Legislative Summary **LS-495E**

BILL C-20: FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT

Mary C. Hurley
Marlisa Tiedemann
Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-20

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	2 November 2004	First Reading:	13 December 2004
Pre-Second Reading Study:	9 December 2004	Second Reading:	16 February 2005
Report Stage:	10 December 2004	Committee Report:	10 March 2005
Second Reading:	10 December 2004	Report Stage:	
Third Reading:	10 December 2004	Third Reading:	21 March 2005

Royal Assent: 23 March 2005

Statutes of Canada 2005, c.9

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-20: FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT*

Bill C-20, the proposed First Nations Fiscal and Statistical Management Act, was introduced in the House of Commons and given first reading on 2 November 2004. It was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on 19 November 2004.

In December 2002, during the 2nd Session of the 37th Parliament, a similar bill was introduced as Bill C-19. In September 2003, the bill was adopted, with a number of technical government amendments, by the then House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources; it died on the *Order Paper* awaiting Report Stage when Parliament was prorogued in November 2003. On 10 March 2004, by virtue of a House of Commons motion, the amended bill was reintroduced at the same stage as Bill C-23. The legislation was debated at Report Stage in April 2004, when the House of Commons adopted a number of government amendments. Bill C-23 was undergoing third reading debate in May 2004, when the 37th Parliament was dissolved.

Bill C-20 incorporates the amendments to Bill C-23 that were adopted by the House of Commons at Report Stage in April 2004. The bill proposes the establishment of an institutional framework to provide First Nations communities that choose to participate in its scheme with the tools to address economic development and fiscal issues on-reserve. Among other things, it would enable First Nations governments to establish their own financing through property tax and borrowing regimes.

The opt-in legislation proposes the establishment of four financial institutions:

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

This paper revises and updates Legislative Summary LS-475 on Bill C-23, the First Nations Fiscal and Statistical Management Act, prepared by Tonina Simeone of the Political and Social Affairs Division in March 2004. The Background and Commentary sections, in particular, rely heavily on that document.

- The First Nations Tax Commission (FNTC): The FNTC would replace the Indian Taxation Advisory Board. It will assume and streamline the real property tax by-law approval process and help reconcile community and ratepayer interests.

- The First Nations Financial Management Board (FMB): The FMB would establish financial standards and provide the independent and professional assessment services required for entry into the First Nations Finance Authority borrowing pool.

- The First Nations Finance Authority (FNFA): The FNFA would allow First Nations communities that come within the legislation to collectively issue bonds and raise long-term private capital at preferred rates for roads, water, sewer and other infrastructure projects.

- The First Nations Statistical Institute (FNSI): The FNSI will assist all First Nations communities in meeting their local data needs while encouraging participation in, and use of, the integrated national systems of Statistics Canada.

The initiative would target mechanisms aimed at enhancing participating First Nations' fund-raising capacity through taxation of leasehold interests on reserve lands and access to more affordable, long-term loans for community development.

BACKGROUND

A. Context

The development of a new fiscal relationship between First Nations and Canada has been an ongoing subject of discussion. In 1983, the Report of the House of Commons Special Committee on Indian Self-Government (the Penner report) recommended the restructuring of fiscal relationships between Canada and First Nations, as did the 1996 Final Report of the Royal Commission on Aboriginal Peoples (RCAP). Generally, the move to restructure fiscal relationships between First Nations groups and the federal government has remained part of a broader movement toward Aboriginal self-government.(1) The federal government, as well as a number of First Nations communities, view Bill C-20 as part of that evolution toward greater economic self-sufficiency and political autonomy.(2)

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(1) See, for example, Robert Bish, *Financing Indian Self-Government: Practice and Principles*, School of Public Administration, University of Victoria, Victoria, 1987.

(2) The majority of groups that have expressed strong support of the legislation are from the western provinces, primarily British Columbia. Several others, however, have viewed this form of legislative initiative as a departure from the principles articulated in the Penner report and the RCAP report. They argue that, rather than promoting greater fiscal autonomy, the legislation, like the *Indian Act*, merely delegates taxation authority to First Nations communities, and is therefore an attempt to "municipalize" Aboriginal governments.

B. Legislative Antecedents

Bill C-20, the First Nations Fiscal and Statistical Management Act, is an extension of a series of legislative and consultative measures initiated 16 years ago. From a legislative standpoint, Bill C-20 follows Bill C-115 (commonly referred to as the Kamloops Amendments), which was passed in 1988.(3) Bill C-115 broadened the taxation authority of First Nations communities under the *Indian Act* to include conditionally surrendered or "designated" lands. It clarified that leased lands remain a part of reserve lands, thereby enabling communities to enact property tax by-laws in respect of those lands.(4) As a result of Bill C-115, the conditional land surrender process was abandoned and replaced by a land use "designation" process to accommodate leasing arrangements. The former "surrendered" lands which, by definition, were excluded from reserve status become "designated" lands.(5) Consequently, when lands are conditionally surrendered or "designated" (e.g., for leasing), no band interest is ceded and the land, therefore, retains reserve status.

Arguably, the result of these 1988 legislative amendments has been twofold. First, they allowed First Nations governments to clarify their tax authority over reserve land. Second, they expanded the tax authority granted to First Nations and thereby created greater opportunities for economic development.(6)

C. Developing a New Institutional Framework

1. An Evolving Context

In the years that followed the 1988 Kamloops Amendments, a number of events increased the existing support for the restructuring of fiscal relationships between First Nations

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(3) Bill C-115, An Act to Amend the Indian Act (Designated Lands), S.C. 1988, amending the Indian Act, R.S., c. I-6, as amended.

(4) Generally, First Nations communities use money derived from taxing leasehold interests on reserve lands to finance programs and services that are not provided for by Canada. As a matter of policy, where there are non-native leaseholders on-reserve, the government does not pay for infrastructure development.

(5) Fiscal Realities, "First Nation Taxation and New Fiscal Relationships," Kamloops, B.C., 1997, available on-line at: http://www.ainc-inac.gc.ca/pr/ra/fnt_nfr/ntltax_e.pdf.

(6) For a more detailed examination of property taxation on reserve leasehold lands and responsibility for services, see Robert Bish, *Aboriginal Government Taxation and Service Responsibility: Implementing Self-Government in a Federal System*, School of Public Administration, University of Victoria, Victoria, 1993.

groups and the federal government. These included the Department of Finance conference on Indian government taxation (1991), the ultimately failed Charlottetown Accord (1992), and the Final Report of the RCAP (1996).

In order to establish an administrative structure for the management of the new legislation, the Department of Indian Affairs and Northern Development (DIAND) created the Indian Taxation Advisory Board (ITAB) in early 1989. The ITAB describes its mandate as including assistance to First Nations communities in property taxation by-law development, review of all property taxation by-laws, training to help First Nations officials develop effective taxation systems, and provision of tax policy advice to the Minister of Indian Affairs.(7) Well over 100 First Nations communities have entered into the field of real property taxation; about half are British Columbia communities, with Alberta and Ontario communities the next most frequently represented.(8)

2. Assembly of First Nations Approach

Beginning in 1991, the Department of Finance undertook to revise its policy on Indian taxation. The Department published its *Working Paper on Indian Government Taxation* in 1993. In 1995, the First Nations Financial Institute (FNFI) was created through an initiative of the Westbank First Nation in British Columbia.(9) It was subsequently incorporated under federal legislation. The primary objective of the FNFI was to provide investment opportunities for First Nations, with a view to providing long-term financing for their public debt. Bill C-20 would transform the FNFI into the First Nations Finance Authority.

A round table meeting organized in 1995 between representatives of the Department of Finance and the Assembly of First Nations (AFN) led in 1996 to the adoption of Resolution 5/96 on taxation by the AFN Annual General Assembly. This resolution supported the development of new fiscal relationships between First Nations governments and the Government of Canada, based on the principles of flexibility, fairness, choice, the certainty of government service delivery comparable to other jurisdictions, economic incentives and efficiency.

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(7) Additional information about the mandate and operations of the ITAB may be found at: http://www.itab.ca/english/home/default.asp.

(8) *Ibid.*

(9) The Westbank First Nation and Canada concluded the *Westbank First Nation Self-Government Agreement* in October 2003. In April and May 2004, the House of Commons and Senate, respectively, adopted Bill C-11, the Westbank First Nation Self-Government Act, thus giving effect to the Agreement. The Act was not in force as of 30 November 2004.

The Chiefs Committee on Fiscal Relations, established two years later to review the financial relationship between First Nations governments and the federal government (General Assembly Resolution 49/98), recommended the creation of First Nations fiscal institutions. In 1999, the AFN expressed its support for this initiative when participants at the Annual General Assembly of the AFN supported the creation of the First Nations Finance Authority (General Assembly Resolution 6/99) and supported the ITAB in its efforts to establish a First Nations Tax Commission (General Assembly Resolution 7/99).

In December 1999, in conjunction with these developments, the federal government and the AFN signed a memorandum of understanding to implement a national round table meeting on fiscal relationships. The meeting was designed to establish concrete foundations for the fiscal relationship through the exchange of information, capacity building and standards development.

In 2000, the AFN confirmed its support for the establishment of the First Nations Statistical Institute and the First Nations Financial Management Board (Confederacy of Nations Resolutions 5/2000 and 6/2000). In Resolution 24/2001, the General Assembly endorsed the recommendation of the Chiefs Committee that four new national First Nations fiscal institutions be established through federal legislation. There was some controversy surrounding the legal validity of this resolution, however, as some felt it did not receive the 60% support required by the AFN charter.

3. Government Legislation

On 15 August 2002, the Minister of Indian Affairs released the proposed legislation with the stated purpose of commencing public consultations on the bill prior to its tabling in the House.(10) Following the release, several First Nations expressed deep concerns over the bill as drafted. As a result, the AFN convened a Special Chiefs Assembly in November 2002 and passed a resolution rejecting the proposed First Nations Fiscal and Statistical Management Act (AFN Resolution 30/2002). According to the AFN resolution, the proposed legislation violated the historic nation-to-nation relationship, infringed upon Aboriginal and treaty rights, and was otherwise so flawed that it could not be corrected by mere amendments. An additional "accommodation" resolution was also passed (AFN Resolution 31/2002) respecting the right of

(10) INAC, "Notes for Remarks by the Honourable Robert D. Nault, P.C., M.P. Minister of Indian Affairs and Northern Development At a News Conference to Announce Public Consultations on the First Nations Fiscal and Statistical Management Consultation Bill, August 15, 2002, Ottawa, Ontario," available on-line at: http://www.ainc-inac.gc.ca/nr/spch/2002/fnf_e.html.

those First Nations who wished to do so to enter into local and regional agreements, but not, however, in the context of national legislation.

On 2 December 2002, the Minister of Indian Affairs tabled Bill C-19, the proposed First Nations Fiscal and Statistical Management Act, in the House of Commons. That bill, which died on the *Order Paper* in November 2003, was reinstated as Bill C-23 on 10 March 2004. Bill C-20, as mentioned above, incorporates amendments to Bill C-23 that were adopted by the House of Commons in April 2004 before Bill C-23, too, died on the *Order Paper*.

DESCRIPTION AND ANALYSIS

Bill C-20 contains a brief preamble and 155 clauses divided into eight Parts: First Nations Fiscal Powers; First Nations Tax Commission; First Nations Financial Management Board; First Nations Finance Authority; First Nations Statistical Institute; Financial Management and Control; Provisions of General Application; Transitional Provisions, Consequential Amendments, Coordinating Amendments and Coming Into Force. In order to maintain coherence with the bill, this legislative summary follows the format of the legislation. The document reviews significant measures under the principal headings found in the bill, but does not discuss every clause.

A. Legislative Approach

First Nations communities' participation in the legislative initiatives as originally set out in Bill C-20's predecessors – Bill C-19 and Bill C-23 – was described as optional. During Bill C-19 hearings before the then House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, however, many First Nations witnesses questioned this characterization.

Opponents of the bill pointed out that the minority of communities with property taxation by-laws already in place under the authority of section 83 of the *Indian Act*[11] would automatically fall under the legislation's regime, regardless of whether they had given their

(11) Paragraph 83(1)(*a*) authorizes band councils, subject to ministerial approval, to make taxation by-laws "for local purposes of land, or interests in land, in the reserve." Approximately 110 communities made by-laws under this provision.

express consent to its application.[12] In addition, the predecessors to Bill C-20 proposed to repeal the portion of section 83 authorizing community councils to make such by-laws. Accordingly, any other First Nations community undertaking property taxation on-reserve would have to do so within the framework of the full regime proposed by the bill. The predecessor bills therefore had the potential to affect all First Nations communities wishing to exercise taxation authority.

Under Bill C-20, the institutions created by the legislation, and their functions, authorities and interactions, as described below, remain largely unchanged. However, the bill replicates government amendments to Bill C-23 as adopted by the House of Commons at Report Stage in April 2004, which signalled a significant shift in approach to that taken in the original legislative scheme. In accordance with those amendments, Bill C-20 is to apply for most purposes on an explicit opt-in basis: First Nations communities wanting to put taxation measures in place are given the choice of whether to do so under the *Indian Act* or the more comprehensive scheme of Bill C-20. This optional feature is set out in relatively few but noteworthy clauses:

- Under clause 2(1)(*b*), a "first nation" for purposes of Parts 1 through 4 and 6 through 8 of the bill is "a band named in the schedule";[13]

- Clause 2(3) provides that, "[a]t the request of the council of a band, the Governor in Council may, by order, amend the schedule by adding, deleting or changing the name of the band." This enabling provision does not require that the Governor in Council comply with a band request to be added to or deleted from the schedule, nor does Bill C-20 appear to define criteria for such additions or deletions. However, the provision does make it clear that addition to the schedule, and therefore application of most of the bill's measures, is contingent upon a First Nations council's request to that effect;

- Bill C-20 further stipulates that those provisions in sections 83 and 84 of the *Indian Act* authorizing property taxation and related by-laws,[14] as well as regulations under paragraph 73(1)(*m*) of that Act respecting borrowing by bands, do not apply to a scheduled "first nation." That is, Bill C-20 provisions are to provide the only source of property taxation and associated authorities for First Nations communities that are included in the schedule at their request (clause 15);

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(12) Under clause 141(1) of Bill C-19, section 83 by-laws that were in force when the bill took effect would be deemed to be laws made under sections 4 and 8 of the bill, as the case might be, to the extent that they were not inconsistent with section 4 or 8 (describing possible local revenue laws and financial administration laws), and would remain in force until they were repealed or replaced.

(13) In Part 5, establishing the First Nations Statistical Institute, "first nation" means "band." The FNSI will thus be able to carry out its functions with all First Nations communities, including the majority that are not necessarily involved with the other institutions created in Parts 2 through 4 of the bill.

(14) These include paragraphs 83(1)(*a*) and 83(1)(*d*) to (*g*).

- As further confirmation of the bill's optional application, it is only when the name of a First Nation is added to the schedule that its existing by-laws under the relevant portions of section 83 of the *Indian Act* will be deemed to be laws under relevant provisions of Bill C-20 (clause 145);

- Finally, the bill does not propose to repeal any portion of section 83 of the *Indian Act* (see clauses 151 and 152). Accordingly, First Nations communities that are not scheduled are to retain the ability to enact property taxation and related by-laws under the authority of that provision, subject to ministerial approval. For scheduled communities, by-law making powers set out in section 83 that are not rendered inapplicable by clause 15[(15)] of Bill C-20 continue to apply, also subject to the Minister's sanction.

This revised optional proposal appears to respond to at least some of the objections raised with respect to Bill C-20's predecessors. However, it should be noted that for purposes of Part 5 of the bill, establishing the First Nations Statistical Institute, the term "first nation" means "band." The FNSI will thus be able to carry out its functions with all First Nations communities, including the majority that are not involved with the other institutions created in Parts 2 through 4 of the bill. This feature renders the bill less than fully optional.

An additional effect of the changed definition of "first nation" to include only scheduled bands for most purposes under the legislation should also be noted. Non-scheduled bands will not benefit from a statutory entitlement to avail themselves of the advisory or counselling services and functions of the institutions created by the bill. It seems the latter would still make those services available on a non-statutory basis.[(16)] The question of whether equivalent parallel services would remain available to non-participating communities through other agencies, including DIAND, remains open. In the past, some have expressed concern that the Department might pressure First Nations communities to take part in the legislation's regime in order to gain access to major capital projects.

(15) That is, paragraphs 83(1)(*a*.1) on the licensing of businesses, trades and occupations; 83(1)(*b*) on the appropriation and spending of band moneys; and 83(1)(*c*) on the appointment of band officials.

(16) Department of Indian Affairs and Northern Development, News Release, "First Nations Fiscal and Statistical Management Act Introduced in the House of Commons," Ottawa, 2 November 2004.

B. Preamble

An eleven-paragraph preamble to Bill C-20 sets out the context and parliamentary intent of the proposed legislation in terms identical to those of the original Bill C-19. Preambles by nature are interpretive rather than substantive and may be used by the courts in resolving any ambiguity in the legislation. Noteworthy aspects of the preamble include statements indicating that:

- the proposed legislation will apply only to those First Nations communities that choose to exercise real property taxation jurisdiction on reserve lands;(17)
- real property tax revenues and other local revenues are to be used for the development of public infrastructure on reserve lands;
- an objective of the legislation is to establish a balance between the interests of First Nations members and (non-native) on-reserve taxpayers;(18)
- the proposed legislative initiative has been driven largely by First Nations groups in Canada and reflects their aspirations to establish statutory institutions.(19)

Although the preamble states that the legislation is not intended to define the nature and scope of self-government, some commentators have criticized it for reflecting a conservative bias. In particular, the language is said to reflect a strong municipal approach to First Nations governments.(20)

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(17) The statement seems to reflect the scope of predecessor legislation, and does not appear to take account of the fact that property taxation will also remain possible under the *Indian Act*.

(18) It should be remembered that First Nations governments levy property taxes only on lessees who are not band members, i.e., non-native leaseholds on reserve lands. This statement attempts to address the issue of non-First Nations taxation of leaseholds on reserves without the accompanying provision of services by the taxing government to taxpayers. The principle being put forward is that of fiscal equivalence: that is to say, a group of people who pay tax should receive benefits and have a voice in the decisions concerning taxes and services.

(19) Although the proposed legislation has been sponsored by a group of First Nations communities and leaders, it should be borne in mind that support for the legislation in its original form among First Nations groups has been uneven across the country.

(20) On this issue, see Fred Lazar, "Comments Regarding the First Nations Fiscal and Statistical Institutions Initiative," Schulich School of Business, York University, Toronto, 25 September 2002; and Chiefs of Ontario, "Legal Analysis on Re: First Nations Fiscal and Statistical Management Act" (prepared by Michael Sherry), 21 September 2002, available on-line at: http://www.chiefs-of-ontario.org/governance/gov13.html.

C. Interpretation and Title (Clauses 1 and 2)[21]

1. Interpretation

Apart from the definition of "first nation" discussed above, clause 2 provides a series of other general definitions of terms used in the bill.

2. Aboriginal Rights

Clause 3 is a non-derogation clause, which states that the legislation "shall [not] be construed so as to abrogate or derogate from any existing aboriginal or treaty rights."

D. Part 1 – First Nations Fiscal Powers (Clauses 4 to 15)

Part 1 sets out the law-making powers of First Nations communities included in the schedule. It also describes the required elements of those laws, as well as some of the obligations communities have with respect to revenues generated under those laws.

1. Financial Administration Laws (Clauses 4 and 9)

Before a council of a First Nations community can make a local revenue law, it must first make a law respecting the financial administration of the community (clause 4). This law must be approved by the First Nations Financial Management Board (FMB) (clause 9(2)).

2. Property Taxation Laws (Clauses 5(1)(*a*), 6(4), 8(1), 8(2), 8(5), 10, 11(1) and 84(5)(*b*))

Clause 5(1)(*a*) allows the council of a First Nations community to make laws respecting taxation for local purposes of reserve lands, interests in reserve lands or rights to occupy, possess or use reserve lands. This is identical to the power to make a property taxation by-law under section 83(1)(*a*) of the *Indian Act*. Unlike section 83(1)(*a*) of the *Indian Act*, however, clause 5(1)(*a*) elaborates on what the property taxation laws might encompass. For example, property taxation laws can include laws: to assess the value of lands, interests and rights (clause 5(1)(*a*)(i)); to create mechanisms to establish and apply tax rates (clause 5(1)(*a*)(ii)); to tax the provision of services in respect of reserve lands (clause 5(1)(*a*)(iii); to tax business activities on reserve lands (clause 5(1)(*a*)(iv)); and to impose development cost charges (clause 5(1)(*a*)(v)). Like all laws made under clause 5(1), property taxation laws need to

(21) Not all definitions are contained in this section of the bill. Others will be dealt with as they appear throughout the bill.

be approved by the FNTC (clause 5(2)). The council of a First Nations community must also consider any representations made to it before making a law under clause 5(1)(*a*) to (*c*) (clause 6(4)).

Part 1 refers to a number of elements that need to be included in a property taxation law. For example, a property taxation law must include an assessment appeal procedure (clause 5(4)(*a*)) and a provision that, in the event that third-party management of the First Nation community's local revenues is required, would allow the FMB to act as agent for the community in order to fulfill powers and obligations of the council under the property taxation law, Bill C-20, and any regulations made under the bill (clause 5(5)). For borrowing members only (i.e., under clause 2(1), a First Nations community that has been accepted by the FNFA as a borrowing member), a provision must be included that, in the event the debt reserve fund established by the FNFA is reduced by 50% or more of the total amount contributed by borrowing members and they are required to replenish the fund, would allow them to recover any amounts paid through property taxation laws (clauses 5(6) and 84(5)(*b*)).

Clause 10 also requires that, at least once a year, the council of a First Nations community make property taxation laws setting out the rate of tax (clause 10(*a*)) and authorizing the expenditure of local revenues (clause 10(*b*)).

Clause 8(1) establishes that certain information must be submitted to the FNTC with a property taxation law or amendment (unless the amendment is considered by the FNTC not to be significant (clause 8(2)). The information to be submitted includes a description of the lands, interests or rights subject to the law (clause 8(1)(*a*)), a description of the assessment practices to be applied (clause 8(1)(*b*)), and information relating to services to be provided, existing service agreements and any current service agreement negotiations (clause 8(1)(*c*)). In addition, the FNTC can request that a community provide any documents that the FNTC requires to perform its functions (clause 8(5)).

3. Other Laws

In addition to making property taxation laws, a First Nation community council can make laws with respect to the following matters:

- the expenditure of local revenues (clause 5(1)(*b*)): A law authorizing the expenditure of local revenues cannot be made by a borrowing member unless its budget provides for the payment of all amounts payable to the FNFA during the budget period (clause 11(3)). Furthermore, all local revenues shall be kept in a separate account (clause 13(1)), and the account shall be audited at least once a year (clause 14(1));

- the manner in which taxpayers can represent their interests to the council (clause 5(1)(*c*)): Other clauses that address the issue of taxpayer representation include clause 6(4), which requires that the council consider any representations made prior to making a law, and clause 8(3), which requires that a law submitted to the FNTC for approval be accompanied by a description of the notices that were given, any consultations undertaken by the council before making the law, and any written representations submitted to the council;

- the borrowing of money from the FNFA (clause 5(1)(*d*)); and

- the enforcement of property taxation laws (clause 5(1)(*e*)).

As indicated above, clause 15 removes a "first nation" (as defined in clause 2(1)(*b*)) from the following provisions in the *Indian Act* that address the powers of a band council to make "money by-laws" and related matters:

- subsection 83(1)(*a*) (taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve);

- subsection 83(1)(*d*) (payment of remuneration to chiefs and councillors out of money raised by taxation for local purposes);

- subsection 83(1)(*e*) (enforcement of payments);

- subsection 83(1)(*e.1*) (imposition and recovery of interest on amounts payable);

- subsection 83(1)(*f*) (raising of money from band members to support band projects);

- subsection 83(1)(*g*) (any matter arising out of or ancillary to the exercise of powers under section 83);

- section 84 (providing that if an Indian fails to pay tax owing under a section 83 by-law, the Minister may instead pay the money owing, plus 0.5% out of moneys payable out of band funds to the Indian, to the body owed the tax); and

- section 73(1)(*m*) (authorizing regulations for empowering and authorizing the council of a band to borrow money for band projects or housing purposes, and providing for the making of loans out of moneys so borrowed to members of the band for housing purposes).

This clause exempting scheduled First Nations communities from prescribed provisions of the *Indian Act* was not included in Bill C-23, which instead proposed repealing certain provisions of section 83 as well as section 84 of the *Indian Act*.

E. Part 2 – First Nations Tax Commission (Clauses 16-36)

1. Commissioners

The FNTC will consist of a Chief Commissioner, Deputy Chief Commissioner, and eight other Commissioners, all of whom are to be appointed by the Governor in Council except for one Commissioner, to be appointed by "a body prescribed by regulation" (clauses 17, 19 and 20).

2. Functions and Powers (Clauses 30 to 34)

Clause 30 allows the FNTC to enter into cooperative arrangements with national and international organizations to consult on or sell products or services developed for First Nations comunities that have made property taxation laws.

The FNTC has a number of functions; two key functions are the review of local revenue laws and their application, and the approval of local revenue laws. With respect to its reviewing function, the FNTC must review written allegations that a First Nations community has failed to comply with Parts 1 or 2 of the bill or with regulations under either Part, as well as allegations that a law has been unfairly or improperly applied, provided the community's council has not remedied the situation at the request of the complainant (clause 33(1)). This review can also be undertaken independently by the FNTC if it is of the opinion that the same failure to comply or improper application has occurred. In the case of a conclusion to that effect, the FNTC must order the First Nations community to remedy the situation (clause 33(3)(*a*)), failing which the FNTC may require that the FMB impose a co-management arrangement or assume third-party management of the community's local revenues (clause 33(3)(*b*)).

With respect to its approval function, provided that the law complies with the proposed Act and any standards and regulations made under it, the FNTC must approve the law and maintain it in a registry along with all financial administration laws (clause 31(1)-(4)).

In the case of a clause 5(1)(*d*) law respecting the borrowing of money from the FNFA for financing capital infrastructure for local services on reserve lands, the First Nations community must obtain a certificate of the FMB under clause 50(3) stating that the community is in compliance with the standards established under clause 55(1), and demonstrate that it has unutilized borrowing capacity, before the FNTC can approve the law (clauses 32(1)(*a*) and (*b*)). The FNTC is then required to provide the FNFA with a copy of the law and a certificate stating

that the law meets all the requirements of the Act and regulations (clause 32(2)). The equivalent clauses in Bill C-23 were worded somewhat differently, and were amended at Report Stage to mirror wording contained in what is now clause 74(*a*)(i) to clarify that the clauses refer only to long-term loans, not short-term loans.

3. Standards and Procedures (Clause 35)

The FNTC can establish standards and procedures relating to local revenue laws (clause 35(1) and (2)).

4. Regulations (Clause 36)

The Governor in Council may, on the Minister's recommendation "having regard to" FNTC representations, make a number of regulations relating to property taxation and other matters under Part 2, including the exercise of First Nations communities' law-making powers under clause 5(1). Bill C-20 also provides that prescribed regulations may vary among provinces (clause 36(2)).

F. Part 3 – First Nations Financial Management Board (Clauses 37 to 56)

1. Directors

The FMB will be managed by a board of directors consisting of a minimum of 9 and a maximum of 15 directors (clause 38(1)). The Governor in Council must appoint a Chairperson and a minimum of 5 and a maximum of 11 other directors (clause 40, clause 41(1)). Up to 3 additional directors are to be appointed by the Aboriginal Financial Officers Association of Canada or any other body prescribed by regulation (clause 41(2)).

2. Purposes (Clause 49)

Clause 49 outlines the FMB's mandate, which in general is geared towards assisting First Nations communities with all aspects of financial management, including providing review and audit services (clause 49(*e*)), assessment and certification services (clause 49(*f*)), developing and supporting the application of general credit rating material to First Nations (clause 49(*d*)), and providing co-management and third-party management services (clause 49(*h*)).

3. Functions and Powers (Clauses 50 to 54)

Clause 50(1) provides that the council of a First Nations community can request that the FMB review its financial management system or financial performance to determine whether the community complies with the standards established under clause 55(1), outlined below. If the FMB is of the opinion that it does comply with the standards, it must issue a certificate stating that the community is in compliance (clause 50(3)). This certificate is important, because without it, the FNTC is precluded from approving a law respecting the borrowing of money from the FNFA for financing capital infrastructure for local services on reserve lands (clause 32(1)(*a*)). Clause 50(4) allows the FMB to revoke the certificate on notice if it is of the opinion that there has been a material change to the circumstances on which the certificate was granted. There is no appeal from the FMB's opinion (clause 50(7)).

Clauses 51, 52 and 53 outline the circumstances under which the FMB can require a First Nations community to enter into a co-management arrangement or can assume management of the community's local revenues (third-party management), as well as the circumstances under which those arrangements can be terminated. Clause 52(2) outlines the powers of the FMB under co-management, and clause 53(2) outlines the powers of the FMB under third-party management.

4. Standards and Procedures (Clause 55)

Clause 55(1) allows the FMB to establish standards respecting the form and content of financial administration laws, FMB approvals under Part 1, certification of First Nations communities, and financial reporting with respect to the auditing of the local revenue account.

Clause 55(2) allows the FMB to establish procedures respecting submission of financial administration laws for approval; the subsequent approval of financial administration laws; issuance of certificates respecting compliance with standards; and implementation or termination of a co-management arrangement or third-party management of a First Nations community's local revenues.

5. Regulations

Clause 56 allows the Governor in Council to make regulations with respect to: the implementation of co-management or third-party management of a community's local revenues (clause 56(*a*)); and fixing fees that the FMB may charge for services (clause 56(*b*)).

G. Part 4 – First Nations Finance Authority (Clauses 57 to 89)

The FNFA is a non-profit corporation without share capital (clause 58) managed by a board of directors who are elected by representatives of borrowing members (clause 61(3)). The board of directors appoints a president to act as the chief executive officer (clause 69(1)).

1. Purposes (Clause 74)

The FNFA's mandate includes securing various types of financing for its borrowing members. For example, using property tax revenues, the FNFA will secure: long-term financing of capital infrastructure for the provision of local services on reserve lands (clause 74(*a*)(i)); lease financing of capital assets for the provision of local services (clause 74(*a*)(ii)); and short-term financing to meet cash-flow requirements for operating or capital purposes under a law authorizing the expenditure of local revenues, or to refinance a short-term debt incurred for capital purposes (clause 74(*a*)(iii)). The FNFA will also secure financing for any purpose prescribed by regulation through the use of other prescribed revenues (clause 74(*b*)). In addition to securing financing, the FNFA will secure the "best possible" credit terms for its borrowing members (clause 74(*c*)), provide investment services to members and First Nations organizations (clause 74(*d*)), and provide advice with respect to the development of long-term financing mechanisms for First Nations communities (clause 74(*e*)).

2. Functions and Powers (Clauses 75 to 87)

The FNFA's board of directors may make a number of resolutions, including respecting the borrowing of money, the issuance of securities, and the lending of securities to generate income if the loan is fully secured (clause 75(1)). To obtain certain short- and long-term loans, a First Nations community must meet specific criteria (clauses 79 and 81).

a. Borrowing Members and their Obligations

Clause 76(1) requires that a First Nations community apply to the FNFA to become a borrowing member. In order for the community to be accepted as a borrowing member, the FMB must have issued a certificate that it complies with all standards (clause 76(2)). The consent of all other borrowing members is required in order for a community to cease being a borrowing member (clause 77).

A borrowing member cannot repeal a property taxation law (clause 11(1)), nor can it obtain long-term financing secured by property tax revenues from a source other than the FNFA (clause 80).

If a borrowing member fails to make a payment to the FNFA, or fails to fulfill any other obligation, the FNFA must notify the FNTC and the FMB (clause 86(1)(*b*)). If the borrowing member has failed to fulfill an obligation other than making a payment, the FNFA can require the FMB to review and report on the failure (clause 86(2)); the FMB must then advise the FNFA of its views on the failure and recommend co-management or third-party management as it considers appropriate (clause 86(3)). If the borrowing member has failed to make a payment to the FNFA, or if the FMB has recommended co-management or third-party management under clause 86(3), the FNFA can require that the FMB impose a co-management arrangement or assume third-party management (clause 86(4)).

b. Funds

The FNFA must establish a sinking fund or other repayment system to repay holders of securities issued by the FNFA (clause 82). The FNFA must also establish a debt reserve fund to cover payments in the event that borrowing members cannot make payments or contribute to the sinking fund (clause 84(1)), as well as a credit enhancement fund (clause 85(1)).

Clause 87 permits the FNFA to establish short-term pooled investment funds.

3. General (Clause 88)

The chairperson must submit an annual report, including the financial statements of the FNFA and its auditor’s opinion on them, to the FNFA’s members and the Minister.

4. Regulations (Clause 89)

Clause 89 provides that the Governor in Council may, on the recommendation of the Minister after consultation with the FNFA, make regulations relating to the funds created by the FNFA, as well as to extend Part 4's application "to any non-profit organization established to provide social welfare, housing, recreational or cultural services to first nations ... on reserve lands." For this purpose, the Governor in Council may make any necessary adaptations to the proposed Act.

H. Part 5 – First Nations Statistical Institute (Clauses 90 to 113)

As is set out in the definitions clause (clause 2(1)), "first nation" in Part 5 means a band. Therefore, Part 5 applies to all First Nations communities, not just those that have been included in the schedule. In addition, Part 5 is to apply to "other aboriginal group[s]," defined to mean former *Indian Act* bands that are parties to a treaty, land claim agreement or self-government agreement (clause 90).

The FNSI is managed by a board of directors (clause 94(1)), of which the Chief Statistician of Canada is a member (clause 94(2)). On the recommendation of the Minister, the Governor in Council appoints a First Nations Chief Statistician (clause 102(1)).

1. Purposes (Clause 104)

The FNSI will provide statistical information on Indians and "other members of first nations," members of other Aboriginal groups, as defined, and other persons who reside on reserve lands or lands of other Aboriginal groups (clause 104(*a*)). The FNSI will work with other government departments and agencies (clause 104(*c*)).

2. Powers (Clause 105 to 107)

The FNSI may collect, compile, analyze and abstract data for statistical purposes respecting a number of subjects, including population, health, law enforcement, education, labour and employment, community services and many others (clause 105(2)). It can agree to share information with other groups (clause 106(1)), but must inform those from whom information is collected on whose behalf the information is being collected (clause 106(2)(*a*)).

3. Protection of Information (Clauses 108 and 109)

Clause 108(1) provides that, except in limited circumstances, only a person employed by or under contract to the FNSI who has sworn or affirmed to comply with the protection of personal information provisions may examine an identifiable individual return made for the purposes of Part 5. In addition, persons sworn or affirmed are prohibited from knowingly disclosing information related to any identifiable individual, First Nations community, business or organization (clause 108(1)(*b*)). Certain disclosures are permitted by the First Nations Chief Statistician (clause 108(2)).

4. Offences (Clauses 111 and 112)

Clause 111 sets out summary conviction offences potentially committed by persons who have sworn an oath or solemn affirmation. These include making false declarations, seeking unauthorized information and the improper examination or disclosure of information. Clause 112 sets out summary conviction offences relating to the wilful disclosure or improper use of information that might affect the market value of a security or commodity.

5. Regulations (Clause 113)

The Governor in Council may, on the recommendation of the Minister having regard to FNSI representations, make regulations relating to the collection, compilation, analysis and abstraction of data for any matter as well as the disclosure of documents or records relating to First Nations communities, Indians or other members of other Aboriginal groups.

I. Part 6 – Financial Management and Control (Clauses 114 to 131)

Clause 115(1) specifies that the officers and employees of the FNTC and the FMB are not part of the public service of Canada. Both institutions are required to submit annual corporate plans and budgets to the Minister for approval (clause 118(1)). Clause 119 discusses bookkeeping and accounting, clause 120 discusses annual auditor’s reports, and clause 121 discusses special examinations to be carried out at least once every five years.

J. Part 7 – Provisions of General Application (Clauses 132 to 142)

1. General

Part 7 contains provisions dealing with conflicts of interest (clause 132), limits of liability (clauses 136 and 137), and conflicts with other laws, including conflicts with other First Nations community laws (clause 138).

2. Regulations (Clauses 140 to 142)

The Governor in Council may make regulations with respect to a number of matters under this bill. In particular, clause 141 provides for the making of regulations to enable an Aboriginal group that does not come within the definition of band in subsection 2(1) of the *Indian Act*, but that is a party to a treaty, land claims agreement or self-government agreement with Canada, to benefit from the provisions of Bill C-20 or obtain the services of any of the bodies established under the bill.

K. Part 8 – Transitional Provisions, Consequential Amendments, Coordinating Amendments and Coming Into Force (Clauses 143 to 155)

1. Transitional Provisions

Clauses 143 and 144 contain provisions relating to employment with, and the operation of, the Indian Taxation Advisory Board over the transitional period, as well as the continuing status of directors of the First Nations Finance Authority Inc.

Clause 145 provides that certain by-laws made under the *Indian Act* that are in force on the day a First Nations community is added to the schedule are deemed to be laws under this bill. Following that, clause 146 provides that if a community already had a by-law in place, the requirement to make a financial administration law before making property taxation laws does not apply, unless the community is a borrowing member.

Clause 147 requires the Minister to review the provisions and operation of the proposed Act within seven years of Royal Assent.

2. Consequential and Coordinating Amendments

Clauses 148 to 153 make a number of consequential amendments to the *Access to Information Act*, the *Financial Administration Act*, the *Indian Act*, and the *Privacy Act*. Clause 154 makes coordinating amendments to the *Public Service Modernization Act*.

3. Coming Into Force

Other than clause 154 (coordinating amendments to the *Public Service Modernization Act*), the provisions of the bill will come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

The First Nations Fiscal Institutions Initiative has its roots in the 1988 Kamloops Amendments to the *Indian Act*. That legislation was spearheaded by a group of B.C. First Nations to clarify the capacity of First Nations to impose property taxes on all reserve land, including conditionally surrendered land. Bill C-19 was developed as a result of a Memorandum of Understanding between DIAND and the AFN through the National Table on Fiscal Relations. At the time, it was seen by some First Nations as benefiting primarily the same small group of First Nations. This view reflected the fact that only about 110 First Nations in Canada – most of which are based in British Columbia and Alberta – collected property taxes. Accordingly, few First Nations benefited significantly from property taxation revenues from leaseholder interests on their lands (cottagers, businesses, etc.).

As a result, there was uneven support among First Nations for Bill C-19. Opposition to the bill came mainly from the Chiefs of Ontario, the Assembly of Manitoba Chiefs, the Association of Iroquois and Allied Indians, the Manitoba Keewatinow Okimakanak Inc., and the Federation of Saskatchewan Indian Nations, as well as several individual First Nations.(22) The Union of British Columbia Indian Chiefs had also criticized the legislative initiative.(23)

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(22) See Ross Montour, "Proposed Act Called Wolf in Sheep's Clothing," *The Eastern Door*, Vol. 11, No. 43, 22 November 2002. See also "Chiefs Reject Plan to Allow First Nations to Collect Taxes," CBC News, 2 December 2002.

(23) Union of British Columbia Indian Chiefs, Press Release, "Our Land is Our Future," 15 August 2002.

As previously mentioned, in November 2002, the Assembly of First Nations passed resolutions rejecting the federal government's "suite" of proposed legislation, which included the controversial First Nations Governance Act.[24] It also adopted an "accommodation resolution" affirming First Nations communities' autonomy at the local and regional levels to enter into agreements with the federal government, as long as those agreements were not in the context of legislation that could potentially affect all First Nations communities wishing to exercise their taxation authority. The AFN does not yet appear to have articulated its position with respect to Bill C-20.

As of 30 November 2004, Bill C-20 does not appear to have elicited the same controversy as its predecessors, Bills C-19 and C-23. The concerns that were raised when those bills were introduced have not been the focus of recent debate in Parliament; there appears to be all-party support for Bill C-20 in the House of Commons. In a November 2004 resolution, the Chiefs of Ontario did, however, reiterate their opposition to the legislation. No media coverage has been noted.

(24) Bill C-7 died on the *Order Paper* in November 2003 and has not been reintroduced.