

COUNCIL REPORT

TO: CITY MANAGER **DATE:** 2011 Sept 27

FROM: DIRECTOR PLANNING AND BUILDING **FILE:** 2155-01
Ref: LMTAC

SUBJECT: LMTAC DISCUSSION PAPER – VOTING IN LOCAL GOVERNMENT ELECTIONS AND REFRENDUM BY RESIDENTS LIVING ON INDIAN RESERVES

PURPOSE: To brief Council on the local government issues and interests contained within the 2011 July 15 LMTAC discussion paper titled "*Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves*" and to advance responding recommendations for the consideration of Council.

RECOMMENDATIONS:

1. **THAT** Council endorse the 2011 July 15 LMTAC discussion paper titled, "*Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves*", including the two LMTAC recommendations listed in Section 7.0 of this report for reference, as a mechanism to initiate further dialogue with the provincial government.
2. **THAT** Council forward a copy of this report to the Honourable Ida Chong, *Minister of Community, Sport and Cultural Development*; the Burnaby Members of the Legislative Assembly; and Mrs. Agnes Rosicki, *Managing Director, Lower Mainland Treaty Advisory Committee (LMTAC)*.

REPORT**1.0 INTRODUCTION**

Residents living on Indian Reserves in BC (Aboriginal and non-Aboriginal) can participate (vote) in local government elections and referenda, if the local government was formed prior to 1990, even though Indian Reserves are outside of local government regulation and taxation. This results in a situation where there is "representation without regulation/taxation" which is contrary to the democratic principles that describe local governance in BC.¹

¹ Robert L. Bish and Eric G. Clemens, "*Local Government in British Columbia*" (Fourth Edition), Union of British Columbia Municipalities, 2008.

Historically, this situation did not appear to be of large concern for local government in most areas, as the number of non-Aboriginals living on Indian Reserves was relatively small. However, since 1990 it has been a matter of provincial policy to exclude Indian Reserves from local government boundaries when a new local government is being formed (e.g., District of West Kelowna, incorporated on 2007 December 6²) or an existing municipality is being expanded, to minimize the “representation without regulation/taxation” implications of having an Indian Reserve within local government boundaries.

A review of the eligibility to vote in local government elections is timely, considering the emergence of new federal legislation such as the *First Nations Commercial and Industrial Development Act* (FNCIDA) and the *First Nations Certainty of Land Title Act* (FNCLTA).³ Large-scale residential market developments on Indian Reserves under FNCIDA are expected to result in a significant increase of the non-Aboriginal populations living on Indian Reserves, which would exacerbate the issue of “representation without regulation/taxation”.

The LMTAC discussion paper was developed in response to LMTAC member concerns regarding Indian Reserves being considered part of local government electoral areas, but being jurisdictionally exempt from local government (municipalities and regional districts) authority and taxation.

Currently, there are no Indian Reserves within the boundaries of the City of Burnaby. However, there are circumstances under which this could change in future (e.g., under the federal Additions to Reserves (ATR) policy⁴).

2.0 REQUEST FOR ACTION

On 2011 July 15, the Lower Mainland Treaty Advisory Committee (LMTAC) circulated a copy of the LMTAC discussion paper titled, “*Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves*” to all of its 26 local government jurisdictions (including three regional districts). LMTAC has requested that each of its member jurisdictions review the discussion paper, forward comments and communicate Council’s views and/or endorsement of the discussion paper to the provincial Minister of Community, Sport and Cultural Development on or before 2011 October 5. Comments from LMTAC member jurisdictions will be discussed at the 2011 November 23 LMTAC Board meeting. This request for action was received by Council, as an item of correspondence, at their regular meeting of 2011 August 21.

² <http://www.districtofwestkelowna.ca/index.aspx?page=2>

³ FNCIDA and FNCLTA were the subject of a separate report which was endorsed by Council at their regular meeting of 2011 March 14.

⁴ The federal ATR Policy was the subject of a separate Council report which was endorsed by Council at their regular meeting of 2010 September 13.

3.0 PURPOSE

The purpose of this report is to brief Council on the local government issues and interests as outlined in the LMTAC draft discussion paper and to advance these and other related issues and recommendations for the consideration of Council. The preparation of this report relied heavily on the following documents:

- LMTAC draft discussion paper entitled, *“Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves”*, dated July 15, 2011.
- LMTAC Briefing Note, *“Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves”*, dated August 2, 2011.

4.0 LOWER MAINLAND TREATY ADVISORY COMMITTEE (LMTAC)

LMTAC was created with the signing of a Memorandum of Understanding (MOU) between the Province of British Columbia and the Union of British Columbia Municipalities (UBCM) on 1993 March 22. LMTAC is comprised of 26 local government jurisdictions (including three regional districts) and has as its mandate:

“Coordinating and representing the collective interests of local government, and through them their constituents, in defining and building relationships between First Nations and other orders of government.”

Local government interests in treaty negotiations are communicated to the provincial government through the UBCM (which provides a province-wide local government perspective) and individual treaty advisory committees, like LMTAC (which provides a region-specific local government perspective). Although local governments are not one of the three negotiating parties in the BC Treaty Process, LMTAC is a full member of the provincial negotiating team and provides advice and guidance to provincial negotiators and its member local governments on treaty and Aboriginal issues from a local government perspective.

On 2008 September 22, the MOU between the province and UBCM which covers the 19 Technical Advisory Committees in the province (including LMTAC) was renewed and significantly expanded to also consider New Relationship and other Aboriginal issues and interests as part of their mandate.

Councillor Dan Johnston has represented the City of Burnaby as a member of the LMTAC Board since January of 2009.

5.0 BACKGROUND

The following provides background information on reserve lands, formation of Indian Reserves, altering of Indian Reserve boundaries, examples within BC, and policies in other provinces.

5.1 Reserve Lands

The title or ownership for all reserve lands remains with the federal government under the terms defined by Section 18 of the *Indian Act*. A previous LMTAC draft discussion paper on the federal Additions-to-Reserve (ATR) policy describes a reserve as an area of land that is held in trust by the federal Crown for the use and benefit of an Indian Band (First Nation). As such, reserve lands are federal lands which are provided for the exclusive use of Indian Bands. These lands are managed as common property by the Indian Band – the Indian Band has exclusive use of the property, but it does not own the property itself. Although the Indian Band manages the common property, the Minister responsible for Aboriginal Affairs and Northern Development Canada (AANDC)⁵ retains the power to veto land use decisions made by the Indian Band.

Under Section 91(24) of the *Constitution Act, 1867*, the normal federal-provincial division of legislative powers is altered and the Federal Parliament is made fully responsible for Indians and lands reserved for Indians. As a result, all federal lands held for reserves are exempt from provincial land use legislation. Provincial legislation and jurisdiction can be introduced if an Indian Band enters into a voluntary agreement. However, this results in an uneven application of provincial legislation and jurisdiction as it varies from Indian Band to Indian Band.

Reserve lands are also outside of municipal boundaries and are not subject to local government jurisdiction and bylaws. If an Indian Band has exercised their right to tax property, the Indian Band is responsible for providing the local services that a municipality and/or regional district would otherwise provide. All Indian Bands in the Lower Mainland have exercised their right to tax property and are therefore responsible for the providing local services. Regional district policies and regulations also do not apply to reserves.

5.2 Formation of Indian Reserves

Many Indian Reserves were established in BC before municipalities existed in the province, and before modern municipal boundaries were developed.

Indian Reserves in BC were created in the late 1850s and 1860s by the colonial government, after BC was proclaimed an official British colony on November 19th,

⁵ AANDC was formerly Indian and Northern Affairs Canada (INAC).

1858.⁶ The terms of union established when BC joined Canada, in 1871, divided the authority between the two levels of government.⁷ The federal government held responsibility for First Nations and the trusteeship and management of lands reserved for First Nations.

Following the creation of Indian Reserves, municipalities began to be formed. The City of New Westminster, the oldest city in Western Canada, was incorporated in 1860; the City of Vancouver was incorporated in 1886; and regional districts began to be created more than a century later in BC in 1965.⁸

Many First Nations in BC were situated in areas that were attractive to settlers. As such, cities were developed close to Indian Reserves and, over time, the cities expanded next to or around the reserves. By 1988, there were 45 scenarios of Indian Reserves being located within the boundaries of municipalities within BC.⁹

As shown in **Table 1** (below), there are currently 18 Indian Reserves (14 of which are currently inhabited) located within the municipal boundaries of 12 different municipalities within Metro Vancouver. There are an additional four (4) Indian Reserves located outside of municipal boundaries, but still within Metro Vancouver's boundaries (of which only one (1) is inhabited). Of the total 22 Indian Reserves, 15 are currently inhabited by an estimated 7,000 people in total.

Table 1 Number of Indian Reserves with Metro Vancouver Inside and Outside of Municipal and Metro Vancouver Boundaries			
	Inside Municipal Boundaries	Outside Municipal Boundaries, But Inside of Metro Vancouver	Total
Inhabited	14	1	15
Uninhabited	4	3	7
Total	18	4	22

⁶ Union of BC Indian Chiefs, *Background on Indian Reserves in British Columbia*, <http://www.ubcic.bc.ca/Resources/ourhomesare/teachers/files/Background%20on%20Indian%20Reserves%20in%20British%20Columbia.pdf>

⁷ Aboriginal Affairs and Northern Development Canada, <http://www.ainc-inac.gc.ca/ai/mr/is/abr-eng.asp>

⁸ Local Government Knowledge Partnership, University of Victoria, *40 Years: A Regional District Retrospective*, 2009.

⁹ Squamish Nation, <http://www.squamish.net/mediacentreandarchives/newsarticles.htm>

5.3 Altering of Reserve Boundaries

The historical actions of the federal and provincial governments, including the removal of reserve land and altering of reserve boundaries, contributed to the current situation where Indian Reserves are contained within local government boundaries.

In 1876, the Indian Reserve Commission was established to determine Indian Reserves in BC.¹⁰ The Commission was authorized to create reserves to be used for the benefit of First Nations. Dominion (federal) crown lands were to be used to add land to reserves while any land removed became provincial land. The decisions of the Commission were made without consent from First Nations.

Through use of the *Dominion Indian Affairs Settlement Act* of 1919 and the *British Columbia Indian Lands Settlement Act* of 1920, the provincial and federal governments expropriated more than 35,000 acres from reserves in BC.¹¹

5.4 Differences in Voting, Jurisdiction and Taxation

Table 2 (below) summarizes the differences in how voting, jurisdiction and taxation vary by existing reserve, new reserve, and Treaty Settlement Lands.

Table 2 Differences in Jurisdiction, Taxation, and Voting				
	Existing Indian Reserves / Pre-1990 Local Government	Existing Indian Reserves / Post-1990 Local Government	Tsawwassen First Nation Treaty Settlement Lands	Yale First Nation Treaty Settlement Lands
LG Jurisdiction	☒	☒	☒	☒
LG Taxation	☒	☒	☒	☒
LG Voting	✓	☒	☒	☒
RD Voting	✓	☒	✓	☒

Legend: LG = local government, RD = regional district, ☒ = no, ✓ = yes.

As shown in **Table 2** (above), non-Aboriginals living on-Reserve within the boundaries of a municipality created prior to 1990 can participate in local government elections and referenda even though they are outside of the local government's jurisdiction and they do not pay local government taxes. As these populations grow, residents living on Indian Reserves could

¹⁰ Dennis F. K. Madill for Research Branch, Corporate Policy, Department of Indian and Northern Affairs, 1981, <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/C-B/treC-B-eng.asp>

¹¹ Union of BC Indian Chiefs (UBCIC).

make-up a significant proportion of eligible voters and receive services provided by the neighbouring municipality which are paid for by tax-payers living off-reserve.

However, residents of Indian Reserves created after 1990, are not eligible to vote in municipal elections and referenda on municipalities, as the current BC provincial policy for the creation of new municipalities or the expansion of existing municipalities excludes Indian Reserves from municipal boundaries.

Different rules also apply to voting eligibility under treaty on Treaty Settlement Lands (TSL) where neither Aboriginal members nor non-Aboriginals can vote in municipal elections, as TSL are removed from municipal boundaries.

However, treatment at the regional district level varies from treaty to treaty. In the case of the Tsawwassen First Nation, the TSL remained within regional district boundaries because the Tsawwassen treaty contained provisions for the Tsawwassen First Nation to become a member of the Greater Vancouver Regional District (GVRD). In the Yale First Nation Final Agreement, Treaty Settlement Lands were removed from the regional district boundaries, subject to the Yale First Nation becoming a member of the Fraser Valley Regional District (FVRD). So until such time as they become member of the FVRD, they do not participate in the FVRD.

5.5 Examples within BC

One of the most striking examples of the “representation without jurisdiction/taxation” is that of Electoral Area B, within the Squamish-Lillooet Regional District (SLRD), where 66% of the population (1,144 of a total 1,719) live on Indian Reserves.¹² This means that residents on Indian Reserves in SLRD Electoral Area B hold a majority vote in the election of their regional director, even though they are outside of the district’s jurisdiction and they do not pay regional district taxes.

Another significant example is the District of West Vancouver, which currently has a population of 42,121¹³ of which 3,140 (7.5%) presently live on the Squamish Nation’s Capilano Indian Reserve No. 5, which is contained within the municipality’s boundaries. If the Squamish Nation pursues the development of residential market housing on its reserve lands as currently proposed, the proportion of residents living on-Reserve and eligible to vote in District of West Vancouver municipal elections and referenda could increase to 30% within 25 years.¹⁴

¹² Squamish-Lillooet Regional District and 2006 Census.

¹³ 2006 Census.

¹⁴ The 30% figure is based upon the current West Vancouver population. *Metro Vancouver's Draft Regional Growth Strategy* (January 2011) projects the population of West Vancouver to increase by approximately 11,000 by 2031. Such an increase could either partially off-set the potential growth of residents on reserve, or account for a portion of the residents moving to the reserve.

In contrast to these two examples is the District of West Kelowna, which was incorporated after 1990 on 2007 December 6¹⁵ under the terms of the current provincial policy to exclude Indian Reserves from municipal boundaries of new or expanded municipalities. The District of West Kelowna has an estimated population of about 27,000¹⁶ while the estimated on-reserve population of the West Bank First Nation is about 6,200¹⁷ – 810 Aboriginal and 5,410 non-Aboriginal. In this case residents on-Reserve can not vote in the District of West Kelowna elections and referenda.

5.6 Policies in Other Provinces

Table 3 (below) summarizes the provincial policies of Alberta, Saskatchewan and Manitoba. **Table 3** shows that in these three other provinces, Indian Reserves are excluded from municipalities, and reserve residents do not have the ability to vote in municipal elections, with the exception of Alberta. However, further research undertaken by LMTAC has shown that common practice appears to be for Municipal Districts in Alberta to remove Indian Reserves from electoral “wards” via electoral boundary bylaws that are permitted by Section 148(2) of the *Municipal Government Act*, thereby excluding Indian Reserve residents from voting in municipal elections.

Table 3 Provinces of Alberta, Saskatchewan, and Manitoba Differences in Jurisdiction, Taxation, and Voting			
	Alberta	Saskatchewan (rural municipality)	Manitoba
Local Government Jurisdiction	☒	☒	☒
Local Government Taxation	☒	☒	☒
Local Government Voting	✓	☒	☒

Legend: ☒ = no, ✓ = yes.

6.0 LOCAL GOVERNMENT CONCERNS

As LMTAC have noted in the discussion paper, while the context behind the modern physical location of Indian Reserves is important to understand, local government concerns do not stem from the physical location of Indian Reserves, but rather from the jurisdictional relationship between the Indian Reserves and the local government.

¹⁵ <http://www.districtofwestkelowna.ca/index.aspx?page=2>

¹⁶ 2009 population estimated by BC Stats

<http://www.districtofwestkelowna.ca/Modules/ShowDocument.aspx?documentid=4140>

¹⁷ 2006 Census data for the total combined population of the two Westbank First Nation Indian Reserves - Tsinstikeptum 9 and Tsinstikeptum 10.

This section of the report presents a summary of the potential implications and local government concerns related to this jurisdictional relationship, as outlined in the LMTAC discussion paper.

Currently representation on Indian Reserves created prior to 1990 is disconnected from regulatory authority and tax authority at the local level. This results in the operation of local governments, with Indian Reserves inside their boundaries, being inconsistent with the democratic principles that describe local governance in BC¹⁸, due to the jurisdictional disconnect. These conditions result in the following specific local governments concerns outlined in **Table 4** (below) related to taxation, voting, and jurisdiction.

Table 4 Summary of Local Government Concerns and Potential Implications	
Local Government Concerns	Potential Implications
Taxation	
<ul style="list-style-type: none"> Non-Aboriginals living on Indian Reserves pay property taxes to the Indian Band, in cases where the Indian Band exercises its authority to collect property taxes under either the Section 83 amendment to the <i>Indian Act</i>, or the <i>First Nations Fiscal and Statistical Management Act</i> (FNFSMA). 	<ul style="list-style-type: none"> Local governments may be faced with increased demand for services (hard and soft) from on-reserve residents, but have no ability to recover these costs through property tax on-reserve.
<ul style="list-style-type: none"> As local governments are not able to tax Indian Reserves directly, they must recover relevant costs and fees through servicing agreements with the First Nation(s). 	<ul style="list-style-type: none"> If rates charged are too low or don't charge for the full suite of services being used, the local government subsidizes the services provided to the First Nation. Off-reserve residents end up subsidizing on-reserve residents (by paying disproportionate amount of the cost).
<ul style="list-style-type: none"> Property taxes collected by a First Nation are not remitted to the neighbouring local government or other taxing authority, such as TransLink, or the Province in the case of school taxes. 	<ul style="list-style-type: none"> This has the potential to leave the remaining pool of tax-payers paying higher rates because there are fewer taxpayers being charged.

¹⁸ Robert L. Bish and Eric G. Clemens, "*Local Government in British Columbia*" (Fourth Edition), Union of British Columbia Municipalities, 2008.

<p>Table 4</p> <p>Summary of Local Government Concerns and Potential Implications</p>	
Local Government Concerns	Potential Implications
Voting	
<ul style="list-style-type: none"> The practice of allowing residents on Indian Reserves to vote in municipal elections is inconsistent with the current BC provincial policy for the creation of new municipalities or the expansion of existing municipalities.¹⁹ 	<ul style="list-style-type: none"> This results in different governance practices in different municipalities (depending on date at which they were created, prior to 1990 or after 1990). The population of an Indian Reserve, including both Aboriginal and non-Aboriginals, can account for a plurality, or potentially a majority, of eligible voters. Residents on an Indian Reserve could have significant influence and, in some cases, a controlling vote on a number of critical issues affecting taxpayers residing in the municipality or regional district (e.g., policy, regulation, capital spending, etc.) without being subject to the consequences of these decisions (e.g., jurisdiction and/or taxation). Votes weighted by population taken at regional districts could be significantly influenced by on-reserve population being included within the weighted vote. As First Nations pursue large-scale on-Reserve market residential developments, even larger non-Aboriginal population living on-Reserve are likely.

¹⁹ Residents of Indian Reserves are eligible to vote in municipal elections and referenda if the Indian Reserve is within the boundaries of a municipality created prior to 1990. However, residents of Indian Reserves are not eligible to vote in municipal elections and referenda on municipalities created after 1990, as the current BC provincial policy for the creation of new municipalities or the expansion of existing municipalities excludes Indian Reserves from municipal boundaries.

Table 4 Summary of Local Government Concerns and Potential Implications	
Local Government Concerns	Potential Implications
Jurisdiction	
<ul style="list-style-type: none"> Municipal regulation (land use, bylaw, etc.) and enforcement does not apply to Indian Reserves, as these are federal lands. 	<ul style="list-style-type: none"> On-reserve residents would have the ability to influence regulations (through voting), but would not be subject to them.
<ul style="list-style-type: none"> If municipalities choose to enter into servicing agreements with First Nations, careful consideration needs to be given to legal issues such as financial and environmental joint and several liabilities which may stem from such agreements. 	<ul style="list-style-type: none"> The enforcement of provincial requirements (e.g., Environmental Management Act (EMA)) by a local government on federal lands is problematic, resulting in potential exposure to financial or judicial liability and/or penalties in the case of on-reserve incident(s).

7.0 RECOMMENDATIONS ADVANCED BY LMTAC

This section of the report lists the recommendations proposed by the LMTAC in their discussion paper to address the local government issues and concerns identified above.

Recommendation #1: Indian Reserves located within municipal boundaries
Recommendation Proposed by LMTAC: <i>The provincial government amend municipal boundaries to exclude Indian Reserves in recognition of the absence of municipal regulatory authority over Indian Reserve lands and land use, and absence of municipal taxing authority over Indian Reserve lands and improvements.</i>

Burnaby staff comments:

If this recommendation were implemented, representation would be directly aligned with regulatory authority and tax authority at the local level. This would bring the treatment of Indian Reserves located within local governments created prior to 1990 in line with current provincial policy for those located in local governments created or expanded after 1990.

This recommended change would also ensure that the operation of local governments would now be consistent with the democratic principles that describe local governance in BC²⁰, as the jurisdictional disconnect would be eliminated.

This recommendation would directly address the local governments concerns outlined in Section 6.0 of this report, with the exception of those identified for servicing agreements, as servicing agreements would likely still be required in some cases.

Therefore, staff are recommending that Council endorse this recommendation.

Recommendation #2: Indian Reserves located within regional district boundaries

Recommendation Proposed by LMTAC:

The provincial government officially exclude Indian Reserves from regional district boundaries until the First Nation joins and participates in the regional district on the same basis as their neighbouring local governments.

Burnaby staff comments:

If implemented, this recommendation would have similar benefits to those outlined for recommendation No. 1 (above). Therefore, staff are recommending that Council endorse this recommendation.

8.0 CONCLUSION

The two recommendations put forward in the LMTAC discussion paper (listed in Section 7.0 of this report) are consistent with both the current BC provincial policy to specifically exclude Indian Reserves from the creation or expansion of a municipality, and with the current provincial policies of Alberta, Saskatchewan and Manitoba. The purpose of the two recommendations put forward in the LMTAC discussion paper is to achieve consistency with such policies by redressing the existing disconnect regarding jurisdiction, taxation, and voting within BC.

Based on the analysis above, City of Burnaby staff are recommending that Council endorse the 2011 July 15 LMTAC discussion paper titled, "*Voting in Local Government Elections and Referenda by Residents Living on Indian Reserves*", including the two LMTAC recommendations listed in Section 7.0 of this report for reference, as a mechanism to initiate further dialogue with the provincial government; and Council forward a copy of this report to the Honourable Ida Chong, *Minister of Community, Sport and Cultural Development*; the Burnaby Members of the Legislative Assembly; and Mrs.

²⁰ Robert L. Bish and Eric G. Clemens, "*Local Government in British Columbia*" (Fourth Edition), Union of British Columbia Municipalities, 2008.

To: City Manager
From: Director Planning and Building
Re: LMTAC Discussion Paper – Voting in Local Government Elections and
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Agnes Rosicki, *Managing Director, Lower Mainland Treaty Advisory Committee (LMTAC).*

Should Council endorse this report, it would be considered and discussed, along with other comments received from LMTAC member jurisdictions, at the 2011 November 23 LMTAC Board meeting.



Basil Luksun, Director
PLANNING AND BUILDING

DAC/

cc: Deputy City Managers
Director Finance
Director Engineering
Director Parks, Recreation and Cultural Services
City Solicitor
OIC RCMP
Fire Chief
Chief Librarian

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