

COMMENTS ON:

**“Comments Regarding: First Nation Fiscal and Statistical
Institutions Initiative by Dr. Fred Lazar”**

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First Nation have convinced the Government of Canada, building on the introduction of First Nation property taxation in 1990, to finally propose a more complete package of legislation to support First Nation property tax and borrowing regimes. In addition to converting the Indian Taxation Advisory Board to a Tax Commission, new institutions include a First Nations Finance Authority, A First Nations Financial Management Board and a First Nations Statistical Institute. This proposal has evolved over time to provide for a major First Nation role to oversee financial management, cooperative debt finance, and the publication of financial information.

The purpose of Dr. Lazar’s comments is stated in its first paragraph: **“to warn against any acceptance of this Initiative, as it stands, by the First Nations.”** This is an interesting approach given that virtually all aspects of the Initiative were proposed, discussed, and researched over the past 20 years by First Nations and it has taken over a decade by the Federal government to respond to each of their requests. The primary basis of Dr. Lazar’s critique is that the Federal government supports the Initiative for reasons that are not in the interest of First Nations; therefore, it must be inimical to the interests of First Nations. Given First Nation efforts to get the Initiatives enacted is it not possible that the institutions created are also in the best interests of First Nations. After all, the major reason for agreements of any kind is that both parties expect that the agreement benefits them; not because they have the same interests. Surely a York University business school faculty member should understand this point. In the brief comments below, I will examine each of Dr. Lazar’s critiques and explain its relevance, or lack thereof, and try to provide some insight as to why First Nations benefit from what is proposed.

Federal Government Motivation

Dr. Lazar's first section simply asserts that the Federal government wishes to avoid its fiduciary responsibilities to First Nations by devolving tax authority to them so that they can raise their own funds. In any case, the motivation of the Federal government is simply unimportant other than to try to design institutions that satisfy all parties to the negotiation. The real issue is: what is in it for First Nations since they ultimately decide to tax or not.

Property Taxation and Non-First Nation Leaseholders

One should note that Dr. Lazar never mentions that the introduction of the first major kind of taxation on reserves, **property taxation**, is levied by Band governments **only on property held by lessees who are not citizens or voters in the Band**¹. This means we need to examine two different aspects of the new institutions, the nature of property taxation, and what interest the government of Canada has in protecting non-Native citizens who have leased reserve lands directly from the Crown on the First Nation's behalf. This makes the issues of taxation a bit more complicated than Lazar's critique indicates.

¹The problem of non-First Nation taxation of leaseholds on reserves, without the accompanying provision of services by the taxing government to taxpayers, has been a major issue in British Columbia, with the first serious analysis undertaken by a tripartite committee of First Nations and the Provincial and Federal government in 1981. The situation was again documented in 1986, which supported Kamloops Chief Manny Jules' initiative to obtain property tax jurisdiction for First Nations. A summary of issues and citations to research reports is provided in Robert L. Bish, "Implementing Aboriginal Self-Government Taxation and Service Responsibility in British Columbia," Canadian Public Administration, Vol. 36, No. 3 (Fall 1996), pp. 451-460.

The best evidence we have on the incidence of property taxation is that it is capitalized into property values. In addition, evidence from third-world economic development indicates that the most important factor is the strength, fairness and stability of institutions. Complicating the need for institutional fairness and stability on reserves is that First Nations are very small governments and outsiders are likely to have difficulty understanding how property tax and other policies affect investments on any particular reserve, relative to First Nation reserves in general. Thus, all First Nations wishing to promote investment financed by non-natives must be concerned with the government policies of other First Nations. As an example, if a First Nation abandoned market value for assessing property on reserve held by non-natives and hence non-voters, it would not only reduce the value of investments on reserve held by non-citizen leaseholders, but it could result in the cancellation of major investments on other reserves and a slowing of sales of developed property on still others. The First Nation abandoning market value may have benefited because its lands are virtually all developed, but other First Nations seeking non-native investment could bear a cost. **One should not be surprised that First Nations themselves are very concerned about the property taxing policies of other First Nations and want a regulatory processes that protects them all from actions of First Nations that could destroy the value of property on their own reserves.** This security is provided for by the Tax Commission, which is a commission made up of First Nation representatives. At the same time, the Federal government could argue that it met its responsibilities to non-natives who were being taxed by First Nation governments, because the Tax Commissioners were appointed via a Federal Government process—and the non-natives did vote for their Members of Parliament. From my perspective, the First Nations come out ahead on this one².

Debt Finance

Another of Dr. Lazar's critiques concerns securitization for issuing debt. While it is clear that the Government of Canada has a fiduciary responsibility to First Nations and their members, it is not clear that the Government of Canada has any fiduciary responsibility for

²Jonathan Kesselman makes this point in "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy," *Canadian Tax Journal* (2000) v. 48, no. 5.

providing infrastructure on reserve lands to be occupied by non-natives, including corporations. In the past, it was common for First Nations to sign contracts with large developers who would install infrastructure as part of their projects, but this was viewed by many as giving up too much control to the non-native developers. Many First Nations, instead, would like to develop their own infrastructure and be more involved in leasing directly to individual residents or smaller companies—and to do this they need a source of capital which debt secured by future property tax revenues can provide.

Dr. Lazar appears ignorant of the success of the Municipal Finance Authority in achieving AAA status for its borrowing on behalf of all municipalities in British Columbia without any provincial guarantees because each member “insures” the others. Extensive research on this model and alternative capital sources for First Nations was commissioned by Westbank Band in the 1990's and the resulting proposal for the First Nations Finance Authority is a direct response to the results of that research and deliberation by First Nations; not a Federal initiative³. There may also be benefits for the Federal government if it can focus funds on the infrastructure needs of First Nation residents instead of trying to second guess economic development projects, something for which past experience with Federal efforts is not encouraging. First Nations would appear to be getting the institution they prefer and do understand its potential benefits.

During the research on First Nation debt finance, another important point was made. It is absolutely critical that the Finance authority be backed up by an efficient regulatory system for First Nation taxation and debt creation because any First Nation which created a bad reputation for First Nation taxation or defaulted on a borrowing would affect the other First Nations right in their pocketbook with a lower bond rating. The closer one looks at the institutions that are proposed the more it looks like First Nations have a much more sophisticated view of the use of property taxation and debt finance than does Dr. Lazar. Dr. Lazar's ignorance is especially obvious in his bold faced quote: **The pooling of property tax revenues, as proposed in the Initiative, would provide little comfort to the debt rating**

³Robert L. Bish, Debt Finance for First Nations, Centre for Public Sector Studies, University of Victoria, 1993, 17 pp. This study builds on previous studies sponsored by Westbank Band of capital financing issues in both the US and Canada.

agencies and the amounts involved would be unattractive to most financial institutions.

Lazar offers no support for this assertion and it is directly opposite the conclusions of both researchers and, most important, the Municipal Finance Authority of British Columbia, which is engaged in such practices and provides the administrative support for the First Nations Finance Authority⁴.

The Costs of Getting Cooperation

Another quote in Dr. Lazar's critique is equally problematical: **If there is any merit in any part of Ottawa's proposed Initiative, the First Nations can act unilaterally and independently to create what is useful and needed. They do not need to be led and controlled by the Federal Government.** In no way can these initiatives be construed as controlled and led by Ottawa. All of the initiatives were led by First Nation leaders for the benefit of First Nations. Furthermore, the First Nation leaders involved were smart enough to recognize that to get agreement of all First Nations that wanted to undertake property taxation to do it properly would have been an extremely extensive and expensive effort. Instead, they negotiated among themselves and then used opportunities available within the Canadian federal system to get their regulatory regime imposed for their collective benefit. Anyone familiar with research on the costs of getting agreement among a large number of parties must appreciate the insight of the First Nation leaders in getting taxation underway in a reasonable period of time instead of still being involved in negotiations. One can also understand regulation requiring First Nations to use property tax rates the same as neighbouring municipalities for the first three years before they developed their own budgets for assuming responsibility for service delivery to leasehold lands. This calms leaseholder concerns over transfer of taxing jurisdiction to the First Nation government and prevents a decline in leasehold property values⁵.

⁴In contrast, at the time of this research in Dr. Lazar's province of Ontario, municipal governments had no such organization, most did not have debt ratings, and were unable to enter organized capital markets. At the same time in British Columbia under the system being created in for First Nations the smallest municipality could borrow with an AAA rating just like the largest. First Nations do not want to follow Ontario's model.

⁵It was interesting to note that Squamish First Nation, which has the largest property tax base of all First Nations, delayed implementation one year after it was permitted so they could

Control Again

Dr. Lazar's final section returns to the issue of "control". Yes, there is control for the reasons expressed above. The control is by First Nation institutions with provisions that non-native (and non-voter) property owners be treated fairly and that funds raised from them be spent on services that benefit them. This is a regime designed to do as much as possible to create a property tax system that will be viewed as fair and efficient and hence contribute to willingness to invest on and thus raise the value of First Nation lands. It is clearly a tax regime that serves the needs of First Nations and seems to be understood by their leaders who promoted it.

Other Taxes

Not all taxes have the land value implications of property taxes, and each additional tax source for First Nations needs to be examined separately. For example some First Nations are moving toward the on-reserve taxation of alcohol, tobacco and gasoline who benefit from obtaining revenues from both their members and non-members purchasing on reserve⁶. This initiative is supported by Provincial and the Federal government because it closes tax holiday areas where non-natives could avoid taxation to the detriment of competing off-reserve merchants. If First Nations move toward sales or income taxation, then common administration and formula sharing with non-Native governments may be appropriate to overcome the fact that sales tax collections are extremely uneven among small governments and to facilitate tax sharing among governments when an individual resides and works within a different government. These taxes have different characteristics than property taxes and will likely need

see if any other First Nations made errors that would affect property values. They understood that the real money was in leasehold revenues and they did not want any decline in property values to be caused by their assumption of property tax jurisdiction. During their first year of taxation they had 100% collection by the due date with no negative influence on property values.

⁶The taxation of one's own members also changes the relationship between Council and members. Members appear to demand much more Council accountability when members pay taxes instead of just receive services financed by Ottawa. Allan Maslov has made this point in several publications.

different institutional agreements if First Nations desire their use. It may also be useful for First Nations to use Federal or Provincial government legislation to achieve their objectives—just as they have done with property taxation. **Current and future taxation decisions, however, need to be left to the First Nations themselves—just as the creation of the First Nation Fiscal Institution Legislation has been. Leaving decisions to First Nations does not preclude taking advantage of cooperation with other governments in the Canadian federal system.**

Economic Development

Dr. Lazar's ideal model of 600 small sovereign First Nations is not a successful recipe for economic development. There are simply too many interdependencies between First Nations and other governments and the decision-making costs of separate negotiations on each issue with each First Nation are prohibitive. First Nations should have constitutionally entrenched jurisdiction in many matters, but they can also benefit by being part of the Canadian federal system that can provide the context for institutional stability on fundamental matters that have been identified as being so important for economic development elsewhere in the world⁷. The exercise of tax jurisdiction by small governments and the creation of opportunities for debt finance are activities where cooperation is necessary and the First Nations Fiscal and Statistical Institutions Initiative is, on net, a very sophisticated movement forward in this area and one that offers substantial benefits to First Nations.

⁷Analyses supporting both constitutional entrenchment and benefits of operating within a federal system are presented in Frank Cassidy and Robert L. Bish. *Indian Government: Its Meaning in Practice*, Oolichan Books and The Institute for Research on Public Policy, 1989, 186 pp.