two groups living either on a reserve or on treaty settlement land. This paper is intended to provide the necessary background information to initiate discussion on this topic. Substantial discussion is needed on how to create mechanisms to ensure that non-members living on treaty settlement lands are represented in Aboriginal institutions. This is a complex question that will require extended research, exploratory discussions and scenario writing. It is anticipated that this document will evolve through further exploration and dialogue.

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1.0 INTRODUCTION

1.1 Purpose

Local Governments have specific concerns with the taxation and representation of non-Aboriginal residents or leaseholders presently living on Indian Reserves and their implication, post-treaty on Treaty Settlement Lands.

Representation of persons who are not members of a First Nation but may reside on future treaty settlement lands has been the subject of substantial public debate since the signing of the Nisga'a Final Agreement. The issue is controversial because it relates to the role and function of governmental institutions, and whether future forms of Aboriginal self-government will be open to all constituents within a given territory ("public") or open to the members of the particular First Nation ("private").

This is an issue of importance to Lower Mainland Local Governments because it is a topic currently being addressed at two of the five treaty tables in the region; in particular the Katzie and Tsawwassen treaty tables. In addition, the urban context of treaty-making in the Lower Mainland highlights a unique situation compared to the rest of the province in that it is not uncommon for the non-Aboriginal population to be numerically higher than the Aboriginal population on reserve. As a result of this concern, the Lower Mainland Treaty Advisory Committee (LMTAC) has developed First Principle 27, which deals with the rights of representation, and reads 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.

The key question that remains is, "How can mechanisms be created in treaties to ensure that non-members living on treaty settlement lands are represented?" Substantial discussion is needed on how to create mechanisms to ensure that non-members living on treaty settlement lands are represented in Aboriginal institutions. This is a complex question that will require extended research, exploratory discussions and scenario writing.

1.2 Process

This discussion paper focuses on residential tenants of First Nations lands, in particular residential leaseholders, and excludes other types of tenants and leaseholders. Reasoning for this focus relates to the democratic representation rights of individuals as residents, voters, and taxpayers. Business entities do not normally have democratic representational rights of the same kind as individuals. A further reason for focusing on the situation of residents who hold leases rather than rent their accommodation on First Nation lands is that unlike renters, leasehold residents will typically have substantial sums of invested in their home structure and site improvements.

For purposes of this discussion paper, the following terminology and definitions will be used:

Aboriginal people- this paper uses the term solely with reference to Indians in Canada, since the *Indian Act* and related tax provisions and exemptions do not apply to other Aboriginals such as Inuit and Metis (as defined in the Constitution Act of 1982).

Band- term used to refer to an organizational structure defined in the *Indian Act* which represents a particular body of Indians as defined under the *Indian Act*.

Band Council- term used to refer to a body elected according to provisions of the *Indian Act*, charged with the responsibility for ‘the good government of the band’ and delegated the authority to pass by-laws on Indian reserve lands.

Eligibility- term used to refer to entitlement to treaty benefits

Enrolment- term used to refer to the process of registering eligible treaty beneficiaries

First Nation- term used to refer to a) an Aboriginal governing body, organized and established by an Aboriginal community, or b) the Aboriginal community itself.

Indian Reserve land- term used to refer to land defined in Section 2 of the *Indian Act* as a tract of land that has been set apart by the federal government for the use and benefit of an Indian band. The legal title to Indian reserve land is vested in the federal government.

Non-Aboriginal resident- term used to refer to residential leaseholders who reside within an Indian reserve or treaty settlement land of a First Nation that do not self-identify as Aboriginal and who are not enrolled as a member of that particular First Nation.

Non-member resident- term used to refer to residential leaseholders who reside within an Indian reserve or treaty settlement land of a First Nation different from the First Nation in which they may be enrolled as members.

s. 87 tax exemption- term used to refer to the tax exemption arising from s. 87 of the *Indian Act* that applies to status Indians’ income and property (including personal property) situated on Indian reserve land.

Self-government- term used to refer to the internal regulation of a First Nation by its own people.

Treaty Settlement Land (TSL)- term used to refer to an area of land that will be owned and managed by a First Nation pursuant to a treaty. The precise legal status of TSL, and the extent of First Nation jurisdiction on it remains to be determined. Some areas within TSL will be held in private ownership, or otherwise designated for uses incompatible with public access. Other areas will accommodate public access as provided for in treaties. The underlying title to TSL will rest with the Provincial Crown.

This document reflects a combination of contributions from LMTAC's Technical and Strategic Working Group (TSWG) members (technical staff from LMTAC member jurisdictions) as well as an articulation of principles, positions, interests and concerns on the subject of rights of representation drawn from specific LMTAC and other Local Government documents. These documents include: *LMTAC's First Principles*; *Considerations- A Guide to Lower Mainland Area Local Government Interests in Treaty Negotiations*; *Regional Governance and Governance in the Region* (Draft #6); *Approaches and Options For Treaties in Urban Areas: A discussion Paper* (Semmens & Adams).

Other primary sources analyzed in preparing this discussion paper include: *Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy* (Jonathan R. Kesselman); *Westbank First Nation Self-Government Agreement-in-Principle*; *Katzie First Nation Treaty Related Measure On Governance Final Report*; *Backgrounder Westbank Self-Government Agreement* (INAC); *Review of Literature on Fiscal Relationships: A Report prepared for the Research and Analysis Directorate* (Danalyn MacKinnon, INAC); *Taxation Without Representation* (Tanis Fiss, Director, Centre for Aboriginal Policy Change, Canadian Taxpayers Federation); *First Nation Property Taxation Review 2000-2001 Annual Report* (Indian Taxation Advisory Board); *Musqueam Park Leases* (INAC); *Background Musqueam Indian Band Taxation* (INAC); *Democracy and Aboriginal Self-Government: Considering the Rights of Non-Aboriginal Residents in First Nation Jurisdictions* (British Columbia Civil Liberties Association).

2.0 FORMULATING THE ISSUES: BALANCING GROUPS' RIGHTS

The situation facing non-Aboriginal lessees on lands of First Nations that have exercised their section 83 taxing powers¹ combines lack of representation and discriminatory² taxation. While this situation has not universally led to major problems or disadvantages for lessees, it does raise questions about their *Charter* rights. In particular, their representation rights and equality rights have been violated and whether this can be justified by Aboriginal autonomy rights has not yet been tested in the courts.

In essence, all of these issues are interrelated and linked to the central issue of voting and representation rights. Without those rights, non-Aboriginal residents lack the channels for participation, influence and restraint that are conventional in institutions for democratic governance. While these concerns are relevant to the full range of governmental powers, they are heightened in the arena of taxation for reasons of tradition and financial impact. The issue of discriminatory taxation further aggravates the lack of representation rights. In all First Nations taxing under section 83 of the *Indian Act*, one group bears taxation without representation and is subject to governance by another group that enjoys representation without taxation.

¹ The Federal government amended Section 83 of the *Indian Act* in 1988 based upon proposals by Indian Bands. The legislation, otherwise known as Bill C-115 or the "Kamloops Amendment", extended the range of a band council's taxation powers to include lands that have been conditionally surrendered for leasehold purposes but does not include lands that have been absolutely surrendered with the intention of sale.

² Throughout this paper the term discriminatory is used simply to denote differential treatment of Aboriginals and non-Aboriginals (or band members and non-band members) in a First Nation tax provision.

All these issues must be considered in the context of First Nations' autonomy, or the "inherent right of self-government". First Nations taxation powers are an essential part of these rights of self-governance. However, this leaves open the question of the rights of First Nations to tax others within their territories as well as the rights that such non-member taxpayers should possess. The question to be addressed here is the extent to which non-Aboriginals resident on First Nations' lands and subject to their taxes should similarly have democratic rights in those governments with respect to their taxation, spending and other public functions.

Therefore, the question arises as to how to reconcile the rights of the two groups, giving effective representational rights in decision-making to non-Aboriginal residents while preserving the autonomy and self-government rights of Aboriginals. At one level, this dilemma can be resolved by the distinction between band government and public government on First Nation lands. If the Aboriginal rights of self-government extend only to matters of inherently Aboriginal content, such as culture, education, and public services that require special Aboriginal adaptations (such as child welfare), then one can achieve Aboriginal self-government and shared public government with no compromise to the rights of non-Aboriginal residents.

The process of negotiating treaties entails certain trade-offs and a balance of differing interests. From a Local Government perspective, pursuing possible methods of resolving these issues would provide the certainty and property rights needed to maximize the rental value of reserve leasehold lands. In return, resolving these matters of lessee rights and governance may also promote the economic development interests of First Nations.

3.0 SETTING THE CONTEXT FOR RIGHTS OF REPRESENTATION

3.1 Historical and Legislative Background

In 1988, the Canadian Parliament passed Bill C-115 amending section 83 of the *Indian Act* to allow Band governments to assume powers of property taxation on Indian Reserve lands occupied by leaseholders. These lessees are mostly non-Aboriginals who have no rights of voting, representation, or serving in the First Nation governments that tax them.

The fact that all of the 80 First Nations across Canada (54 of them in British Columbia) that have assumed taxing powers have exempted their own members from these taxes further compounds the situation. In addition to the issue of taxation without representation, the choice to exempt band members invokes representation without taxation. These conditions combine to reduce the accountability of First Nations governments both to their taxpayers and to their members. Moreover, non-Aboriginals do not have a say in the administration of schools at the band level. Schools on reserves are under the control of the band councils. In some cases the school will be administered directly by the band council but in others a school board, school committee, or education committee of the band council will administer the schools. Band councils and their education committees do not come under provincial jurisdiction even for school purposes. They may operate somewhat like school boards under provincial jurisdiction but they have, in fact, considerably more autonomy.

It is anticipated that, post-treaty, land development will lead to a larger number of non-members living on treaty settlement lands. It is possible, in some circumstances, that they will form the majority of residents living on treaty settlement lands.

In fact, non-Aboriginal residents on reserves in BC represent nearly one-third of all persons on BC reserve lands. This BC group also accounts for more than 70 percent of all non-Aboriginals living on reserves across the country. Not only is the non-Aboriginal population living on reserves high in BC, but also it has been rising rapidly, both absolutely and relative to on-reserve Aboriginals. Additionally, as of the early 1990s, it was estimated that BC contained 60 percent of all leased lands on Indian reserves in Canada, and growth of the resident non-Aboriginal population suggests that this proportion has grown since then.

3.2 Exploring Current Examples in British Columbia

Nisga'a Final Agreement

There are few existing comprehensive treaty settlements that can be utilized to help us understand and assess how relations with individuals who are not members of self-governing First Nations will take shape. The Nisga'a Final Agreement suggests one possible approach.

In the Nisga'a Agreement, the Nisga'a central government is required to consult with individuals who are ordinarily resident within Nisga'a lands, and provide opportunities for their participation in Nisga'a institutions on issues which directly and significantly affect them (Chapter 11, sections 19-23). Such "participation" could include the ability to vote or become a member of a Nisga'a institution.

Representation of non-members is further complicated in regions where the population of non-members living on treaty settlement lands outnumbers the existing Aboriginal population. Such a situation is more likely to occur in urban areas where non-Aboriginal populations are greater. If, in this situation, every person residing on the treaty settlement land had an equal vote in the First Nation's institutions, then non-members would hold the majority voting power — a situation that would undermine the rationale for Aboriginal self-government.

Sechelt Self-Government Agreement

Sechelt self-government powers were established through federal legislation, the *Sechelt Indian Band Self-Government Act* (1986) and provincial legislation, the *Sechelt Indian Government District Enabling Act* (1987). The governance section of the Agreement-in-Principle is very short and established that the Sechelt will continue to exercise self-government powers under these Acts. The legislation mentioned above sets up a political and administrative structure for Sechelt Self-Governance by dividing legislative powers between the Sechelt Indian Band Council and the Sechelt Indian Government District Council. The provisions regarding Sechelt governance will not be constitutionally protected treaty rights, unless specifically provided for in the Final Agreement.

In the Sechelt Agreement-in-Principle, the topic of relations with non-members living on *Treaty Settlement Land* is not mentioned directly since the present arrangement in the *Sechelt Indian Band Self-Government Act* will continue. This legislation has provisions which relate to “non-Band” members (presumably) some sort of transition provisions for this legislation in the treaty will be needed — section 15.3.5 refers to this fact). Under this legislation, non-Band members cannot vote for the Band council nor the electoral area director for the regional district. Both non-Band and Band members can vote for members of the Advisory Council. The role of the Advisory Council is restricted to the provision of advice on the delivery of local services in the *Sechelt Indian Government District*. “Clearly, the council represents the interests of residents as occupiers of land and *consumers* of services but not as *citizens* in the fullest governmental sense.”

The Westbank Self-Government Agreement

The Westbank First Nation, located near Kelowna, BC, is signatory to a bilateral Self-government Agreement and assumes jurisdiction for most matters now regulated under the *Indian Act*. Under this bilateral Self-government Agreement, Westbank was provided with critical governance and land management powers needed to manage effectively and efficiently the community and economic development on their reserve lands. The Self-government Agreement provides for a Westbank constitution that will ensure political and financial accountability of the Westbank government to its members, as well as a mechanism by which non-member residents on Westbank Lands, and those who have interests on Westbank Lands, may be represented. The Self-government agreement includes provisions for Non-Westbank members to provide input to the Westbank Government on matters that will directly and significantly affect them.

Westbank has the largest number for leaseholders and non-Aboriginal residents of any in BC or Canada. Leasehold properties are estimated at 2,500 and the population residing on these properties now exceeds 7,000 (one-third of all non-Aboriginal reserve residents in BC). Hence, the leaseholders outnumber the roughly 400 resident band members by more than 17 to 1. The Westbank leasehold developments were made on lands owned individually by a few band families rather than the band collectively. The tax rates imposed by Westbank First Nation on its residential leaseholders are in the general range of the rates imposed by nearby municipalities. There reportedly have been no significant complaints by the leaseholders over matters of assessments or taxes. Public services are provided to the leasehold properties by the regional district under contract to the Westbank Band as well as the Band directly. A leaseholder advisory council was established by the Band at the start of 2000, with monthly meetings, and the Band reportedly responded to the lessees’ concerns about a proposed 5 percent increase in the taxation budget by trimming it.

Lheidli T'enneh

The Lheidli T'enneh has proposed an innovative solution for self-governance in their traditional territory without excluding non-Aboriginal residents. The system allows for modified clan-based election that assigns one seat in the government to each clan in the nation; but the system also leaves aside one seat for a representative of non-Aboriginals living on Lheidli T'ennah land. It is

believed that the proposal, if implemented would avoid disenfranchising Lheidli T'enneh members who live off-reserve and non-members.

Tsawwassen

In 1986 the Tsawwassen First Nation south of Vancouver began a residential development, called "Stahaken," with 92 long-term leasehold properties. As part of the original Stahaken arrangements, the individual lessees entered into contracts with the adjoining municipality of Delta for the supply of services for the full terms of their leases. In return, the leaseholders agreed to pay the Tsawwassen First Nation a service charge equal to the municipal taxes that they would otherwise pay Delta. From 1994 through 1998 Delta collected the lessees' entire tax bills and remitted to the Band the counterpart to the BC school property tax. In general, relations between the leaseholders and the Band have been congenial and without incident, although there is no active formal advisory mechanism.

Musqueam

Musqueam Indian Reserve No. 2 is the Band's largest and main reserve. It has 471 acres located in the southwest corner of Vancouver. Almost all available land on the Musqueam Reserve is currently devoted to band housing or to long-term leaseholds. At its own initiative, the Band instituted a *Musqueam Taxation Advisory Council* as a venue for the reserve taxpayers to advise Chief and Council on all the relevant aspects of assessment, taxation and the delivery of local services. The Advisory Council was composed of 10 representatives — five chosen from the Band (usually but not always members of the Band Council), one from the commercial lessees, and four elected by the residential lessees. The terms of office were two years, the same as for the Band's Chief and Council. The Advisory Council met first on a non-interim basis in March 1992. The intention was to have meetings on roughly a monthly basis; with many meetings cancelled or postponed, a total of 42 meetings were held by the time of the last meeting in May 1998. The demise of the Advisory Council as a formal body was largely the result of both parties' frustrations over the process and its limited results. The Advisory Council's mandate was intended to be purely advisory, and the Chief and Council of the Band viewed themselves as the governmental decision-making body.

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

accept or entertain any change in the governing relationship with leaseholders resident on the Musqueam Indian Reserve.

3.3 The Lower Mainland Context:

LMTAC has developed an interest statement, which reads: *Aboriginal self-government should strive to simplify this structure, not add to its complexity* (LMTAC Interest 4.4.2 from the *Considerations* paper, July 2000, Page 22). Furthermore, LMTAC interest statement 4.4.3 states: *Self-government arrangements and co-management regimes established in treaties should encourage cross representation. In other words, consideration should be given to non-Aboriginal representatives sitting on First Nation Councils / Boards, and First Nation representatives sitting on Local Governments Councils / Boards.*

LMTAC has also developed First Principle 27, which deals with the rights of representation, and reads 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.

The table below provides a numerical comparison of the non-Aboriginal population residents on reserve with the Aboriginal population on reserve. The Lower Mainland is a unique situation when compared with the rest of British Columbia because the number of non-Aboriginal residents outnumbers the Aboriginal population on reserve in a majority of the First Nation communities. In the rest of the province the opposite situation is more common in which you find that the Aboriginal population residing on reserve outnumbers the non-Aboriginal residents.

Aboriginal / Non-Aboriginal Population for the Lower Mainland / Sunshine Coast Area Indian Reserves

GVRD-Area First Nations	No. of Reserves	On-Reserve Aboriginals (1)	Off-Reserve Aboriginals (2)	Total Aboriginal Population (1+2)	Non- Aboriginals Living on Reserves** (3)	Total Popula- tion on Reserves (1+3)	% Non- Aboriginals Living on Reserves
Katzie	5	285	173	458	15	300	5.0%
Kwantlen	6	73	100	173	10	83	12.0%
Kwikwetlem	2	31	31	62	0	31	0.0%
Matsqui	4	105	107	212	390	495	78.7%
Musqueam	3	608	484	1,092	760	1,368	55.5%
New Westminster	0	0	6	6	0	0	0.0%
Sechelt	26	576	504	1,080	380	956	39.7%
Semiahmoo	1	46	24	70	80	126	63.4%
Squamish	23	2,166	1,103	3,269	1,735	3,901	44.4%
Tsawwassen	1	160	74	234	270	430	62.7%
Tsleil-Waututh	3	224	159	383	965	1,189	81.1%
TOTALS	74	4,274	2,765	7,039	4,605	8,879	51.8%

Source: Registered Indian Population data obtained from surveys conducted by the *Department of Indian and Northern Affairs Canada* and available from its web site at: www.inac.gc.ca Registered Indian Population data current as of December 2002.

** Non-Aboriginal population data obtained from the 2001 Census Community Profiles from *Statistics Canada*. Data in this table does not include incompletely enumerated Indian Reserves. These Census figures derive from the 20% data and, therefore, due to rounding conducted by *Statistics Canada*, the overall totals and percentages may not be numerically accurate.

In many cases, such as the Musqueam, Semiahmoo, Tsawwassen and Tsleil-Waututh, the number of non-Aboriginal residents living on Indian Reserves outnumber the Aboriginals. In a complex urban region such as the Lower Mainland, there is the potential for multiple overlapping Local Government and Aboriginal authorities.

Several principal issues arise in the taxation of non-Aboriginal residents by First Nation governments — representation and governance, discriminatory taxation, the expenditure of tax revenues, the setting of tax rates, tax assessment methods, and the assessment appeal process. In essence, all of these issues are interrelated and linked to the central issue of voting and representation rights. Without those rights, non-Aboriginal residents lack the channels for participation, influence, and restraint that are conventional in institutions for democratic governance. While these concerns are relevant to the full range of governmental powers, they are heightened in the arena of taxation for reasons of tradition and financial impact. The issue of discriminatory taxation further aggravates the lack of representation rights. With respect to First Nations taxing under Section 83 of the *Indian Act*, one group on an Indian Reserve bears taxation without representation and is subject to governance by another group on the same Indian Reserve that enjoys representation without taxation. In essence, the non-Aboriginals become disenfranchised within their own country.

The right of individual citizens to vote and be represented in their government, particularly but not uniquely with respect to taxation matters, is well established in Canada. Section 3 of the *Canadian Charter of Rights and Freedoms* states: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership”. Section 53 of the *Constitution Act, 1867*, states: “Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons”. Furthermore, the Supreme Court of Canada has asserted that Section 53 of the Act codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate within the legislature. Moreover, Section 90 of the *Constitution Act* extends this principle of representation and consent to the provincial legislatures, from which municipalities derive their authority. In the context of First Nations taxation, authority flows directly from the House of Commons. The representation issue also likely would invoke the Charter’s Section 15(1) assurance of equality rights.

All these issues — representation, discrimination, and accountability — must be considered at the forefront of any discussion with respect to First Nations’ autonomy, or the “inherent right of self-government”. Appropriate provisions for representation and non-discrimination are needed to achieve accountability in government. At the same time, Aboriginal rights to self-government — often expressed as First Nations’ sovereignty or autonomy — must be respected.

4.0 TWO FUNDAMENTAL ISSUES:

4.1 Representation and Governance

4.2 Taxation

4.1 Representation and Governance

The right of individual citizens to vote and be represented in their government, particularly but not uniquely with respect to taxation matters, is well established in Canada. Section 3 of the *Canadian Charter of Rights and Freedoms* states that “Every citizen of Canada had the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership.”

Individuals’ rights to vote and be represented in government apply with regard to the full range of governmental decisions that affect them. The nexus between these rights and taxation has been historically strong when compared to most other areas of public policy. Even currently, municipalities in most Canadian provinces extend voting rights, beyond their resident individuals, only to non-resident owners of real property; presumably this provision is in recognition of their liability to property taxes.

It has been argued that non-Aboriginals living on reserves are not entitled to rights of representation, based on the fact that they choose to live on those lands and must accept whatever conditions the First Nations allow. One possible objection to this perspective arises where the First Nation rules, such as the taxing powers or provisions, have been changed after the tenant made an investment in the leased property. A fundamental objection to the tenant-landlord characterization of First Nations legal relations to their non-Aboriginal residents is that the powers involved are different in kind from those of a landlord. The taxing powers under section 83 of the *Indian Act*, as well as the decisions about how to spend the tax revenues, and other regulatory, zoning, land use, and bylaw-making powers of First Nations extend well beyond the domain of a private landlord’s powers. When First Nations exercise their tax or other governmental powers over non-Aboriginal residents, they are acting in two roles simultaneously. They are acting as band, in the financial and other interests of their Aboriginal members, and they are also acting in the capacity of public government. If a government is expected to act in the interests of the public generally, a First Nation government which lacks representation of all the governed is intrinsically in a conflict of interest. The arrangements devised for the Sechelt Indian Government District recognized the need to distinguish between band government and public government. In the latter it provided for rights of representation, albeit very limited ones, for non-Aboriginal residents.

One might ask whether the rights of individuals to be effectively represented in their government, at least with respect to matters that directly or significantly affect them, can be achieved by purely consultative or advisory bodies. Such bodies were implemented for non-Aboriginal residents in Sechelt and some First Nations taxing under section 83. Where relations between a First Nation and its non-Aboriginal residents are congenial, and where the two groups’ interests are closely aligned, advisory input may suffice to provide meaningful and effective participation.

One must ask further whether the existing means of participation by non-Aboriginals resident on the lands of taxing First Nations are adequate to satisfy their basic rights. The only form of participation afforded to non-Aboriginal taxpayers in section 83 of the *Indian Act* is the requirement that the Minister of the *Department of Indian and Northern Affairs* (DIAND) must approve all taxation and related expenditure bylaws of First Nations. This provision presumes that effective representation arises via the fact that the Minister is an elected Member of Parliament, responsible to the government of the day and to the electors at large, and the fact that non-Aboriginal residents on reserves can vote in federal election.

a) Identifying Local Government Concerns

Local governments are concerned that non-members living on treaty settlement land will not have the right to vote in elections for First Nation governments but will be subject to the laws established by those governments. The law making powers of First Nations' governments will likely include most of the powers currently exercised by local government.

Today non-members typically do not have voting rights or other forms of representation on First Nation governments. Many local governments view treaties as an opportunity to address a situation they considered inconsistent with democratic government.

b) The Current Situation:

For both municipalities and electoral areas, any eligible Canadian citizen of voting age is able to vote for Mayor and Councillors or Director.

First Nation governments, any Band member of voting age, residing either on or off reserve is able to vote for the Band Council. Non-Band members residing on reserve land cannot vote for the Band council. However, there may be the possibility of an informal advisory committee.

Example: Sechelt Indian Government District

Non-Band members on land inside the *Sechelt Indian Government District* cannot vote for the Band council or an electoral area director, but are able to vote for members of the Advisory Council. (In practice, members of the advisory council have been chosen by acclamation rather than through election.) Those standing for the advisory council have not been Band members.

Example: Nisga'a Final Agreement

- All residents of Nisga'a land will continue to vote for the electoral area director (Nisga'a citizens will form a majority of residents of the electoral area.)
- Non-citizen residents of Nisga'a land will not vote in elections for the Nisga'a government(s). The Nisga'a government determines who can become a citizen.
- The treaty includes a requirement that Nisga'a government consult with residents who are non-citizens on decisions that 'directly and significantly affect them' (Chapter 11, section

12). The meaning of the word consultation is explicitly defined in the treaty (Chapter 1, Chapter 11, section 19).

- The Nisga'a Government may establish Public Institutions (e.g. a school board) and may delegate powers to them. If the activities of these institutions 'directly and significantly affect' non-citizens, the Nisga'a government must provide an opportunity for participation by non-citizens. Participation may take various forms. However, if members of the Institution are elected, non-citizens must be able to vote and stand for office, or must be provided with a guaranteed number of voting members on the Institution (Chapter 11, sections 20 and 21).

c) How the Situation May Change Post-Treaty

- Land development could lead to a larger number of non-members living on treaty settlement lands. It is possible, in some circumstances, that non-members will form the majority of residents living on treaty settlement lands.
- Non-members may not be able to vote for the First Nation government even though they may be paying taxes to that government for services received and even though non-members may be subject to regulations established by the First Nation government.
- Following a finalized treaty, non-members may become disenfranchised in the sense that they may not be able to vote for a First Nations government or for a local government representative.
- Members of First Nations may continue to be able to vote in local government elections as well as participate in First Nations' governments.
- Provincial laws, such as landlord-tenant laws, are expected to apply on settlement lands.

4.2 Taxation

All of the First Nations that have assumed taxation powers under section 83 have opted to exempt their own resident members from the taxes that they impose on non-members. The issue of discriminatory application of taxes therefore combines with the lack of representation for non-Aboriginal residents to aggravate their disadvantage. These two circumstances also work together to weaken the accountability of First Nation government with respect to their non-Aboriginal resident taxpayers. Not only is their taxation without representation, but the resident Aboriginals enjoy representation without taxation.

a) Identifying Local Government Concerns

In regards to property taxation, local governments are concerned that non-members will be paying property taxes to First Nation governments but may not have the right to vote in elections for First Nations governments.

b) The Current Situation

A lessee of reserve land that is part of the municipality is subject to all local and provincial taxation unless the Band has established an independent taxation regime. In that case, only the Band levies taxes. Taxes are not paid to the provincial government or local government. Services may be provided by the municipality (under contract to the Band).

Lessees of reserve land that is part of the electoral area are subject to all local and provincial taxation unless the Band has established an independent taxation regime. In that case, the Band levies taxes. Taxes are not paid to the provincial or regional government. Services may be provided by the region (under contract to the Band).

Lessees of reserve land under the jurisdiction of First Nations governments pay provincial and local property taxes; or, pay property taxes only to the Band if the Band has established an independent taxation regime.

All residents of the *Sechelt Indian Government District* pay local taxes levied by the *Sechelt Indian Government District* and all regional and provincial taxes.

Example: Nisga'a Final Agreement

- Non-citizen residents of settlement land will continue to pay provincial and regional property taxes.
- At this time, the Nisga'a have not sought property-taxing powers. The previous Provincial Ministry of Aboriginal Affairs has indicated that the Nisga'a could be provided with delegated powers of property taxation in the future but only if this includes 'protection' or 'representation' for non-Nisga'a taxpayers.

Example: Sechelt Agreement-In-Principle

- The current situation described above will continue. Residents will continue to pay provincial and regional district taxes.

c) How the Situation May Change Post-Treaty

- If the First Nations property taxation regimes currently in place continues unchanged, residents of First Nations lands will not be subject to provincial property taxation (for schools, and for policing and roads in unincorporated areas) or to taxation in support of general regional services.
- The taxation and representation issues are intertwined. Non-members may not be able to vote for the First Nation government even though they are paying taxes to that government for services received. Some mechanism for non-members input, representation or protection will be a precondition of delegating provincial property taxation powers to First Nations.

- It is anticipated that land development will lead to a larger number of non-members living on settlement lands. In some circumstances, it is possible that they will form the majority of residents living on settlement lands.

d) Options: Equity in Taxation for Non-Members Living on Treaty Settlement Lands

- The property taxing powers provided to First Nation governments could allow for non-member input on decisions.
- Alternatively or in addition, conditions could be established governing the use of property taxation powers. Such conditions could include:
 - The requirement that property taxation be linked to the services provided.
 - Limits on the ways in which First Nation governments can discriminate between different property taxpayers.
 - Limits on tax rates.
- If neither of these approaches is taken, the relationship between First Nations and non-members will be determined by First Nation governments. Presumably, non-members will reside on First Nations' land only if the conditions are acceptable to them; although, some transition arrangement may be appropriate for existing residents.

5.0 CONCLUSION

Extending genuine representation rights to non-Aboriginal residents would enhance governance and serve to foster healthy relationships between the two groups living on a reserve. The urban context of the Lower Mainland is unique due to the fact that a majority of First Nation communities in the region contain a larger non-Aboriginal population resident on reserves when compared to the Aboriginal population. Therefore, this situation may raise concerns by First Nations about diluting Aboriginal autonomy even in the areas of public governance. In only a handful of reserves across Canada and in the rest of British Columbia do non-Aboriginal residents outnumber Aboriginal residents. In those few cases, any residual concerns could be addressed through methods such as delegated governance or joint governance in which representation on non-Aboriginal residents in the decision-making body is restricted to a bare minority. The potential exists to find workable solutions to First Nations' governance that will ensure the representation and equality rights of non-Aboriginal residents while simultaneously enhancing governmental accountability and respecting Aboriginal autonomy.

Distinguishing between uniquely Aboriginal matters and matters of general public governance may provide a relatively simple solution to the representation rights of non-Aboriginal residents. Yet some First Nations' leaders would argue that economic development and fiscal powers of a First Nation government are integral to Aboriginal autonomy and self-government. If that view were accepted, it would be necessary to devise a method of balancing Aboriginal rights of autonomy with non-Aboriginal rights of representation and equality. However, non-Aboriginal residents should not just have a token role but one where they can effectively represent their interests.

Perhaps one possible local approach that addresses these issues and can be considered for further debate and discussion is included in the recently released *Katzie First Nation Treaty Related Measure on Governance* (October 30, 2002) document. With respect to non-Aboriginals residing on Katzie land, the document states: "...we believe that the rights of non-members who reside on Katzie land should be constitutionally embedded... Additionally, non-members of the Katzie community residing on Katzie lands should have input into issues and decisions that affect them."

Any workable solution(s) may need to draw elements from more than one approach as various approaches to resolving the representation issue place different demands on the removal of discriminatory taxing provisions. Furthermore, the objective of governmental accountability applies for Aboriginal residents as well as non-Aboriginal residents, and both populations might gain from appropriate institutional changes. Diverse value judgments will be involved in selecting the best way to resolve these issues. Moreover, any workable solution(s) will likely require statutory amendments to various pieces of legislation. Substantial discussion is needed on how to create mechanisms to ensure that non-members living on Treaty Settlement Lands are represented in Aboriginal institutions. This is a complex question that will require extended research, exploratory discussions and scenario writing.