



Tsawwassen Treaty and Taxation Tsawwassen Indian Band

Follow the Money: Who Pays and Who Gets to Keep the Money?

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“Most taxes will be paid by non-members. In fact – for every dollar we collect from our own band members we will collect 3 more from our non-members leaseholders. This will help us deliver better programs and services and partially provide for some of our infrastructure needs.”

**Survival Guide to the Treaty
Tsawwassen Band Government**

“The income tax of any person (First Nation or non-First Nation) who resides on Treaty Settlement Lands will flow to the First Nation government no matter where they earn their income. The First Nation government will also receive 100% of the GST generated and 50% of the PST generated on Treaty Settlement Lands. And all First Nation government-run businesses will be exempt from income tax on profits earned on treaty lands.”

B.C. Treaty Commission

Executive Summary

We have repeatedly been told that after the Tsawwassen Treaty is signed, Tsawwassen Band members will finally acquire one of the responsibilities of living in this country that all the rest of us grudgingly accept - the responsibility to pay taxes to our federal and provincial governments to fund the services we receive.

But will they? Will Tsawwassen Band members start paying taxes to fund federal and provincial services like all other Canadians are required to do?

The answer is no. Tsawwassen Band members will not start paying taxes to the federal government like the rest of us. Nor was it ever intended that they would do so.

- When Tsawwassen Band members eventually pay income taxes the money will be paid to the Tsawwassen Band government to fund its activities not to the federal government to pay for federal programs and services all Canadians enjoy including Tsawwassen Band members.
- When “non-citizens” (non-Band members) who reside on the Reserve pay their income taxes the money will go to the Tsawwassen Band government to fund its activities not to the federal government.
- The Band is entitled to the GST paid by Band members and members of the public in respect of goods and services consumed on the Reserve. This makes hotels, restaurants and casinos particularly lucrative for the Band because the goods and services are consumed on the Reserve.
- The GST on goods purchased on the Reserve in retail outlets such as a Wal-Mart or Canadian Tire are considered to be used or consumed off-Reserve. Most but not all of the GST collected for such purchases will stay with the Band government.
- Most of the Band’s tax revenue will come not from Band members but from “non-citizens” living on the Reserve or members of the public who might shop at stores that locate on the Reserve.
- The “non-citizens” who live on the Reserve and pay the lion’s share of taxes will not be able to vote for or against the Band government or have any meaningful say in how their tax dollars are spent.

This Treaty is not about ensuring that Band members start paying taxes like other Canadians. The Taxation provisions of the Treaty are about the Band government getting its hands on income tax and GST revenue, most of it paid by others. This is a deal that any municipality in Canada would die for and one that Canadian taxpayers will pay for.

Will Band Members Pay Taxes? And to whom?

We have repeatedly been told that after the Tsawwassen Treaty is signed, Tsawwassen Band members will finally acquire one of the responsibilities of living in this country that all the rest of us grudgingly accept - the responsibility to pay taxes to our federal and provincial governments to fund the services we receive.

But will they?

Will Tsawwassen Band members start paying taxes to fund federal and provincial services like all other Canadians are required to do?

The answer is no. Tsawwassen Band members will not start paying taxes to the federal government like the rest of us. Nor was it ever intended that they would do so.

The Treaty and its Taxation chapter are designed, in large part, to facilitate the Band government receiving the taxes which would normally be paid to the federal and provincial governments.

The Treaty anticipates taxation agreements with the federal government on both income taxes¹ and GST and with the province on the PST (provincial sales tax) and property taxes.

The Treaty was never about Tsawwassen Band members paying taxes like the rest of us, it was about the Band government getting its hands on the taxes paid by others.

Canadians have never been given the facts on who pays taxes and who gets to keep the money.

¹ The existing federal policy and practice is to allow Bands who have entered into Treaties or Land Claims agreements to receive the income tax paid by any resident living on reserve lands, be they band members or members of the general public.

What Band Government, BC Treaty Commission, Treaty Negotiator and Indian Affairs Are Saying:

When we look at the fine print of various statements by the Tsawwassen Band government, the B.C. Treaty Commission, the Chief Federal Negotiator and the Department of Indian Affairs, it is clear that Band members may eventually pay income and sales tax, but little if any of the taxes paid will go into federal and provincial coffers to fund services to all Canadians including Tsawwassen Band members.

What the Tsawwassen Band Government is Saying:

It Will Be Painless

While the public was told that the Treaty deserved broad support because it will ensure that Band members now exempt from taxation would now pay taxes, Band members were told a different story. In the *Survival Guide*² to the Treaty, Band Members were advised that the tax money is coming to the Band government, not going to fund federal programs:

“No one likes to pay taxes. However, **it helps when you know that your taxes will be coming back to the community** to pay for such things as health care and education which will benefit the whole community.”

The point is, the money is going to the Band government, not to the federal government.

Others Will Pay

The Treaty *Survival Guide* advised Band members that most of the taxes finding their way into the Band’s coffers would be paid not by Band members but by non-citizens resident on Band land; it was not really about taxing Band members:

“**Most taxes will be paid by non-members.** In fact – for every dollar we collect from our own band members we will collect 3 more from our non-members leaseholders. This will help us deliver better programs and services and partially provide for some of our infrastructure needs.”

What the B.C. Treaty Commission Is Saying

A recent statement by the B.C. Treaty Commission had similar advice for Band members. The September 2007 Treaty Commission *Update* advised that the tax money was mostly coming in one direction, it was coming to the Band government not going to the federal government. It stated:

² The *Survival Guide* was published by the Band to inform Band members about the Treaty. See Appendix.

“The income tax of any person (First Nation or non-First Nation) who resides on Treaty Settlement Lands will flow to the First Nation government no matter where they earn their income. The First Nation government will also receive 100% of the GST generated and 50% of the PST generated on Treaty Settlement Lands. And all First Nation government-run businesses will be exempt from income tax on profits earned on treaty lands.”

With all the hype about Band members paying taxes sometime in the future, little has been said about the Band’s ability to tax members of the public who live on Band lands. The Band can receive, through arrangements with the federal and provincial governments, all or a significant portion of the property, sales tax, and income taxes paid by these non-citizens who reside on Band land, taxpayers government officials now merely refer to as “non-citizens.”³

What the Department of Indian Affairs Is Saying

The Department advises that the Treaty “contemplates” side-agreements allowing the Band government to “impose” sales and income taxes on members of the public who might reside on the Tsawwassen Reserve:

“Outside of the treaty, Canada and British Columbia are prepared to negotiate how a Tsawwassen tax could also apply to non-members within Tsawwassen Lands.” ...

“Canada has already negotiated such agreements with other First Nations in Canada. Under these agreements, Canada has vacated some of its tax room – that is, agreed not to impose a portion of its taxes – to allow the First Nation to impose sales or personal income taxes that are fully harmonized with the taxes vacated by Canada. These agreements coordinate the taxes and ensure that the tax burden on taxpayers remains the same both on and off treaty settlement lands.”

“The Final Agreement *contemplates* that the Tsawwassen government could enter such arrangements for the coordination and harmonization of its taxes. Such arrangements would allow the Tsawwassen government to implement taxation in an effective and efficient manner, while avoiding the costs associated with the design, implementation and administration of an independent tax system.”

What the Chief Treaty Negotiator Is Saying

³ See excerpt from explanation of the Chief Treaty Negotiator in Appendix. For example – “The FNGST applies to both First Nation citizens and *non-citizens* within the First Nation’s lands and replaces the federal GST within those lands. In this way, *non-citizens* are not subject to a higher tax burden than they would be otherwise...”

The Chief Federal Negotiator of the Tsawwassen Treaty advises that one of the purposes of the Taxation chapter of the Treaty is to allow the Band to enact taxes that would apply to members of the public who might reside on Reserve land:

“The *purpose* of 4a of the Tax Chapter is to enable the parties to enter into agreements in the future under which a TFN tax would apply to non-citizens. ... In addition, through the negotiation of such agreements, Canada and British Columbia can ensure that the manner in which and extent to which a TFN tax applies to non-citizens is consistent with federal and provincial interests, respectively, and only takes place in circumstances under which the interests of non-members are protected.”

The Chief Federal Negotiator goes on to say that the federal government is prepared to negotiate agreements on the GST and income tax such that would apply to members of the public who live on the Reserve:

“Under *current federal policy*, Canada is prepared to negotiate agreements of the type described in clause 4a of the Tax Chapter in respect of First Nation Goods and Services Tax (FNGST) and a First Nation Personal Income Tax (FNPIT). Under the FNGST agreements, the FNGST is levied under a First Nation law, but is identical to the federal GST and is administered by the Canada Revenue Agency. *The FNGST applies to both First Nation citizens and non-citizens within the First Nation’s lands and replaces the federal GST within those lands.*”

The Chief Federal Negotiator also notes that British Columbia would be prepared to negotiate similar tax agreements:

“Under clause 4a, British Columbia would be able to negotiate similar arrangements with TFN regarding provincial taxes, in order to meet its policy interests. British Columbia has already negotiated an agreement with TFN regarding property taxes, under which TFN property taxes would apply to both TFN citizens and non-citizens within TFN lands.”

Who pays Taxes and Who Gets To Keep the Money:

The taxation powers of the Band are found in Chapter 20 of the Treaty. Clause 1a gives the Band the power to make laws in respect of direct taxation –

“Direct taxation of Tsawwassen Members within Tsawwassen Lands in order to raise revenue for Tsawwassen First Nation Purposes.”

A direct tax is paid directly by the person or firm on which it is levied. Examples of direct taxes include personal and corporate income tax and the capital gains tax. Indirect taxes are taxes levied on expenditures, such as sales and gasoline taxes. Under the *Constitution Act, 1867* both the federal and provincial governments have the power to levy direct taxes. The provincial power to levy direct taxes is found in section 92(2) of the Constitution. The Treaty defines the Band’s direct taxation power to be the same as the provincial taxation power found in section 92(2) –

“Direct” has the same meaning, for the purposes of distinguishing between a direct tax and an indirect tax, as in class 2 of section 92 of the *Constitution Act, 1867*.”

Chapter 20 contemplates a number of taxation and fiscal agreements with the federal and provincial governments. Clause 1b of the Taxation chapter provides that the Band may make laws with respect to –

“The implementation of *any taxation agreement* entered into between Tsawwassen First Nation and Canada or British Columbia.”

It should be noted the *taxation agreements* in Clause 1b does not appear to be limited to direct taxation and therefore can include indirect taxes such sales taxes and gasoline taxes.

A number of such tax and fiscal side-agreements to the Treaty were signed by the representatives of the three governments in December 2006 when the Treaty was initialed:

- Fiscal Financing Agreement
- Own Source Revenue Agreement
- Real Property Tax Co-ordination Agreement
- Tax Treatment Agreement

Agreements on the levying and collection of GST and income taxes from non-citizens resident on band land have yet to be signed off.

The taxation by the Band of non-citizens living on Band land is the most important feature of the Taxation Chapter of the Treaty. **It is not about Band members paying taxes it is about the Band collecting taxes from others.**

While the treaty has not given the band the power in clause 4b to tax non-citizens it gives the Band the power to enter into agreements with the federal and provincial governments that would provide for such taxation and to make laws with regard to such federal and provincial taxation powers. Clause 4.b states that at the request of the Band, the federal and provincial governments may negotiate agreements in respect of:

“the extent, if any, to which the *power of Tsawwassen Government* under sub-clause 1.a *may be extended to apply to Persons, other than Tsawwassen Members*, within Tsawwassen lands;”

The Chief Federal Treaty Negotiator explains it this way –

“The **purpose** of 4a of the Tax Chapter is to enable the parties to enter into agreements in the future under which *a TFN tax would apply to non-citizens.*”

Income Taxes

Section 16.b of the Treaty removes the taxation exemption under section 87 of the Indian Act with regard to income taxes. The exemption would be removed 12 years after the treaty becomes law such that band members would become taxable.

Some interpret the removal of the income tax exemption to mean that Tsawwassen Band members will start paying income taxes to the federal government to fund services received by all Canadians, including Tsawwassen Band members. That would be a misreading of both the intent of the Treaty and the intent of existing federal law and policy.

According to the Chief Federal Treaty Negotiator the federal government is prepared to allow the band to enact income tax laws that would apply to both Band members and non-Band members living on reserve lands such that the Band would levy the income tax and get the money:

“Under the current federal policy, Canada is prepared to negotiate agreements of the type described in clause 4.a of the Tax Chapter in respect of ... a First Nation personal income tax.”

Under such agreements the federal government would return to the band government income taxes collected from Band members and all or virtually all of the income tax paid by non-Band members living on Band lands. Income tax would be paid to the Canada Revenue Agency just as all other Canadians do. **The fundamental difference is that income tax collected from all such residents living on Band land, be they Band Members or non-citizens, will be returned to the Band government.**

That is a whole lot different that paying federal taxes to fund government services for all Canadians.

Sales Taxes

Clause 16.a of the Treaty removes the taxation exemption under section 87 of the *Indian Act* with regard to what the Treaty calls Transaction Taxes. The Treaty defines a Transaction Tax to include a tax imposed under the B.C. Motor Fuel Tax Act, B.C. Social Service Tax Act, the BC Tobacco Tax Act, B.C. Property Transfer Tax Act, B.C. Hotel Tax Act, the B.C. Insurance Premium Tax Act and the federal Excise Tax Act.

The transaction tax exemption would be removed 8 years after the treaty becomes law and Band members would begin to pay these taxes. It is assumed that taxes collected by the Canada Revenue Agency, the federal tax man, would be largely turned over to the Band government to spend in anyway they see fit.

There are already a number of First Nation Goods and Services Tax Agreements now in operation⁴ that allow Indian Bands to have their own GST.

This tax is collected by the Canadian Revenue Agency in the same manner as it collects the GST except that it turns over to the Band government all or a significant part of the GST paid by Band members and non-Band members resident on Band lands. This can include the GST collected at big-box stores such as Canadian Tire or Wal-Mart located on Band land that is frequented by members of the public who are not Band members and who do not live on band lands.

The Chief Federal Treaty Negotiator describes the First Nations Goods and Service Tax (FNGST) in the following manner:

“Under the FNGST agreements, the FNGST is levied under a First Nation law, but is identical to the federal GST and is administered by the Canada Revenue Agency. **The FNGST applies to both First Nation citizens and non-citizens within the First Nation’s lands and replaces the federal GST within those lands.**”

Under these agreements, Bands are entitled to receive an estimate of the FNGST and GST paid by both “First Nation citizens” and “non-citizens” in respect to goods and services consumed on Band lands. This makes hotels, restaurants and casinos particularly lucrative for the Band because the service is consumed on the Reserve. Goods like gasoline and cigarettes are treated as if they are consumed on the Reserve. The GST on goods purchased by members of the public at a Wal-Mart are used or consumed off-Reserve and come under a different tax remission formula that is slightly less advantageous to the Band than for services consumed on the Reserve.

⁴ See Library of Parliament review of this matter. It can be found in the Appendix.

Property Taxes

The Band will have the authority to levy property taxes on residents who are band members. The Treaty anticipates and provides for the Band to levy property taxes on non-citizens resident on Band lands. Taxation of real property situated on band lands owned by non-citizens is detailed in the Real Property Tax Co-ordination Agreement. The B.C. Treaty First Nation Taxation Act enacts this agreement.

The Taxation *Summary* issued jointly by the federal and provincial governments and the Band states:

“Under a non-treaty agreement with British Columbia, the Tsawwassen government will collect all real property taxes applicable to both Tsawwassen members and non-member residents on Tsawwassen Lands.”

“The Tsawwassen government will be responsible for providing local services to all residents on Tsawwassen Lands.”

The current pre-Treaty property tax situation on the reserve is instructive. Delta residents pay property taxes that can be broken down roughly equally into three parts – municipal services, schools, and a Metro Vancouver levy for such things as parks and transportation. Presently non-Band members resident on the reserve pay the municipal services portion of the property tax to Delta. They pay a second tax roughly equal to the school and GVRD portion of the property tax to the Band government. The province compensates the school board for the school and Metro-Vancouver taxes the Band keeps.

Accountability

The Department of Indian Affairs claims that the taxation power will make Band government accountable for the money it raises through taxation and the money it spends:

“The power to tax is a basic feature of governments. Not only does it provide financial resources to deliver various programs and services, it also serves as a means of the government’s accountability.”

That should be true but it is not true for the Tsawwassen government. Taxation will not make for a democratically accountable government because those who pay the vast majority of the taxes cannot vote for or against the government levying the taxes or spending the tax money.

According to Indian Affairs there are 163⁵ Band members resident on the Reserve. In addition there are at least another 500 residents who are not Band members but who will also see their income taxes end up in the hands of the Band government.

Thus the majority of those who live on the reserve are not Band members. They will pay the greatest share of the taxes. They will receive few if any services from the Band government and cannot participate in that government in any meaningful way. They will be a cash cow for the Band government. No accountability there.

⁵ The Department of Indian Affairs maintains a registry of the Band population. It is published on the Department’s website and updated regularly. For March 2007 the registered population on Reserve is 163 persons.

Non-Member Representation

The Department of Indian Affairs would have us believe that members of the public who reside on the reserve and who pay property, income and GST taxes for fund the Band government will have some role in regard to these taxation matters.

The Treaty does not provide any such protection for the members of the public who reside on Band lands yet the Department of Indian Affairs seems to claim otherwise.

Here is what the Department claims:

“There will be non-member representation on any Tsawwassen First Nation public institution that makes decisions relating to taxation matters that directly and significantly affect non-members.”

They do not explain what they mean. An explanation could only embarrass those who would give it.

The Department then goes on to claim that “non-members will have the same rights of appeal as members.” Right to appeal what?

The real issue is that it is an unelected and unrepresentative government that will tax members of the public and spend their tax money not on the tax payers who pay the taxes but on others who happen to be Band members and run the Band government. When those who pay the taxes cannot vote the government in or out, the government cannot ever be said to be a democratically elected government.

It is the worst kind of taxation without representation and flies in the face of our most fundamental democratic values as Canadians.

Appendix A

Excerpt from the **Survival Guide⁶ to the Tsawwassen First Nation Agreement 2007**

Indian Status

First and foremost, you will still have your status card (if you have one now). However, the tax exemption will be phased out over time.

Medical and Dental Benefits

Under the treaty, Tsawwassen members will still have medical and dental benefits as provided by Canada. ...

Taxation, Financial Benefits

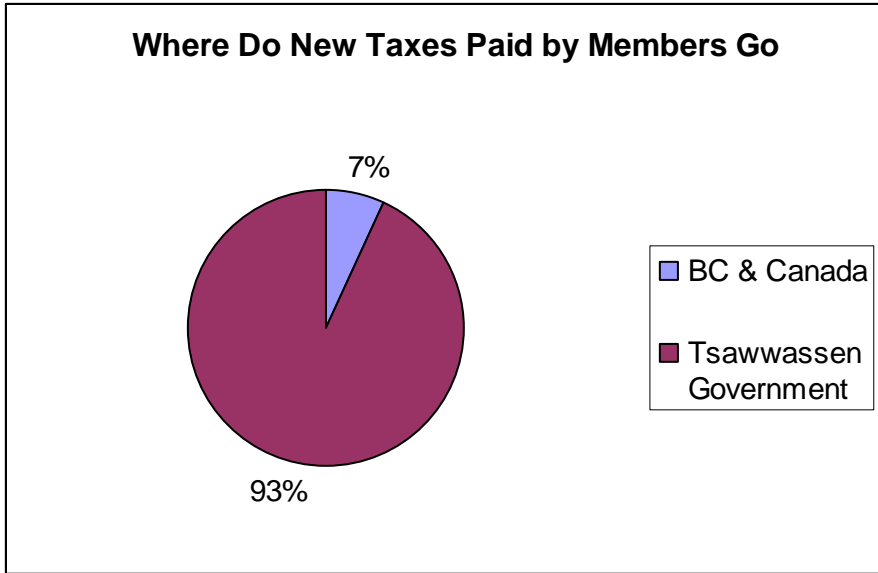
... The TFN government will continue to have direct taxation powers and will charge taxes on its members living on treaty lands at the end of the exemption periods. TFN will also tax non-members living on treaty lands.

The payment of sales taxes will be phased out over eight years and the phasing out of income and property taxes will be over a 12-year period following the implementation of the treaty.

No one likes to pay taxes. However, it helps when you know that your taxes will be coming back to the community to pay for such things as health care and education which will benefit the whole community.

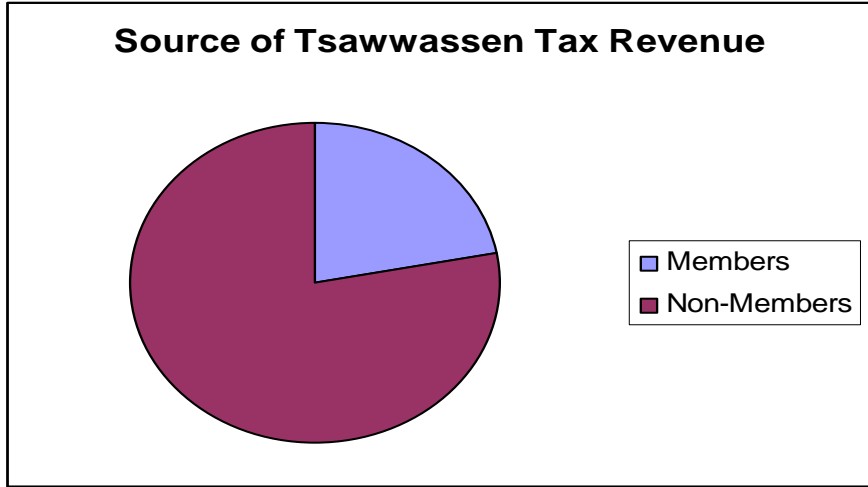
Most New Taxes Paid by Members Remain in Tsawwassen Community

⁶ Distributed by the Band to Band Members prior to the Band Referendum on the Treaty



Tax revenues provide a wide range of benefits to Tsawwassen. TFN government will do whatever it can to offset any tax impacts to TFN members.

Vast Majority of Tsawwassen Taxes Paid by Non-Members



Currently tax revenues would provide Tsawwassen \$2 million in annual revenues. Most taxes will be paid by non-members. In fact – for every dollar we collect from our own members we will collect 3 more from our non-member leaseholders. The revenue will help us deliver better programs and services and partially provide for some of our infrastructure needs.

Appendix B

Excerpt from the **The BC Treaty Process⁷** **Tsawwassen Final Agreement**

Taxation Powers of Tsawwassen First Nation

The power to tax is a basic feature of governments. Not only does it provide financial resources to deliver various programs and services, it also serves as a means of the government's accountability.

In the context of treaty negotiations, the Tsawwassen First Nation government will have the ability to levy direct taxes on its members within treaty settlement lands, known as Tsawwassen Lands. Outside of the treaty, Canada and British Columbia are prepared to negotiate how a Tsawwassen tax could also apply to non-members within Tsawwassen Lands. ...

Canada has already negotiated such agreements with other First Nations in Canada. Under these agreements, Canada has vacated some of its tax room – that is, agreed not to impose a portion of its taxes – to allow the First Nation to impose taxes or personal income taxes that are fully harmonized with the taxes vacated by Canada. These agreements coordinate the taxes and ensure that the tax burden on taxpayers remains the same both on and off treaty settlement lands.

The Final Agreement contemplates that the Tsawwassen government could enter such arrangements for the coordination and harmonization of its taxes. Such arrangements would allow the Tsawwassen government to implement taxation in an effective and efficient manner, while avoiding the costs associated with the design, implementation and administration of an independent tax system.

Real Property Taxes

Under a non-treaty agreement with British Columbia, the Tsawwassen government will collect all real taxes applicable to both Tsawwassen members and non-members resident on Tsawwassen Lands. ... The Tsawwassen government will be responsible for providing local services to all residents on Tsawwassen Lands.

Tax Treatment of Tsawwassen Members

Under the *Indian Act*, status Indians are eligible for a tax exemption in respect of property (including income) situated on a reserve. As the relationship between the federal and provincial governments and Tsawwassen is defined and the *Indian Act* ceases to apply after the effective date of the treaty, the tax exemption under the *Indian Act* ceases to apply after the effective date of the treaty, the tax exemption under the *Indian Act* will also cease to apply following a transition period.

⁷ From Department of Indian Affairs website, also published separately as summary sheet entitled Taxation.

The tax exemption will be phased out after eight years for transaction (e.g. sales) taxes and 12 years for all other taxes, including income taxes, to allow affected individuals to prepare and adapt to the change in their taxable status.

Non-Member Representation

Here will be non-members representation on any Tsawwassen First Nation public institution that makes decisions relating to taxation matters that directly and significantly affect non-members. The non-member representative will be selected by non-members and will have the ability to participate in discussions and vote on taxation matters that directly and significantly affect non-members. Non-members will have the same rights of appeal as members.

Appendix C

Excerpt from
*September 2007 Treaty Commission Update*⁸

Commonly Asked Questions about Life after Treaty

What about taxes?

The tax exemption under the **Indian Act** will continue to apply for a specified period of time after the effective date of a treaty, for example 8 years for the sales tax exemption and 12 years for the sales tax exemption. Then all treaty First Nation members will pay taxes. How those taxes apply and where income tax flows will depend on where a person resides and works.

For example, the income tax of any person (First Nation or non-First Nation) who resides on Treaty Settlement Lands will flow to the First Nation government no matter where they earn their income. The First Nation government will also receive 100% of the GST generated and 50% of the PST generated on Treaty Settlement Lands. And all First Nation government-run businesses will be exempt from income tax on profits earned on treaty lands.

⁸ *Treaty Commission Update* is published by the B.C. Treaty Commission

Appendix D –

Excerpt of Explanation from Chief Federal Treaty Negotiator, Tim Koepke⁹

Regarding clause 4a:

The Final Agreement provides with TFN with the power to levy direct taxes over its citizens within its lands. The Agreement does not provide TFN with the power to tax persons other than its citizens. **The purpose of 4a of the Tax Chapter is to enable the parties to enter into agreements in the future under which a TFN tax would apply to non-citizens.** By providing that the parties “may” negotiate such agreements, rather than “shall” negotiate, Canada and British Columbia retain the flexibility to determine whether it is in their respective interests to pursue this type of agreement. In addition, through the negotiation of such agreements, Canada and British Columbia can ensure that the manner in which and extent to which a TFN tax applies to non-citizens is consistent with federal and provincial interests, respectively, and only takes place in circumstances under which the interests of non-members are protected.

Under current federal policy, Canada is prepared to negotiate agreements of the type described in clause 4a of the Tax Chapter in respect of First Nation Goods and Services Tax (FNGST) and a First Nation Personal Income Tax (FNPIT). Under the FNGST agreements, the FNGST is levied under a First Nation law, but is identical to the federal GST and is administered by the Canada Revenue Agency. The FNGST applies to both First Nation citizens and non-citizens within the First Nation’s lands and replaces the federal GST within those lands. In this way, non-citizens are not subject to a higher tax burden than they would be otherwise and are not required to adapt to any new forms, appeal processes, or other procedures. In addition, the agreements include a mechanism to limit the amount of revenues that flow to the First Nation in circumstances in which there is a high level of consumption by non-citizens within the First Nation lands and can be terminated at any time by either party with notice. These agreements, which are authorized by the federal First Nations Goods and Services Act, as well as the similar FNPIT agreements, extend the First Nation’s power to tax with respect to a specific tax only, and subject to specific terms and conditions, and, in this way, enable the First Nation to access tax revenues while protecting federal interests.

Under clause 4a, British Columbia would be able to negotiate similar arrangements with TFN regarding provincial taxes, in order to meet its policy interests. British Columbia has already negotiated an agreement with TFN regarding property taxes, under which TFN property taxes would apply to both TFN citizens and non-citizens within TFN lands. The TFN Government is in turn responsible for providing local services to all the residents on TFN Lands. TFN currently has this property tax collection power through the Indian Act and has been exercising it, so post-treaty it is really the status quo continued.

⁹ Response to Question on Taxation from the Chief Federal Negotiator, dated October 24, 2007

Appendix E

Library of Parliament Paper – Tsawwassen Final Agreement and Taxation

NOTES ON THE TSAWWASSEN FINAL AGREEMENT AND TAXATION

This paper answers a series of questions related to taxation powers under the Tsawwassen First Nation Final Agreement and its associated documents.

BACKGROUND

The Tsawwassen First Nation Final Agreement (Final Agreement) is a tripartite agreement between the Tsawwassen First Nation, Canada, and British Columbia that covers broad areas of self-governance, including taxation. The Tsawwassen First Nation (TFN) voted on the Final Agreement on July 25, 2007 and 69.5% voted in favour of the agreement.⁽¹⁰⁾ The *Final Agreement* must be approved by both the B.C. and federal legislatures. Currently, a provincial bill enacting the *Final Agreement* (Bill 40) is being debated in the B.C. legislature.⁽¹¹⁾

The taxation powers of the TFN are found in chapter 20 of the *Final Agreement*. Chapter 20 contemplates a Tax Treatment Agreement (TTA) between the TFN, Canada and British Columbia.⁽¹²⁾ The TTA has been recently signed by the mentioned parties. This agreement applies exclusively to the tax treatment of TFN members. Taxation of real property situated on TFN lands owned by non-TFN members is detailed in the Real Property Tax Co-ordination Agreement (RPTCA).⁽¹³⁾ A Bill enacting this agreement (Bill 42) is currently being debated in the B.C. legislature.⁽¹⁴⁾ Agreements and laws regarding sales and income taxes of non-TFN members could not be found. Finally, the amount of tax revenue collected by the TFN from the taxation of TFN and non-TFN members is used in determining the level of

⁽¹⁰⁾ See <http://www.gov.bc.ca/arr/firstnation/tsawwassen/default.html#aip> and for a copy of the *Final Agreement* see http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf.

⁽¹¹⁾ See http://www.leg.bc.ca/38th3rd/1st_read/gov40/gov40-1.htm.

⁽¹²⁾ See http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/tax_treatment_agreement.pdf.

⁽¹³⁾ See http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/real_property_tax_coordination_agreement_2.pdf.

⁽¹⁴⁾ See http://www.leg.bc.ca/38th3rd/1st_read/gov42-1.htm.

financial support for the TFN as provided by the tripartite Fiscal Financing Agreement between the TFN, Canada and British Columbia.⁽¹⁵⁾

1. Can the Tsawwassen Band makes laws to imprison non-Tsawwassen Band Members who do not pay property, sales or income taxes to the Tsawwassen?

Chapter 20 of the *Final Agreement* states that a Tsawwassen law with respect to taxation may provide for a term of imprisonment that is greater than 6 months.⁽¹⁶⁾ This penalty may apply to the non-payment of property, sales or income taxes and could apply to both TFN and non-TFN members depending on the specific taxation agreement and the specific taxation law. Before implementation of a taxation law specifying imprisonment, a taxation agreement must be agreed upon by the TFN and Canada or British Columbia or both. After this process is completed taxation laws are published by the TFN in the First Nations Gazette.⁽¹⁷⁾

The current *RPTCA* applies to non-TFN members who are registered owners of real property on Tsawwassen Lands or who are ordinarily resident on Tsawwassen Lands.⁽¹⁸⁾ Since Tsawwassen Real Property Taxation Laws for the application of the *RPTCA* could not be found it is unclear whether the non-payment of property tax or other types of offending behaviour will lead to imprisonment.⁽¹⁹⁾

Agreements and laws regarding the collection of sales tax by the TFN could not be found. Administration agreements between the TFN and the Federal Government regarding a GST-like tax, or with the Provincial Government regarding a PST-like tax, could also not be found.⁽²⁰⁾ Thus, it is uncertain whether the non-payment of sales tax by non-TFN members could lead to imprisonment. The non-payment of federal GST could result in imprisonment for a term not exceeding six months.⁽²¹⁾

⁽¹⁵⁾ See http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/fiscal_financing_agreement2.pdf.

⁽¹⁶⁾ See Chapter 20, Clause 6 and see Chapter 16, Clause 135 of the *Final Agreement*.

⁽¹⁷⁾ See note 5.

⁽¹⁸⁾ See Section 1.2 “Non-member” of the *RPTCA*.

⁽¹⁹⁾ See the First Nations Tax Commission at <http://www.fntc.ca/>. The Sample Property Tax Law does not contain imprisonment penalties for non-payment see http://fntc.ca/media/sample_property_taxation_law_september_2007.pdf.

⁽²⁰⁾ Based on information provided by Finance Canada, no such material is publicly available.

⁽²¹⁾ *Excise Tax Act*, R.S.C. 1985, c. E-15 at section 329.

Similarly, agreements and laws regarding the collection of income tax by the TFN could not be found. Thus, it is uncertain whether the non-payment of income tax by non-TFN members could lead to imprisonment. For federal income tax, the failure to file an income tax return with the Canada Revenue Agency (CRA) could result in imprisonment for a term not exceeding twelve months.⁽²²⁾ As well, the filing of a false or deceptive return could result in imprisonment for a term not exceeding two years.⁽²³⁾

2. Could non-Tsawwassen Band members be required to file an income tax return with the Tsawwassen Band?

The application of tax administration agreements between First Nations and Canada provides for CRA to administer the collection of income tax from non-First Nations members in a similar fashion as the collection from other persons earning taxable income in Canada. The Nunatsiavut and Yukon First Nations currently have a personal income tax administration and tax sharing agreement with the Government of Canada for this arrangement.⁽²⁴⁾ Under this agreement, the CRA remits income tax revenue back to Nunatsiavut or Yukon First Nations based on the residency designation of persons residing on First Nation lands at the time of the filing of their income tax return with the CRA.

3. If a corporation establishes an office on Tsawwassen lands what taxes could be collected by the Tsawwassen from the corporation?

The *RPTCA* states that the Tsawwassen Government may make real property taxation laws in respect of “Persons” other than Tsawwassen Members, on Tsawwassen lands.⁽²⁵⁾ “Persons” is not defined in the agreement and may or may not include corporations. According to the *Income Tax Act*, “person” includes corporations.⁽²⁶⁾ Thus, the *RPTCA* may apply to non-TFN member corporations and Non-TFN member Corporations residing on TFN lands may be liable for property tax. Specific property tax laws enacted by the TFN could not be found, as

⁽²²⁾ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) at section 238(1).

⁽²³⁾ See note 13 at section 239(1).

⁽²⁴⁾ See <http://www.cra-arc.gc.ca/E/pub/ts/06-111/06-111-e.txt> and see <http://www.cra-arc.gc.ca/E/pbg/tf/5011-c1/5011-c1-06e.pdf>.

⁽²⁵⁾ See note 4 at section 2.5.

⁽²⁶⁾ See note 13 at section 250(4).

stated above. Corporations residing on TFN lands may also be liable for First Nations goods and services tax (FNGST), although agreements between the Federal Government and the TFN could not be found other First Nations have agreements for the remittance of tax revenue collected as a FNGST from the CRA. Corporations residing on TFN lands may be liable for income tax once Income Tax Administration Agreements are completed between the TFN and the Federal Government.

4. Would income arising from operations off the Tsawwassen lands, but paid to the corporate head office on the reserve, thus earned on the reserve, be subject to Tsawwassen taxation, rather than federal or provincial taxation?

Taxation of income earned outside of Canada is governed by international tax treaties between Canada and foreign nations, and the *Income Tax Act* and is based on the residency of the corporation. Residency determination under the *Income Tax Act* is complex and requires interpretation of the definition of residency in both the *Income Tax Act*⁽²⁷⁾ and in international tax treaties. Corporations that are deemed resident in Canada are liable for tax on their worldwide income, subject to tax relief by tax treaties for certain forms of income. The taxation of income earned off of TFN lands of a corporation resident on TFN lands requires an interpretation of TFN income tax laws and the income tax agreements between the TFN and Canada and between the TFN and British Columbia. These agreements have not yet been completed, making it difficult to determine the tax treatment of income earned by a corporation resident on TFN lands.

5. Can the Band government level property, sales and income taxes under clause 4a on non-band members?

The *Final Agreement* provides for the collection of tax from non-TFN members through taxation administration agreements between the TFN, Canada and British Columbia. This taxation power is specifically mentioned in clause 4(a) and (b) of the *Final Agreement* where it states that taxation powers of non-TFN will be coordinated with existing federal and provincial tax system.⁽²⁸⁾ Generally, the most common form of non-First Nation taxation is sales

⁽²⁷⁾ See note 17.

⁽²⁸⁾ See Chapter 20 clause 4(b) of the *Final Agreement*.

tax similar to a GST-like tax as provided by the federal *First Nations Goods and Services Tax Act*.⁽²⁹⁾ The general operation of these agreements results in GST being paid by businesses and consumers to the Federal Government with remittances to the First Nation based on a mathematical formula of business activity on, or related to, First Nation lands.

The TFN legislative approval process for real property taxation laws (RPTCA) provides for representation by non-TFN members.⁽³⁰⁾ Thus, the imposition of property tax on non-TFN members requires input from non-TFN members. Similar representation from non-TFN members for sales and income tax laws cannot be determined due to the lack of specific agreements and laws.

6. Provide an example of agreements such as those listed in the following and how they operate?

Canada has entered into tax administration agreements in respect of a First Nations Goods and Services Tax (FNGST) with the following First Nations:

- Champagne and Aishihik First Nation (Yukon)
- Teslin Tlingit Council (Yukon)
- First Nation of Nacho Nyak Dun (Yukon)
- Vuntut Gwitchin First Nation (Yukon)
- Little Salmon/Carmacks First Nation (Yukon)
- Selkirk First Nation (Yukon)
- Trondek Hwechin First Nation (Yukon)
- Taan Kwatchan First Nation (Yukon)
- Kluane First Nation (Yukon)
- Kwanlin Dun First Nation (Yukon)
- Tlicho (Northwest Territories)
- Nunatsiavut (Newfoundland and Labrador)
- Tsawout First Nation (British Columbia)

⁽²⁹⁾ S.C. 2003, c. 15, s. 67 and for an overview of the collection of First Nations GST see <http://www.cra-arc.gc.ca/E/pub/tg/rc4365/rc4365-e.html>.

⁽³⁰⁾ See note 4 at clauses 2.5 to 2.8.

Under the FNGST agreements, the FNGST is levied under a First Nation law, but is fully harmonized with the federal Goods and Services Tax (GST) and is administered by the Canada Revenue Agency. The FNGST applies to both First Nation citizens and non-citizens within the First Nation's lands and replaces the federal GST within those lands. The FNGST is administered in a way that does not increase the administrative burden for taxpayers or suppliers. Under the agreements, the First Nation is entitled to receive an estimate of the FNGST and GST paid by both First Nation citizens and non-citizens in respect of goods and services consumed within the First Nation's lands, subject to a revenue sharing mechanism which limits the First Nation's revenues where there is a relatively high level of consumption by non-citizens within the First Nation's lands. The agreements may be terminated by either party subject to a notice period.

Canada has entered into tax administration agreements in respect of personal income tax with the following First Nations:

- Champagne and Aishihik First Nation (Yukon)
- Teslin Tlingit Council (Yukon)
- First Nation of Nacho Nyak Dun (Yukon)
- Vuntut Gwitchin First Nation (Yukon)
- Little Salmon/Carmacks First Nation (Yukon)
- Selkirk First Nation (Yukon)
- Trondek Hwechin First Nation (Yukon)
- Taan Kwatchan First Nation (Yukon)
- Kluane First Nation (Yukon)
- Kwanlin Dun First Nation (Yukon)
- Tliche (Northwest Territories)
- Nunatsiavut (Newfoundland and Labrador)

Under the tax administration agreements in respect of personal income tax, the First Nation levies a personal income tax within its lands under a First Nation law. The First Nation personal income tax is roughly equal to 95% of federal income tax otherwise payable (except in the Yukon, where the percentage is 75% for the first ten years of the agreements, and

95% thereafter) and applies to both First Nation citizens and non-citizens resident on the First Nation's lands. Canada provides a credit for the purposes of federal personal income tax equal to the First Nation personal income tax paid, so that the total income tax burden for individuals subject to the First Nation personal income tax is the same as for other individuals in the province or territory. The First Nation personal income tax is administered by the Canada Revenue Agency, and the only additional administrative burden for individuals subject to the tax is that they must check a box on their federal income tax return to indicate their residence on the First Nation's lands. Current federal policy relating to the negotiation of tax administration agreements in respect of personal income tax includes a revenue sharing mechanism to limit the First Nation's revenues under the agreements where there is a relative large number of non-citizens resident on the First Nation's lands. The agreements may be terminated by either party subject to a notice period.

Appendix F

Media Reports on Bands Making Use of GST as A Revenue Source

Band sees GST as path to self-sufficiency

Shannon Moneo. *The Globe and Mail*. Toronto, Ont.: Feb 1, 2007. pg. S.1

Full Text (1044 words)

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The first Indian band in a Canadian province to receive GST revenue wants its \$130,000 monthly cheque to balloon, so the Tsawout First Nation has put out the welcome mat for tax-generating businesses.

Negotiations with big-box stores Costco and Wal-Mart have Tsawout Chief Allan Claxton feeling bullish.

He expects a deal to be struck with one of them some time this year.

"The developers are always knocking on our doors because of our prime land," the 53-year-old chief said.

He foresees a big box anchoring a mall that would draw both native and non-native spenders who would generate revenue to fuel the Tsawout's plans for growth.

On Tsawout territory, the GST is called the First Nations Goods and Services Tax (FNGST). Paid by everyone, including status Indians, the FNGST is set at 6 per cent, a percentage the band cannot raise or lower.

The 240-hectare Tsawout reserve on the busy Pat Bay Highway is 15 minutes north of downtown Victoria. Victoria International Airport is minutes away from the reserve and the B.C. ferry terminal is a 10-minute drive north.

It's a great location for commercial business, Mr. Claxton believes. Another plus is that it's next to the Municipality of Central Saanich, two-thirds of which is protected by the Agricultural Land Reserve.

Central Saanich Mayor Jack Mar, 66, a farmer for 46 years, said very few hectares are left for large developments.

Costco approached Central Saanich about two years ago. But strong public opposition and the municipality's rural-focused community plan shut the lid on the big box.

"Everything's working in our favour," Mr. Claxton said.

Costco's vice-president of corporate affairs, Ron Damiani, said the company doesn't comment on proposed locations.

He said 250,000 people are needed to support a store. The Victoria area has about 360,000 residents who can shop at the suburban Langford Costco.

If development unfolds as predicted, Mr. Claxton said that his band will need to buy more land. The band has been eyeing the 305-hectare Vantreight Farms, North America's second largest daffodil grower.

Land purchases will be financed with FNGST funds.

"As long as the government has the GST, we'll keep getting it," Mr. Claxton said. "It's money that stays in the community. Positive things come from it. Otherwise, it goes to Ottawa into a big, black hole."

Canada's first FNGST agreement was finalized in 2004 with a Yukon band. Later this year, native communities in Eastern Canada and Yukon should have agreements. And four more B.C. bands have expressed interest in the FNGST, according to the Department of Finance.

Under the agreements, the bands agree to give up their GST-free status in exchange for a share of the revenue.

Mr. Claxton and his six-person council signed their agreement with Ottawa after two years of negotiation.

The idea to tap into the GST was introduced to him in 1997 when he met progressive bands that were seeking ways to generate revenue. Financial self-sufficiency makes it easier for bands to opt out of the federal Indian Act and run their reserves like a municipality without federal input.

Mr. Claxton says self-government will allow the band to create more jobs and reduce dependency.

"We know our needs. We want to get off welfare. Welfare was never something our people believed in," said the chief, who in previous careers managed a grocery store in nearby Sidney, and worked as a long-term-care nurse.

Later this year, he intends to hold a vote to ask Tsawout members if they want to extricate themselves from the Indian Act. The FNGST and the promise of more development provides leverage, he believes.

For the 2005-06 fiscal year, the Tsawout received \$3.2-million in federal funds.

Several non-Tsawout businesses -- including motels, gas stations, restaurants and offices -- continue to send their collected FNGST to the Canada Revenue Agency.

The Department of Finance determines how much is returned to the Tsawout.

Based on an estimate of the net GST collected in B.C. for one year, the government calculates the Tsawout's share of the FNGST using a formula based on the number of band members aged 15 and up, and their income.

The band has about 500 members living on the urban reserve, at least 60 per cent of them under the age of 30.

About 1,500 non-natives also live on the reserve, lease land and pay property taxes. They also figure into FNGST calculations.

If new businesses materialize, the FNGST returned to the Tsawout will increase. But the estimated value of the goods and services tax paid by the Tsawout when they are away from the reserve is deducted from that.

The end result of the formula is that the net FNGST returned to the Tsawout will be lower than the total collected by FNGST-paying businesses on the reserve.

The 130-seat White Spot family restaurant pays about \$8,000 a month to lease property on the reserve.

A manager wasn't aware that some of the roughly \$10,000 per month of FNGST collected at the eatery will go back to the Tsawout.

"I didn't know they could do that," said Jenny Paiva, 28. "Sometimes it seems like they benefit more. When does it stop? When will everyone be equal?"

However, Sandy Mackay, the manager of the 51-unit Super 8 Motel, was aware of the new regime. Procedurally, nothing has changed for her.

"They [the federal government] still grab our taxes by the 15th of each month," said Ms. Mackay, 56.

She thinks it's wonderful that the Tsawout are receiving tax money.

"If the money goes to the right hands and they do as they say, hats off to them."

Mr. Claxton has plans.

The priority is a \$5-million sports facility for Tsawout youth. Work will begin this spring on a gym/community hall, state-of-the-art lacrosse box and year-round soccer field.

The FNGST revenue may also be used to subsidize postsecondary education for band members.

And the Tsawout's two-year-old health and community-care centre will benefit.

The FNGST will also fund research and lawyers for the Tsawout's bid to prove that their traditional lands were taken and should be returned.

"There's a lot of work that's got to be done," said the chief, who became a grandfather six months ago. A FNGST-financed legacy is his hope for his grandson.

Credit: SPECIAL TO THE GLOBE AND MAIL

First Nations tax replaces GST on Tsawout land

Peninsula News Review. Sidney, B.C.: Oct 4, 2006. pg. 3

Full Text (437 words)

(Copyright (c) 2006 Black Press Group Ltd.)

People purchasing items on the Tsawout First Nation reserve will no longer pay GST to the federal government, instead, they will pay First Nations goods and services tax [FNGST] that will go directly to the band.

"Tsawout First Nation is the first Band south of 60 to assert tax jurisdiction over all goods and services sold on its lands. I'm proud of our efforts to develop a new fiscal relationship with Canada that will help us support a strong community. Revenues from the Tsawout FNGST will benefit our community and the local economy," said Tsawout First Nation Chief Allan Claxton.

Tsawout territory covers 650 acres in Central Saanich in the area of Mount Newton X Road and Highway 17. Some of the businesses on Tsawout land include the Esso service station, McDonald's restaurant, the Super 8 Motel, the Western 66 Motel and the White Spot restaurant.

The new tax took effect October 1 and everyone who buys goods or services on the Tsawout First Nation reserve will now be subject to the Tsawout FNGST. The Tsawout FNGST replaces the GST on goods and services previously subject to GST.

"We're very proud to be able to do this. It's very positive to implement our own Tsawout tax," said Claxton. "It should bring in about \$1.3 million a year and to ease the pressure off our members we have a rebate policy." Each of the 500 members of the Tsawout, living both on and off reserve, will receive approximately \$500 a year from the FNGST.

The First Nations goods and services tax is a six per cent tax on taxable supplies of goods and services on some First Nations lands. The tax applies when a band council of a First Nation passes its own law imposing FNGST. The Canada Revenue Agency administers FNGST on behalf of the First Nation.

The FNGST has the same basic operating rules as the goods and services tax/harmonized sales tax (GST/HST). The same goods and services taxable under the GST/HST are taxable under the FNGST.

"Our first goal is to complete our Health Centre," said Claxton. "We also want to look at Douglas Treaty implementation. There are so many needs down here that we have to prioritize - those two needs, with our health facility are on the top."

Claxton said he is also looking forward to the Conservative government keeping their promise of matching the FNGST to the community.

"The GST implementation in our community is because of the Conservatives to help build up First Nations economic development," Claxton said.

Further information on the FNGST can also be found at www.cra-arc.gc.ca/E/pub/tg/rc4365/rc4365-e.html.

news@peninsulanewsreview.com

Vuntut Gwitchin to start collecting goods, services tax; [Final Edition]

Chuck Tobin. Whitehorse Star. Whitehorse, Y.T.: Nov 6, 2003. pg. 5

Abstract (Summary)

The Vuntut Gwitchin First Nation of Old Crow has approved a resolution to expand its taxation authority to include the collection of the GST, says Chief Joe Linklater.

Linklater said last week from Old Crow the new initiative was passed Oct. 25. It will give the first nation the ability to draw down a portion of the GST collected by Ottawa for goods consumed on VGFN settlement land.

Linklater said the issue of drawing down taxation authority over GST collected by Ottawa comes now because the territory's nine self-governing first nations were able to move the federal government away from a position it stood by for several years.

Full Text (681 words)

(Copyright THE WHITEHORSE DAILY STAR 2003)

The Vuntut Gwitchin First Nation of Old Crow has approved a resolution to expand its taxation authority to include the collection of the GST, says Chief Joe Linklater.

Linklater said last week from Old Crow the new initiative was passed Oct. 25. It will give the first nation the ability to draw down a portion of the GST collected by Ottawa for goods consumed on VGFN settlement land.

Estimates based on the level of spending today indicate the portion of GST the Old Crow community is eligible to apply for would be approximately \$150,000 and \$200,000 annually, he said.

Linklater explained that under the agreement with Ottawa, the first nation would receive the full amount in the first two years.

In the third year, 35 per cent of what is refunded would be deducted from the first nation's annual fiscal transfer payment from the federal government.

Year four will see the offset increase to 40 per cent, and to 45 per cent in year five. Year six will see the offset reach its maximum of 50 per cent, he said.

"It gives us a certain amount of pride to say our taxes are helping pay for our self-government," the chief said. The first nation is hoping to have the GST arrangement in place by Jan. 1.

The first nation, he noted, has been collecting a portion of personal income tax paid on its settlement land since 1999. That's done through a similar arrangement where the amount rebated by Ottawa is offset by a reduction in the annual transfer payment, he added.

Net gains from the personal income tax rebate, after the offsetting reduction in the annual transfer payment, is estimated at between \$260,000 and \$290,000, the chief said.

Also passed at the Oct. 25 special general assembly was a resolution directing the chief and council to pursue a fundamental change to the trustee arrangement for management of the compensation money the first nation received in its land claim settlement.

Linklater said under the current arrangement, the chief and council act as the trustees for the investment fund, with a mandate to manage it with a long-term vision.

Under the proposed arrangement, the general membership would become the trustees. It would provide direction for management of the compensation money through general membership meetings and such, he explained.

The chief said the resolution directs the chief and council to formalize the trustee structure and have it reviewed by Ottawa to make sure it fits into the tax regime prior to making the switch, though the target is to have the trusteeship changed by April 1 of next year.

In much the way the Vuntut Development Corp. is at arm's-length from the chief and council, so too will be management of the compensation fund, he said.

Linklater said moving the trusteeship to the membership at large is further evolution of self-governing authority, where not all self-governing responsibility that comes under the Vuntut Gwitchin settlement lies with the five elected members of council.

"And what the community is saying by passing this is, 'Yeah, we are willing to do that.'"

Linklater said the issue of drawing down taxation authority over GST collected by Ottawa comes now because the territory's nine self-governing first nations were able to move the federal government away from a position it stood by for several years.

Federal negotiators, he explained, maintained that GST rebates could only be claimed for goods purchased on settlement land.

Linklater said because the vast majority of purchasing occurs off settlement land - vehicles, groceries, etc. - first nations were not interested in entering into taxation arrangements for a benefit of a couple of thousand dollars a year.

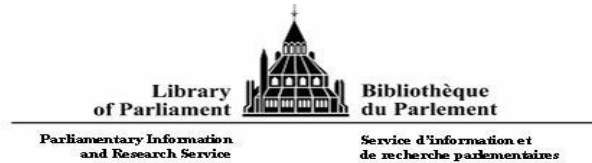
But the first nations were able to convince Ottawa that it should apply the GST taxation issue not at the point of purchase, but rather where the goods are consumed - on settlement land, he said.

Meanwhile, a general election for chief and council is scheduled for this coming Monday. Linklater's bid for re-election is being challenged by Stanley Njootli and Bruce Charlie.

Credit: The Daily Star

Appendix G

Excerpt from Library of Parliament Response³¹ on Taxation Questions



Below is my response to your two previous questions.

1. In Chapter 20, Clause 1a and 4a reference is made to "direct taxation". Please explain what taxes that could include and the taxes that could not be included because they are not "direct taxation".

The term "direct taxation" has its origins in section 92(2) of the *Constitution Act, 1867*. This section grants the provincial legislature the power to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes". This provision of the *Constitution* has been interpreted to mean that direct taxation refers to general taxes payable by the person being taxed, while indirect taxes refers to a tax in which the financial burden is passed on to another party (see *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575). The policy behind this interpretation is to exclude from provincial power those taxes that are most likely to be passed on, and thereby confining provincial power to those taxes the burden of which is most likely to remain within the province (see Peter Hogg, *Constitutional Law of Canada* (Loose-leaf Edition), Thomson Canada Ltd., Scarborough, 1997, at pg. 31-8). Land taxes would be an example of direct taxes, while duties are a form of indirect taxation since they are built into the consumer price of the product and the product may not be sold in the province of manufacture or importation. Sales taxes are borne by the consumer and are not passed on to another party thereby qualifying them as direct taxes. In relation to Chapter 20 of the *Final Agreement*, "direct taxation" probably refers to taxes borne by individuals resident on TFN lands (eg. Personal income tax), on property within TFN lands (eg. Property tax), on transactions occurring or benefits arising on TFN lands (eg. succession tax or corporate income tax), or on goods and services that are purchased by the ultimate consumer on TFN lands (eg. Sales tax). Indirect taxes, such as duties on goods transported through TFN lands, are likely to be outside the TFN taxation powers.

2. "You note that the tax revenue collected by the band is used in determining the level of financial support of TFN." What does it mean?

³¹ Library Response dated November 13, 2007

The following information on federal financial support (federal transfer payments) to the TFN is obtained from the combined effect of the *TFN Own Source Revenue Agreement (OSRA)* and the *TFN Fiscal Financing Agreement (FFA)*. Net annual federal transfer payments are determined by the following formula.

Net Annual Federal Transfer Payments equals the **greater** of:

- a) **\$265,000 – Floor** (increases by 3.43% compounded annually) or
- b) **Federal Block Funding plus Time Limited Federal Funding minus TFN Taxation Revenue (see below)**

Federal Block Funding

- In Year 1 equals \$2,616,218 and increases annually by 3.43% (compounded).

Time Limited Federal Funding

- In Year 1 equals \$41,265 + \$1,000,000 + \$4,521,389.33 (total = \$5,562,654.33).
- Time Limited Federal Funding in Year 2 equals \$4,702,244.90.
- Time Limited Federal Funding in Year 3 equals \$4,890,334.70.
- Time Limited Federal Funding after Year 3 equals nil (see *FFA*).

TFN Taxation Revenue (TFNTR)

- for the year equals the revenue received by the TFN for the fiscal year resulting from taxation minus the Basic Exemption (see below) times the inclusion rate (see below)
- **TFNTR = (taxation revenue – basic exemption) * inclusion rate**

Table of Federal Block Funding, Basic Exemption and TFN Tax Revenue for Federal Transfers to be equal to the Floor set out in clause 2.5 of the *FFA* (see Table 1: of the *OSRA* for basic exemptions and inclusion rates)

Year	Floor (compound ed 3.43%)	Federal Block Funding (compounded 3.43%)	Time Limited Federal Funding	Basic Exemption (unadjusted)	Inclusion Rate	Tax Revenue for the floor to be reached (Federal Block Funding minus floor) / inclusion rate plus basic exemption	Net Annual Federal Transfer Payments
1 (2007)	265,000.00	2,616,218	5,562,654.33	1,370,000	0	Floor never reached (FNR)	8,178,872.33
2	274,089.50	2,705,954.28	4,702,244.90	1,370,000	0	FNR	7,408,199.18
3	283,490.77	2,798,768.50	4,890,334.70	1,370,000	0	FNR	7,689,103.20
4	293,214.50	2,894,766.26	0	1,370,000	0	FNR	2,894,766.26
5	303,271.76	2,994,056.75	0	1,370,000	0	FNR	2,994,056.75

6	313,673.98	3,096,752.90	0	1,370,000	3.3	85,705,724.85	See column 2
7	324,433.00	3,202,971.52	0	1,370,000	6.6	44,984,220.00	See column 2
8	335,561.05	3,312,833.45	0	1,370,000	10.0	31,142,724.00	See column 2
9	347,070.79	3,426,463.63	0	1,370,000	13.3	24,523,329.62	See column 2
10	358,975.32	3,543,991.34	0	139,125	16.6	19,325,968.49	See column 2
11	371,288.18	3,665,550.24	0	140,416	20.0	16,611,726.30	See column 2
12	384,023.40	3,791,278.61	0	141,749	23.3	14,765,161.92	See column 2
13	397,195.36	3,921,319.47	0	143,127	26.6	13,391,713.88	See column 2
14	410,819.16	4,055,820.73	0	144,550	30.0	12,294,555.23	See column 2
15	424,910.26	4,194,935.38	0	146,021	33.3	11,467,417.76	See column 2
16	439,484.68	4,338,821.66	0	147,539	36.6	10,801,465.17	See column 2
17	454,559.01	4,487,643.24	0	149,108	40.0	10,231,818.58	See column 2
18	470,150.38	4,641,569.41	0	150,729	43.3	9,784,491.19	See column 2
19	486,276.54	4,800,775.24	0	152,403	46.6	9,410,983.90	See column 2
20	502,955.82	4,965,441.83	0	154,132	50.0	8,925,126.15	See column 2

Notes:

- The term of the *OSRA* is for 20 years. The term of the *FFA* is for 5 years and is renewable.
- If the TFN generate tax revenues **equal** to or greater than the amount indicated in **Column 7** for the year than the federal transfer for the year equals the **Floor** in **Column 2**.
- If the TFN generate tax revenues **less than** the amount indicated in **Column 7** after year 5 than the amount of the federal transfer for the year equals the Federal Block Funding for the year (Column 3) minus the amount of tax revenue generated as determined by **Column 3 minus TFNTR (This means that federal block funding for the year decreases based on the TFNTR formula above)**.
 - For years 6 to 9 the TFN would have to earn greater than 1,370,000 in tax revenue for federal funding to decrease by the formula.
 - From year 10 to 20 tax revenue greater than the amount in column 5 would cause federal funding to decrease based on the inclusion rate in column 6.
 - For example if the TFN earned 200,000 in tax revenue in year 15:
 - $(200,000 - 146,021) * 33.3\% = 17975.01$
 - Therefore, Federal Block Funding for year 15 (\$4,194,935.38) decreases by \$17975.01.
- The basic exemption is adjusted according to the rate found in the *OSRA*.

Appendix H

Excerpt from Library of Parliament Response³² on *Yukon First Nations Income Tax Act*

Yes, a significant portion of the income tax paid by Yukon Indians goes back to the band government. See the carefully-phrased wording in the instructions to Yukon First Nation members filing federal income tax returns to complete "form YT432, Yukon First Nations Tax, to determine the part of federal and territorial tax that is transferred to the Self-Governing Yukon First Nation government responsible for the settlement land where you resided."

For further clarification I called the Canada Revenue Agency's Northern BC and Yukon Tax Services Office in Prince George, B.C., at (250) 561-7827 and was transferred to Betty Reid in audit at (250) 561-6926, but she referred the question back to Warren Hazlitt in Aboriginal Affairs at the Canada Revenue Agency's head office in Ottawa, at (613) 941-1630.

Hazlitt says that in the past there were moratoriums or deferments on the taxation of the members of Yukon Indian bands by the federal government, due to the uncertain application of the Indian property taxation exemption in section 87 of the Indian Act (RSC 1985, c. I-5, as amended). Now that the Yukon First Nations settlement agreement excludes a self-governing Yukon First Nation from the operation of the Indian Act, individual Yukon Indians are clearly liable for GST and income tax, and several Yukon First Nations governments have signed tax collection agreements with the federal government which give them back revenue from these taxes according to a percentage formula. Form YT432 basically serves to identify a taxpayer by self-declaration as a resident member of a particular self-governing Yukon First Nation, so that **around 75% of the income tax declared by each identified First Nations resident taxpayer will be transferred back to his or her band government. The First Nations taxpayer in effect ends up paying 25% of his or her income tax to the federal and territorial governments, and 75% to the band government.** Hazlitt will send details of the Yukon tax-sharing formula later, but he observes that the main problem encountered so far with the tax-sharing system is that a certain number of band members neglect to self-identify on form YT432, since there is no tax credit or refund in it for them. So the band has to follow up with the CRA Aboriginal Affairs office regarding non-identified First Nation taxpayers to get all of the tax moneys transferred to which it is entitled.

Similar agreements are also being signed gradually with other First Nations around the country for both GST and income tax collection, mostly as a result of individual First Nations self-government agreements which, like the Yukon settlement agreement, exclude a First Nation from section 87 of the Indian Act but in compensation offer a portion of tax revenues to the First Nations government. For example, under their self-government agreement the Nisga'a of British Columbia are to become subject to the GST and to income tax in 2008, and reap a portion of the revenues thereof. The occasional non-self-governing band also has a tax collection agreement and receives money via a funding formula under the Indian Act.

³² Library of Parliament response dated November 9, 2007

The negotiation of First Nation tax collection agreements actually takes place at the Dept. of Finance, and Hazlitt will check with colleagues there to find out if any umbrella federal First Nations Income Tax Act is being considered as a framework for all the First Nations income tax collection agreements, similar to the framework provided for GST agreements by the First Nations GST Act.

Appendix I

Excerpt from Library of Parliament Response³³ on GST on Reserves

I am writing in response to your request about taxation of goods on reserves. Please see below some information about the GST/HST, the First Nations Goods and Services Tax, and the First Nations Tax.

Goods and services tax (GST)

On a reserve

Indians, Indian bands, or unincorporated band-empowered entities may acquire property on a reserve without paying the GST/HST, provided they have the appropriate documentation to show the vendor. Acquisitions of property on a reserve by non-Indians will be subject to the normal GST/HST rules. Corporations are considered to be separate legal persons from either an Indian or an Indian band and would not usually be eligible for relief from the GST/HST. However, the tax will not apply to incorporated band empowered entities purchasing property for band management activities.

Businesses owned by Indians, Indian bands or band-empowered entities whose annual taxable sales of property and services are more than \$30,000, are required to register for the GST/HST. Like other businesses, once registered, they must collect and remit the tax on their sales of property and services (unless the sales are made to Indians, Indian bands or band-empowered entities under conditions where the GST/HST is not payable). They may also claim input tax credits for the GST/HST paid on purchases made in the course of their commercial activities.

Source: Canada Revenue Agency : <http://www.cra-arc.gc.ca/E/pub/gm/b-039/b-039r3-e.pdf>

The First Nations goods and services tax (FNGST)

The First Nations goods and services tax (FNGST), first introduced in 2003, is a 6% tax on taxable supplies of goods and services on certain First Nations lands. This tax applies when a band council, or other governing body, of a First Nation passes its own law imposing FNGST. The Canada Revenue Agency administers FNGST on behalf of the First Nation. The FNGST applies to Status Indians as well as non-natives, and allows for the First Nation to share the FNGST revenue with the Government of Canada.

Information from the Canada Revenue Agency about the FNGST: <http://www.cra-arc.gc.ca/E/pub/tg/rc4365/rc4365-06e.pdf>

First Nations that have applied the FNGST: <http://www.cra-arc.gc.ca/tax/business/topics/gst/indian/fngstapp-e.html>

First Nations Tax (FNT)

The First Nations tax (FNT) is a tax on the sale of listed products on some First Nations reserves. Following recent legislation, some band councils have passed by-laws that impose FNT on listed

³³ Response dated October 19, 2007

products. A listed product refers to alcoholic beverages, fuel, and tobacco products that are specifically mentioned in the band by-law.

Source: Canada Revenue Agency: <http://www.cra-arc.gc.ca/E/pub/gp/rc4072/rc4072-e.html>