Indian Taxation Powers: Sharing Canadian Prosperity

Dominic C. BELLEY

Abstract

A government can hardly have efficient public institutions and a dynamic economy without having flexible taxation powers as well as an effective and fair tax system. Over the last few decades, discussions have begun around the question of the status of Indian governments in Canada. Starting from the premise that Indian self-government may be implemented, this paper addresses the issue of the taxation powers that these new governments should have, with a view to the economic and social values that the use of these powers should seek to promote.

This paper is divided into three parts. Part 1 will address the current taxation powers granted to Indian bands under the Indian Act. Part 2 will address the issues of current tax revenue sources and the taxable interests available under the current state of the law. Finally, Part 3 will be devoted to the policy considerations surrounding the implementation of a comprehensive Indian tax system aimed at financing autonomous Indian governments.
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INTRODUCTION

Taxation, i.e., the power granted to a government to impose a charge upon an individual, a corporation or a trust in order to generate revenue to be used for the needs of the public,¹ is a central power allowing a government to exercise its authority over the people residing on, carrying on business on, or deriving income from its territory. In a democratic society, along with control over the military and the borders, taxation is a powerful tool for the development of a democratic and prosperous country with solid public institutions.

The scope of taxation is not restricted to the raising of revenues for public purposes. Through a strategic redistribution of wealth policy, taxation may be a powerful economic regulator and an efficient business stimulator. The implementation of a small business deduction is a classic way to ensure adequate public revenues without imposing a heavy tax burden that would preclude young business corporations from being efficient.² Another excellent example is the research and development tax incentives aimed at fostering scientific advancement through generous tax credits.³ These two “tax catalysts” are aimed at stimulating strategic economic sectors, which will be likely to generate more public revenues. Thus, a government can hardly have efficient public institutions and a dynamic economy without having flexible taxation powers as well as an effective and fair tax system.

Over the last few decades, discussions have begun around the question of the status of Indians in Canada.⁴ One of the issues raised before various panels is the existence of an Indian right to

². Subs. 125(1) of the Income Tax Act, R.S.C. 5th Supp., c. 1 [hereinafter “Income Tax Act”] provides a credit against tax otherwise owing. It reduces the federal tax on the first $200,000 of a Canadian-controlled private corporation’s income from an active business in Canada.
³. Subs. 37(1) of the Income Tax Act entitles a taxpayer to a full deduction for research and development expenditures, even where they would otherwise be on account of capital and thus prohibited. In addition, such expenditures entitle the taxpayer to investment tax credits.
⁴. The term “Indian”, which is the term used in the Indian Act, shall be used in this paper. However, it is acknowledged that “First Nations”, “Aboriginal Peoples” or “Native Peoples” may also be appropriate terms.
self-government and the need to implement Indian self-government in Canada. Starting from the premise that Indian self-government may be implemented, the purpose of this paper is to address the issue of the taxation powers that these new governments should have, with a view to the economic and social values that the use of these powers should seek to promote.

This paper is divided into three parts. Part 1 will address the issues surrounding the current taxation powers granted to Indian bands under the *Indian Act*. This part will include discussion of the historical evolution of Indian taxation powers, the modern exercise of these powers and the taxation models contemplated by the *Indian Act*. Part 2 will address the issues of current tax revenue sources and the taxable interests available under the current state of the law. This part will include a discussion of the two main sources of revenue of Indian bands, *i.e.*, real property taxation and licensing, as well as a discussion of the economic considerations that Indian bands must take into account in the exercise of their taxation powers. Finally, Part 3 will be devoted to the policy considerations surrounding the implementation of a comprehensive Indian tax system aimed at financing Indian self-government. This part will include discussions of political issues (popularity of the new system, scope of taxation powers), co-ordination issues (substantive coherence, tax room) as well as procedural issues (legislative, administrative and judicial review processes).

1. CURRENT INDIAN TAXATION POWERS

1.1 Historical Evolution

1.1.1 Early Forms of Taxation

Before the arrival of Europeans in North America, members of numerous Indian communities shared and redistributed resources by way of formal gifts between private parties. The formalism surrounding the way in which those gifts were made is persuasive enough to classify the tradition as an early form of
Indeed, one of the purposes of taxation, besides raising revenue for public services, is the redistribution of wealth. However, the element that might be missing in this tradition, which would preclude it from being called a tax in the modern sense, is the lack of involvement of a government, or some form of public authority. In this respect, Ricardo mentions:

Taxes are a portion of the produce of the land and labour of a country placed at the disposal of the government; and always ultimately paid either from the capital or from the revenue of the country. [Emphasis added]

The absence of sophisticated Indian governments likely to impose and collect taxes might be the only obstacle to the Indian tradition being called a tax. With the arrival of Europeans and the importation into North America of a sophisticated state came the notion of taxation.

### 1.1.2 Modern Forms of Taxation

The power of Canadian Indian bands to tax in the modern sense is not recent either. Even if its scope may have varied according to time, bands and statutes, this power was first granted to some Indian bands as far back as 1880. Indeed, the Indian Advancement Act conferred taxation powers upon Indian band councils as part of a reform of Indian governmental institutions. However, limited to real property taxation and subject to the approval of the Government of Canada, these powers were fairly restrictive and not comparable to those enjoyed either by the Government of Canada or provincial governments. The Indian Advancement Act, described by Sir John A. Macdonald as an...
“experimental one”,13 was solely aimed at providing the most mature reserves with the framework of modern governmental institutions,14 including some taxation powers. Macdonald’s opinion reads as follows:15

This bill is to provide that in those larger reserves where the Indians are more advanced in education, and feel more self-confident, more willing to undertake power and self-government, they shall elect their councils much the same as the whites do in the neighboring townships. [Emphasis added]

The policy of the Government of Canada at that time was clear. The taxation powers triggered by the opportunity granted to Indian bands to enjoy limited powers of self-government were to be restricted to larger reserves16 composed of Indians more advanced in education and confident enough to be willing to undertake self-government duties in keeping with the Western tradition of elected government.

Therefore, the Indian taxation powers could not be exercised at will by Indian communities. A long political, social and educational process, restricted to the larger reserves, culminating in the election of a democratic government (or council) was necessary before they would enjoy what looks very much like a privilege.17

In addition to the pre-requisites mentioned above (and until 1988), a band wishing to exercise taxation powers had to seek an order by the Government of Canada declaring that the band had reached an advanced and sufficient stage of development.18 Today, the historic supervision of the Government of Canada still exists, since any taxation by-law has to be approved by the Minister of Indian Affairs and Northern Development19 before coming into force.

15. *Ibid*.
16. No figures were provided. It was probably a subjective notion to be defined more precisely by the Government of Canada when the time came to approve the constitution of Indian governments and the enactment of Indian taxation by-laws.
17. One could also argue that it was an incentive to foster education, self-determination and especially the adoption of the Canadian rules of government.
19. Hereinafter “Department of Indian Affairs”.

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1.1.3 Claims and Reforms

(a) Economic Issues

Since most Indian bands did not reach the degree of sophistication contemplated by the *Indian Advancement Act*, the taxation powers were not a viable option.20 During the Macdonald years, most Indian bands did not even have a monetary economy and the majority of their members were living below the poverty line.21

(b) Legal Issues

(i) Kamloops Amendments

Since 1960, several Indian bands have requested a substantial increase in their ability to exercise taxation powers. Specifically, in 1985, the Kamloops Band of British Columbia, along with over 115 other bands, under the leadership of Chief Clarence (Manny) Jules, began petitioning for “tax emancipation”. Their claims could be summarized as follows:22

- More freedom in the exercise of taxation powers;
- Enhanced financing tools to promote the growth of Indian self-government and economic activities such as the development of lands, roads and natural resources;
- Right to tax non-Indian interests, including the right from tax surrendered lands; and
- Precluding provincial governments and municipalities from taxing surrendered lands.

In 1988, Parliament enacted Bill C-115 (“Kamloops Amendments”), which contained the following policy decisions:23

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22. CANADA, Department of Indian Affairs, *Proposed Amendments to the Indian Act Concerning Conditionally Surrendered Lands and Band Taxation Powers* (Ottawa: The Department, 1987) [hereinafter “Kamloops Amendment Proposals”].
• Removal of the “advanced stage” requirement;
• Expanded tax base by the inclusion of surrendered lands within the definition of reserve lands;\footnote{24}
• Non-Indians’ interests to be subject to Indian taxation;
• Expanded power to regulate tax appeal procedures; and
• By-laws to be approved by the Minister of Indian Affairs, rather than by the Governor in council.

In 1988, the federal Indian policy began a significant shift towards modernism and emancipation with respect to the exercise of taxation powers.

(ii) Indian Tax Advisory Board

Soon after the enactment of the Kamloops Amendments, the Indian Tax Advisory Board (ITAB), was established to help Indians to achieve self-determination by the establishment of taxation jurisdiction.\footnote{25} The ITAB is made up of 10 members, the majority of whom are Indians. The Minister of Indian Affairs appoints members. One of the major duties of the ITAB is to advise and assist the Minister on the following issues:\footnote{26}

• Policy issues relating to the implementation of taxation by-laws;
• Examination of proposed by-laws;

\footnote{24. See: 2.1.2.}
\footnote{25. The ITAB’s mandate may be summarized as follows:
• Promoting the exercise of Indian real property taxation jurisdiction in support of self-government and self-reliance;
• Examining taxation by-laws proposed by Indians under s. 83 of the Indian Act and recommending their approval to the Minister of Indian Affairs;
• Advising the Minister on policy related to Indian taxation powers;
• Fostering conformity between Indians and taxation by other authorities; and
• Hearing from taxpayers whose interests are affected by taxation under s. 83. See: ITAB’s web site at: http://itab.cactuscom.com/english/menu2.htm.}
\footnote{26. Memorandum of Understanding, between the Minister of Indian Affairs and the Indian Tax Advisory Board (1999) [Hereinafter “Memorandum of Understanding”].}
• Recommendations relating to bands' by-laws;

• Hearing from taxpayers;

• Educational issues concerning Indian taxation;

• Opportunities to introduce regulations relating to s. 83 of the Indian Act;

• Issues relating to co-operation between the Government of Canada, provincial governments, municipalities and Indian bands;

• Mediation and dispute resolution issues; and

• Legislative amendments to the Indian Act.

The ITAB is a central actor at each stage of the political, economic and legal processes. The ITAB is available to provide support, information and advice to Indian bands, through publications as well as human resources programs aimed at helping Indian bands in the process of enacting taxation by-laws and establishing tax policies.

Even though this reform is not perfect, it has granted bands more freedom in the use of a fundamental governmental tool and it has produced results. According to the ITAB, 80 Indian bands have enacted taxation by-laws, most of which relate to real property taxation, and at least two of which relate to sales tax. Still, the total amount of potential tax revenues for all Indian bands in Canada remains low: $20 million annually.

27. Sample by-laws (including: taxation by-laws, assessment by-laws, rates by-laws, expenditure by-laws, telephone company taxation by-laws, financial administration by-laws), real property taxation guide, real property taxation policy, rate policy, and software.

28. Taxation seminars and workshops; forum for taxpayers; mediation; legal, accounting and public administration counselling.

29. At the time of publication: 54 in British Columbia, 10 in Alberta, 9 in Ontario, 2 in Manitoba, 2 in Nova Scotia, 2 in Saskatchewan and 1 in Quebec.

30. The Westbank and Cowichan bands.

31. FISCAL REALITIES, First Nation Taxation and New Fiscal Relationships (Kamloops: Fiscal Realities, 1997), at 1 [hereinafter "First Nation Taxation"].
1.2 Legislative Basis

Policy questions are important factors that should be taken into account when trying to establish the limits of powers granted by statutes. With respect to the limits of Indian taxation powers granted by the *Indian Act*, policy questions, while somewhat dated, are crystal clear: Indian taxation powers, being granted for the purpose of funding municipality-like institutions, should be limited to municipal taxation powers, *i.e.*, real property taxation and business licensing. The *Indian Act* and the federal policy adopted for the approval of taxation by-laws implicitly limit the scope of Indian taxation powers to those of a municipality, with little room for emancipation. Almost 125 years later, it remains in perfect agreement with the policy articulated by Sir John A. Macdonald.33

1.2.1 Taxation Powers and Institutional Models

(a) Municipal Model

All Indian bands in Canada have the power to enact real property taxation by-laws. This power is now the major source of tax revenues. The legislative basis of the real property taxation power is parag. 83(1)(a) of the *Indian Act*, which reads as follows:34

83. (1) [...] the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

32. It is little, but it still exists. See: 1.2.1(b).
33. *Supra* note 15.
34. Pursuant to the *Council of Yukon Indians Umbrella Agreement* signed by the Government of Canada, the Government of Yukon and the 14 Yukon First Nations (self-government agreement), broader taxation powers are granted to these Indian bands. These powers include:
   - Shared jurisdiction (with the two other governments) over real property tax;
   - Shared jurisdiction over direct taxation of their common citizens; and
   - Shared tax room so long as taxation by-laws are enacted for local purposes.

In addition, an “agreement-in-principle”, signed by the Government of Canada, the Government of British Columbia and the Nisga’a Band, goes even further by providing the Nisga’a Band with the following powers:
   - Direct taxation power applicable to Nisga’a citizens on Nisga’a lands;
   - Shared tax base with the Government of Canada and the Government of British Columbia; and
   - Eventual direct taxation power applicable to non-Nisga’a citizens on Nisga’a lands.
(a) subject to subsections (2) and (3), taxation for local purposes of land, or interest in land, in the reserve, including rights to occupy, possess or use land in the reserve. [Emphasis added]

Along with the pure power to tax, Indian bands also have a power to impose license fees and regulatory charges pursuant to parag. 83(1)(a.1), which reads as follows:

83. (1) [...] the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a.1) the licensing of businesses, callings, trades and occupations [Emphasis added]

Thus, the ability of Indian bands to enact taxation by-laws is limited to real property taxation by-laws. Moreover, the expenditure policy of the band in respect of revenues raised by such by-laws is restricted to local purposes. However, as an incidental and complementary revenue-raising tool, bands have the ability to enact licensing by-laws for the purpose of regulating the occupation of the reserve lands by businesses.

These limitations are consistent with the taxation powers usually granted to municipal bodies in Canada. While these limited taxation and licensing powers may restrict the ambitions of Indian bands, they are likely as sufficient for funding band duties as they are for municipal duties.

(b) Governmental Model

Even if the restrictive municipal model seems to have been adopted in the Indian Act, a careful reading of parag. 83(1)(f) suggests that a full range of taxation powers may well be available to Indian bands. Indeed, parag. 83(1)(f) reads as follows:

83. (1) [...] the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(f) the raising of money from band members to support band projects [Emphasis added]

Beyond the limited real property taxation and licensing powers, parag. 83(1)(f) seems to allow income taxation as well as sales
taxation powers since they may be ways to raise money from band members. Indeed, it contemplates that when property taxation is not sufficient to provide for revenue to cover the costs of band projects, any form of revenue-raising tools can legally be used to raise money, but only from band members. If these implied income and sales taxation powers were to be fostered, they would be an opened door to the development of Indian self-government without legislation.\textsuperscript{35}

Unfortunately, it is the policy of the Department of Indian Affairs not to approve by-laws the purpose of which is to impose income or sales taxes pursuant to parag. 83(1)(f).\textsuperscript{36} This policy is a barrier to the emancipation of Indian governments, despite the fact that the Act would allow it. Increased taxation powers will be necessary for the implementation of Indian self-government. Without such an increase, the degree of autonomy and self-sufficiency of Indian governments would be limited. Tax flexibility is a \textit{sine qua non} condition of the development of self-sufficient and efficient Indian governmental institutions.\textsuperscript{37}

On a positive note, since 1997 it is undisputed that, in addition to the general power enjoyed by all bands over real property taxation, two bands, the Westbank Band and the Cowichan Band, can exercise sales taxation powers, pursuant to the \textit{Budget Implementation Act}.\textsuperscript{38} However, these powers are restricted to taxes imposed on consumer sales of tobacco, alcohol and fuel on reserve.\textsuperscript{39} As we can see, the only way to substantially enhance Indian taxation powers seems to be by legislative amendment.\textsuperscript{40}

\subsection*{1.2.2 Exercise of Taxation Powers}

\textbf{(a) What is a Taxation By-Law?}

Pursuant to s. 83, a valid Indian taxation by-law may be described as a by-law enacted for the purpose of generating reve-

\begin{thebibliography}{9}

\bibitem{35} However, one might suggest that the development of Indian self-government in such a way might be anarchic.
\bibitem{36} BARTLETT, supra note 18, at 116.
\bibitem{37} CANADA, Department of Finance, \textit{A Working Paper on Indian Government Taxation} (Ottawa: The Department, 1993), at 1 [hereinafter \textit{Working Paper}].
\bibitem{40} Preferably in the form of a comprehensive reform. See: Part 3.
\end{thebibliography}
nues from the use or ownership of land or interest in land, to be used by the band council for local purposes. For the sake of clarity, one must be aware of the four “traditional hallmarks” of a tax, as articulated by the Supreme Court of Canada in Westbank First Nation v. British Columbia Hydro and Power Authority. These hallmarks are the following:

- The charge must be enforceable by law;
- It must be imposed pursuant to the authority of Parliament;
- It must be levied by a public body; and
- It must be imposed for a public purpose.

Therefore, taxation by-laws enacted by Indian bands pursuant to parag. 83(1)(a) of the Indian Act are valid taxation by-laws because:

- The tax imposed is enforceable by law pursuant to the authority of the Indian Act and the regulation deriving from it, among which are bands by-laws;
- The tax is imposed pursuant to the authority of a power granted by Parliament through the Indian Act;
- The tax is levied by an Indian band, which is a public body created by the Government of Canada pursuant to the Indian Act (Indian bands are also known as a “Federal Office” for administrative law purposes); and
- The tax is imposed for the purpose of providing revenue for the band council that are to be used for local purposes.

In the absence of one of these four criteria, the by-law would not be a tax. However, a charge may meet all of these criteria and be a licence rather than a tax if it meets a fifth criterion. This crite-

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41. A good indication of the “taxing character” of a by-law is the absence of restriction on the expenditures of the revenue raised by it. Usually, when revenues are for the discretionary spending of the band which enacted it it is a taxation by-law. However, when it is directed to a specific regulatory purpose, it is a licence.

42. [1999]3 S.C.R. 134 [hereinafter “Westbank First Nation”].

43. Also see: Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1930] S.C.R. 357, which is the first case that established these criteria.
rion is the nexus between the quantum charged to the licensee and the costs of the services rendered by the public authority pursuant to the authority of the licence.44

A licence should be distinguished from a tax when the revenue-raising purpose is incidental.45 Licences usually have more than a revenue purpose. They are intended to regulate a behavior, which cannot be done only by imposing a duty. In this respect, licences can usually be recognized because they contemplate all or substantially all of the following factors:46 a detailed code of regulation,47 regulatory purpose,48 estimated costs of the regulation,49 and the relationship between the regulation and the person being regulated that either creates the need for the regulation or benefits from it.

Since Indian bands have the power to enact both taxation and licensing by-laws, the distinction is not important as a matter of legislative competence. However, the distinction will be of utmost importance as a matter of revenue-raising opportunity. Stated briefly, a licence has to balance its revenues with the costs of the regulation intended. But on the other hand, it will benefit from an exemption from the application of s. 125 of the Constitution Act, 1867, and will therefore apply to Crown corporations carrying on business on reserve.50 Therefore, Indian bands will have to exercise their power carefully and with a precise understanding of the impact of the by-law’s purpose as well as the legislative style.

(b) Capacity

Before the Kamloops Amendments, the power to enact taxation by-laws was limited to reserves at an advanced stage of develop-

46. Westbank First Nation, supra note 42, at par. 24.
48. Licences must seek to regulate in some specific way or for some specific purpose. See: Westbank First Nation, supra note 42, at parag. 28; and Re Exported Natural Gas, [1982] 1 S.C.R. 1004, at 1075.
50. See: 2.2.
opment. Today, this pre-requisite no longer exists and any band can exercise its power to tax.

(c) Procedure

The Indian tax enactment procedure is a detailed code marked by caution and allowing for discussions, evaluations and modifications. It contemplates the involvement of several actors, most of whom are non-Indians, with the inescapable consequence that Indian interests risk, through several steps, being diluted. However, it has the advantage of providing Indians with professional advice.

The current legislative process for the enactment of Indian taxation by-laws consists of seven stages:51

- **Decision to Tax:** An Indian band council enacts a resolution aimed at expressing its intention to implement a taxation by-law. The resolution shall contain sufficient information to help determine whether taxation is worthwhile, including the financial objectives and feasibility, the interests to be taxed and the costs of implementation and administration;

- **Preparation:** The council collects legal information in order to produce draft legislation.52 Discussions must take place with the ITAB, the Indian Tax Secretariat,53 the Department of Indian Affairs and the Department of Just-

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52. The preparation of four by-laws will be required:

- **Taxation By-Law:** Duties of the administrative body, enforcement powers, etc;
- **Assessment By-Law:** Interests to be assessed;
- **Rates By-Law:** Rate at which interests will be taxed; and
- **Expenditure By-Law:** For what purposes will the revenue raised through the taxation by-law be used.

53. As an organ of the ITAB, the purpose of the Indian Tax Secretariat is to advise the Board with respect to the technicalities involved in creating taxation regimes (such as the mechanisms of assessment, appeals, collections, financial reporting, public notice, rate limits and the management of tax revenues); to examine by-laws in accordance with the principles of equity, natural justice, comprehensiveness, and conformity with the enabling legislation, in order to advise the Board and the minister of Indian Affairs with respect to recommendations for change or for approval; and, to provide advice or play the mediating role, in accordance with an examination of the above principles, if any difficulties arise for parties subject to band taxation by-laws.
tice. After the discussions, the band council should come up with a proposed by-law;

- **Communication**: All potentially affected parties should be informed of the intention of the Indian band to impose a tax, based on the proposed by-law. These parties include potential taxpayers, members of the Indian band, municipalities,\(^{54}\) and the provincial government(s);

- **Analysis**: After the completion of the first three steps, the proposed by-law must be analyzed by the ITAB, the Department of Indian Affairs and the Department of Justice;

- **Recommendation to the Minister**: Based upon its own conclusions as well as those of the Department of Indian Affairs and the Department of Justice, it is the duty of the ITAB to make a recommendation to the Minister of Indian Affairs. This recommendation may either be a recommendation that the by-law be approved in whole or in part; a recommendation to defer the approval of the by-law until some specific amendments are made; or a recommendation that the by-law not be approved;

- **Ministerial Decision**: Based on the recommendation of the ITAB, the Minister decides whether the by-law should be approved or not as well as the date when the by-law shall come into force; and

- **Implementation**: The taxation by-law is effective and taxpayers are required to pay the tax payable.\(^{55}\)

The ITAB has established a procedure for revising each by-law and recommending to the Minister which by-law should be approved. The following principles are used by the ITAB: conformity with enabling legislation,\(^{56}\) conformity with the *Canadian Charter of Rights and Freedoms*, comprehensiveness, compliance

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54. Indian bands will often have to negotiate agreements to purchase services otherwise provided by a municipality.

55. Since rates may change from time to time while most parts of the by-law may not change, rates by-laws and more generally amendment by-laws may use an expedited procedure. See: *Why Tax?*, supra note 7, at 18-19.

56. *Memorandum of Understanding*, supra note 26, at art. 1.1.2.

57. This includes the *Indian Act* as well as any federal statute or regulation.
with principles of equity and justice,\textsuperscript{58} fairness,\textsuperscript{59} adequacy of notification and appeal procedure, and absence of ministerial liability.

This procedure is lengthy. Generally, eight months are required before a proposed by-law passes through each step and becomes effective. If it allows Indians to benefit from professional advice, the process remains heavily legalistic and subject to ministerial discretion. It is a clear impediment to an efficient use of taxation powers. It is possible to focus on legal standards of fairness and enforceability (which are positive gains for taxpayers who deserve state-of-the-art legal rules in order to know where they stand from a tax point of view), while at the same time reaching a satisfactory level of efficiency and legislative flexibility. The number of decision-making levels is the hallmark of unflexible and lengthy processes. A simplification of the enactment process, along with other reforms will be discussed in the last part of this paper.

2. CURRENT TAX REVENUE SOURCES

Before any Indian tax reform can be undertaken, one must assess the efficiency of the current system (from a revenue-raising point of view) by determining the legal entitlements and limitations of Indian bands, and the economic reality that they must face when enacting taxation by-laws. The current Indian taxation powers being \textit{de facto} limited to real property taxation and licensing, this part will address the issue of the extent to which such by-laws can be used to raise revenues and the strategic sources of money.

2.1 Legal Considerations

2.1.1 Real Property Taxation

Pursuant to parag. 83(1)(a), any band council may enact by-laws the purpose of which is to impose a tax on reserve land. In order to determine the true taxation powers of a band council, one must therefore ask the question: “Which lands are reserve lands?” Reserve lands for the use and benefit of Indians located within the


\textsuperscript{59} See: 3.3.2(b).
limits of a reserve are reserve lands for tax purposes. In other words, that Indians living on reserve are subject to Indian taxation is a certainty. What is less certain is whether lands for the use and benefit of non-Indians are reserve lands for tax purposes. If the answer is “yes”, there is a risk of taxation without representation, since non-Indians (and even Indians living on surrendered lands) have no right to elect the band council, which exercises its power to tax.60

(a) Reserve Lands

Two kinds of lands may be located within the borders of a reserve: lands for the use and benefit of an Indian band, and lands for the use and benefit of non-Indians. Under the Indian Act, reserves are held by the Crown in right of Canada for the use and benefit of Indian bands.61 Once the Government of Canada has acquired and set aside for Indians a title in land, Indians have the exclusivity of its use. However, it may happen that some parts of the reserve are required for use by non-Indians.62 In this case, bands are invited to surrender their right in the piece of land to the federal government, which will then lease or sell the use of the land to non-Indians.

If one is tempted to see this kind of surrender as a way to diminish the size of reserves at the expense of Indians (and consequently open to criticism), one must also be aware of the possible revenue-raising opportunities that accompany such surrenders. Indeed, before any surrender to non-Indians, an agreement is reached between the Government of Canada and the band, which will receive an amount of money in compensation for the surrender. While bands may be reluctant in some instances to see the size of their reserve diminished by the use of their lands by non-Indians, the process might also be seen as a way of funding the bands’ activities. And in fact, several bands are interested in leasing parts of their lands, since it is a way to put their land in the

60. Sections 74-80 of the Indian Act. However, pursuant to s. 10, a band may assume control of its membership if it establishes membership rules, which implies that non-Indians may become members of the band pursuant to a band rule.
62. For example: Electric or telephone lines.
commercial mainstream, usually to be used by profitable service businesses.\textsuperscript{63}

(b) \textit{Mutual Exemption Theory}

In this respect, it may be argued that the taxation of surrendered reserve lands should be determined with a view to the Indian tax exemption found in s. 87 of the \textit{Indian Act}. Indeed, ss. 83 and 87 could be seen as mirror provisions, reflecting a policy decision to the effect that each group should be exempted from taxation laws enacted by the other.

Section 87 states that no Indian property located on reserve should be subject to taxation, so as to avoid the erosion of Indian property by non-Indian governments. The same reasoning could apply to non-Indians who are not represented before the band council and whose property may be eroded by Indian taxation. This approach would be called the “Mutual Exemption Theory”.

The Mutual Exemption Theory brings us to a discussion of access to a sufficient tax base. It is often noted that reserve lands constitute a poor land base\textsuperscript{64} unlikely to generate significant revenues.\textsuperscript{65} Therefore, there is a strong incentive for band councils to tax each and very piece of land that is within the borders of the reserve, despite the fact that it may not be held for the benefit of Indians. Not only is the taxation of surrendered lands a good way to increase the tax base, but surrenders for lease, as mentioned above, are the best way for reserves to put their lands into the economic mainstream and consequently increase their economic value.\textsuperscript{66} The Mutual Exemption Theory would significantly decrease the Indian revenue-raising capacity, unlike the Indian tax exemption, which has only a slight effect on consolidated federal and provincial revenues.

\textsuperscript{63} Kamloops Amendment Proposals, supra note 22, at 2.
\textsuperscript{64} First Nation Taxation, supra note 31, at 24.
\textsuperscript{65} Hence, reserve lands are relatively small; only a limited percentage of reserve lands are used (and likely to be used) for residential or commercial purposes; many reserve lands have only limited natural resources potential; and the potential to increase the size of reserve is negligible. For a complete discussion on this topic, see: 2.2.1.
\textsuperscript{66} Kamloops Amendment Proposals, supra note 22, at 2.
(c) Kamloops Amendments

Not surprisingly, the Mutual Exemption Theory has not been adopted by the courts or by the federal policy-makers. Indeed, since 1988, the Indian Act makes it clear that lands surrendered to non-Indians for lease are part of Indian reserves, which enables a band council to tax them. Before 1988, lands surrendered to non-Indians for lease (conditionally) were excluded from reserve status and therefore not taxable. Today, conditionally surrendered lands are known as “designated lands to the benefit of non-Indians”; they remain “within the reserve” for tax purposes and they are fully subject to Indian taxation by-laws.

The Indian Act was amended in 1988 to get to this solution. Today, there may be two kinds of surrenders: conditional surrenders, i.e., lands surrendered for lease, for a term of years or for a limited purpose wherein the band continues to have a beneficial interest, called “Designated Lands”; and unconditional surrenders, i.e., all Indian rights and interests in the land are transferred to the Crown in right of Canada for some final form of compensation, called “Surrendered Lands”.

The 1988 definition of reserve found in the Indian Act as “a tract of land the legal title of which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”, had to be amended so as to include designated lands. Consequently, the definition of reserve now reads as follows:

2. (1) “reserve” (a) means a tract of land the legal title of which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band and

(b) [...] includes designated lands. [Emphasis added]

Designated lands are now clearly under the jurisdiction of Indian bands, which includes the right to tax. The following types of interests in reserves are taxable: commercial land use leases

67. Subject to parag. 83(1)(f) of the Indian Act, which states that a band may raise money from band members to support band projects. Therefore, one could say that the Mutual Exemption Theory has found an application in respect of funding to be applied to specific band projects.
68. First Nation Taxation, supra note 31, at 1.
69. Kamloops Amendment Proposals, supra note 22, at 8.
70. Ibid.
(maybe the best way to develop a tax base because the value of the land is increased); oil, gas, timber and resources leases; utility leases (business involving power, telephone and natural gas lines located on reserve lands); rental leases; and agricultural permits and leases.

A much more tax-efficient land base has resulted from the Kamloops Reform.

(d) Judicial Criteria for Transfers of Lands

Three recent cases have addressed the question of the taxation of non-Indian interests in reserve lands. The central question as to when a reserve land has been “conditionally” or “unconditionally” surrendered was clarified in three instances: transfer to a private party, transfer to a Province, and transfer to a Crown corporation.

(i) Transfer to a Private Party

In St. Mary’s Indian Band v. Cranbrook, the Supreme Court of Canada addressed the issue as to whether and when a reserve land is absolutely surrendered to a non-Indian private party. In its analysis, the Supreme Court described the purposes of the Kamloops Amendments as follows:

[The] effect of the Kamloops Amendments was to draw native lands surrendered for lease back into the reserve. Lands surrendered [for sale] were clearly intended to remain outside the band’s property tax jurisdiction.

In order to determine whether land had been absolutely surrendered (i.e., for sale), the Supreme Court said that one must look at the true purpose of the dealings, because the true purpose of the surrender provisions of the Indian Act is to ensure that the intention of Indian bands with respect to their interests in their reserves is honoured. “What is the true intention of the band?” is therefore the correct question to ask in this instance.

72. Unlike royalties, tax revenues go directly to the band’s general administration revenues.
73. [1997] 2 S.C.R. 657 [hereinafter “St. Mary’s Indian Band”].
74. Ibid., at 666.
75. Ibid., at 669.
The Supreme Court then went on to mention what it considered factors favouring the surrender being considered absolute:

- The band surrendered the land for sale;
- The band entered into negotiations with the Government of Canada based on the understanding that the impugned lands were to be sold for the purpose of constructing an airport; and
- In return for its surrender, the Government of Canada paid the band the fair market value of the land.

Finally, mentioning that one of the most important powers that bands need is the real property taxation power, the Supreme Court commented on the meaning of the expression “otherwise than absolutely”, used to qualify designated lands, that shall remain subject to Indian taxation:

Parliament [...] selected [a] broad phraseology [...] in order to account for other contingencies – to allow, at one end, for other forms of surrenders, such as a right of way, to be considered designated lands, and to ensure, at the other end, that other forms or permanent surrenders such as exchange or gift remain beyond our notions of reserve land. [Emphasis added]

Therefore, the current state of the law fosters inclusion of lands within the reserve, so as to provide Indian bands with a sufficient land base. But the limit on this favourable “inclusion policy” is the sale of the land to a third party. Land is considered to have been sold when the purpose of the dealings between the band and
council, the Government of Canada and the private party included the construction of establishments that are permanent in nature and when the fair market value of the land was paid in compensation for the surrender.

(ii) Transfer to a Province

In *Osoyoos Indian Band v. Oliver*, the Court of Appeal of British Columbia was asked to decide whether lands transferred pursuant to s. 35 (which empowers any governmental institution or agent to take or to use reserve lands without the consent of the owner) of the *Indian Act* to the Government of British Columbia (pursuant to an order in Council of the Government of Canada) were taxable. The court noted that the operative words of disposition were the following:

[...].

These words, according to the Court of Appeal, are a clear indication that a permanent transfer of jurisdiction from the Government of Canada to the Government of British Columbia was intended. However, for the land to be notionally transferred out of the reserve, the court stated that one must determine whether the transfer was unlimited or only for the purposes mentioned in the deed.

The Court of Appeal stated that the transfer of a fee simple absolute removes land from a reserve, which means that land taken pursuant to s. 35 is no longer taxable. The court added that the fact that the Order in Council operating the transfer contained a provision reserving the mineral rights did not support taxation of the surface land. Therefore, a reserve land transferred to the administration of a governmental institution for public order reasons, with or without the consent of the owner, is an unconditional surrender.

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84. However, one must remember that the transfer being from the Crown in right of Canada to the Crown in right of the Province of British Columbia, the principle of indivisibility of the Crown intervenes and conveyance of title is not involved.
86. *Osoyoos Indian Band*, supra note 83, at 70.
87. *St. Mary’s Indian Band, supra* note 73.
88. Arguably the equivalent of the rider in the *St. Mary’s Indian Band* case.
(iii) Transfer to a Crown corporation

Finally, in the case of Westbank First Nation, the Supreme Court of Canada clarified the question of the taxation of reserve lands held by a tax-exempt Crown corporation. In this case, a Crown corporation had acquired several permits from the Government of Canada, pursuant to s. 28(2) of the Indian Act, to use and occupy various lands on the reserve, with the consent of the band. The purpose of the permits included the building of electric transmission and distribution lines in order to provide electrical energy to residents of the reserve.

The Supreme Court made it clear that in some instances, a Crown corporation may be constrained to pay a charge in the form of a license or a regulatory charge, but outside this encroachment (that must be strictly interpreted), a band is constitutionally incapable of levying a tax on a Crown corporation. Therefore, land transferred to a Crown corporation is an unconditional surrender.

2.1.2 Licences

Even though licences are used as a public-protection tool, as opposed to a revenue-raising tool, political pragmatism forces one to admit that licensing fees are reliable and lucrative revenue-raising sources. Indian bands are not immune to this pragmatism and, in this respect, raising band revenues through the implementation of licences involves two major considerations: the extent to
which a licence may be an attractive revenue-raising tool, and the revenue-raising limitation intrinsic to licence status.

(a) Revenue-Raising Advantage

A licence is applicable to all businesses, callings, trades and occupations on reserve.\(^\text{95}\) In addition, as opposed to a tax in the purest sense, the power to require a licence extends to requiring one of Crown corporations. In *Westbank Indian Band*, the Supreme Court said:\(^\text{96}\)

> Flexible federalism demands protection from taxation, but not from all forms of charges, when the charges are levied in support of other regulatory objectives within the competence of the taxing authority.\(^\text{97}\)

Thus, the power to raise money by way of licences has an advantage over the general power to tax, since a tax does not touch a Crown corporation, but a licence does. A strategic use of the licensing power may thus sound attractive, since it is a way to take advantage of all economic presence on a reserve, be it private or public.

In addition, it is the policy of the Government of Canada that Crown corporations should pay a reasonable amount to bands in whose reserves they have premises, due to the benefits that they generally enjoy in respect of public services provided by bands.\(^\text{98}\) That can be done through an agreement by which the Crown corporation will commit itself to pay a specified amount, usually calculated to equal the amount that it would have paid, had it been subject to the taxation by-law. The limitation found in s. 125 of the *Constitution Act, 1867* must thus be clearly understood by bands, because negotiations will likely be needed before a Crown corporation will pay any amount. The constitutional power to raise money from Crown corporations by way of licences is therefore an authoritative bargaining advantage: it may help to increase the amount

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\(^{95}\) Parag. 83(1)(a.1) of the *Indian Act*.

\(^{96}\) *Westbank Indian Band*, supra note 42, at parag. 18.


\(^{98}\) The Government of Canada and provincial governments normally pay grants in lieu of taxes. The Government of Canada has adopted the policy to pay grants to all taxing authorities in Canada in respect of government buildings, including Indian bands and Indian governmental bodies. See: *Why Tax?*, supra note 7, at 6-7.
paid by Crown corporations, unless they will be indirectly subject to Indian taxation by way of licence fees.

(b) Intrinsic Revenue-Raising Limitation

However, there is an important limit to the revenue-raising capacity of licences: the amount of revenue raised is limited to the amount necessary to cover the costs of the regulation intended. Therefore, licences should be used and by-laws should be drafted with great care.

2.2 Economic Reality

A tax system may contemplate the broadest taxation powers, but if there is no wealth against which they can be used, these powers will be useless. That is why, before trying to implement a comprehensive Indian tax system likely to pave the way to the implementation of resourceful Indian governments, one must assess the viability of the current system, according to the economic resources available, i.e., reserve lands, Indian individuals as well as Indian and non-Indian businesses.

2.2.1 Reserve Lands

The availability of land remains a central issue, since most tax revenues are and will likely be derived from real property taxation in the future. If all Indian bands implemented taxation by-laws, they would be able to collect $20 million annually. These poor results are mainly due to an insufficient real property tax base. Disadvantageous attributes of lands include:

99. And to the bargaining advantage as well.
100. Westbank Indian Band, supra note 42, at parag 19; Re Eurig Estate, supra note 44. Also see: A.G. Ontario v. City of Toronto (1892), 23 S.C.R. 514; and A.G. Canada v. Registrar of Titles, [1934] 4 D.L.R. 764 (B.C.C.A.). This logical exercise is workable if and only if fees are levied for the sole purpose of paying for the services. This is sufficient to justify the revenue-raising limitation imposed on licenses. However this line of reasoning should not apply in cases where a license’s sole purpose to protect the public.
101. See: 3.1.2(a) and 3.3.2(a).
102. First Nation Taxation, supra note 31, at 1.
103. Ibid., at 24. In some instances, if taxation were implemented in a reserve, compliance costs would exceed tax revenues.
104. Ibid., at 24-25.
• **Small Land Base**: It represents approximately 0.5 % of the Canadian land mass south of the 60th parallel;\(^{105}\)

• **Limited Commercial and Residential Use**: The federal land allocation policy has usually been to allocate reserve lands away from the best lands as population expanded;\(^{106}\)

• **Patchwork Nature**: It is harder to establish infrastructure, development projects and viable businesses when the land base is still a forest for the most part;

• **Limited Natural Resources**: Reserve lands have usually had low agricultural or mineral potential, the policy rationale being that Indian lands would never be properly developed; and

• **Limited Territorial Expansion Ability**: The ability of band councils to expand their land base is negligible. The main solution consists in the purchase of fee simple lands.

The obvious conclusion from these facts is that Indian real property taxation powers have nearly been annihilated over the last decades by a careless land allocation policy, which ostensibly did not foresee the importance of Indian taxation in the future. In fact, the land allocation policy may be the strongest impediment to an effective use of taxation powers.

### 2.2.2 Indian Individuals

On a short-term basis, Indian individuals should generally not be considered as a reliable revenue source, neither from a strict income tax point of view, nor from a land development point of view. Over the last decade, 65 % of Indians living on reserves reported annual income below $9,000 on average.\(^{107}\) Coupled with

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105. 80 % of reserves are below 500 hectares in size. By contrast, American Indian bands benefit from 3 % of the land base of the 48 southern states (i.e., 6 times the territory allocated to Canadian Indian bands). That is a major advantage, especially given the fact that American Indians represent a much smaller part of the overall population of the United States.


a high unemployment rate, this is a strong indicator that, in most reserves, the level of Indian taxable income or income available for investments is not significant and certainly not sufficient to implement an efficient individual income tax regime based on this sole source.\textsuperscript{108} Non-Indian revenue sources will be needed to fund any form of Indian tax system, be it local, regional or national.

\subsection*{2.2.3 Indian and non-Indian Businesses}

Low levels of economic activity characterize reserves. Many “objective” factors may partially explain this situation:\textsuperscript{109} low income of residents, a large percentage (80\%) of expenditures by reserve residents are made off reserve, many reserves are located too far from business service centers, and many reserves are too small to support a retail sector.

All of these factors might explain the low rate of business activity. In addition, one must also take into account the intangible impact of the “uncertainty costs” of carrying on business on reserve, which include:

- **Land Title:** There is a fair amount of uncertainty regarding the security over land title on reserve, especially with respect to the very limited possibility of conducting a seizure on Indian lands or financing business projects;

- **Land Development Regulations:** Whereas regulations for commercial land development projects are usually provided by municipalities, these guidelines are found in the *Indian Act* in the case of reserves; and

- **Political Uncertainty:** Business people are generally afraid of Indian political positions and actions, including

\textsuperscript{108} On average, only 3\% of income from Canadian individual taxpayer having less then $10,000 in annual revenue was assessed by the Canada Customs and Revenue Agency pursuant to the *Income Tax Act*.

\textsuperscript{109} First Nation Taxation, supra note 31, at 32.
the possibility that they could be denied access to their business premises or become subject to different business conditions.

Nevertheless, non-Indian business activity might become the best source of taxation revenues. If Indian economic forces per se would not be sufficient, Indian and non-Indian sources of income on reserve would be a viable alternative likely to generate enough economic activity to finance the system, even though the Department of Finance once argued that it would be the case only infrequently. The problem in respect of the attractiveness of reserves from a business point of view can be solved by a better land allocation policy. Indeed, one cannot think of a comprehensive Indian tax reform without a mandatory reform of the land allocation policy. In addition, there should be efforts on the part of the Government of Canada to adapt its regulations to provincial ones, or to grant this power to the Indian bands, which would be likely to adapt to local regulations so as to avoid conflicts.

3. IMPLEMENTATION OF AN INDIAN TAX SYSTEM

Indian communities aspire to the same standard of living as other Canadians and wish to share Canadian prosperity. However, with the growth of the Indian population driving up expenditures, it is unlikely that federal grants alone will be able to maintain the current level of services, and it is impossible to believe that there will be an improvement with the same form of financing. Both Indians and non-Indians will have to be creative.

The solution might be the development of flexible revenue-raising tools, including expanded real property taxation powers as well as income taxation and sales taxation powers. This solution is likely to improve the quality of services provided to Indians living on reserves and enhance the degree of business activity on reserves. In this respect, the implementation of a com-

110. JAMIESON, supra note 107, at 55:3.
111. Ibid.
112. From 1981 to 1991, the overall Canadian population increased by nearly 11 %, whereas the population of registered Indians living on reserve increased by 34 %, and the total population of registered Indians increased by approximately 58 %. See: First Nation Taxation, supra note 31, at 37.
113. Meaning a tax-driven land allocation policy.
114. At the individual, business and trust levels.
prehensive Indian tax system entails the consideration of three major issues: political issues, co-ordination issues, and procedural issues.

3.1 Political Issues

Politics is about choices. And in the context of Canadian democracy, political choices are often made by weighing the popularity of the options. This is no less true in the case of tax policy choices, in which each Canadian has a personal interest, than in Indian affairs, which are often misunderstood by the population. Therefore, an Indian tax policy reform is likely to be intensely political among both Indians and other Canadians, Indians being traditionally opposed to taxation, and Canadians being consistently reluctant to have a heavier tax burden.

3.1.1 Indian Political Concerns: Should there be Taxation At All?

Probably due to the general, philosophical opposition to taxation, Indian bands might have a strong incentive not to impose taxes on their members. Therefore, before any comprehensive Indian tax system can be implemented, Indians themselves must be convinced that such a system will be among the means by which they will share Canadian prosperity.

(a) Traditional Opposition to Taxation

The basis of the traditional Indian opposition to taxation might be found in the policy rationale that led to the implementation of the s. 87 Indian tax exemption. In *Mitchell v. Peguis Indian Band*,¹¹⁵ the Supreme Court of Canada stated that the purpose of the exemption was to preserve the entitlements of Indians to their lands and to ensure that the use of their reserve lands is not eroded by the ability of governments to tax.¹¹⁶ The Supreme Court noted the following:

The exemptions [...] have historically protected the ability of Indians to benefit from [their] property [...] [The exemptions] guard

against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian Affairs. [Emphasis added]

Hence, Indians generally fear any form of taxation, imposed either by the Government of Canada, a provincial government or even an Indian government. One must also take into account that taxation is generally considered contrary to the Indian traditional way of life.\textsuperscript{117} The implementation of an Indian tax system, being part of a broader institutional reform aimed at creating self-sufficient Indian communities, brings the foreseeable fear of the erosion of the Government of Canada’s fiduciary duties towards Indians, \textit{i.e.}, a decrease of federal subsidies. However, there is at least one consensus on the taxation question, and it is the general acceptance of taxing non-Indian lands and businesses on reserve.\textsuperscript{118} Since this is likely to be the main source of revenue, such a consensus is fortunate.

\textbf{(b) Acceptable Implementation Process}

The solution to this political problem rests with the clarification of the issues, and especially with respect to five points: decision to impose a tax, decrease of federal subsidies, quality of public services, economic development, and taxation of non-Indians.

\textbf{(i) Decision to Impose a Tax}

If all Indian bands have broad taxation powers, the ultimate decision to impose a tax should be made by each Indian community, taking into account local concerns and capabilities. This policy orientation is not without consequences. It brings with it the necessity to consider taxation not as a short-term replacement tool for federal funding, but as a long-term complementary tool aimed first and foremost at enhancing the standard of living and economic development on reserves, along with federal support. Indeed, federal funding has traditionally been used to help bands operate the machinery of Indian band councils and the related administration, or when Indian bands have undertaken to pro-

\textsuperscript{117} \textit{A contrario, see}: 1.1.1.
\textsuperscript{118} \textit{First Nation Taxation, supra note} 31, \textit{at} 26.
vide services to their members directly, if the programs were previously provided by the Government of Canada.119

(ii) Decrease of Federal Subsidies

If the implementation of an Indian tax system means a gradual end of federal subsidies, the decrease should not happen before Indian bands exercising their taxation powers have reached a satisfactory degree of self-sufficiency, which compensates for federal funding, provides bands members with services the quality of which exceeds that of services provided to members of the surrounding bands which do not use taxation as a major revenue-raising tool. With such an agenda, Indians will be able to weigh the advantages of taxation as well as its disadvantages. They will then be able to decide whether taxation is better than subsidies, on a short, medium and long-term basis.

(iii) Quality of Public Services

Unlike s. 83 of the Indian Act, which provides for a vague expenditure policy,120 a comprehensive Indian tax system should adopt a strict expenditure policy focused on two objectives: the improvement of the quality of public services and the elaboration of an economic development agenda (discussed below). Indian communities will have to establish a list of new or significantly improved public services that Indians will benefit from with the implementation of a comprehensive Indian tax system. Therefore, they will have to consult with their population, establish such a list, and finally negotiate with the Government of Canada and provincial governments in order to take over responsibilities for public services (e.g.: education, health care, business regulation, etc.). However, one must keep in mind that an increase in quality of public services is only an intangible benefit compared to a fixed sum of money that must either be paid to the band or kept away from the taxman. That intangible benefit will have to be explained.

120. Parag. 83(1)(a) of the Indian Act provides only that the council of a band may enact taxation by-laws for local purposes.
(iv) Economic Development

With a higher quality of public services comes the opportunity to attract more businesses that should be less afraid of carrying on business on reserve and should be interested in coming on reserve because of the services that it provides and the business opportunities. Along with the implementation of a tax system, Indian bands will have to table a strategic economic development agenda aimed at fostering economic benefit from the payment of taxes. This agenda should focus on the establishment of new businesses due to the favourable investment climate created by the tax system and should take advantage of local strengths.

(v) Taxation of Non-Indians

The issue of taxation of non-Indians should be clear: non-Indians will be subject to Indian taxation. The purpose of implementing a tax system likely to be a reliable source of revenue is to have more businesses on reserve that will pay taxes to the band council. If federal funding decreases, the tax revenue generated by taxation of non-Indian businesses should be seen as part of the compensation.\(^\text{121}\)

The main argument in favour of the implementation of a comprehensive Indian tax system is the establishment of a climate favorable to economic development, through state-of-the-art public services. One of the fears of Indians is that some bands will implement taxation whereas some others will not, therefore undermining Indian solidarity on the taxation matter. In order to enhance this solidarity, but in favour of taxation rather than in opposition to it, the implementation will have to be gradual, and strategically orchestrated, focusing on reserves that have the ability to implement a system successfully, thereby building on successful experiences to help implementing tax systems on reserves where it will be harder.

3.1.2 Canadian Political Concerns: What Should the Scope of Indian Taxation Powers be?

Once Indian agreement is secured, the focus will have to shift to global Canadian concerns over the issue of the tax burden that

\(^{121}\) The controversial issues in respect of taxation of non-Indians will be addressed in the following section.
could increase with a new level of taxation. Canadian concerns will be discussed in light of the taxation model that should be adopted and the extent to which non-Indians should be subject to Indian taxation by-laws even though they are not represented by the taxation authority.

(a) **Taxation Model**

Flexibility must be the cardinal value of the new Indian tax system. In this respect, there should be a shift from the municipal model to the governmental model. That means a departure from a restrictive system allowing only for real property taxation and licensing powers, towards a comprehensive taxation system modeled on provincial taxation powers found in subs. 92(2) of the *Constitution Act, 1867*. Indeed, for a tax system to be effective, stable revenue sources are necessary. Even though revenues are likely to be derived mainly from real property taxation and licensing, the Indian governments should be entitled to exercise a full range of taxation powers, which will allow them to raise revenue from adequate sources, corresponding to the level of local economic development and commercial sophistication.

Therefore, along with the existing licensing power, Indian bands should have access to all forms of direct taxation, including: property tax, income tax, and sales tax. At this point, such a system does not hurt Canadians because, *in abstracto*, their pockets are not yet involved. Political problems and double-taxation problems will become a serious issue when the liability to tax question is addressed.

(b) **Liability to Tax**

If Indian bands ought to have broad taxation powers, who will be liable to these new taxes? To answer this question is to

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122. Taxation models have historically evolved according to the degree of sophistication of business activities: from real property taxation, for less sophisticated societies, towards sales and income taxation, for more sophisticated societies. See generally: A. NEURISSE, *Histoire de l’impôt* (Paris: Presses universitaires de France, 1978).

123. A “direct tax” is a tax that cannot be shifted by the taxpayer to others. By opposition, an “indirect tax” is a tax which is levied on producers, importers or sellers in the expectation that they will pass it on their customers in the form of higher prices. See: P.W. HOGG and J.E. MAGEE, *Principles of Canadian Income Tax Law*, 2nd Ed. (Scarborough: Carswell, 1997), at 59.
answer a much broader tax policy question, namely: “Will the liability to Indian taxation be determined according to the status\textsuperscript{124} of the taxpayer or according to his residence\textsuperscript{125}?” An Indian tax system based on status would leave all non-Indians (i.e. individuals, corporations and trusts) free from Indian taxes, while a system based on residence would render non-Indian corporations and trusts as well as some individuals (e.g.: civil servants, physicians, teachers, non-Indian spouses) potentially liable to Indian taxation.

As a matter of pragmatism, any Indian tax system can be viable only if non-Indian businesses are subject to taxation. Therefore, the system will have to be based on residence, despite the fact that Indian band membership is based on status. But even if an Indian tax system would have been viable without the need for any involvement of non-Indian interests, the basis for liability to tax would probably have been residence anyway, because residence is the traditional Canadian tax liability principle. In this respect, it would have been hard to foresee the implementation of a new tax system in the Canadian context not respecting this fundamental principle. Indeed, our tax system has evolved according to two axes:\textsuperscript{126} resident in Canada (taxation on worldwide income) and non-resident in Canada (taxation on Canadian-source income). Consequently, Indian bands should be entitled to exercise direct taxation powers as follows:\textsuperscript{127} real property tax

\textsuperscript{124} Indian or non-Indian.
\textsuperscript{125} On or off reserve.
\textsuperscript{126} Section 2 of the \textit{Income Tax Act} reads as follows:

2. (1) An income tax shall be paid [... on the taxable income for each taxation year of every person resident in Canada at any time in the year.
(2) Where a person who is not taxable under subsection (1) for a taxation year (a) was employed in Canada,
(b) \textit{carried on business in Canada}, or
(c) disposed of a taxable Canadian property,
at any time in the year, \textit{an income tax shall be paid} [...] on the person’s taxable \textit{income earned in Canada} for the year [...] [Emphasis added]

\textsuperscript{127} It could be argued that such a reform would incorporate “private international law-type” questions, especially with respect to the determination of the residence of an individual, a corporation or a trust; and the place where a transaction has occurred. This may be true, but no tax system has the privilege of avoiding such problems and the Indian tax system is no exception. The Canada Customs and Revenue Agency has to deal with such problems \textit{(e.g.:} inter-provincial or international transactions) on a day-to-day basis. However, what might become a serious problem is the arguable balkanization of Canadian taxation. Indeed, adding a new tax system for each band might dramatically increase the number of tax rules. Tax harmonization has become a popular policy around the world, the Indian tax system may thus look a bit archaic. For discussions on the
(real property located on reserve), income tax (individuals, corporations and trusts residing or carrying business on the reserve – income derived from reserve only), and sales tax (transactions occurring within the reserve).

These broad powers have the effect of providing Indian bands with enough flexibility to raise revenue according to the source which is appropriate, given the economic development of their reserve. However, since liability to tax is based on residence rather than status, one could question the legitimacy of a tax that will arguably be imposed without several taxpayers being represented by the taxing authority, since only band members living on reserve have a right to vote in band elections. This principle, alleged to have been at the heart of the American Revolution is widely known as “No Taxation without Representation”.

In abstracto, any taxation without representation looks reprehensible and wrong. Since the taxpayer is unable to influence the expenditure policy, he is likely to pay without benefiting from its payments and he is likely to be subject to an unfair process due to his status. That being said, the Canadian tax system, which is that of a democratic country, while respecting the principle of representation, nevertheless contains provisions that overrule the principle in order to prevent abusive tax avoidance strategies.128 Our system is not unfair for this reason alone.

Indeed, if residence is the starting point in Canadian taxation, the starting point in the Canadian democracy is citizenship. Consequently, many taxpayers may well be resident of Canada, and therefore subject to Canadian taxation, but at the same time not be Canadian citizens and not have the right to vote in an election. Similarly, a non-resident in Canada may have Canadian-source income and therefore be liable to tax in Canada while having no right to vote.

128. Indeed, if non-residents in Canada carrying on business in Canada did not pay Canadian taxes, and if the same rule were applied around the world, everybody would manage to be non-resident in the country in which he established his business and pay no taxes.
Our system remains fair, despite the fact that some taxpayers are taxed but not represented, because all of them benefit (to a certain extent) from the taxes they pay by way of state-of-the-art public services. In addition, they all have a right to be heard before impartial and independent administrative and judicial tribunals if they consider that their assessment is erroneous or unfair. The system will remain fair so long as the expenditure policy and the administrative process are fair. Consequently, a comprehensive Indian tax system will be fair and acceptable from a non-Indian point of view if the policy expenditure is aimed at providing services to every taxpayer, including non-Indians, and if the administrative process is equally fair.129

3.2 Co-ordination Issues

The Indian tax system must work in co-ordination with the existing federal, provincial and municipal tax systems. Indeed, a tax system is suitable only to the extent that it is likely to raise revenue without hurting the population that is taxed.130 The Indian tax system would be the fourth taxation level in Canada, after the Government of Canada, the provincial governments and the municipalities.131 And apart from Indians living on reserves, taxpayers subject to the new Indian taxation would already have to face the tax obligations imposed by the three existing tax authorities. In this respect, two issues must be addressed: the substantive coherence of tax provisions, and an orchestrated share of the tax room.

129. It should also be noted that subs. 10(1) of the Indian Act provides that a band may assume control of its own membership if it establishes membership rules. This power may also be a solution to the problem of representation since a band could decide to allow non-Indians to be members of the band to which they pay taxes. If they would not have the status of Indian, at least they would have a right to vote. However, this would be a case-by-case solution likely to become complex. Another solution might also be the creation of "public governments", composed of a majority of Indians, who would be sure to control the governmental institutions, but in which non-Indians would be recognized on the same footing as Indians. This solution might only be viable in northern regions of Canada where the non-Indian population is not likely to exceed the Indian population (eg.: Nunavut).

130. See: D.C. BELLEY, “Taxation of Corporate Loss Transfers in Canada: Business Efficiency under Threat” (Tax Policy Essay, McGill University, 1999). The second part of this paper explains how and when a tax system is suitable because it does not hurt taxpayers.

131. To a lesser extent, the school boards might be considered as a fifth tax authority.
3.2.1 Substantive Coherence

(a) Legislative Process

If flexibility is a good thing when the time comes for a competent body to exercise its tax jurisdiction, one must keep in mind that taxation is a powerful regulatory scheme, even though this is not its primary objective. Both businesses and individuals must take into account tax rules before putting forward transactions and making decisions. Co-ordination is thus required to ensure that each tax system is compatible with its neighbors and not at odds with the others.

For example, pursuant to the *Income Tax Act*, 50% of capital gains are taxable upon disposition of capital property. A taxpayer who carries on business as a sole proprietor, and thereby accumulates capital property in the course of business, will be deemed to have disposed of this capital property and will trigger a notional capital gain if he or she decides to incorporate the business, to transfer assets to the newly incorporated corporation, and to carry on business under the corporate form. Fortunately, as a matter of business efficiency, s. 85 of the *Income Tax Act* provides for a rollover of the capital gain from the sole proprietorship form to the corporate form in order to avoid the payment of capital gains tax. However, some specific criteria must be fulfilled. These criteria are the following:

- a taxpayer...
- must have disposed of any “eligible property”...
- to a “taxable Canadian corporation”...
- for consideration that includes shares of the capital stock of the transferee corporation, and...
- the taxpayer and the corporation have jointly elected...

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132. Flexibility has already been acknowledged by the grant of all means of direct taxation.
133. Working Paper, supra note 37, at 27.
135. See: subs. 85(1.1) of the *Income Tax Act*.
136. See: subs. 89(1) of the *Income Tax Act*. 
in prescribed manner and...

within prescribed time.

Any sole proprietor will arrange his or her transaction so as to fulfill each criterion in order to avoid the realization of a capital gain. This operation will remain simple\textsuperscript{137} as long as there is only one authority that regulates the recognition and the taxation of capital gains and rollovers. However, in the case of Canada, 11 jurisdictions have such authority: the Government of Canada and the ten provinces. We can easily foresee the potential legal difficulties. Fortunately, legislative coherence (in this example as well as in the overall tax system) has been achieved to a satisfactory extent in two ways:

- **Shared Tax Base:** All provinces except Quebec share the same tax base as the Government of Canada. Each of them calculates the provincial tax payable as a percentage of the federal tax payable. Therefore, a taxpayer subject to tax in any Canadian province except Quebec only has to fulfill the criteria set forth in the *Income Tax Act* (Canada) in order to fulfill both federal and provincial regulations;

- **Canada–Quebec Co-ordination Policy:** Even though Quebec does not use the federal tax base, it has been the policy of the Government of Quebec for several years to adjust the provisions of the *Taxation Act* (Quebec) to those of the federal *Income Tax Act*.\textsuperscript{138} The process usually takes into account major amendments to the federal legislation and avoids substantial legal confusion.

That being said, all tax authorities in Canada, along with the new Indian tax authorities, will have to commit themselves to tax co-ordination so as to ensure that the Indian tax authorities will benefit from a flexible tax system likely to be harmonized with the economic reality of their reserves, but which will not become an impediment to business efficiency on reserves due to an accumulation of conflicting technicalities. These negotiations should address the following issues:\textsuperscript{139} harmony in tax provisions,

\textsuperscript{137} As much as possible.
\textsuperscript{138} The Quebec functional equivalents to s. 85 of the *Income Tax Act* are ss. 521-526, 528(a)-(c) and 581 of the *Taxation Act*, R.S.Q., c. I-3.
\textsuperscript{139} Working Paper, supra note 37, at 28.
minimization of compliance costs, and no increase of the tax burden.\textsuperscript{140}

Apart from business efficiency, there is a revenue-raising incentive, from the governments’ point of view, to ensure that the Indian tax system will not harm the integrity of the existing Canadian tax system. Indeed, if conflicting technicalities often constitute expensive legal and accounting expenses on the part of businesses, they can also be the source of genuine tax avoidance schemes aimed at taking advantage of technical provisions in different taxing statutes by fulfilling the literal obligations but avoiding the spirit of the act.\textsuperscript{141} These tax-planning strategies (which usually benefit profitable businesses that would otherwise pay taxes) are often costly to governments. Therefore, both governments and taxpayers will take advantage of the global harmonization of Indian and Canadian taxation.

\textit{(b) Judicial Process}

Tax legislation being traditionally technical,\textsuperscript{142} even if there is a constant co-ordination effort, it is foreseeable that conflicts, or at the very least overlaps, will occur in many instances. In this respect, one might question the validity of tax provisions imposing on a taxpayer two (or more) different tax obligations (especially with respect to compliance issues). Given the effort on the part of all tax authorities to ensure that the Indian tax system will be integrated harmoniously within the larger Canadian tax system, Indian taxation by-laws should not be declared void for the sole

\textsuperscript{140} See: 3.2.2 (b).


\textsuperscript{142} J.W. DURNFORD, “The Corporate Veil in Tax Law”, (1979) Canadian Tax Journal 281, at 304 commented on the legislative drafting technique of the Income Tax Act as follows:

[...] The Commissioners who drafted the Civil Code of Quebec in the 1860s made it a deliberate general policy to avoid giving definitions because of the difficulty of producing satisfactory ones and the desirability of retaining flexibility to meet changing times and conditions. The system has worked well. The Parliament of Canada cannot be accused of having followed the same policy with respect to the Income Tax Act: one has only to glance at subsection 248(1) to discover a vast array of definitions, to which must be added many others spread through the Act. Flexibility (and endless confusion) has been maintained in the Act since 1972 by enacting literally hundreds of amendments (what a way to do it!). [Emphasis added]
reason that, from a technical point of view, they conflict with federal, provincial or even municipal tax rules.\textsuperscript{143} Doing so would amount to declaring a tax provision void for the sole reason that it is a tax provision, because in essence, a tax provision is technical and precise, which sometimes leads to conflicts.

According to La Forest,\textsuperscript{144} conflict of laws questions in tax matters should not be resolved according to the usual doctrine of paramountcy of federal statutes. La Forest’s position reads as follows:\textsuperscript{145}

Since both levels of government may impose direct taxation and levy revenue by way of licenses, their legislation may well overlap. Here the courts [...] have taken the attitude that \textit{two taxations can stand side by side} and there is no clash or conflict. [Emphasis added]

This policy is consistent with the broad interpretation that should be given to Indian treaties and statutes.\textsuperscript{146} Indian tax legislation should be given a broad application so as to allow Indian governments to fulfill their obligations, as it is the intent of the Government of Canada and Indian governments.\textsuperscript{147} So long as the Government of Canada, provincial governments and Indian governments make an effort to minimize differences in their tax legislation, this interpretative approach will succeed. Legislative co-ordination may be seen as an impediment to flexibility, but it is the best way to ensure the viability of the new system and its effectiveness within the Canadian tax system.

However, in the absence of conflict of laws, Indian taxation by-laws should not be given a broad application as the accepted doctrine suggests. Indeed, the broad interpretation doctrine should only apply in order to ensure the existence and the applica-

\textsuperscript{143} If a tax rule enacted by another tax authority should not preclude an Indian taxation by-law from being applicable, one must keep in mind that Indian taxation by-laws must still be consistent with federal laws and regulations so as to be valid.

\textsuperscript{144} Later Justice at the Supreme Court of Canada.

\textsuperscript{145} G.V. LA FOREST, \textit{The Allocation of Taxing Power Under the Canadian Constitution}, 2nd Ed. (Toronto: Canadian Tax Foundation, 1981), at 52.


\textsuperscript{147} Here again we can find a clear incentive to reach a negotiated agreement where we will find a consensus likely to foster judicial interpretation in favour of broad Indian taxation powers.
tion of Indian taxation by-laws when they conflict with taxation laws. Otherwise, when a taxpayer contests the application or the interpretation of an Indian taxation by-law, the generally accepted Canadian tax interpretation principles should be applied, with no distinction being granted to the Indian tax system. These principles may be summarized as follows:148

- A court should apply the plain meaning of the words used in tax legislation, with no reference to its purpose or to the motivations of the taxpayer;

- When interpreting tax legislation, a court should adopt a purposive approach and take into account the motivations of the taxpayer only to the extent that it faces a patently ambiguous provision, a sham transaction, an abuse of right or a fraud;

- A court must seek to avoid an absurd result in respect of the provision under scrutiny, not under the whole scheme of the tax legislation;

- Any purposive or otherwise liberal interpretation of tax legislation should be an exception; and

- If there is a major interpretation problem, Parliament should solve the problem, not the court.

3.2.2 Share of Tax Room

The opportunity given to Indian governments to exercise wide taxation powers will be a success only to the extent that it does not add unreasonably to the existing tax burden.149 Indeed, most taxpayers subject to Indian taxation will also have to pay federal and provincial taxes.150 This policy concern is an important reminder that the Indian tax system is aimed at fostering economic activities on reserve, and that adding to the tax burden would lead to unattractive consequences.

148. BELLEY, The Corporate Veil, supra note 141.
150. And often municipal and school taxes.
(a) **Tax Room Needed by Indian Governments**

Even if the Government of Canada, but especially provincial governments and municipalities may be reluctant, there is a need for negotiation on the available tax room.\(^{151}\)

- **Land Base:** Major increase of the size of reserves;

- **Limited Commercial and Residential Use:** The federal land allocation policy should become a tax-driven policy, allowing for the allocation of lands with commercial and residential potential. This means that reserves should not be situated too far from metropolitan areas, so long as Indians agree;

- **Natural Resources Potential:** Reserve lands should have higher agricultural, mineral and hydro-electric potential, Indians being able to develop their lands properly; and

- **Tax Credit:** Implementation of a tax credit system which would provide for a deduction from federal income tax payable for Indian tax amount already paid.

(b) **Issues of the Negotiations**

In order to be successful, negotiations on tax room should address controversial political issues that are not directly concerned with Indian taxation. These issues are:\(^{152}\) the federal control over the national fiscal agenda, the declining federal funding to provincial programs, and municipal revenue sources.

(i) **Federal Control over the National Fiscal Agenda**

Since nine provinces out of ten use the federal tax base, and Quebec adjusts its tax legislation to the federal legislation, the Government of Canada has *de facto* control over the national fiscal agenda, leaving less space for provincial interference once the fed-

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\(^{151}\) Stated briefly, the Government of Canada, provincial governments and municipalities will have to vacate tax room, in specific fields for the sake of tax efficiency.

\(^{152}\) See generally: *First Nation Taxation, supra* note 31.
eral policy is set. In this context, provinces might not be willing to accommodate Indian considerations as to how the Canadian tax system should work in order to satisfy their claims, because that would amount to a decline of their influence.

(ii) Declining Federal Funding to Provincial Programs

Provincial allegations concerning the arguably massive decline in federal financial contributions to provincial programs in the fields of health care, education and social services are well-known and are likely to be a source of dispute. Indeed, since provincial governments argue that they must face financial obligations “alone”,\(^{153}\) they might not be willing to vacate tax room to the benefit of Indian governments, since they might argue that they cannot afford to lose money.

(iii) Municipal Revenue Sources

Arguably due to federal cuts, provinces have also reduced their financial transfers to municipalities, which may also be reluctant to vacate tax room, especially since municipalities have little flexibility with respect to the determination of their own tax room (usually limited, by provincial legislation, to real property taxation and licensing). In fact, municipalities are competing with Indian bands for the same room. If the Indian tax system is coupled with a generous grant of lands (as we suggest), this competition will only increase.

The only solution leading to the implementation of the Indian tax system might well be a more general reform of federal funding to both provincial and Indian governments. Since we are now experiencing the first federal budget surpluses in a generation, the appetite of provincial governments, municipalities and several groups is likely to be an important consideration. The implementation of Indian self-government may thus lead to major federal expenditures in order to ensure an agreement among several parties. The size of such expenditures will likely be the ultimate consideration that will either foster or delay the reform.

\(^{153}\) This is a political issue that this paper does not intend to solve.
3.3 Procedural Issues

Once an agreement on implementation of an Indian tax system is reached, a delicate question will have to be addressed: the procedural form that such a system will have to adopt. At that point, the last necessary consensus will have to be in respect of the values that shall govern the administration of the Indian tax system.

3.3.1 Legislative Process

The current process through which any proposed taxation by-law must pass before coming into force contemplates a detailed process on which an improved legislative process for Indian governments will be based and through which Indian governments will be able to exercise increased legislative independence.

(a) Current Process

The current legislative process consists of seven stages:\footnote{154}{For a complete discussion on this topic, see: 1.2.2(c).}

- Decision to tax by the Indian band council;
- Collection of legal information and preparation of the by-law;
- Communication to all potentially affected parties of the intention to tax;
- Analysis of the proposed by-law by the ITAB, the Department of Indian Affairs and the Department of Justice;
- Recommendation to the Minister by the ITAB;
- Ministerial Decision; and
- Implementation.

(b) Discussion

This very detailed, technical and rather administrative process is aimed at ensuring that Indian bands fulfill requirements of
the Indian Act and more generally that the substance of the by-law is consistent with the federal Indian tax policy. This process is paternalistic. It suggests that Indian bands do not have or will not be able to find the proper professional support to come up with valuable by-laws. And even if they do, this process implicitly suggests that there is a risk that their decisions and projects are at odds with the agenda of the Department of Indian Affairs.

With the enhanced powers that will accompany the status of self-government, the Indian tax system should be marked by an increased amount of legislative independence from the Department of Indian Affairs. The system should involve the following elements:

- **Concentration of Legal Detail at the Band Level:** Collection of information; discussion as to whether the intended by-law respects the Charter, the Indian Act and other standards of fairness; and drafting should be left to the Indian band (or government) and its legal counsel;

- **Essential Tools Provided to Bands:** The kinds of services provided by the ITAB, the Department of Indian Affairs and the Department of Justice should be available but on an optional basis. Otherwise, Indians should be entitled to produce their by-laws with their own legal and human resources;

- **Judicial Control:** The federal executive control over enactment of taxation by-laws should be left to the judicial level, which will be the most competent body to apply the principles set forth by the ITAB in order to determine the validity of a by-law;

- **Provincial and Municipal Involvement:** The existence of provincial and municipal tax systems should not be ignored. Indians should be open to co-operative arrangements with those systems and take advantage of their expertise at the local level; and

- **Co-ordination and Flexibility:** As mentioned above, tax co-ordination will be a key to the success of the Indian tax system. However, tax co-ordination must be achieved
on an informal basis. Indian bands (or governments) will have to try to accommodate the existing Canadian tax system, just as the Canadian tax system will have vacated tax room to provide Indians with effective taxation powers. However, the very reason why tax co-ordination should be informal (and not subject to ministerial approval), is to provide Indians with the opportunity to enact taxation by-laws harmonized with local needs, without federal interference.

(c) Proposal

Consequently, the legislative process in a comprehensive Indian tax system should be the following:

- **Decision to Tax:** An Indian band council (or government) enacts a resolution aimed at expressing its intention to implement a taxation by-law. The resolution shall contain sufficient information to help determine whether taxation is worthwhile, including: the financial objectives and feasibility, the interests to be taxed and the costs of the implementation and administration. [No Change]

- **Preparation:** The Indian band (or government) collects sufficient legal information in order to produce draft legislation. Discussions can take place with the following institutions: the ITAB, the Indian Tax Secretariat, the Department of Indian Affairs and the Department of Justice. [Consultations with federal agencies are optional]

- **Communication:** All non-Indian parties potentially affected must be informed of the intention to tax. These parties include: potential non-Indian taxpayers, municipalities, the pertinent provincial government and the Government of Canada. The decision to communicate the intention to tax to members of the Indian band is a political decision for the band. [Communication is mandatory only to non-Indian parties]

- **Analysis by ITAB, Indian Affairs and Justice:** [Repealed]

- **Recommendation to the Minister:** [Repealed]

- **Ministerial Decision:** [Repealed]
- **Vote:** The Indian band council (or government) votes on the adoption of the taxation by-law. [New enactment step]

- **Implementation:** The taxation by-law is effective and taxpayers are required to pay the tax payable. [No Change]

This process eliminates the compulsory presence of the Government of Canada in the enactment of Indian taxation by-laws. Federal agencies will still be available for support as professional consultants, but not at a decision-making level. The power to decide whether a by-law respects the enabling legislation and fundamental justice would be left to the judicial level. Indians could exercise their taxation powers in any way they wish, with a view to the unavoidable need for tax co-ordination among Canadian tax authorities. All this shall be seen as a signal that the Indian taxation power has reached the age of majority, Indians being finally able to control their tax policy, under the rule of law.

### 3.3.2 Administrative Process

The creation of a public body aimed at supervising the application and the respect of taxation by-laws is necessary. Revenue Canada played this role at the federal level for several decades; the Canada Customs and Revenue Agency has performed the same functions since November, 1st 1999. The quality of the administrative process will be determinative of the success of any form of Indian tax system. In this respect, the Indian tax administrative process shall have two objectives: effectiveness (the administration shall provide for the maximum revenues with minimum costs) and fairness (the administration shall ensure that Indian and non-Indian taxpayers will be treated on the same footing).

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155. This is already a mandatory requirement for the enactment of taxation by-laws under the current system. See: subs. 83(3) of the Indian Act.
156. Several countries have encountered serious difficulties with their tax system due to the fact that it was not properly administered, even if the legislation, on the face of it, looked correct. Indeed, integrity, professionalism, respect and co-operation with taxpayers are values that shall be shared by both officials and employees of any Indian tax administrative body. See: Canada Customs and Revenue Agency’s web site at: http://www.ccra-adrc.gc.ca/.
157. Since the political process is aimed at eliminating as much as possible the involvement of the Government of Canada in the decision-making process, and since both Indians and non-Indians will to be subject to Indian taxation, despite
(a) Effectiveness

(i) Duties of the Tax Administrative Body

The implementation of an effective tax administrative process will involve several duties that will have to be carried out with care and professionalism by both officials and employees of Indian governments. The main duties will be the following:

- **Forms:** Preparation of official forms to be used for assessments by both taxpayers and Indian governments;

- **Information:** Competent civil servants will have to be assigned to information posts so as to provide taxpayers (either actual or prospective) with complete and accurate information about the taxation by-laws, the entitlements they allow and the obligations they impose, all of which in complete confidentiality.158 This obligation will lead to the development of information circulars and interpretation bulletins159 and a continuing legal and accounting training program;160

- **Advance Rulings:** In the most complex tax cases, information provided by civil servants will not be sufficient. When the amounts of money involved in transactions are considerable, a taxpayer may wish to have an advance ruling from the tax administrative body in which it states in writing how it will interpret and apply specific provisions of existing tax law to a definite transaction that the taxpayer is contemplating.161 That is a way to reassure the prospective taxpayers and therefore encourage them to carry on business on reserves;162

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158. Canada Customs and Revenue Agency, *Declaration of Taxpayers Rights* [hereinafter “Declaration of Taxpayers Rights”].
159. Aimed at setting the position of the tax administrative body in respect of the application of taxation by-laws, in view of an uniform application.
162. An advance ruling is binding upon the tax administrative body. *Ibid.*
Tax Return Verification and Audit: A tax return verification and audit policy will have to be implemented. In smaller communities, arguably all returns may be verified. However, in larger communities, a selected number of tax returns will be verified and the administrative body will have to set forth criteria it will use to select the returns to be verified and audited.\textsuperscript{163} Rules for the selection of files to be audited should be dictated by criteria of objectivity and impartiality;\textsuperscript{164}

Investigation: In suspected tax avoidance and evasion cases, investigations will likely be necessary in order to establish whether the taxpayer has committed an offence, to determine the true tax payable, and to accumulate evidence to establish the facts.\textsuperscript{165} In this respect, the Indian tax system will have to provide agents of the Indian tax administrative body with the authority to search premises and seize records of the taxpayers under investigation;\textsuperscript{166}

Re-Assessment: After a verification, an audit and/or an investigation is performed (if necessary), if the position of the tax administrative body does not correspond to that of the taxpayer, a re-assessment will have to be prepared and sent to the taxpayer;\textsuperscript{167} and

Litigation: If the taxpayer refuses to pay the amount provided for in the re-assessment, he must have the right to

\textsuperscript{163} Taxpayers should be divided into groups (e.g.: individuals, corporations, trusts) and sub-groups (e.g.: resources corporations, service corporations), each of which should receive at least a nominal amount of audit attention. See: Canada Customs and Revenue Agency, \textit{Information Circular IC 71-14R3 “The Tax Audit”}.

\textsuperscript{164} Means of selection include:
- Audit Project: The compliance of a particular group is tested;
- Leads: Information from other files, audits, investigations and informers; and
- Secondary Files: A file may be selected for audit because of its association with another file previously audited.
This selection is greatly facilitated by the computer records of all returned files. See: \textit{Ibid}.

\textsuperscript{165} Canada Customs and Revenue Agency, \textit{Information Circular IC 73-10R3 “Tax Evasion”}.

\textsuperscript{166} \textit{Ibid.} Also see: section 231.1 and following of the \textit{Income Tax Act}, which provide agents of the Canada Customs and Revenue Agency with such powers.

\textsuperscript{167} See generally: Canada Customs and Revenue Agency, \textit{Information Circular IC 75-7R3 “Reassessment of a Return of Income”}. 

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contest the re-assessment, either before an administrative panel or before a judicial court, or both.\textsuperscript{168}

Such a process may become complex and expensive very quickly. In addition, some employees of the tax administration body will need specific search and seizure powers in order to carry out their duties, especially with respect to audits and investigations, which involve serious questions of evidence, privacy and privilege. These powers will have to be granted directly by Parliament (federal statute), and not by a band council (regulation).

(ii) Who Should Administer the Indian Tax System

This brings us to the question of who should administer an Indian tax system. In Canadian Pacific Ltd. \textit{v. Matsqui Indian Band},\textsuperscript{169} the Supreme Court of Canada commented on the current Indian taxation powers as follows:

Parliament clearly intended \textit{bands to assume control over the assessment process} on the reserves, since the entire scheme would be pointless if assessors were unable to engage in the preliminary determination of whether land should be classified as taxable [...]

[Emphasis added]

This is a clear indication of the policy that should be respected in the implementation of an Indian tax system, i.e., that the Indians themselves should control the legislative as well as the administrative levels of tax authority, at the local level. However, practically speaking, it would be a euphemism to say that administering an Indian tax system modelled on provincial powers at the local level would be a challenge. Truly, this would be a laborious, burdensome business. Indeed, the administration of an Indian income tax system alone, due to the numerous income tax planning opportunities, would be very expensive, and arguably not effective.

Nevertheless, the administration of an Indian tax system by Indians at the local level is possible and has proved to be effective in several instances if it is limited to real property taxation, which provides for fewer planning opportunities and is easier to assess due to the simplicity of the tax base. However, opting for a restric-

\textsuperscript{168} See: 3.3.2(b) and 3.3.3.
\textsuperscript{169} [1995] 1 S.C.R. 3 at 28 [hereinafter “Matsqui Indian Band”].
tive real property tax system would not amount to significant change and one should refuse to implement a system which would not provide viable solutions to funding problems, quality of public services and economic development.

In this respect, it might be possible to have a comprehensive Indian tax system, contemplating increased taxation powers, if the administration of such a system were to be provided by a central body, specialized in compliance issues and whose employees and professionals have the proper training and investigative powers to exercise their duties effectively. That might be the new Canada Customs and Revenue Agency, specialized in income and sales taxes as well as customs at a national level, which applies international standards of professionalism, and which collects federal and provincial taxes alike. Or that central body might also be a provincial or municipal tax authority specialized in real property taxation. The question of Indian involvement in the administration of their by-laws could be solved by agreements providing for the representation of Indians on the board of directors or such bodies and the involvement of Indians in the day-to-day “administrative unit” responsible for the Indian tax administration.

Another solution might be the creation of a National Indian Revenue Agency, based on the model provided by the Canadian agency. This new agency could have the duty to administer taxation by-laws of each Indian government, and could be a competent and strong counter-party when the time came for the Indian governments to negotiate the tax room and the harmonization of tax rules with federal and provincial governments. In addition, this system would respect the dictum in the Matsqui Indian Band case.

(b) Fairness

If Indian bands decide to opt for the creation of an Indian Revenue Agency, be it local, regional or national, once the effectiveness of the system will be secured, the issue of fairness will have to be addressed.

170. For example: the Canada Customs and Revenue Agency’s Board of Directors is made up of representatives from the ten Provinces. Indian representation is therefore conceivable.

171. Some forms of regional revenue agencies might also be viable solutions. For example: A “Cree Revenue Agency”.
High standards of fairness will have to be respected by both the employees of the tax administration body (responsible for audits and investigations), as well as by the administrative tribunal (the duties of which will be to revise, evaluate and amend the decisions made by the employees of the administrative body).

(i) Employees

Every taxpayer will be entitled to the benefit the law allows, which means that employees of the Indian tax administrative body will have to exercise their functions with care and professionalism. And this exercise should be based on the principles set forth by the Canada Customs and Revenue Agency in the *Declaration of Taxpayers Rights*.172

With the rights to information, confidentiality and impartiality considered above, taxpayers shall be presumed honest, unless there is evidence to the contrary. In addition, it should be the duty of the administrative body to collect only the correct amount of tax, therefore not abusing technicalities or penalties to gross up any amount. Furthermore, the administrative body should exercise its duties and its rights within a specific and fair period of time so that taxpayers are able to arrange their affairs with an accurate knowledge of their tax position at any time. Finally, applying the classic *dictum* of *I.R.C. v. Duke of Westminster*,173 the administrative body should respect the right of taxpayers to arrange their affairs to pay the least amount of tax the law allows, at the same time as it should be firm with those taxpayers who are found guilty of tax evasion.

(ii) Administrative Tribunal

Despite the application of the above-mentioned principles of fairness in tax administration, if a taxpayer receives a tax assessment, he can either decide to pay it or to challenge its legal validity. In this respect, an administrative tribunal will have to be implemented so as to provide the taxpayer with a right to appeal.174 This fundamental right is based on two grounds:175 civil

172. *Supra* note 158.
174. This obligation already exists. See: subs. 83(3) of the *Indian Act*.
serving judgment (an assessment – or re-assessment – decision is made on the strength of a civil servant’s judgment, without a hearing being provided to the taxpayer) and natural justice (natural justice rules relating to administrative process, including tax administration, provide for a right to a hearing where the person’s liberty or property rights are involved).

In this respect, any administrative body will have to respect the principles of natural justice: the promotion of aboriginal self-government or Indian emancipation should, must and does not dilute natural justice. Consequently, any Indian tax system should include a statutory right to be heard before a panel made up of independent and impartial members whose duties will be to decide the merits of the specific case as well as to set standards to be respected by civil servants.

According to the Supreme Court of Canada in Matsqui Indian Band, to assess the independence and the impartiality of an administrative tribunal, one must rely on the following rules:

To assess the impartiality of a tribunal, the appropriate frame of reference is the “state of mind” of the decision-maker. The circumstances [...] must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence in contrast extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other internal force, such as business or corporate interests or other pressure group. [Emphasis added]

We can elaborate from this statement a test that should be applied to determine whether an administrative tribunal is independent or not. This test requires freedom from interference by the executive branch of government, the legislative branch of government, business or corporate interest groups, pressure groups, or any other internal force.

Therefore, if there is interference at an institutional level from any of these groups, the tribunal is not independent and its

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176. Matsqui Indian Band, supra note 169, at 46.
177. Ibid.
decisions should not be enforceable. In the particular case of Indian tax administration, such a test has the effect of preventing a policy that would deliberately be aimed at favouring Indian taxpayers at the expense of non-Indian taxpayers. That should be regarded by non-Indians as an indication of the reliability of an Indian tax system which would have authority to tax them.

As to the independence of the members of the tribunal themselves, according to the Supreme Court, three factors should be satisfied: 178 security of tenure, 179 security of remuneration, 180 and administrative control.

Once independence is secured, one should then ask whether the institution and its members are impartial. The following test should be applied to determine whether an administrative tribunal (as institution) is impartial or not. An administrative tribunal will not be impartial when there is a reasonable apprehension of pre-conceived bias in a particular situation based on personal interests of the decision-makers. 181 Only when the test is failed can we conclude that an administrative tribunal is not impartial. In addition, one should take into account the case of R. v. Lippé, 182 where the Supreme Court of Canada established a two-step test aimed at determining the impartiality of a tribunal (be it administrative or judicial), which may also be useful. 183 Step 1: Having regard to a number of factors, including the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases? Step 2: If the answer to the first question is “no”,

178. Ibid. These factors are essential. They cannot be replaced by a simple oath of office taken by members, by which they promise to be impartial and independent in reaching their decisions. This oath of office may be taken into account when determining the overall impartiality and independence of the board, but it cannot be a substitute for the satisfaction of each of the three criteria set forth in the test.

179. The members can be removed only for cause. The cause should be subject to an independent review. And the member being removed should be afforded a full opportunity to be heard. Valente v. The Queen, [1985] 2 S.C.R. 673, at 698. In Matsqui Indian Band, the Supreme Court stated that a specified period of tenure would satisfy the security of tenure requirement; there is no requirement that the appointment be “for life”.

180. The right to salary should be established by law (as opposed to executive decisions). Ibid., at 706.

181. Matsqui Indian Band, supra note 169.


183. Ibid., at 144.
allegations of apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.

These tests show that the members of administrative tribunals can use their personal experience, knowledge and perception in order to make decisions, so long as their personal interests, are not constantly the major motivation for the decisions. This means that in the case of Indian taxation, impartial members of an administrative tribunal should not base their decisions on grounds that include the effects of their decisions on their own tax obligations.\textsuperscript{184}

This analysis leads to the question of the composition of an Indian tax administrative tribunal, and specifically the concern about the appointment of Indians and non-Indians on the tribunal. In \textit{Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)},\textsuperscript{185} the Supreme Court provided us with guidelines regarding how an administrative tribunal should be composed, so as to avoid any apprehension of bias. The criteria set forth by the Supreme Court are the following:\textsuperscript{186} administrative boards can and should reflect all aspects of society, they should include experts likely to give technical advice, they should include representatives of government, and they should include representatives of the community. The Supreme Court added:\textsuperscript{187}

\begin{quote}
There is no reason why advocates for [a particular interests group] should not, in appropriate circumstances, be members of boards. No doubt, many boards will operate more effectively with representation from all segments of society who are interested in the operations of the board.
\end{quote}

Therefore, an Indian tax administrative tribunal shall be composed of remunerated members who can be removed only for cause, and who will have to represent a fair portion of each class of the population subject to taxation (i.e., Indians and non-Indians

\textsuperscript{184} It should be mentioned that in the \textit{Matsqui Indian Band} case, the Supreme Court stated that the concern that Indian members of the board might be inclined to increase taxes in order to maximize the revenues of the band is too remote to constitute a reasonable apprehension of bias at a structural level. A personal and distinct interest on the part of the members would be needed as opposed to a more social interest.


\textsuperscript{186} \textit{Ibid.}, at 635.

\textsuperscript{187} \textit{Ibid.}

242 \hspace{1cm} \textit{Revue du Barreau/Tome 60/Automne 2000}
alike) in addition to experts and representatives of the Indian taxation authority. With such obligations, non-Indians should be satisfied with the fairness of the process. Consequently, taxation by-laws should not be considered void or inequitable for the sole reason that they apply to taxpayers who do not have a right to vote.

3.3.3 Judicial Review Process

(a) Availability

In addition to a fair administrative process specialized in Indian tax questions, a taxpayer should also have the opportunity to seek judicial review of administrative decisions, when he feels that the administrative tribunal has exceeded its competence to decide the question. Judicial review should be sought before the Federal Court of Canada, which is already competent to hear such cases in respect of the current Indian taxation powers.188

(b) Criteria

Judicial review should leave enough room for Indian control, since it is acknowledged that Indians are entitled to administer their tax system themselves (with a view to fostering Indian self-government). Factors to be considered in determining whether judicial review is appropriate include:189 convenience of the decision, alternative remedy, and nature of the error.190

In this respect, in Matsqui Indian Band,191 the Supreme Court of Canada said that the purpose of the enactment of Indian taxation powers, and moreover, the enactment of broader powers under a comprehensive Indian taxation system, should be carefully scrutinized and seriously taken into account in determining the validity of the administrative process and the availability of judicial review. The Supreme Court mentioned:192

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188. Section 24 of the Federal Court Act, R.S.C., c. F-7. Indian bands taxation by-laws have regulations status under parag. 2(1)(a) of the Interpretation Act, R.S.C., c. I-21, and therefore fall within the meaning of subs. 24(1) of the Federal Court Act.

189. Matsqui Indian Band, supra note 169, at 31.

190. An error should be patently unreasonable to open the door to judicial review.

191. Supra note 169.

192. Ibid., at 24.
The [taxation] regime [...] is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. [...] [The] underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principle of administrative law to the statutory provisions at issue here.

In deciding whether a particular administrative body has correctly exercised its jurisdiction, one must take into account the revenue-raising purpose of the by-law, and the fulfilment of its obligations as a government. Policy considerations should also be taken into consideration in determining whether a judicial review process should be undertaken according to the Supreme Court:

193

I certainly cannot say that these policy considerations are irrelevant in determining whether the appeal procedures provide an adequate alternative remedy. [...] If a factor is relevant, it should be considered.

Here, the evidence indicates that the purpose of the assessment scheme is to promote interests of aboriginal peoples and to further the aims of self-government in Canada [...] The scheme seeks to provide governmental experience to Aboriginal bands, allowing them to develop the skills which they will need for self-government.

The purpose of implementing of a comprehensive tax system includes the right for bands to develop their own administrative appeal process. That should be viewed as a fundamental element of the reform. Judicial review should be an exception so as to allow Indians and non-Indian taxpayers, sitting on an administrative panel, to reach decisions, outside legalistic constraints, in agreement with Indian principles of public policy and in accordance with the principles of natural justice. The objective is to create a flexible and efficient tax system.

CONCLUSION

If Indian self-government ought to be implemented, these new governments ought to be strong and able to provide Indians with an improved standard of living. And for a government to be strong, solid financial resources are necessary. That is why tax reform shall accompany any reform of Indian governmental institutions.

193. Ibid., at 33-34.
Taxation powers of Indian governments should be marked by flexibility. The current taxation system, restricted to real property taxation and licensing, coupled with a poor tax base, has proved to be inefficient. A flexible Indian tax system should contemplate flexibility of means (i.e., all direct taxation powers, including income taxation, sales taxation and real property taxation) as well as flexibility of resources (i.e., an efficient tax base).

Such an ambitious reform will require specific policy changes, including a tax-driven land allocation policy, a more independent legislative process, and tax co-ordination among all levels of government in Canada, to mention only a few. But the most important decision will relate to expenditure policy. Indeed, for such a reform to be valuable, expenditure policy must focus on a significant improvement of the quality of public services to be provided to Indians (and taxpayers in general), and on the implementation of an economic development agenda capitalizing on local strengths.

Taxation is both a way to buy civilization and a way to destroy individual initiative. Problems related to the tax burden and the fairness of the tax administrative process promise to be major considerations addressed in the implementation process. Otherwise, any reform will fail. An Indian tax system governed by the values of efficiency and fairness and looking forward to provide taxpayers with state-of-the-art public services, but always keeping an eye on economic development, will be a success.