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## **In Praise of Taxes: The Link Between Taxation and Good Governance in a First Nations Context<sup>1</sup>**

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### **Introduction**

Death and taxes, the popular aphorism goes, are two aspects of life we can all count on. The statement has a fetching morbidity—but does it really give taxation its due? Perhaps taxes are more like our grandmother’s cold remedies: bitter at first, but a boon to our health if correctly administered.

This paper makes a positive case for taxation. It does so for a particular context—that of First Nation governments now considering taxing their communities. Further, it does so from a governance standpoint, arguing that taxation regimes on-reserve—analogue to our grandmother’s cold remedies—would ultimately promote the health of First Nation governance systems. In making this argument, the paper draws on fiscal theories of governance in the international literature and public finance theory. It also draws on accounts of traditional Aboriginal resource-sharing practices, which suggest the prior existence of strong webs of accountability and sharing relationships that would have been akin to modern taxation.

In Section I, the paper outlines the current legislative and attitudinal terrain surrounding First Nations taxation. Section II defines the central terms it seeks to relate: the “tax relationship” and five principles of good governance. Section III turns to international and comparative literature to provide evidence of a link between taxation, service provision, and governance practices from countries as varied as Tanzania, Zambia, and Argentina. Section IV returns to the context of First Nations by drawing relevant parallels to the international literature. It also outlines the experience of certain First Nations in the Yukon, British Columbia, and Saskatchewan that are now practising taxation of their members. A final goal of the paper is to present the policy and research options for First Nations governments on the one hand and the federal government on the other. Section V, therefore, outlines both what a First Nations taxation regime might look like and the facilitating role the federal government could play in helping more First Nations realize the benefits of taxation on-reserve.

A reminder of our purpose and scope: this paper discusses taxation possibilities for First Nations communities with a territorial base. Except in providing background information, it does not take up taxation of First Nations people by other governments, nor does it discuss taxation possibilities for large Métis organizations or other Aboriginal governments. While the insights into the linkage between taxation and good governance and taxation would also apply to other Aboriginal governments, the focus of this paper is on options for First Nations communities—either reserves under the *Indian Act* or settlements under self-government agreements and modern-day treaty and land claims.

## **I. The Present Situation**

The discussion begins with an orientation on the current state of affairs surrounding First Nations taxation. Following a brief discussion of the present taxation situation for Indians and their governments, we present two countervailing attitudes among First Nations people. We take each theme up in turn—beginning with current legislation.

### ***A. The Tax Exemption and Existing Legislation***

Misconceptions abound in the hotly disputed area of Indian taxation. Beyond this, the legislative landscape has changed substantially since 1988, when the so-called “Kamloops amendment” to the *Indian Act* was passed. For these reasons, some background to the discussion that follows would be useful. We first describe the tax treatment of Indians and bands and the current possibilities for taxation by First Nation governments in this rapidly evolving area, specifically:

- The tax exemption under the *Indian Act*, Section 87
- The real property taxation powers under the *Indian Act*, Section 83
- The *First Nations Fiscal and Statistical Management Act, 2005*
- The *First Nation Goods and Services Tax Act, 2003*
- The personal income tax (PIT) powers of self-governing First Nations
- Federal government objectives concerning Indian taxation

These descriptions will establish the legislative and policy context of the arguments that follow in subsequent sections.

### ***The Section 87 Tax Exemption***

Perhaps the best-known element of the tax treatment of Indians is the Indian tax exemption. Some First Nations people argue that this exemption arose from the treaties as an exchange for the land the treaties granted to Canada. This very question was at issue in *Benoit v. Canada* (2002), a case in which Federal Court Justice Campbell relied heavily on oral history to establish that the Cree and Dene signatories of Treaty 8 believed that the treaty included a tax exemption. In his view, because of this original belief—combined with the same belief of many

contemporary Treaty 8 people—Canada was required to recognize and fulfill the tax assurance as a means to preserve the honour of the Crown.<sup>2</sup> In 2003, the Federal Court of Appeal reversed the earlier decision, stating that the oral history Justice Campbell relied on had been selective and sparse.<sup>3</sup> The Supreme Court of Canada later declined to hear the case on appeal.

Pending further court decisions on the Indian tax exemption as a treaty or even an Aboriginal right, the only recognized source of the exemption remains Section 87 of the *Indian Act*. This section exempts Indian property on reserves from taxation. Specifically, it exempts “(a) the interest of an Indian or a band in reserve or surrendered lands; and (b) the personal property of an Indian or band situated on a reserve.” The section further establishes that “no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b).” Section 87 also ensures that “no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian”(Imai and Hawley 1994, 84).

The Section 87 exemption was originally intended to protect Indians from those who might attempt to seize their lands for repayment of debts, thereby eroding the reserve land base.<sup>4</sup> It has since been interpreted to include not only tangible personal property but also income and other intangible property and rights. At present, income earned by an Indian individual working on his or her reserve generally will be exempt from the federal personal income tax.<sup>5</sup> The exemption also applies to sales taxes, such as the federal goods and services tax or provincial sales tax on Indian property and services on reserves. In general, the exemption applies where an Indian purchases goods on a reserve or has the vendor deliver goods to a reserve (Department of Finance 1993, 17–18).

### ***Real Property Taxation Powers***

Since 1952, the *Indian Act* has provided for real property taxation by Indian bands. Section 87 provides that the tax exemption is subject to Section 83—a provision that arose from another legislative intention entirely. The section was drawn from the *Indian Advancement Act* of 1884, which had sought to encourage Indian governments to tax themselves in order to raise revenues to improve reserve lands (Kesselman 2000, 1532–33). Parts of the 1884 Act were incorporated into the 1951 revised version of the *Indian Act*, underscoring the long-standing federal understanding that Indians living on-reserve are not immune to taxation by their own governments.

Section 83 was amended in 1988. This occurred largely as a result of the efforts of Chief Clarence T. “Manny” Jules of the Kamloops Indian Band, who pressed government for the so-called “Kamloops amendment” of 1988. As amended, Section 83 defined the taxing powers of First Nations to include interests in conditionally surrendered or designated (in laymen’s terms, leased) lands located on-reserve. The section clarified that band councils can impose property taxes

on all leaseholders on their reserves, including property held by non-members. Affecting mainly non-Aboriginal lessees and businesses on the reserve and expressly exempting Aboriginal and member property interests, the Section 83 power is subject to the following conditions: (1) Expenditures made from property tax revenues must occur through a bylaw of the band council, and (2) An additional bylaw must provide for an appeals procedure on the property assessments that serve as the basis of the tax levied. Bylaws for “taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve” (Imai and Hawley 1994, 81–82) would be subject to approval by the Minister of Indian and Northern Affairs Canada at the advice of the First Nation-led Indian Taxation Advisory Board (ITAB), which was created to support the Kamloops amendment in 1989.

It should be noted that the rationale behind the Kamloops amendment was to correct a situation that had been unfair to First Nations. Municipalities in the province of British Columbia were taxing the property interests of non-Indians on-reserve without necessarily providing any services. Thus, the Kamloops amendment allowed First Nations to occupy a property tax field that up to that point had been under the domain of the municipalities in the province.

Subject to the approval of their property tax bylaws, First Nations communities under the *Indian Act* can now collect property taxes on all real property on-reserve, either under Section 83 of the *Indian Act* or under the new *First Nations Fiscal and Statistical Management Act* passed in 2005. The latter act also established the First Nations Tax Commission (FNTC), the successor to the Indian Taxation Advisory Board. At present, the FNTC is the regulatory body overseeing the implementation and administration of property tax jurisdiction on-reserve.

### ***Federal Sales Tax and Income Tax Agreements***

The 1990s have seen much change in the area of federal sales tax and personal income tax policy. In 1990, the Department of Finance announced a comprehensive review of its policy. In 1993, it produced a draft discussion paper envisaging the possibility of First Nations opting into assuming tax jurisdiction for sales, personal, and corporate income tax (Department of Finance 1993). In 1996, the Royal Commission on Aboriginal People (RCAP) came out strongly in favour of First Nations governments taxing their members. The commission recommended a comprehensive taxation system for First Nations established through a legislative enabling framework. The system would be multi-tiered and have multiple taxation sources; in addition to the fiscal transfers (which would now occur under a uniform equalization formula), the RCAP recommended a combination of personal income tax, corporate income tax, sales tax, property taxes, and user fees that would serve as a crucial source of funding for viable First Nations governments (1996, 288–94).

**Sales Tax.** For First Nations under the *Indian Act*, current federal policy has not adopted the RCAP’s recommendation for comprehensive taxation systems,

yet it has made progress in the area of consumption tax. Beginning in 1997, First Nations were able to opt into legislation enabling them to pass bylaws imposing a tax on sales of alcohol, fuel, and tobacco on-reserve. Establishing a tax equivalent to the federal goods and services tax (GST), about a dozen such First Nations sales tax (FNST) agreements were implemented up to 2007.

The FNST has now been supplanted by the First Nations goods and services tax (FNGST), which applies to all taxable goods and services consumed on participating First Nations reserves or settlement land. The 2003 *First Nations Goods and Services Tax Act* enables First Nations under the *Indian Act* to impose a consumption tax at a rate identical to that of the GST. To opt into this taxing jurisdiction, special agreements with Canada are required. As a condition of arrangements, the FNGST applies to both First Nations and non-Aboriginal consumers on-reserve. Like the First Nations Sales Tax that preceded it, the FNGST is administered and enforced by the Canada Revenue Agency on behalf of the taxing First Nation. Funds collected are remitted to the First Nation government, subject in some cases to a revenue-sharing mechanism.<sup>6</sup>

**Personal Income Tax.** We turn finally to the present situation concerning personal income tax. In contrast to the FNGST, there is no national framework legislation for income tax. Taxation jurisdiction in this area is available only to those First Nations that have concluded comprehensive self-government agreements with Canada.

For self-governing First Nations,<sup>7</sup> the federal government recognizes a general concurrent tax authority over their own members or citizens within their settlement lands. Special side agreements may be negotiated by the Department of Finance to extend that tax authority to “other persons” (for example, non-member residents) within the First Nation’s lands. Beginning with the self-governing Yukon First Nations in 1999, tax-sharing agreements have enabled First Nations to obtain personal income tax revenues from all residents of their settlement lands. Similar agreements have been implemented with the Tlicho (Dog Rib) in the Northwest Territories and the Labrador Inuit.

The agreements, although individualized to each taxing First Nation, have a common structure. The First Nation will impose a tax that is fully harmonized with the relevant federal tax. The federal government will then vacate a corresponding portion of its tax room. In agreements to date, Canada has vacated 75%–95% of federal personal income tax so that the First Nation can impose its own income tax. Arrangements are also subject to a negotiated revenue-sharing mechanism that is conceptually similar to the one that applies to the FNGST arrangements.<sup>8</sup> As with the FNGST, the Canada Revenue agency will administer and enforce the tax on behalf of the taxing government. Where a tax agreement is in place, the personal income tax of the First Nations government is payable by both Aboriginal and non-Aboriginal residents.

Notably, First Nations that negotiate comprehensive treaty and self-government agreements will have a strong motivation to implement taxation agreements in

sales and personal income tax. Due to the new treaty, the *Indian Act* tax exemption ceases to apply to a land base that no longer has the status of an Indian reserve. The *Indian Act* in its entirety—including the Section 87 tax exemption—is replaced by the new, negotiated self-government agreement.<sup>9</sup> In the absence of a tax agreement with Canada, income and property that was formerly exempt under the *Indian Act* would otherwise be subject to federal taxation. The tax agreements with Canada mean that the First Nations government itself can retain a significant portion of the taxes that may apply as a result of the treaty.

### ***Federal Government Objectives***

To avoid getting lost in the subtleties of the current legislation, it will be useful to outline the overarching federal objectives in the area of sales and personal income tax. According to senior officials in the Department of Finance, the federal government seeks to promote self-reliance and accountability of First Nation governments through expanded taxing powers for interested First Nations. In doing so, however, it seeks to advance several other central objectives:

- To protect the interests of non-First Nations taxpayers on-reserve, via the following measures:
  - Full harmonization and coordination with federal taxes
  - Application to non-Aboriginals only through negotiated agreements
  - Limiting First Nation taxation to direct taxes (no indirect taxes)
  - Disallowing discriminatory taxation practices for GST/PIT
- To maintain the integrity of the Canadian tax system, via the following measures:
  - Restricting application of First Nations taxation to First Nations land
  - Vacation of tax room but not of the underlying federal tax authority
  - Requiring full harmonization with the federal system  
(Fiscal Realities 2001, 38)

The 2003 FNGST legislation was the first major initiative to draw First Nations governments into non-property-based taxation. If interest were to exist, a parallel enabling legislation for personal income tax for First Nations governments might follow. At present, it is unclear whether that interest actually exists.

### ***Interest of First Nations in Assuming Taxation Jurisdiction***

We let the numbers begin the story. As of June 2007, the most popular tax by far with First Nations has been the real property tax introduced under Section 83 and overseen by ITAB, now the FNTC. Some 113 First Nations now collect property tax under either Section 83 of the *Indian Act* or the *Fiscal and Statistical Management Act* introduced in 2005. The vast majority of First Nations exercising that taxing power (82) are located in British Columbia, presumably due to the ability

of municipalities to tax non-Aboriginal property interests on reserves, as noted earlier in this section.

Consumption taxes are far less popular than the property tax, with only twenty-nine First Nations applying them. Ten First Nations (one in Manitoba, one in Saskatchewan, and eight in British Columbia) have introduced the First Nations sales tax on alcohol, fuels, and tobacco. As of April 2008, nineteen First Nations have introduced the FNGST, which they levy on all taxable supplies of goods and services that occur on the reserves or settlement lands of the taxing First Nations. Thirteen of these First Nations are located in the Yukon, the Northwest Territories, and Newfoundland and Labrador. They have implemented taxes through agreements pursuant to their comprehensive self-government agreements. The other six groups that have implemented the FNGST are bands in British Columbia that continue to operate primarily under the *Indian Act*. The Nisga'a First Nation implemented the FNGST in 2008, following the end of the transition exemption for sales tax that was provided in their 2000 treaty.

Recalling that self-government entails relinquishing the Section 87 tax exemption along with the *Indian Act* as a whole, twelve self-governing First Nations have negotiated personal income tax agreements with Canada (ten in the Yukon, one in the Northwest Territories, and one in Newfoundland and Labrador).<sup>10</sup> These twelve will likely be joined by the Nisga'a, whose citizens will be liable for paying personal income tax as of 2013. Other British Columbia First Nations that conclude comprehensive treaties are expected to follow suit once their *Indian Act* tax exemptions come to an end.

Officials in the Department of Finance assured us that the interest of First Nations in occupying sales tax jurisdiction is growing. Despite that assurance, it is striking how few First Nations have adopted it. Likewise, our interviews with taxing First Nations revealed little to no clamour to occupy jurisdiction for personal income tax. On the contrary, there was a consensus that introducing personal income tax would be premature at this point—if not damaging to efforts to introduce other taxes. Why the general resistance to introducing taxation? The following subsection discusses some reasons for this resistance.

### ***B. A Prevailing Wind of Resistance***

Why are First Nations governments willing to forego the revenues that would flow to them if they imposed a sales tax? Present First Nations attitudes could be summed up as countervailing winds moving over and, to some extent, shaping the legislative landscape. The prevailing wind is a strong antipathy for and even a fear of taxation within the general First Nations population—one reinforced by a potential majority non-Aboriginal sentiment that First Nations people should be subject to tax. The countervailing one, gradually growing in strength, regards taxation as one component of a new chapter in the relationship between Canada and First Nations. This attitude is one for which self-sufficiency is prized and



fiscal transfers become part of a mere business relationship. We discuss each in turn.

When considering why First Nations governments would *not* want to tax their members, an obvious reason immediately comes to mind—new taxes are generally unwelcome. Indeed, in the words of a former Canadian Minister of Customs and Excise, “taxes are repulsive to most people” (Honourable Jacques Bureau, cited in Gillespie 1991, 42). For this reason alone, we could presume that any government seeking re-election would be reluctant to introduce a new tax on its population.

Yet a tax questionnaire survey of members of the Indian Taxation Advisory Board suggests a resistance more fundamental than the general revulsion to new taxes shared by all citizens. The ITAB survey found that opposition to or apprehension of taxation is “especially pronounced when the tax under consideration is on previously exempt First Nation citizens or enterprises” (Fiscal Realities 1997, 26). Many respondents indicated a fear that taxation by band governments would erode the federal government’s fiduciary responsibility towards Indians. Concerns were most pronounced among members of remote communities, where it was thought that a tax system would never allow them to finance even a small proportion of their service costs. Notably, respondents also feared the acceptance and implementation of taxation by *other* First Nations, seeing its potential to erode both the portability of their own exemption and solidarity among First Nations on the taxation issue.<sup>11</sup>

The ITAB survey is illuminating in terms of the nature of the concerns that it both does and does not bring to light. One issue that does not arise in the survey is an argument often offered against taxation of First Nations people: “You can’t tax poverty.” Because so many First Nations people are living in impoverished circumstances, the argument goes, there is little to be gained by attempting to tax them. We address this objection later in this essay—yet the ITAB survey suggests it is peripheral in any case. A more fundamental concern surrounds the federal fiduciary relationship and the perception that taxation, if introduced, would provide an occasion for the federal government to scale back its fiscal transfers.<sup>12</sup> What appears to lie at the heart of First Nations people’s opposition to being taxed, however, is the tax exemption itself—and the perceived threat to the fiduciary relationship with Canada it symbolizes.

The 2002 *Benoit* case crystallized this position. The oral history that Justice Campbell admitted as evidence attested, in his view, to a widespread and long-standing belief that Treaty 8 had established immunity to taxation for treaty adherents—in the words of one elder, for “as long as the sun shines, as long as the mountains can be seen, as long as there is grass ... as long as there is a world.”<sup>13</sup> By granting their land through the treaty, the Aboriginal signatories had bought the right to be exempt from tax for future generations and in perpetuity. In the *Benoit* case, the plaintiff argued that this right arose through the oral promises made when Treaty 8 was signed. Other Aboriginal commentators have argued that the exemption stems not from a particular treaty, but from the Aboriginal rights set



out in Section 35 of the *Constitution Act, 1982*—or more fundamentally still, from the special relationship between Aboriginal peoples and the Crown that underlies all constitutional provisions (Pratt 1989, 49–50).

It could be countered that the position outlined above justifies a resistance to taxation by the federal or provincial governments, but not by First Nations' own governments. Yet First Nations people's concern about the tax exemption indicates a strong resistance to taxation as such, regardless of which government does the taxing. For example, some First Nations people regarded the Kamloops Indian Band sales tax (the first sales tax applied to tobacco, alcohol, and fuel) as "the beginning of the end of the Section 87 tax exemption" (Fiscal Realities 2001, 40). As a further argument against it, some respondents to the ITAB survey also believed taxation is contrary to traditional Aboriginal ways of life (Fiscal Realities 2001, 26).

A 1995 resolution on taxation by the Assembly of First Nations (AFN) sought to accommodate in its constituency both those First Nations seeking to tax and those resisting taxation. In support of First Nations seeking to tax, the resolution stated that "First Nations have full tax jurisdiction over all their territory." It further affirmed that "First Nation citizens will never pay taxes to the Crown no matter where they reside" (Fiscal Realities 2001, 7–8). The AFN made these statements despite the fact, as Fiscal Realities pointed out, that most First Nations citizens do pay taxes to the Crown and that most taxes collected from non-Indians on reserve lands do not go to First Nations governments. Whatever the reality, the rhetoric is clear: immunity from taxation is and should remain a permanent state of affairs for Aboriginal people living on-reserve. And First Nations taxation, if implemented, should be regarded as purely an internal affair.

Before turning to the Aboriginal voices speaking on behalf of taxation, we note one further detail of significance: namely, the attitude of non-Aboriginal people to the tax exemption. Long a source of general grumbling among non-Aboriginal taxpayers, the Indian tax exemption was called directly into question by a 2002 British Columbia referendum. The provincial government asked whether "the existing tax exemptions for Aboriginal people should be phased out." Aboriginal organizations urged supporters to boycott the vote, while the majority of British Columbia residents voted "yes" to the proposition (Richards 2006, 114ff).

If First Nations people imagine that their tax exemption is under siege, therefore, they do so with good cause. This consideration, together with the perceived symbolic association of the tax exemption with treaty and Aboriginal rights, must factor into any understanding of First Nations people's aversion to being taxed, regardless of which government is doing the taxing.

### ***C. A Countering Wind of Acceptance***

Despite the symbolic significance of the tax exemption and such dangers as the one posed by the 2002 British Columbia referendum, more First Nations people now realize the advantages of First Nations governments taxing their member-

ship. The main consideration here is the enhanced self-reliance that own-source revenues would provide, although considerations of equity and sharing with needier members also play a role.

The issue of taxation is intimately linked with that of federal fiscal transfers and the rationale underlying them. Some Aboriginal spokesmen regard a near-exclusive reliance on federal transfers to follow from the federal government's fiduciary duty to First Nations. Yet John Beaucage, grand council chief of the Anishinabek Nation, protests this attitude:

We talk about our Nation-to-Nation, Government-to-Government relationship with federal and provincial governments. Yet despite all of this momentum and political awareness, we still cling to the sacred fiduciary relationship, a failed concept that has done us great disservice. By its very nature a fiduciary duty must end at some point. A parent-child relationship changes, and at some point it reverses itself in terms of duty of care. (Beaucage 2007, 9)

Beaucage upholds the continued need for fiscal transfers, but justifies them as contractual relationships stemming from fiscal federalism, not as the obligatory products of an eternal fiduciary duty to First Nations people. He also calls for greater self-sufficiency and self-reliance of First Nations governments. This point is underscored by Calvin Helin, the controversial author of *Dances with Dependency*. In his plea for a return to Aboriginal traditional self-reliance, Helin observes that self-generated wealth is critical both to Aboriginal aspirations of self-government and to their liberation from the poverty and dependence that now plague them (2006, 141).

A handful of Aboriginal authors justify taxation in keeping with Indian traditions. The FNTC's *First Nations Real Property Taxation Guide* reminds us that First Nations traditionally practised a form of taxation in such actions as paying tribute for occupying or using territory or redistributing wealth through ceremonies like the potlatch or giveaway dances (2007, 9). Emphasizing the equity element of taxation, Chief Clarence Louie of the Osoyoos First Nation posted the following slogan on one of his now-famous community billboards: "Taxation: we have always had it—it's called sharing" (MacGregor 2006). A more detailed account of a tax-like practice is recorded by Cree storyteller Joy Asham, recalling how the Plains Cree conducted their buffalo hunt in the 1800s:

The most prestigious and dangerous position in the settlement was held by the Poundmaker. He was the head of the Hunt and was responsible for its success or failure. He was technician, teacher, leader, and was full of Courage. Once a herd's location was identified his work began in earnest. He observed

the weather, the wind and determined how much and how fast the Buffalo needed to be turned to bring them to the Pound ...

The entry would then be closed and the Buffalo fell captive. They would not be killed as yet, as the Warriors had more work to do. They counted the animals and accounted for their size, figuring out their overall resources. Around the fire that night they would determine the distribution of the beasts: who was sick and old and needed the extra richness of organ meats? Who had to feed the most people? Who needed Buffalo robes for clothes or for their lodge? They determined all these things so that the Hunt would take care of all needs and that the meat distribution would be fair. There was only one person who was not considered in the division of the beasts. That was the Poundmaker. It was Honour enough for him to have led a successful hunt ...

What of the Poundmaker? He has led an Honourable and successful hunt but how will he live? And then they come from their lodges, all of them. They bring him the steaks and the roasts and the cuts of meat that they know he loves and needs. They express their Gratitude and Respect for him in this way, knowing that in the greatest Humility he would never ask.

I somehow think that this must have been a very good system: the workers determining the boss's salary. (Asham 2007, 19)

Clearly, many First Nations people are not accustomed to the tax “touch” that other Canadians, including a large number of Aboriginal ones, feel in the modern context. Yet recollections like those Asham recorded remind us that things were not always that way. Practices surrounding the buffalo hunt evinced a traditional means to both share resources within the community and to manifest and ensure the leader's dependence on and accountability to his community.

Notably, First Nations voices on behalf of taxation are joined by a burgeoning literature that advocates taxation for First Nations governments. Authors with such varied backgrounds and agendas as Andre LeDressay of Fiscal Realities, Tom Flanagan of the University of Calgary, Métis political leader and former Manitoba MLA Jean Allard, and Stephen Cornell of the Harvard Project on American Indian Economic Development argue on behalf of First Nations governments taxing their members. From a governance standpoint, we join our voices to theirs—arguing that broad-based taxation, if introduced gradually and administered fairly, would

mark a significant advance in the quality of governance for First Nations communities. The next three sections present our reasons for taking this position.

## **II. Defining Terms: Tax Relationship, Governance Principles**

The next three sections present our reasons to support local taxation by First Nations from a good governance standpoint. Yet first we must present the reason why taxation—at first blush, solely a fiscal matter—enters into the sphere of governance at all. This requires a brief explanation of the basic political relationship taxation creates, followed by a presentation of some fundamental principles of good governance.

### ***A. The Tax Relationship***

In his study of 120 years of tax reform by the Canadian federal government, economist W. Irwin Gillespie noted that the choices governments actually make in establishing taxes and tax rates do not flow from normative theories of taxation. Although they may be informed by these theories, the tax decisions governments make do not translate economic norms such as equity, equivalence, economic efficiency, or administrative ease into practice. Instead, they are the outcomes of a critical relationship that underlies taxing and spending decisions in a democracy: the relationship between citizens and their elected government.

No relationship between two parties, with the possible exception of that between client and psychiatrist, is more fraught with love and hate than that between citizen and elected government. We love the government spending that benefits us directly; we hate the taxes that we are called upon to pay. We love the taxes that someone else is called upon to pay; we hate the government spending that provides benefits for others but does not seem to benefit us directly. We know that in order to persuade government to launch the desirable projects, beneficial programs, and great public works that we value highly (and are prepared to pay for), we may have to accept and help pay for the misguided projects, wasteful programs and extravagant public works that others value much more highly than we do. We accept this but we grumble, we apply pressure, we try to persuade others and we threaten “to vote the scoundrels out of office.” (Gillespie 1991, 2)

In order to retain and exercise power, political officials must remain in office. To do this, they must persuade a substantial number of citizens of their ability to tax and spend public funds wisely. If collecting taxes and spending revenues collected are among the fundamental activities a government does, they are also

the most contentious. In theory, citizens continually scrutinize the taxing and spending decisions of their governments. Such scrutiny establishes a “survival rule” whereby governments try to achieve electoral victory (generated in part through spending) and avoid defeat (caused by too many disgruntled voters whose revenue source is being taxed). Thus, the citizen-government relationship that lies at the heart of the government’s taxing and spending activities helps define, constrain, and steer those activities (Gillespie 1991, 16–18).

### ***B. Five Governance Principles***

The taxation relationship is inherently political. But this realization lands us directly among the central concerns of governance, which we understand broadly as the ordering and steering of a community such that peace, prosperity, and common direction prevail.<sup>14</sup> Drawing heavily on the work of United Nations Development Program, the Institute On Governance (IOG) has identified five principles of good governance.<sup>15</sup> They are:

- 1. Legitimacy/Voice:** requiring that both internal and external actors perceive the governance system as possessing the power, means, and recognition that it governs by right. In addition, all men and women have some voice in decision making.
- 2. Direction:** establishing a strategic perspective on collective development, along with a sense of what is needed to achieve it. Such direction should also be based in a clear sense of the community’s historical, cultural, and social complexities.
- 3. Performance:** requiring that collective institutions should serve their stakeholders effectively. Also, the quality of the services rendered and their responsiveness to the needs of the governed should be considered.
- 4. Accountability:** demanding that decisions-makers can account for resources expended and exercise of the responsibilities they are entrusted with. Such issues as proper documentation, transparency, access to information, results, as well as checks and balances come into consideration here.
- 5. Fairness:** striving for equal opportunity and impartial application of the rule of law. It is manifested in sound legal and regulatory frameworks, independence of the judiciary functions from political leaders, due process, and adequate dispute resolution mechanisms.

In prior publications, the Institute On Governance has made the case that its governance principles apply equally to First Nations governments, with the caveat that Aboriginal history and culture will modify their application in practice. Our claim rests to a large degree on the basis of the principles in international human rights law, which First Nations governments generally accept. Within Canada, the Assembly of First Nations (AFN), the leading national body representing Canada’s First Nations people on-reserve, has also officially endorsed recognition of the Universal Declaration of Human Rights by First Nations governments.<sup>16</sup>

As the precursor to our case for introducing taxation on reserves, our grounds for supporting one fiscal practice over another is simple: we favour any practice that demonstrably enhances a government's ability to manifest the five principles of good governance the IOG has identified. It is important to note that no government achieves this perfectly. Complete attainment of these principles is an ideal that no society has fully realized. It is the goal of a long journey, "a promise rather than a list" (UNDP 2002, 61). Moreover, there can be disagreements on the proper path to take to reach this goal. That said, one can generally distinguish progress from regress and keep one's eye firmly on the goal.

Having presented both the taxation relationship and a basic outline of the IOG's five governance principles, we now discuss the systematic link between the two. Most work on so-called fiscal theories of governance has occurred in the international and development contexts. Accordingly, the next section turns to the historical and international evidence, presenting both positive and negative cases for the beneficial effects of taxation on governance practices.

### **III. The Link between Taxes and Governance: International Evidence**

#### ***A. Fiscal Theories of Governance***

Gillespie's taxation relationship model—one he uses to explain over one hundred years of tax reform in Canadian fiscal history—did not appear out of thin air. The sense that an intensely political relationship underlies government taxing and spending activities also stems from the self-interpretation of Anglo-Saxon political regimes. The British narrative, for example, traces a story of Parliament's progressive domination over the monarchy through a succession of stands. In a long historical process, Parliament gained control of public finance and restricted funding of bureaucracy, military, and monarchy to monies that had been raised through taxation and authorized by Parliament (Moore 2007). In the United States, the American colonists themselves perceived a tie between taxation and representation when they censured the British government for having imposed three new taxes—the Sugar Act, the Stamp Act, and the New Townshend levies—on the colonies to help repay debts incurred by the Seven Years War (Ross 2004, 231). Indeed, the complaint of "imposing Taxes on us without our Consent" was one of the grievances of the 1776 Declaration of Independence and was cited as one cause for dissolving ties with the British Crown (Frohnen 2002, 190).

The question thus inevitably arises: Are we heirs of Anglo-Saxon political thought simply historically predisposed to linking taxes to good governance? More fundamentally, does the link occur beyond the historical confines of European and American nation-states? Expanding the base further, a persistent link between taxation and socio-political form was also identified on the European continent. In the early years of the twentieth century, for example, Austrian pioneers in fiscal

sociology described the mutual evolution of society on the one hand and the state's public revenue sources on the other (Goldscheid 1962). Beyond this, there is a burgeoning literature in comparative government—presenting so-called fiscal theories of governance—that suggests that the link manifests itself in the international context too.<sup>17</sup> Struggles between citizens and governments over taxes and government services tend to produce greater deference, thereby enhancing both performance and accountability in an international context as well.<sup>18</sup>

How precisely does taxation enhance good governance? Political scientist Mick Moore suggests that dependence on broad taxation, if fairly and effectively administered, should lead to some predictable governance outcomes. These outcomes (together with their extrapolated effects on the IOG's five governance principles added in italics) are the following:

- More responsiveness and bureaucratic capacity with the focus on systematically taxing citizens (*enhancing performance and voice*)
- Increased state emphasis on prosperity of citizens, where rulers now have a direct stake in encouraging it (*enhancing direction, performance*)
- More political engagement of citizens, as they experience taxation and mobilize to either resist or monitor the way revenues are collected and spent (*enhancing accountability, legitimacy and voice*)
- As an outcome of the first three, what Moore calls “revenue bargaining.” Taxation becomes more acceptable and predictable to taxpayers as the collection process becomes more efficient and routine (*enhancing performance, fairness*). Taxpayers begin to exchange compliance for institutionalized influence over level and form of taxation and use of revenues (*enhancing voice, accountability and legitimacy*).

As for the long-term effects of revenue bargaining, Moore predicts a considerable improvement in the quality of life (2007, 17–18).

This model, Moore cautions, does not translate “directly, fully and unambiguously” into reality. Indeed, no single-cause explanation of a complex transition toward better governance could. Taxation is only one factor influencing governance quality; others—institutions and political culture, for example—are also implicated. Beyond this, the direct link between individual citizens and governments is obscured by the vagaries of interest-group politics, so that it is not self-evident to governments how (or even whether) individual citizens will vote or campaign in a given election (Moore 2007, 16, 19). And as the frequent election losses of incumbent governments attest, mistakes abound in the political cost/benefit calculations of incumbent governments.

The model is encouraging, therefore, but a rough guide at best; it is perhaps not compelling enough to establish a definitive linkage between taxation and governance quality. Further evidence arises not where the taxation relationship is present, but more forcefully where it is absent. There are two relatively common situations where governments can afford not to tax—where they enjoy



large revenues from natural resource exports and where they receive aid from other governments (Moore 2007, 14). In exploring further the connection between governance and taxation, therefore, we turn to the negative case: the effects of the absence of a need to tax as discussed in the comparative and international literature.

## ***B. The “Curse” of Non-Tax Revenue***

### ***The “Curse of Oil”***

Since the 1970s, revenues from natural resource extraction or export have become a significant source of wealth for some governments. Canadians are broadly familiar with the notion of the “curse of oil,” the thesis that oil wealth impedes democratic governance. Much international development literature suggests that sudden oil wealth inflicts greater damage on democratic development in poor states than it does in rich ones, just as “a given rise in oil exports will do more harm in oil-poor states than in oil-rich ones” (Ross 2001, 356). Economist Paul Collier cites dependence on natural resource exports as one of three economic characteristics that make a country prone to civil war (the other two being low income and slow economic growth). In Collier’s analysis, a newly independent nation bearing these three characteristics is literally playing Russian roulette—its statistical chance of derailing into civil war is one in six (2007, 32).

A major governance difficulty of sudden resource wealth for a developing nation is the volatility of its revenue source. Such volatility contributes to poor planning. In the price boom phase, governments tend to raise budgets and expand programs, forgetting the survival rule of efficient public investment. During the bust phase, it becomes difficult to reduce budgets to stay in line with actual revenues. Cuts are often made to basic investments rather than to the “splurges” that were introduced during the boom (Collier 2007, 40, 41). Collier uses the example of Nigeria to demonstrate how difficult it is for citizens to sort causes from effects. The country’s boom-and-bust cycle caused the standard of living for Nigerians to fall by one-half within a decade, yet left Nigerians with no idea of what actually caused the fall.

Potentially, a more damning governance issue posed by large natural resource revenues is that they tend to undermine democracy where it already exists. The first casualty here is electoral competition. Higher rates of voter apathy have been found in many resource-rich democracies. A potentially deeper symptom of democratic decay, however, would be manifest if resource-rich political systems were to invite undemocratic practices even before the voter reached the polls. Rentier theories of democracy suggest that this is the case in Middle Eastern and African oil- or mineral-rich countries, that is, that a resource-rich state quickly overawes civil society through its easy access to a source of wealth independent from domestic taxes (Gervasoni 2007, 4–6). Rather than encouraging incumbent political parties to attract votes by delivering cost-effective services,

over-abundant public monies encourage leaders to buy votes instead. This is especially pronounced in communities with strong ethnic or familial loyalties, where “buying” the vote of one community leader will also purchase those of most of his ethnicity or family. Thus does patronage politics become the more cost-effective option for politicians presiding over resource-rich states. Thus too does service quality plummet and the character of public life change. Where patronage politics is not only feasible, but the most cost-effective approach, those attracted to public life tend—in Collier’s analysis—to be crooks seeking a share in the spoils (2007, 44–45).

Note the central source of the shift in this new cost/benefit scenario: large resource revenues weaken the restraints on, and increase incentives to engage in, patronage, and above all they radically reduce the need to tax. In absence of a need to tax, resource-rich political systems fail, according to Collier, to “provoke citizens into supplying the public good of scrutiny over how their taxes are being spent” (2007, 46). Other commentators have noted that this observation could apply equally to countries that do not need to tax for other reasons, for example, countries that rely on foreign aid as their chief revenue source. Notably for First Nations, there have been similar observations of subnational governments that rely largely on fiscal transfers from their central governments.

#### ***The “Curse of Non-Tax Fiscal Rents”***

Extension of the “curse-of-oil” logic to an analysis of subnational governments is a relatively new development within fiscal theories of governance. That said, it would seem to be the next logical step. Argentinian political scientist Carlos Gervasoni reminds us that the curse arises less from the fact that the revenues come from natural resources than from the fact that they do not come from taxation. Above all, then, the curse arises from external money flowing in from outside, so to speak, in the form of non-tax fiscal rents. Yet such funds can also flow from central governments to subnational ones, as they do in Argentina, and indeed in any country practicing fiscal federalism. This consideration motivated Gervasoni’s study of the influence of fiscal transfers on levels of electoral competition among Argentinian provinces.

Through extensive quantitative analysis, Gervasoni found that provinces that depended more on taxation revenue from citizens were essentially more democratic than those relying heavily on fiscal transfers. Fiscal federalism had provided incumbents in the latter group of provinces with incentive to engage in the same rentier conduct that other analysts saw as characterizing natural-resource rich and tax-poor regimes elsewhere. Among the signs of rentierism identified were a disproportionately large public sector, a bloated public payroll, widespread patronage politics, and a notable lack of political competition for incumbents (Gervasoni 2007, 4–6).

Gervasoni stressed that democratic suppression is by no means total in Argentina, which enjoys a national-level democracy. Because the semi-authoritarian provinces

are embedded in a national democracy, their political leaders are severely constrained in terms of the extent to which they can restrict political rights in their provinces (Gervasoni 2007, 11–12). Another limiting factor is the ease of exit for citizens, who are free to migrate to other provinces. Yet incumbents can still resort to subtle means of restricting democratic choice: pumping public finances into their own campaigns, bribing local media, firing dissidents or rival candidates, or hiring their family members for public sector jobs. With less pressure from taxpayers to spend public monies effectively, the ratio of public sector employees to private ones further depresses electoral competition. A larger number of people who are anxious about the possibility of losing their jobs in public service means fewer people who are willing to publicly criticize the incumbent, join opposition parties, or denounce corruption (Gervasoni 2007, 10).

Gervasoni concludes that “High levels of federal transfers go hand in hand with less democratic or hybrid provincial regimes. Governors in command of plentiful fiscal federalism rents appear to use their financially privileged position to restrict democratic contestation and weaken institutional constraints on their power.” “These findings,” he adds, “may well apply beyond Argentina” (Gervasoni 2007, 23, 24). The next section explores possible applications in the First Nations context.

## **IV. Enhancing First Nations Governance through Taxation**

The following section will attempt to draw relevant connections from the international evidence to First Nations governments, beginning by indicating certain parallels between the “rentier conduct” identified internationally and the political situation on many reserves in Canada. It will then indicate in more detail how broad-based taxation would work to improve governance in First Nations communities. Finally, it will outline the experience with taxation of First Nations whose staff or professional service providers agreed to speak with us for this paper.

### ***A. Identifying the Curse***

Both the question surrounding natural resource rents and the one surrounding the effects of fiscal transfers have long bedevilled Canadian commentators. Some question the effects of Alberta’s sudden oil wealth on the governance of that province, for example (Nikiforuk 2007). Others ask whether heavy subsidies to certain provinces and territories through the federal equalization formula serve only to depress their economies further.

Turning first to resource rents, First Nations in Alberta have experienced the mixed blessings of oil wealth first-hand. The patronage and corruption combined with appalling social conditions that plagued such bands as the Stoney First Nation outside of Calgary or the Samson Cree Nation in the late 1990s amply attest to the magnifying effects sudden natural resource wealth can have on pre-

existing social and governance issues in a First Nation community (Allard 2002, 145–49; Flanagan 2000, 89–92, 104–05). The Community Well-Being (CWB) index developed by researchers at Indian and Northern Affairs tells a similar story about Alberta First Nations. Combining data related to educational attainment, income levels, housing, and labour-force participation, the CWB rated only three Alberta First Nations with above-average CWB scores. None of them was an oil-rich First Nation (McHardy and O’Sullivan, 2004).

Less pronounced, but still palpable, are the effects felt by First Nations depending almost solely on federal fiscal transfers for their revenue. On this count, few comparisons with Canadian provinces can be made, where even those provinces that depend most on equalization payments derive most of their revenues from taxation (Richards 2006, 126). This is not the case for the average First Nations government. In 2001, employing “the most generous assumptions regarding First Nation own-source revenues,” Fiscal Realities estimated that, on average, First Nations governments depend on fiscal transfers for 90% or even 95% of their revenues. Manifesting “extreme fiscal imbalance,” this level was more than double that of the poorest province in the country (Fiscal Realities 1997, 17).

As Fiscal Realities also notes, public finance theory would predict serious accountability issues here. With monies flowing to governments almost solely through the fiscal transfer rather than from members, there would be little correspondence between revenues collected and services delivered. This situation would produce such symptoms as those that First Nations communities witness in reality. In summary:

- Within First Nations, there will be lower satisfaction levels with services delivered. This is to be expected where the funding government is far removed from the recipient citizen and the political advantages of government responsiveness are lost.
- Within First Nations, community members will tend to demand more services than they would be willing to pay for, because they do not fund them themselves.
- Outside First Nations, there will be a growing intransigence from taxpayers to continue supporting transfers from which they themselves realize no benefit and also believe they see limited results.
- Within the federal government, there will be a relatively high incentive to underfund the services it supports. (Fiscal Realities 1997, 17)

These are the adverse effects of extreme fiscal imbalance on the quality of services delivered on-reserve. Yet there are also closely related adverse effects on governance, which mirror those described in the Argentinian study. Commentators on First Nation governments note the tremendous size of the public sector on-reserve compared to municipal governments (Graham 2007b, 5–6; Flanagan 2000, 101–02). In part, that size can be explained by the broad scope of services

First Nations governments deliver to their citizens, ranging from provision of potable water to delivery of housing, social assistance, and education, yet this explains only part of the story if the rentier effect also comes into play in First Nations communities.

There is good reason to think it has. As noted previously, the rentier theory of democracy assumes that democratic governance survives when there is a rough balance of power between the state on the one hand and society and the less-privileged on the other. In rentier situations, that balance is upset in favour of the state. Due to the structural distortions of the reserve governance system, it has also proven to be absent on many reserves.

Jean Allard cites sociologist Menno Boldt when he asserts that reserves are typically “one-dimensional systems” that possess few of the checks and balances on government power issuing from such organizations as unions, businesses, non-governmental organizations, and media. With a few notable exceptions, reserves often have no middle class, only a small, insulated elite, and a much larger group of impoverished and dependent members (Allard 2002, 130, 131). In many First Nations communities, the government is far and away the main source of income in the community. Jobs with the band government or administration are often the highest paying jobs on the reserve—in some cases, the only ones. Politics in many Aboriginal communities are known to be highly factional and patronage-based, and the media and other organizations have reported cases of election fraud and vote buying.<sup>19</sup> According to Calvin Helin, blogs posted by Aboriginal youth lament rampant “elitism,” “corruption,” and “cronyism” in government (2006, 149).

It would be false to depict all First Nations governments as corrupt and elitist. On the contrary, some are very well governed despite the absence of taxation regimes and all incentives to the contrary. In general, however, both the governance and the quality of services suffer within a governance system that lacks the crucial tie of a direct reliance upon its citizens for survival.

In *Dances with Dependency*, Helin identifies what he sees to be to one primary source of the ills now plaguing Aboriginal communities:

In Aboriginal communities, transfer payment monies are simply provided, not self-generated. While the same observation and criticism can be made about any government, many grassroots community members charge that a similar lack of *gravitas* sometimes applies to band council decision making in relation to such transfer payment monies ... [T]ransfer payments are “play money” to some if they did nothing personally or collectively to acquire the money in the first place. This circumstance has led to equally “obscene” wastage of federal monies. The situation is one without a normal baseline since it operates outside the parameters of a market system and the normal institutional rules

of accountability that might otherwise impose some level of reality on decision making. (Helin 2006, 140)

The Canadian commentary and the international literature surveyed converge on this point. Of Argentina, Gervasoni states that the country's fiscal federalism "has the perverse consequence of financing the political survival of less-than-democratic regimes." On the basis of cross-national quantitative comparisons, British political scientist Michael Ross reaches a similar conclusion: "programmes that extend subsidized loans to authoritarian governments should tend to retard democracy, by dropping the cost of government and reducing the democratic pressures the regime would otherwise face" (2004, 247; Gervasoni 2007, 26). Even though most First Nations governments fall well short of being authoritarian, Ross's central point remains.

What to do with this situation? The answer is not substantial reductions of federal transfers. Many argue—justifiably, in our view—that these do not adequately support services in any case. Nor could one ever expect taxes collected in small First Nations communities to fund such big-ticket items as education, health care, and social welfare. The goal should not be to reduce federal transfers then (or at least not in the foreseeable future), but to boost overall revenues. We make the following recommendations:

- In light of the demonstrated connection between natural resource wealth and poor governance practices, First Nations that have limited their aspirations for own-source revenue to securing such external sources as land rents and resource revenues might reconsider their strategy.
- In calculating the benefits and costs of federal fiscal transfers, both First Nations and other governments should consider the damaging effects of a near-exclusive reliance on federal fiscal transfers on First Nations communities—both on the quality of services received and on internal governance practices.

The latter consideration would call into question any strategy of relying exclusively on fiscal transfers as rents owed for historical indignities and losses wrought by the colonizing federal government. The indignities and losses did in fact occur, but the evidence suggests that these are only compounded by a perpetual reliance on funds that are in fact not free money but come at considerable cost to both Aboriginal communities and their governments. With present revenue sources and their attendant accountability structures intact, we can expect the quality of both governance and service delivery on most reserves to remain roughly at their present levels.

The next subsection presents our argument, grounded in the IOG's five governance principles, for First Nations collecting taxes as a significant supplement to their fiscal transfers. Combined with revenues from band-owned businesses and a modest reliance on land or resource rents, where applicable, this practice would

go far to begin relieving the situation of extreme fiscal imbalance that prevails on many reserves.

### ***B. Reversing It: A Return to Governance Principles***

Broad-based taxation by First Nations governments, together with broader economic strategies and community plans, would enhance all five of the principles of good governance identified earlier in this paper. The following points elaborate more fully how and why this is the case.

- 1. Legitimacy and Voice:** When First Nations governments are no longer totally beholden to the Canadian government for their survival, it enhances their legitimacy in the eyes of both their citizens and other governments. As for voice, the adage, “he who pays the piper calls the tune” works both ways. For First Nations governments relying heavily on federal transfers, the federal government calls the tune by attaching its conditions to revenues it provides.<sup>20</sup> In a taxation scenario, the caller of the tune is the community itself, which is now enmeshed in a tensional, but ultimately healthy, fiscal relationship with its own government.
- 2. Direction:** An array of taxation sources yields a relatively stable, reliable revenue source that allows for long-term government planning. First Nations would be able to fund their own projects and set their own priorities regardless of the priorities of other governments. Our interviews revealed one striking example in practice: the tax revenues collected by the Westbank First Nation allowed the First Nation to fund its self-government negotiations in a period where the federal government had frozen all funding for that purpose. Taxation also lends direction to economic development by providing not only services (in the case of property taxation), but also much-needed clarity and jurisdictional certainty to potential investors.
- 3. Performance:** The performance-enhancing effect of taxation of citizens has already been well-established. The same effect could be expected for First Nations—a virtuous cycle whereby taxing governments would enhance their provision of cost-effective services to members who are paying for them. First Nations governments would also gain a fresh incentive to increase the prosperity of their citizens, who now are not merely consumers of services, but potential sources of revenue as well. Better services lead to higher levels of private investment in the local economy.
- 4. Accountability:** As with performance, taxation’s enhancement of accountability has been well-established. The proviso here is that expenditures and services should be linked as far as possible, so that taxpayers can clearly identify what their revenues should be paying for. A larger proportion of revenues from taxation would shift the accountability focus from the funding federal government—including, on average, its requirement of 168 reports per year—to the community. The actions of community



members, the other partner in the tax relationship, would likely change as well; as taxpayers, community members would be more likely to demand that their governments address such long-abiding issues of concern as poor water and housing quality.

5. **Fairness:** At present, there are great discrepancies in income on most reserves, where a small number of members possess most of the jobs and income. One aim of a well-designed tax regime—and notably, of a number of sharing practices within First Nations traditions—would be to redistribute wealth among citizens according to need, thereby enhancing internal equity within First Nations communities.

These would be the governance advantages of a well-designed taxation regime on First Nations. As for barriers to implementation, one obvious hurdle is that those who would implement taxation regimes as a public good—council and band administration—would likely stand to lose the most privately. Here, as elsewhere in public life, self-interest might prove a hurdle to implementing taxation regimes in many First Nations. A second hurdle in many cases would be the membership itself. Taxation is a hard sell at all times everywhere, but particularly among First Nations people who are justifiably wary of any talk of taxes at all.

Despite the barriers to doing so, we recall that some First Nations have already implemented taxation in their communities. Before turning to specific recommendations in the final section, we briefly outline the experiences of those taxing First Nations we were able to speak with.

### ***C. The Experience of Taxing First Nations***

As the opening section indicated, very few First Nations now tax their membership. Those that do have been doing so for only a few years, so the evidence we can draw from is limited. Further, what evidence we have is strictly anecdotal, derived from interviews with staff members who have had long experience with the First Nations in question.

With these caveats in mind, we were able to gain a sense of the experiences of the following First Nations: Westbank in British Columbia, the Whitecap Dakota in Saskatchewan, and various First Nations in the Yukon. The First Nations in question have varying legal statuses: Westbank has a self-government agreement with Canada; Whitecap Dakota is largely under the *Indian Act*; some of the Yukon First Nations are self-governing, whereas others are under the *Indian Act*. The two First Nations south of 60 have implemented property and sales taxes. The self-governing Yukon First Nations began implementing their personal income taxes in 1999 and their sales taxes in 2004.

We asked interviewees whether taxation had benefitted the community. All of them informed us that it had formed a critical component of the First Nations comprehensive community and economic development plans. In conjunction with those plans, taxation provided the following benefits:

- **Funds for projects of priority to the First Nation:** Whitecap Dakota used its sales tax revenues to fund elders, youth, and cultural projects. Westbank invested its property taxes both in services and in the governance infrastructure required. Its sales tax provided community facilities and community workers to help members in need.
- **A priority on service provision, promoting economic development:** Property taxes allowed the First Nations canvassed to improve their reserve property interests and services, thereby increasing the value of leases for reserve land and generally improving property values on the First Nation.
- **Increased citizen participation:** Most interviewees noted that there was a different attitude among members after the taxes were introduced. Members were intensely interested to see what kind of projects their tax revenues would fund. The Yukon First Nations provided a basis for comparison on this count: one interviewee who provides accounting services for two different First Nations (one self-governing and one not) suggested that the members of the taxing First Nation showed significantly more interest in spending decisions than those of the one that did not.
- **A premium on transparency, accountability, and performance:** This emphasis was due both to a desire to assure members that tax dollars had been well-spent and to encourage economic development and reassure outside investors. Two First Nations interviewees also noted that the need to administer property tax both fairly and efficiently had required them to invest in their governments' bureaucratic and governance capacity.

Notably, a key benefit in the view of the First Nations south of 60 was that at least a portion of the taxation revenue—whether from property or sales tax—came from non-members. A good portion of the sales tax came from members, however. And in the case of the Yukon First Nations, the personal income tax arose almost entirely from the membership.

The experience of the Yukon First Nations suggested three further important points. Firstly, for even the small First Nations located in generally remote places, governments gained a significant source of revenue (on average about 8% of total revenues) by taxing principally their members through sales and personal income tax. Secondly, the principal source of income tax arose from members working for the First Nations. This meant that the First Nations had to adjust the salaries of those First Nations employees who were subject to personal income tax. Thirdly, one Yukon interviewee noted that introduction of personal income tax had resulted in a new source of pride among First Nation members, who no longer felt the need to rationalize their non-taxpaying status to non-member Yukoners. The fact that the tax dollars flowed to the First Nation governments augmented this pride.

As a critical note on causation: One Yukon interviewee stated that the catalyst for change was self-government itself and that taxation was only as a component of this. He suggested that Yukon self-governing First Nations do not distinguish between tax dollars and funds received through the self-government fiscal transfer. For them, the central thing is that both allow the First Nations to determine their own priorities and develop accountability mechanisms directed at citizens in a way that had not been possible before self-government. Our other interviews reinforced the perception that taxation is successful when undertaken as one component of a larger community or strategic plan to enhance the overall direction of the First Nation.

In a self-government context, one interviewee spoke of a “complete transformation” of a First Nation that had been mired in debt and partisan politics twenty years earlier. Taxation had contributed to the changed attitudes of citizens, and better governing institutions, services, and relationships with other governments and non-Aboriginal parties within a reasonably short period.

In summary, the connection between taxation and good governance in First Nations communities is both sparse and anecdotal but nonetheless encouraging. In accordance with the belief that such results should be attainable for many First Nations—ideally sooner rather than later—the next section presents some policy and research options that would serve as next steps for First Nations and other governments in realizing broad-based taxation of First Nations people on reserve.

## **V. Policy and Research Options**

This final section proposes a number of options that First Nations and other governments may wish to consider. In our view, it is important to broaden the discussion in at least two dimensions. Firstly, any discussion of taxation that fails to consider the impact on and nature of fiscal transfers from other levels of government is not fruitful. This requires us to introduce some basic principles underlying fiscal federalism and connect these to the discussion of future options.

Secondly, following the RCAP, we share the view that the structure of First Nation governance should be factored into the consideration of tax. The RCAP presented convincing arguments to support a tiered system of First Nation governance. This would occur above all for capacity reasons: individual First Nations are simply too small to exercise all the jurisdictions that are involved in self-government regimes. Family reasons also come into play: the small size of individual First Nations makes managing competition among families difficult (RCAP 1996, 245–65). We concur with these arguments and would add another: it makes no sense to combine conflicting governance functions in a single government. Taking an example from the contested area of potable water, a single government should not simultaneously operate a water plant and regulate its own operation. For regulatory functions to work well in a First Nation context—and these functions occur

in a wide variety of public services, ranging from environmental protection to building codes—multi-tiered governance is a must (Graham 2000).

With these two considerations in mind, we first present a continuum for financing First Nation governments (A). The two subsequent subsections (B and C) discuss policy and research implications for both First Nations and other levels of government. In the final subsection (D), we discuss a set of proposals by former Manitoba political leader, Jean Allard.

### ***A. Continuum for Financing First Nations Governments***

When attempting to put some of the ideas presented above into practice, it is helpful to think of financing options for First Nations as organized along a continuum. Nearing one end of the continuum would be self-governing First Nations that rely on some combination of the following revenue sources:

- **An array of tax revenue** derived from property taxes (individual households and businesses), personal income tax, and sales taxes applied to all residents of First Nation lands in a non-discriminatory manner
- **An array of user fees** charged for such local services as water, sewage treatment, and garbage collection
- **Other own-source revenue (OSR)**, ranging from royalties and other rents charged for natural resource extraction to income from First Nation-owned businesses
- **A single fiscal transfer** from the federal government and possibly from the province or territory. Among other things, the size of this transfer would take into account the First Nation's capacity to generate OSR.

First Nations starting from the other end of the continuum could begin combining some of these options. A stepwise approach to adding taxes would make the transition to self-government gradual rather than a traumatic “leap.” Each of these revenue sources deserves further elaboration.

#### ***An Array of Tax Revenues***

Property tax is the principal tax source for Canadian municipalities, and accounts for 53% of their overall revenues. Among public finance experts, there is a general consensus that property tax is the suitable tax for fulfilling local purposes, especially for funding municipal services benefitting the entire population, such as police and fire services, roads, and other infrastructure. It is less effective for funding social programs, in part because of its pattern of slow growth. Further, property tax is often difficult to administer. Finally, the tax is regressive as it tends to take a significantly higher portion of the income of the poor versus that of the wealthy.

For these and other reasons, many argue that Canada's local governments should have a more diversified tax base. The Conference Board of Canada (2007) for example, advocates that municipalities should have access to such “growth

taxes” as income tax and consumption taxes. It points to precedents abroad: in the United States, for example, roughly 3,800 local governments levy income tax, and in Scandinavian countries, local governments do not have property taxes but instead rely on personal income tax as their principal tax source.

There are therefore considerable grounds to support First Nations—given the breadth of their responsibilities, many of which are province-like—having access to property and sales tax as well as personal income taxes. Another argument on behalf of First Nations possessing a range of tax powers is that tax revenue, combined with user fees, should make up a substantial portion of their revenue. The reasons for this have been addressed in earlier sections of this paper.

Corporate income tax would not be an appropriate one for a local government to impose where businesses can easily relocate to lower tax jurisdictions. That said, there are situations where sharing in an existing corporate income tax would be appropriate: our Yukon First Nations interviewees, for example, suggested that the self-governing First Nations there should gain access to a share of the corporate tax now collected by the federal government in the territory.

Assuming that First Nation governments will one day be multi-tiered, careful thought should be given to how each tier will finance itself. For example, property taxes and user fees might be most appropriate for lower-tier governments because those governments deliver services and make expenditures that relate directly to these revenue sources. Conversely, personal and sales taxes might be more appropriate revenue sources for an upper-tier government. Finally, the design and administration of these tax regimes should follow generally accepted tax principles as outlined in the box below:

## **Tax Principles**

The following principles that should form the basis of a good taxation regime are compiled from two sources: Fiscal Realities, “Getting First Nations Government Right—Tax and Related Expenditures” and the 1993 “Working Draft: Indian Government Taxation” prepared by the Department of Finance.

- **A clear link between taxes paid and services provided to the taxpayer.** This ensures accountability for revenues collected.
- **Harmonization and coordination with taxes imposed by other governments.** This avoids double taxation and the inadvertent creation of tax havens; further, it reduces the burden of complying with different tax regimes and administrative costs.
- **Efficient collection of taxes.** This might mean that, for some taxes (sales and personal income tax, for example) federal and provincial governments may be in the best position to collect them.
- **Territorially based taxation.** Taxation power in Canada tends to be tied to governments with a specific land base.

- **Non-discriminatory taxation.** Taxes should apply equally to all residents of the land base.
- **No taxation without representation.** Those taxed are entitled to some say in how they are taxed and what services they should receive from their taxes.
- **Neutrality.** Tax systems should not distort where businesses decide to locate through differing tax treatment.

The tax principles outlined above entail a rejection of several recommendations that are often presented for First Nation taxation. For example, the argument that non-resident First Nation members should be able to redirect part of their federal and provincial taxes to First Nation governments would not be an easy approach to administer. More fundamentally, it breaks the direct link between those being taxed and those receiving the services.

### ***An Array of User Fees***

User fees (which public finance experts do not consider to be taxes) constitute a larger and larger portion of revenues for local governments in Canada. For Canadian municipalities, user fees make up almost a quarter of all revenues. User fees are an appropriate revenue source under the following conditions:

- There is a clear link of a citizen to the service received.
- The service can be easily costed.
- The administrative costs of collecting user fees are reasonable.
- There are strong arguments for conservation of the service being provided (i.e., conserving water, minimizing garbage).
- There is little likelihood of unintended consequences—for example, a fee on garbage collection might induce citizens to dump their garbage in roadside ditches.

In a First Nation context, the best user-fee candidates are likely drinking water provided through some communal system, and possibly sewage treatment and garbage removal. Akwesasne in Ontario and Whitecap Dakota in Saskatchewan are two examples of First Nations that employ user fees, and there are others.

User fees are perhaps the best example of connecting a revenue source to a specific service received. For this reason, they are popular among public finance experts. The strike against them is that they are regressive: where the services tend to be essential, they are consumed as much or more by the poor as by the rich.

### ***Other Significant Revenue Sources***

Three other common sources of own-source revenue are open to at least some First Nations. The first rely on profitable, community-owned businesses, perhaps following the Osoyoos model championed by Chief Clarence Louie. Indeed, many First Nations leaders emphasize band-owned businesses as part of their

larger economic development schemes, as a means to create jobs and enhance the self-sufficiency of their communities. With few exceptions, however (some American tribes and First Nations with immense casino revenues come to mind), band-owned businesses are unlikely as stable and growing sources for funding public services. There are a few central reasons for this. Firstly, business revenues are cyclical and hence ill-suited to providing a stable revenue source. Secondly, businesses need working capital to grow and must rely on the profits they realize to obtain it. And finally, long experience has shown that governments, whether on- or off-reserve, tend not to be well-suited to directing business enterprises.

A second, more promising source of revenue for First Nations is to share in the resource rents collected by other levels of government. There are solid reasons why other levels of government should support revenue-sharing with local governments—especially First Nations (Graham 2007a). These include the following:

- Revenue-sharing agreements can be critical elements in achieving reconciliation with Aboriginal peoples on how Aboriginal and treaty rights will find modern expression.
- There are strong equity arguments for supporting revenue-sharing with local governments, since they bear a disproportionate share of the costs of resource extraction and tend not to receive a corresponding share of the benefits.
- Resources are the heritage of a region and its people. If these resources are going to be exhausted or substantially reduced, then the region deserves an opportunity to build a sustainable economy based on other forms of economic activity.
- Resource-sharing sustains stability and certainty for governments, local interests, and industry.

Despite the possible benefits of sharing resource rents, three cautionary notes concerning this source of revenue need to be sounded. The first is that sustainability should be an important feature for revenue-sharing agreements: First Nations, as with other governments, should avoid the temptation to spend these revenues—especially those derived from non-renewable resources such as minerals, oil, and gas—on non-self-sustaining assets or initiatives. Rather, the emphasis should be on the establishment of trust fund-type vehicles where the objective is to create sustainable economies once the resource extraction has run its course. A second cautionary note involves the so-called curse of natural resources that was canvassed earlier in this paper. In many situations, excessive reliance on this revenue source has been an impetus for poor rather than good governance. Finally, because tax revenues from resource commodities tend to vary significantly over time as world markets change, these revenues should not be the principal means for funding government programs.

A final source of revenue could arise from the settlement of claims. Where this source, particularly the capital component, should also be handled as a trust-like



vehicle, it is also not a viable source for financing the operations of large, ongoing government programs.

### ***Fiscal Transfers from Other Levels of Government***

Our discussion now turns to the difficult matter of the fiscal transfer. The fiscal relationship between governments in a federation is inevitably contentious. Although the principles behind sound fiscal federalism are easy to enunciate, many principles conflict with one another and—as always—the “devil is in the detail.” The list below outlines some of the key ideas animating fiscal federalism regimes. Is it any wonder, given its array of contending ideas, that a recent Canadian study on the issue was entitled “Reconciling the Irreconcilable?” (Council of The Federation).

#### **Fiscal Federalism**

- **As far as possible, the revenue capacity of each level of government should match its expenditure responsibilities.** This maintains the basic bargain with citizens: governments should be accountable for the taxes they raise.
- **Subnational governments should be able to provide relatively the same level of services at comparable rates of taxation.**<sup>21</sup> This provides a strong argument for national governments of any federation having revenue-generating powers that exceed its expenditure needs—in contradiction to the first principle above.
- **Fiscal transfers should contain as few conditions as possible** to allow subnational governments to determine their own priorities. Where achieving important national goals is an exception to this rule, it is an exception that could encompass a wide range of initiatives and can be very contentious.
- **Transfers should not offer disincentives** for subnational governments to collect their own revenue. This is another area of possible contention.
- **The fiscal transfer regime should be easy for citizens to understand.** This principle would argue against complexity, where equity arguments might pull toward it.
- **To be fair, the regime has to recognize the unique conditions of each subnational government.** This principle is at direct odds with the simplicity doctrine. (Graham 1998)

The tensions surrounding principles of fiscal federalism have a direct bearing on First Nations governments. At present, the federal government takes own-source revenue (OSR) into consideration in funding a number of programs for First Nations. For example, First Nations are expected to pay for a portion of their operation and maintenance in providing potable water through OSR (presumably through user fees charged to consumers). Similarly, band support funding assumes that First Nations will contribute to some of their costs in this area.

Self-government agreements take OSR requirements further by reducing the fiscal transfer through a formula that takes into account a First Nation's own-source revenue. The recent self-government agreement with the Tsawwassen First Nation illustrates how this can occur, while still providing the First Nation with incentives to generate OSR.<sup>22</sup> It provides this incentive in three ways:

- By providing a minimum floor for OSR below which no “clawback” occurs
- By having a twenty-year, phase-in period
- By capping the rate of inclusion of OSR in the formula at 50%

In its recommendation for appropriate fiscal transfers for Aboriginal governments, the RCAP suggested that the parties involved pattern a new approach. This would occur according to the same logic as the federal government's transfers to the three territories (*Federal-Provincial Fiscal Arrangements Act*). Incorporating revenue capacity and expenditure needs, this approach (laid out in legislation) appears a sensible longer term goal. That said, this route makes sense only for First Nations—ideally, a small number of aggregated ones—with proven financial management records. The final two subsections turn to the policy implications for First Nations and the federal government.

### ***B. Policy and Research Implications for First Nations***

This paper has raised four issues that First Nations might consider addressing:

- Consider instituting taxation regimes—sooner, rather than later
- Ensure fairness to non-member taxpayers
- Undertake additional research, especially to document the experience of First Nations that have instituted tax regimes
- Reassess long-term strategies that rely primarily on revenues from natural resources to reduce dependency on transfers from other governments

We examine each in turn below.

#### ***Begin Instituting Taxation Regimes***

The First Nations interviewed for this paper indicated that their experience with tax regimes had been positive. This finding, coupled with the international experience, offers a strong rationale for First Nations to begin instituting taxation regimes in their communities. For reasons the preceding sections have suggested, the politics of doing so are by no means easy where many First Nations people are strongly attached to exemption from taxation by any government. However, our research has revealed some ways political leaders might handle the taxation issue in their communities:

- **Link the introduction of a new tax to a broad, community development strategy.** Such a strategy aims at enhancing economic and community development and improving overall community well-being. Together with strong and consistent leadership, this comprehensive

approach produced remarkable results for the Westbank and Whitecap Dakota First Nations over a two-decade span.

- **Link the introduction of a new tax to a specific community project.** Within the broader strategy, concrete projects offer an important avenue through which to introduce a new tax. For example, the Kamloops First Nation linked introduction of a sales tax to payment of legal fees surrounding its claim to Douglas reserve land at Scheidam Flats (Fiscal Realities 1999, 40).
- **Add to the attractiveness of the proposition by including non-members in the First Nation tax base.** Recalling that the beneficial effects to governance practices arise from taxation of a First Nation's own membership, there are still advantages to including non-members in the tax base. Tax revenue generated from non-members, whether GST, property tax, or income tax, can add significantly to the overall revenue stream. This makes it a major selling point of a proposed initiative for members.
- **Canvass and cite the positive experiences of other First Nations.** A few First Nations have gained clear, demonstrable benefits from their introduction of tax regimes in their communities. Their experiences could help inform a community considering whether and how to begin taxing.
- **Cite the benefits for those in the community with low incomes.** This is particularly the case for personal income tax. To provide just one example, a family of four with an income of \$20,000 would be eligible for refundable federal and provincial benefits of just over \$11,000.<sup>23</sup> This fact turns the argument “you can't tax poverty” on its head.
- **Build on positive experience by adding taxes incrementally.** Implementing one tax at a time would gradually introduce the membership to taxation and its benefits. A First Nation might wish to begin by introducing property tax and establishing jurisdiction, then proceed to FNGST, and—once available—to personal income tax. Introducing a property tax regime has the added benefit of building a competent bureaucratic infrastructure to administer this tax.

### ***Ensure Fair Treatment of Non-Member Taxpayers***

Taxing non-members can reap significant benefits for First Nations but, as the experience of some British Columbia First Nations demonstrates, it can also be the cause of controversy, negative media coverage, and legitimate complaints of discrimination. This concern applies particularly to property tax, where in many cases non-members pay the tax and members do not. Long-term lessees of reserve property have made charges of discriminatory taxation, “taxation without representation,” and—in the case of non-taxpaying members receiving services and voting—“representation without taxation” (Kesselman 2000). As a means to ensure some representation of non-member taxpayers, First Nations may wish

to consider permanent advisory councils comprised of non-members about tax assessments and rates. They might also want to consider developing appeals and arbitration mechanisms that are neutral from the perspective of non-members—in other words, that are not simply appointees of chief and council. Finally, First Nations will wish to examine the fundamental fairness of introducing a property tax that is aimed exclusively at non-members and exempts members.

### ***Undertake Additional Research***

There is a dearth of good case studies of First Nations that have had tax regimes for long periods of time. One striking example is the Yukon, where First Nations under self-government agreements have had experience with personal income tax since 1999. To this point, no studies of the Yukon First Nations experiences exist. In our view, these experiences should be documented and analyzed in order to inform other First Nations considering self-government and its attendant tax agreements.

Another area that requires significant attention is the structure of First Nation governance: specifically, whether and how multi-tiered governments should be established. Some multi-tiered Aboriginal governments do exist: the Nisga'a in British Columbia, the Métis Settlements of Alberta, and the James Bay Cree of northern Quebec come to mind. Several new agreements (Nunatsiavut, for example) also establish two-tiered systems. The structures of these governments also need to be studied, especially from the perspective of how they are and should be financed. We are unaware of any serious research since the RCAP that has been done on multi-tiered governments.<sup>24</sup>

### ***Reassess Strategies Relying Heavily on Natural Resource Revenues***

Given the difficult politics involved in introducing tax regimes in First Nation communities, it is understandable that some First Nation leaders look elsewhere for revenue to reduce or eliminate dependence on federal transfers. The most obvious candidate here is to share natural resource revenues collected by other levels of government, yet both international and Canadian experiences would suggest using caution when pursuing such a strategy, exclusive of taxing members. All governments—including First Nation governments—need to tax their citizens for the reasons we have outlined in this paper.

### ***C. Policy and Research Implications for the Federal Government***

Our research suggests that the overall federal policy framework for First Nation taxation is sound—with two important exceptions on which we elaborate later in this section. It is based on clearly articulated principles, proceeds on a voluntary basis, and offers significant incentives for First Nations to introduce tax regimes. Progress has not been galloping since 1990, but much has been accomplished over the past two decades. Further progress has been made with personal income tax in the Yukon—a significant breakthrough. What follows are a number of suggestions

for accelerating the progress that has already been made. Most of the following suggestions should be acted on in close collaboration with First Nations:

- Increase the options available on the financing continuum described above
- Correct an anomaly relating to the refundable benefits under personal income tax
- Standardize the administration of First Nation taxes
- Develop a more effective strategy for promoting the benefits of taxation
- Improve coordination between OSR policy and tax policy
- Develop a policy on multi-tiered governments

### ***Increase the Financing Options Available***

Moving from the *Indian Act* to a negotiated self-government regime is a huge leap for First Nations. This explains in part the slow progress being made on the self-government front. If the government were to develop incremental steps related to financing, this might make the leap less daunting. Such steps could include the following two in particular:

- **Introduce a First Nations personal income tax (FNPIT) act.** The parallel here would be the act for the FNGST, which emphasizes a voluntary approach. At the moment, First Nations can pursue personal income tax jurisdiction only with self-government agreements. While the initial demand will no doubt be low, having a personal income tax option could be attractive to a number of First Nations, especially those with large and growing non-member populations.
- **Introduce a multi-year grant as a fiscal transfer vehicle.** This grant would be available only to First Nations that meet and maintain third-party certification standards, such as a modified ISO 9001. Such a grant would move some First Nations closer to the type of fiscal transfer now found under self-government agreements. Third-party accreditation would ensure that the governance and program quality is of the level required to justify such an approach to funding First Nations—essentially a hands-off approach with much reduced conditionality and reporting.

For those First Nations that have already taken the difficult steps to achieve self-government and have obtained agreements, the federal government should reduce the growing number of conditional transfers that supplement the self-government transfer. Our interviews on self-governing First Nations in the Yukon indicated that such conditional transfers are major irritants to these communities and skew the accountability relationship back to the federal government.

### ***Correct an Anomaly Relating to Refundable Benefits***

First Nation members who are eligible for a Section 87 tax exemption can still take advantage of the refundable benefits (e.g., GST and child tax benefits) available

through the administration of the personal income tax system.<sup>25</sup> As we noted earlier, these benefits can be substantial: a family of four in British Columbia might be eligible for a refund totalling as much as \$11,000 (see **Appendix B** - page 85.) The anomaly is this: under Section 81 of the *Income Tax Act*, all income that is tax exempt from another act need not be considered in the calculation of these refundable benefits. Thus, a Status Indian with a large income that is tax exempt under Section 87 would be eligible to receive these benefits. The result is very questionable social policy, with the rich receiving a sizable benefit under a program designed to aid the poor. Moreover, the anomaly would represent a serious disincentive for a First Nation considering entering a personal income tax agreement with the federal government, should a FNPIT be developed.

### ***Standardize the Terms and Legal Authority of First Nation Tax Agreements***

The federal government now has over forty tax administration agreements with individual First Nations. These agreements cover personal income tax, FNGST, or its predecessor, the First Nations Sales Tax on gas, tobacco, and alcohol. Such one-off agreements are better than none at all, yet despite some success in efforts to adopt a “template” approach, they may be cumbersome to negotiate and implement. What is more, the individualized agreements yield a patchwork taxation system that may inhibit economic development on First Nation land. Rather than having consistency and clarity across the First Nations taxation landscape, potential investors must examine the terms for each individual First Nation. Therefore, we suggest greater standardization of these agreements and the legal/legislative authorities upon which they are based. As noted above, opt-in framework legislation for a First Nation personal income tax (similar to the existing opt-in framework set out in the *First Nation Goods and Services Tax Act*) would be a positive step in this regard.

### ***Develop a More Effective Promotion Strategy***

We have seen that First Nations are in many cases wary of any discussions that would affect the Indian tax exemption. Their wariness is compounded by their sense that benefits would flow to the federal government through reduced fiscal transfers to First Nations communities. Given this mistrust, the federal government is in a poor position to advocate the benefits of taxation to First Nations. To this end, we suggest that the government partner with a credible First Nation organization to develop a more effective strategy: the First Nation Tax Commission and/or the National Centre for First Nation Governance. A first step here might be to partner in conducting joint research on the experience of First Nations that have already developed tax regimes.

***Improve Coordination between OSR Policy and Tax Policy***

We were unable to find any public document explaining federal policy on the treatment of OSR in self-government agreements. This is odd, given that actual OSR agreements—for example, with the Tsawwassen First Nation—are publicly available. Because the treatment of OSR is a critical factor in weighing the pros and cons of initiating a tax regime, it is essential that First Nations be able to access a copy of the OSR policy.

More fundamentally, our interviews in the Yukon revealed that there is insufficient coordination between Indian and Northern Affairs (which has responsibility for OSR policy) and Finance Canada (which directs tax policy). There is a strong requirement for a Government of Canada policy that links tax and own-source revenue policies. This would be especially urgent if the government were to introduce a First Nation personal income tax act.

***Develop a Policy on Multi-Tiered Governance***

As the RCAP has argued, with additional points added by the Institute On Governance, there are solid governance reasons for adopting multi-tiered self-government in certain circumstances. The federal—and indeed, provincial—governments need to develop a policy on this issue, ideally in collaboration with First Nations. Part of this policy should address how tax powers would be distributed among these tiers.

***D. The Jean Allard Proposal***

Jean Allard, a former MLA from Manitoba, has advocated that a portion of federal transfers to First Nations should go directly to Status Indians, both on- and off-reserve, as “modern” treaty payments (2002). Specifically, Allard called for an increase in treaty payments from the current \$5 under the numbered treaties to \$5,000 per individual, resulting in a family of five receiving \$25,000. The result, according to Allard, would be to “re-inject a measure of independence and accountability into the lives of the Indian community” (2002, 166).

Allard’s objective is laudable and to some extent fits with the themes of this paper. That said, assuming that the federal government does not have a legal obligation to pursue this course, we believe that implementing the Allard proposal would not be sound social policy. Firstly, the proposal does not distinguish between rich and poor and therefore would represent a substantial windfall for some, both on- and off-reserve. Secondly, it would not in itself establish a tax relationship between members of First Nation communities and their governments. Finally, the proposal would have the effect of reducing federal transfers to some of Canada’s poorest communities while benefitting provincial governments by reducing their welfare loads.

In conclusion, the better approach is to establish a FNPIT and to attempt to ensure that First Nation residents, especially the less well off, take full advantage of current tax benefit programs.



## Conclusion

This paper has shown that the decision to tax or not to tax is inherently political. It has sought to demonstrate why, from a good governance perspective, it makes sense to introduce tax regimes on reserves despite the political hurdles associated with such introductions. New taxes are always a tough sell—and even tougher in First Nations communities with no prior experience of taxation and a long-standing resistance to being taxed by any government. Yet both international and Aboriginal examples indicate that taxation is an essential ingredient in the legitimacy, direction, performance, accountability, and fairness of governments. The taxation relationship establishes a crucial tie between governments and their citizens—a tie, as the political conduct of rentier states has shown, that is perhaps most noticeable in its absence.

For First Nations communities, broad-based taxation regimes would provide their governments with the resources they need to pursue community priorities. And for First Nations families and individuals, the equity aspect of consumption and personal income taxes stands to benefit the poor directly via substantial benefits and rebates.

The final section of this paper provided some policy and research options for both First Nations and federal governments to consider. Some of the options presented would entail substantial changes to the present relationships between governments. With the exception of framework personal income tax legislation, however, most would occur at the policy and administrative levels and would involve new frameworks and infrastructures rather than broad constitutional reforms. If undertaken incrementally, the changes would be more manageable for all levels of government, and once established, they would promise to yield both lasting revenue sources and substantial governance improvements to First Nations within a matter of years rather than decades or half-centuries.

The interests of First Nations communities and the general Canadian public alike would see broad-based taxation for First Nations occur sooner rather than later. To that end, we hope that the federal government, First Nations governments, and such key intermediate bodies as the First Nations Tax Commission will cooperate closely to make taxation a working reality for First Nations governments that choose to exercise this option.

## Appendix A: The Relationship of IOG and UNDP Governance Principles

The IOG Governance Principles	The UNDP Principles and Related UNDP Text
<b>1. Legitimacy and Voice</b>	<p>Participation: All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.</p> <p>Consensus Orientation: Good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.</p>
<b>2. Direction</b>	<p>Strategic Vision: Leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural, and social complexities in which that perspective is grounded.</p>
<b>3. Performance</b>	<p>Responsiveness: Institutions and processes try to serve all stakeholders.</p> <p>Effectiveness and efficiency: Processes and institutions produce results that meet needs while making the best use of resources.</p>
<b>4. Accountability</b>	<p>Accountability: Decision-makers in government, the private sector, and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organizations and whether the decision is internal or external.</p>
<b>5. Fairness</b>	<p>Equity: All men and women have opportunities to improve or maintain their well-being.</p> <p>Rule of Law: Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.</p>

## Appendix B: Federal and British Columbia Tax Payable Net Benefits

Federal and British Columbia Tax Payable Net Benefits, 2009 Tax Year								
Total Income	Single Individual				One-Earner Family of Four			
	Federal BFT	Provincial Tax	Refundable Benefits	Net Tax Payable	Federal BFT	Provincial Tax	Refundable Benefits	Net Tax Payable (\$)
5,000	0	0	474	(474)	0	0	10,395	(10,395)
10,000	0	0	1,257	(1,257)	0	0	11,609	(11,609)
15,000	455	0	563	(108)	0	0	11,905	(11,905)
20,000	1,155	180	488	847	0	0	11,015	(11,015)
25,000	1,855	576	488	1,943	77	251	9,450	(9,121)
30,000	2,555	952	488	3,019	777	628	8,290	(6,885)
35,000	3,255	1,188	295	4,148	1,477	864	7,026	(4,685)
40,000	4,055	1,539	18	5,576	2,277	1,215	5,684	(2,192)
45,000	5,112	1,910	0	7,022	3,335	1,585	5,134	(215)
50,000	6,204	2,292	0	8,496	4,426	1,968	4,684	1,710
55,000	7,304	2,677	0	9,981	5,526	2,353	4,484	3,395
60,000	8,404	3,062	0	11,466	6,626	2,738	4,284	5,080
65,000	9,504	3,447	0	12,951	7,726	3,123	4,084	6,765
70,000	10,604	3,832	0	14,436	8,826	3,508	3,884	8,450
75,000	11,704	4,321	0	16,025	9,926	3,996	3,684	10,239
80,000	12,919	4,846	0	17,764	11,141	4,521	3,484	12,179
85,000	14,219	5,427	0	19,646	12,441	5,103	3,284	14,260
90,000	15,519	6,042	0	21,560	13,741	5,717	3,084	16,374
95,000	16,819	6,656	0	23,475	15,041	6,332	2,884	18,489
100,000	18,119	7,285	0	25,404	16,341	6,961	2,648	20,618

Source: Department of Finance, Aboriginal Tax Policy Section.

Notes: Refundable benefits include the federal amounts for Goods and Services Tax Credit, the Working Income Tax Benefit, the Universal Child Care Benefit, and the provincial amounts for Sales Tax Credit, Family Bonus, Earned Income, and the Climate Action Credit.

One-Earner Family of Four assumes both children under the age of six.

## Endnotes

- 1 The authors and Institute On Governance gratefully acknowledge the financial support of the Department of Finance, whose resources made this project possible. We also thank those who agreed to be interviewed by us: Andre LeDressay of Fiscal Realities; Jon Kesselman of Simon Fraser University; staff members of the Whitecap Dakota First Nation in Saskatchewan and the Westbank First Nation in British Columbia; two individuals working with several Yukon First Nations; and senior officials at the Aboriginal Tax Policy Section, Department of Finance. The assistance of all parties contributed greatly to the research of this paper. The end product presents views of the authors alone.
- 2 *Benoit v. Canada* [2002] FCT 243 at para 327.
- 3 *Benoit v. Canada* [2003] FCA 236 at para 51.
- 4 See here, “Working Draft: Indian Government Taxation” (Department of Finance 1993, 9). A more detailed discussion of the Section 87 exemption can be found in “Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy,” *Canadian Tax Journal* 48(5) (Kesselman 2000, 1531). As Kesselman also notes, the tax exemption has long been the subject of dispute and legal analysis.
- 5 See here Dickson, J. in . (1983): “As I read it, s. 87 creates an exemption for both persons and property. It does not matter then that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property.” Cited in Imai and Hawley, *The 1995 Annotated Indian Act*, 86. In successive cases, the Supreme Court has set out principles application of the exemption to income based on an assessment of “connecting factors” to a reserve. The Canada Revenue Agency has developed guidelines based on this direction <<http://www.cra-arc.gc.ca/aboriginals/indians-e.html>>.
- 6 Indian and Northern Affairs Canada, “Fact Sheet—Taxation by First Nation Governments,” <[www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca)> (viewed on March 22, 2008). See also comments from Department of Finance officials. According to these, the rationale behind a revenue-sharing mechanism is to contain federal costs (in the form of foregone tax revenues) where, for example, non-members comprise a substantial portion of the First Nation’s tax base.
- 7 At the time of writing, those with personal income tax jurisdiction are the Yukon First Nations (originally seven, now ten), the Nisga’a, the Tlicho, the Labrador Inuit, the Tsawwassen, and Maa-nulth in British Columbia.
- 8 Finance officials indicated that this mechanism prevents unreasonable sharing by the federal government and contains the income tax revenues the federal government must forego where non-members of the First Nation account for a significant proportion of the tax base of the latter.
- 9 The modern treaties include a negotiated transition period allowing for some adjustment to the new tax treatment: eight years for sales taxes and twelve years for other taxes, including income tax.
- 10 All figures taken from Indian and Northern Affairs Canada, “Fact Sheet—Taxation by First Nation Governments.”
- 11 As a caution, Fiscal Realities noted a potentially serious bias in the composition of the sample selected: four respondents (20%) were ITAB members and five were property-tax-collecting First Nations. The bias, if it existed, would mean that “the philosophical barriers to taxation identified in the study are even more prevalent in the First Nation population than is reported in this survey (Fiscal Realities 1997, 55).
- 12 One commentator with thorough knowledge of both recent federal government practice and the views of the Assembly of First Nations suggested the source of these concerns. For one, First Nations still feel the effects of the devolution of service delivery to their governments without sufficient capacity-building efforts in the 1980s and early 1990s, an effort they perceived as a “dump and run” action by the federal government. Secondly, federal funding for core programs has not had an inflation adjustment (now at a very low 2% since 1996. And thirdly, there is evidence—including a report from the auditor general on First Nations Child and Family Services—that federal funding for First Nations for core functions is lower than provincial funding for the same. These aspects of the recent history of the fiscal relationship provide the context in which First Nations regard any federal government attempt to introduce taxation on-reserve and settlement lands.

- 13 *Benoit v. Canada* [2002] FCT 243 at para. 227(4).
- 14 Hundreds of definitions of governance have been offered. For our purposes, the one provided by the World Bank suffices: “Governance consists of the traditions and institutions by which authority ... is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them” <<http://info.worldbank.org/governance/wgi2007/home.htm>>.
- 15 Appendix A of this paper indicates the link between the UNDP’s nine principles of good governance and the five principles articulated by the Institute On Governance.
- 16 See Section 8 of the 2005 First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments: “First Nations and Canada are committed to respecting human rights and applicable international human rights instruments” <<http://www.afn.ca>>.
- 17 To cite only one example, a recent comparison of public services provided by local governments in Tanzania and Zambia found that local governments depending heavily on revenues collected from citizens expended funds more efficiently than those that did not. Whereas the latter tended to consume resources on salaries and infrastructure, governments depending on tax for revenues spent more on service provision, regardless of differences in political institutions (Hoffman and Gibson 2006b, 5, 23).
- 18 On this point, see especially “Does Taxation Lead to Representation?” (Ross 2004, 247). Seeking to account for policy and regime developments in terms of the fiscal resource funding them, so-called fiscal theories of governance have emerged only in the past twenty-five years in the comparative government literature. That said, the theories have been subjected to rigorous quantitative testing and have steadily gained prominence in the comparative literature since the seminal 1985 publication of Robert Bates and Dau-Hsiang Lien’s “A Note on Taxation and Representative Government,” *Politics and Society* 14(1) (1985, 53–70).
- 19 See especially the work of the Frontier Center for Public Policy (FCPP). As part of a campaign to democratize election practices and generally to improve governance practices on-reserve, Don Sandberg of the FCPP has created an Aboriginal Governance Index that rates the governance performance of First Nations in Saskatchewan and Manitoba <[www.fcpp.org](http://www.fcpp.org)>.
- 21 This argument is also offered by researchers of the Harvard Project on American Indian Economic Development and appears in a recent book edited by Miriam Jorgensen: “Funds that originate in Washington or Ottawa often originate in outsiders’ ideas about what Indigenous nations need, and they tend to bring conditions and limits with them. Most such funds are program specific, keeping decisions about funding priorities in federal hands. They are also inconsistent with the idea of independence. As a tribal leader once said to us, every federal dollar ‘is a leash around my neck’” (Jorgensen 2007, 165). In the Canadian context, one finance official expressed a hunch that Indian Affairs programming had in many cases determined the structure of First Nations governments—thereby potentially further undermining the “self-determination” of those governments.
- 21 This principle is enshrined in the *Constitution Act, 1982* in section 36(2).
- 22 See here “Tsawwassen First Nation Own Source Revenue Agreement,” <[www.tsawwassenfirstnation.com/finalagreement.php](http://www.tsawwassenfirstnation.com/finalagreement.php)>.
- 23 The Department of Finance provided the authors with this figure. The table it was drawn from (see Appendix B) indicates that a family of four would not begin paying taxes until its income reaches approximately \$50,000. Note that First Nation residents are already eligible to receive these benefits.
- 24 Stephen Cornell of the Harvard Project made a similar observation in 2007. As one of the necessary foci of research for Indigenous governance in the near future, he noted: “We need a systematic examination of what Indigenous governance requires in terms of both structure and scale.” Although there is no shortage of Indigenous solutions to governance challenges, “we are not very good yet at analyzing those solutions and making these emergent Indigenous models and the practical analysis of why they work available to Indigenous and non-Indigenous decision makers” (Cornell 2007, 168).
- 25 See Appendix B for a comprehensive list of these refundable benefits.

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