

2004-2005

ANNUAL REPORT

OF THE

INDIAN TAXATION ADVISORY BOARD

**INDIAN
TAXATION
ADVISORY
BOARD**



**COMMISSION
CONSULTATIVE
DE LA FISCALITÉ
INDIENNE**

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TAXATION
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DE LA FISCALITÉ
INDIENNE

The Honourable Andy Scott, P.C., M.P.
Minister of Indian Affairs and Northern Development
Les Terrasses de la Chaudière
Room 2100, 10 Wellington Street
GATINEAU PQ K1A 0H4

Dear Minister Scott:

On behalf of the Indian Taxation Advisory Board (ITAB), it is my pleasure to submit to you our 2004-2005 Annual Report. The report highlights our achievements of the past year and outlines some of the challenges before us.

The growth of the First Nation property tax system across Canada continues. Today, more than 100 communities are collecting property tax and, in so doing, are realizing the much-needed benefits: jobs, improved infrastructure and economic growth.

The passage of the *First Nations Fiscal and Statistical Management Act* (FSMA) signals a change in the relationship between ITAB and your department. First Nations now have an option to strengthen their property tax jurisdiction and access financing tools that are critical to the development of economic infrastructure. ITAB will focus its attention on transition and implementation matters, to ensure the operational readiness of the First Nations Tax Commission and to otherwise make certain that the FSMA works to the benefit of First Nation tax authorities and First Nation taxpayers.

I trust you will find this report satisfactory.

Regards,

Chief Strater Crowfoot
Chairman

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EXECUTIVE SUMMARY

The Indian Taxation Advisory Board (ITAB or the Board) is the only independent and Aboriginal controlled body involved in the exercise of the Minister of Indian Affairs and Northern Development's (the Minister) approval authority under the *Indian Act*. As such, ITAB maintains a unique institutional relationship between the Minister and First Nation governments. Since 1989, ITAB has exercised its mandate to ensure the smooth and credible introduction of First Nation property taxation jurisdiction on reserve. Today, as a result, 105 First Nations across Canada are collecting property tax, generating more than \$46 million in tax revenues.

Increased revenues through First Nation property taxation continues to play a fundamental role in improving First Nation economies by enabling First Nations to offer local competitive services necessary to compete for private investment. However, in comparison to other jurisdictions in Canada, ITAB research has shown that it is ten times harder for First Nations to attract private investment. The Board spent many years working with First Nations on ways to improve this situation. It proposed the development of four institutions that will together help First Nations reduce some of the barriers to economic development on their lands.

On March 23, 2005, the *First Nations Fiscal and Statistical Management Act* (FSMA or Bill C-20) received Royal Assent. The Act, in part, changes ITAB from an advisory body reporting to the Minister to the First Nations Tax Commission (FNTC) - a statute-based service agency. The FSMA allows First Nations to choose between exercising property taxation jurisdiction under section 83 of the *Indian Act* or under the FSMA. Therefore, the FNTC will be responsible for maintaining two parallel and national on-reserve property tax systems. ITAB has formulated a transition plan to ensure it meets this challenge.

The FNTC will be directly accountable to the federal government through Parliament and to First Nation taxing authorities, taxpayers and other affected parties through performance measures in the same manner as other Crown authorities. It will report annually on its progress concerning these measures. As a service agency, the FNTC will have an appropriate degree of independence from the federal government, yet remain fully accountable.

The FNTC will be one of four First Nation fiscal institutions, including the First Nations

Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute. All four institutions will be established by the FSMA once the legislation comes into force (expected to be in April 2006). The establishment of these institutions is a first step in providing First Nations with the tools necessary to further economic development on their lands.

Because of its unique role in the process of drafting real property tax bylaws, ITAB created a bridge between First Nation bylaws and federal legislation. ITAB has streamlined the process for First Nations to establish their own taxation regimes by developing sample laws, specialized software, educational programs and publications. The Board's own body of policies, procedures and regulations are further designed to facilitate and protect the integrity of First Nation real property taxation jurisdiction.

ITAB is the leading authority on First Nation property taxation in Canada and is committed to developing strong First Nation tax administrations. As the number of First Nations with real property tax regimes continues to increase, so does the requirement for strong tax administrations to manage and operate them. ITAB's previous review of courses designed for local government taxation regimes found that these do not meet the unique requirements of managing or administering a real property taxation regime on reserve. ITAB has instituted education and training initiatives to establish a level of professionalism for First Nation tax administrators, facilitate their mobility between First Nations and serve as a model for future capacity development initiatives.

The Board has also established partnerships and networks to foster a better understanding of First Nation property tax lawmaking – not only to reduce the potential for conflict between other affected parties and First Nations, but to generate support for new tax initiatives. When necessary, ITAB has successfully mediated conflicts between First Nations, third party interests and other levels of government.

The *First Nations Gazette*, produced in partnership with the Native Law Centre at the University of Saskatchewan, is an excellent example of the type of alliance ITAB has sought to move the self-government agenda forward. The publication of First Nation taxation bylaws in the *Gazette* ensures that community members, on-reserve taxpayers and the public at large are aware of First Nation taxation initiatives. More importantly, the *Gazette* provides First Nation lawmakers and the courts with a critical tool for communicating and enforcing First Nation laws.

Highlights of 2004-2005

First Nations Fiscal and Statistical Management Act: In 2004-2005, ITAB played a key leadership role in securing support for the FSMA. The legislation was introduced on November 2, 2004 and successfully moved through Parliament to receive Royal Assent on March 23, 2005. The FSMA earned all-party support in both the House of Commons and the Senate.

First Nations Tax Commission: The FNTC will build upon the reputation and expertise of ITAB. The Board continued to conduct research, and define and refine a policy framework that will best serve ITAB's transition from an advisory body to the First Nations Tax Commission - a statutorily-based service agency. ITAB worked with the proponents of the other institutions, as well as officials from the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice (DOJ) to ensure all objectives of the institutions were met.

Regulations: In anticipation of the FSMA coming into force in April 2006, ITAB has worked with officials of other institution advisory panels, DIAND and DOJ, as well as other stakeholders, to develop regulations associated with the FSMA. Consultation on these regulations will be completed by the end of 2005.

Bylaws: In 2004-2005, 99 bylaws, enacted by First Nations under section 83 of the *Indian Act*, were reviewed and recommended by the Board and approved by the Minister. Since 1989, ITAB has recommended a total of 1108 bylaws covering areas such as property taxation, assessment, tax rates, expenditure, business licensing, financial administration, telephone companies and other related amendments. On November 2, 2004, the Kwantlen First Nation became the 100th First Nation in Canada to establish a property tax regime.

Public Education: ITAB, in fulfilling its mandate to promote and safeguard the First Nation property taxation system, is a leading advocate for enhanced First Nation government accountability. The publication of the *First Nations Gazette* continued to provide for the proper promulgation of First Nation legislation. The *Gazette* will further contribute as a publication and consultation tool for the regulations required to govern the development, approval and implementation of First Nation property tax laws under the FSMA. Further, the ITAB transition to the FNTC will require the development of a new accountability framework to meet the more exacting provisions of the FSMA.

Building Capacity: To build the capacity of First Nation property tax administrations,

twenty-four certificates were awarded to candidates in the last fiscal year after they completed ITAB courses in the Financial Administration and Management Bylaw Certificate Program and the Client Lands Assessment Services System. In 2004-2005, ITAB developed and launched an on-line Financial Administration and Management Bylaw Certificate Program (FAM).

Negotiations and Dispute Resolution: As the number of First Nations collecting property tax grows, ITAB is increasingly called upon to negotiate disputes between First Nations, various levels of government and First Nation ratepayers. The Board continued to carry out these activities using established mediation procedures and standards that have proven highly effective over time. With ITAB facilitation, the Canadian National Railway (CNR) and a number of BC First Nations continued discussions regarding CNR property taxation and revenue sharing with the Province of British Columbia. ITAB also assisted the Squiala First Nation and the City of Chilliwack with service agreement negotiations.

Research and Policy Development: To prepare for the coming-into-force of the FNTC, ITAB has been developing new policies, as well as reviewing existing policies to update and ensure a smooth transition to the FNTC. ITAB has also continued with its research initiative to support economic development of First Nation economies and expand the First Nation property tax base. In 2004-2005, the Board's research focussed on creating certainty in the First Nation investment climate and expanding the First Nation private sector.

I. OPERATIONS

1. Authority

In 1988, First Nations-led amendments to the *Indian Act* extended the taxing powers of First Nations to their interests in conditionally surrendered or “designated” lands. This change to the *Indian Act* gave First Nations broad new powers to tax the interests within reserves, thereby establishing their jurisdiction, creating economic development opportunities and providing a basic tool for self-government. The Indian Taxation Advisory Board was established in 1989 to complement these amendments to the *Indian Act* and to facilitate the approval of First Nation taxation bylaws. As such, ITAB became the first independent, Aboriginal-controlled institution exercising the Minister of Indian Affairs’ decision-making authority under the *Indian Act*.

2. Mandate

ITAB’s relationship with DIAND is governed by a Memorandum of Understanding. As a result of this agreement, the Board is mandated to:

- Promote the exercise of First Nation real property taxation jurisdiction in support of self-government and self-reliance.
- Examine taxation bylaws proposed by First Nations under section 83 of the *Indian Act* and recommend their approval to the Minister.
- Advise the Minister on policy concerning the taxation powers of First Nations.
- Assist First Nations interested in developing taxation bylaws.
- Foster harmonization between taxation by First Nations and by other authorities.
- Hear from taxpayers whose interests are affected by taxation under section 83 and consider this information in making recommendations to the Minister.
- Provide mediation and alternate dispute resolution mechanisms to First Nations, governments, taxpayers and other affected parties concerning matters related to the exercise of First Nation property tax jurisdiction.
- Advise the Minister on improving the administration of the Minister's statutory responsibilities under section 83.
- Ensure First Nation tax bylaws are properly promulgated and available to the public through the *First Nations Gazette*.
- Continue discussions with federal government officials on the Board’s further development in the area of new fiscal relations between First Nations and Canada.
- Work with the Minister to develop legislative proposals for establishing a permanent body, which may include the Board as a statutory institution of self-government.

3. Membership

The five-member Board is composed of First Nation members who are knowledgeable and experienced in First Nation government, intergovernmental relations, property taxation, reserve land development, economic development and the provision of government services.

The members are:

- Chief Strater Crowfoot, (Chairman and CEO), Siksika Nation, Alberta
- David Paul, (Deputy Chair), Tobique First Nation, New Brunswick
- Clarence T. (Manny) Jules, Kamloops Indian Band, British Columbia
- William (Bill) McCue, Chippewas of Georgina Island, Ontario
- Ricky Fontaine, Innu Takuaitkan Uashat mak Mani-Utenam (Sept-Îles), Quebec.

4. Process

The Board has established policies, precedents and procedures regarding bylaw development, enactment, approval and implementation, as well as bylaw enforcement and assessment appeal procedures. All bylaws proposed under section 83 are reviewed to ensure conformity with the *Canadian Charter of Rights and Freedoms* and enabling legislation, comprehensiveness, equity and natural justice, fairness, adequacy of notification and appeal procedures, and the absence of ministerial liability.

In addition, a comprehensive analysis of issues reflecting the perspectives and interests of First Nations, on-reserve taxpayers and other affected parties is conducted when formulating recommendations to the Minister. First Nation governments must demonstrate that they have consulted potential taxpayers and other governments, and that all reasonable measures have been taken to ensure that there will be an orderly transition to the First Nation taxation regime. When necessary, ITAB also requests comments from the appropriate federal government departments or sectors within DIAND in order to assure the Minister that all interests and perspectives have been considered.

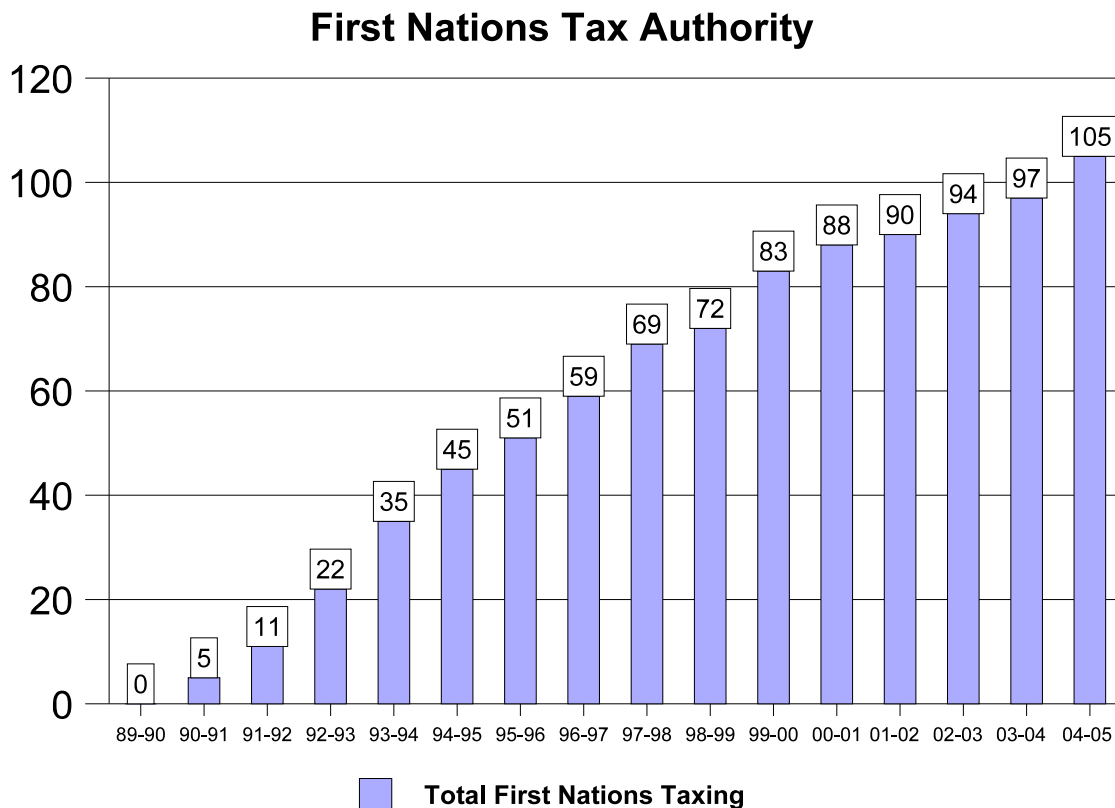
Furthermore, the ITAB Rates Committee develops policy and reviews each First Nation's proposed annual rates bylaw in order to balance the need to respect on-reserve taxpayers' rights to fairness and equity with the need to respect the accountability of First Nation governments to their citizens.

5. Support

The Board is supported by a staff of 12 employees located in the Eastern Office in Ottawa, Ontario and the Head Office in Kamloops, British Columbia. The staff provides professional and logistical support and assist the Board by reviewing proposed taxation bylaws and developing, communicating, and implementing related policy. The Board is also supported by a network of specialized consultants and First Nation advisors.

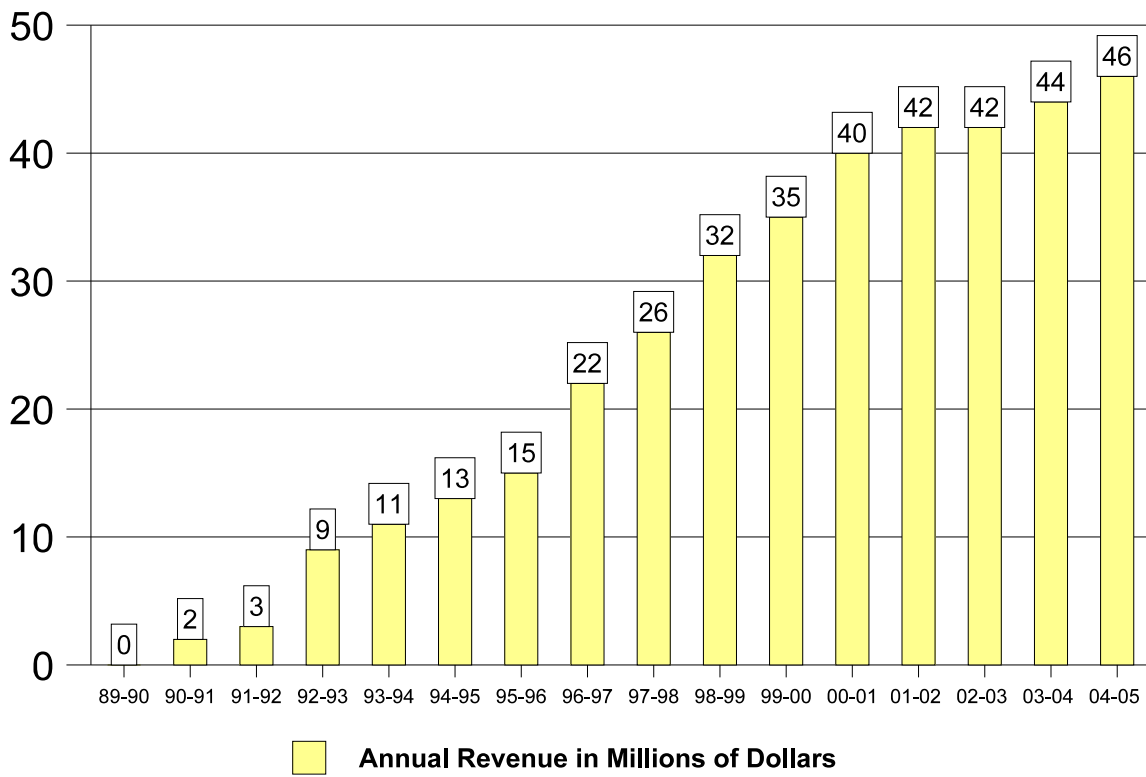
6. Results

One hundred and five First Nations were exercising taxation jurisdiction as of March 31, 2005. More than 15 percent of First Nations in Canada are now levying property taxes on reserve.



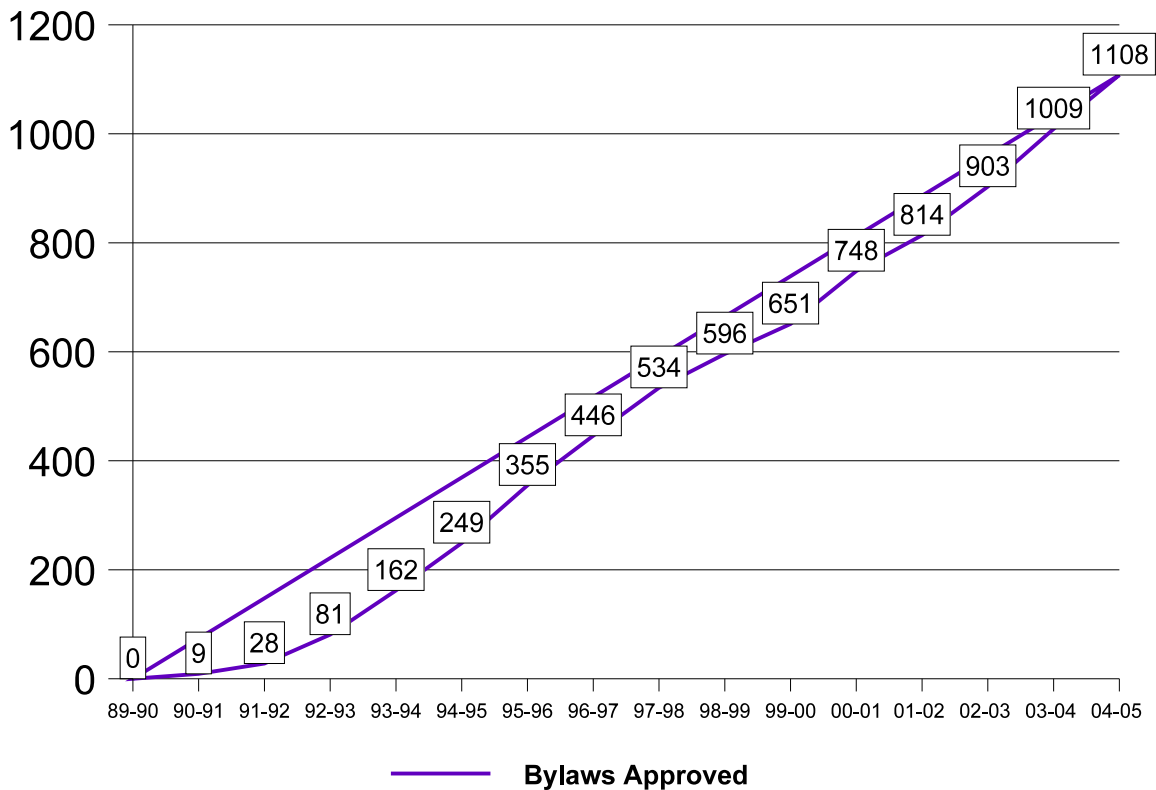
Annual revenues to First Nations from taxation exceeded \$46 million in 2004-2005. Since 1989, more than \$294 million has been generated through property taxation on reserve.

Property Tax Revenue



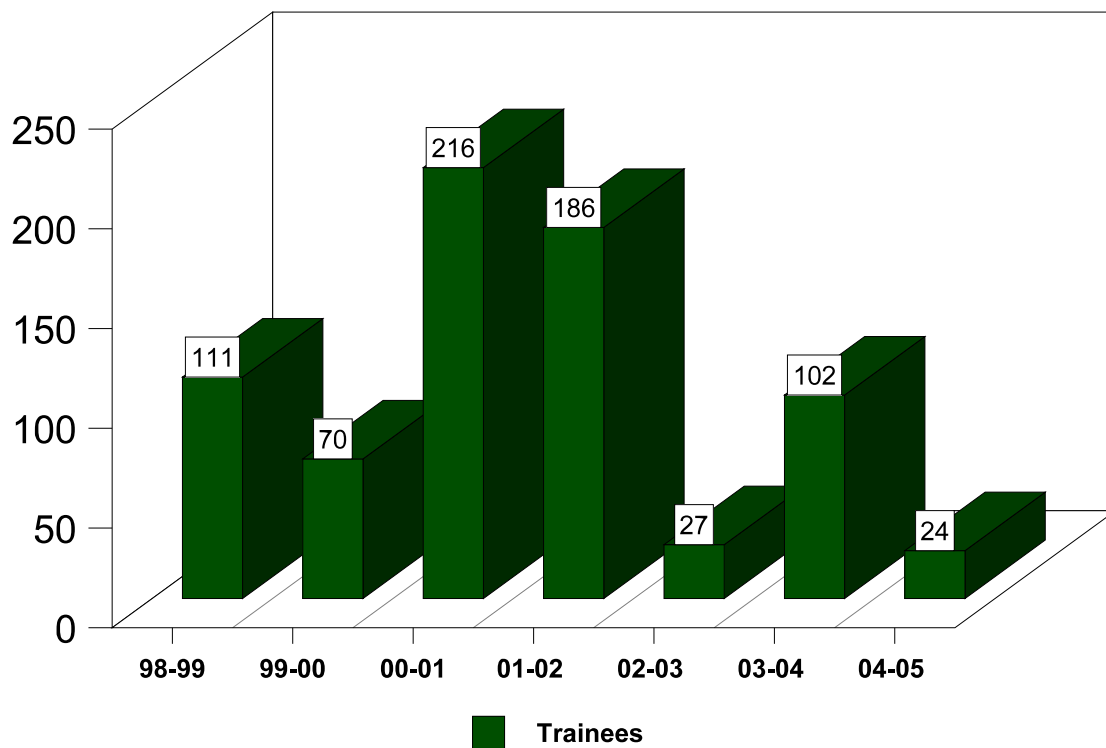
The variety, complexity and volume of bylaws processed by the Board each year and approved by the Minister has increased steadily. By the end of fiscal year 2004-2005, ITAB had reviewed 1108 bylaws concerning property taxation, assessment, rates, expenditure, business licensing, financial administration, telephone companies, settlement revenue account and related amendments. Nearly 20% of First Nations in Canada had enacted at least one bylaw under section 83 of the *Indian Act*, signalling a continued strong interest in exercising this jurisdiction.

Section 83 Bylaws Approved



To build the capacity of First Nation tax administration, 24 candidates received certification in the 2004-2005 fiscal year after completing ITAB courses in the Client Lands Assessment Services System and the Financial Administration and Management Bylaw Certificate Training. The Board views education as a priority. Training for tax administrators is vital to the success of the tax system and providing quality services to taxpayers. Program services in this area are below desired and acceptable targets, primarily due to a lack of financial support.

Building Capacity



II. PROGRAMS AND POLICIES

1. Bylaw Services

First Nation Bylaw Development

In 2004 -2005, the following First Nation communities submitted bylaws for review under section 83 of the *Indian Act*:

a) Property Taxation

- Fort William First Nation, ON
- Kitsumkalum First Nation, BC
- Kwantlen First Nation, BC
- Metlakalta First Nation, BC
- Mowachaht/Mulchalaht First Nation, BC

b) Business Licensing

- Hupacasath First Nation, BC
- Whitecap Dakota First Nation, SK

c) Financial Administration

- Canoe Creek Indian Band, BC
- Waskagamis Bay First Nation, ON

d) Settlement Revenue Account Bylaws

- Alexis Nakota Sioux First Nation, AB
- Enoch First Nation, AB

On November 2, 2004, the Kwantlen First Nation became the 100th First Nation to enact a property tax bylaw in Canada. This marked an important milestone for ITAB and for those First Nations who have recognized the integral role of property taxation in community planning, infrastructure, and economic growth.

ITAB also reviewed 81 amendments to existing bylaws (including rates bylaws) for policy compliance and recommended them for approval by the Minister. A list of all First Nations with section 83 bylaws is attached as APPENDIX A.

2. Strengthening First Nation Tax Administration

Education and Training

Managing a real property taxation system demands a broad set of skills. Administrators must manage bylaws, maintain various pieces of legislation covering areas such as rate setting, assessment, appeals and financial management, and keep up effective communications with community members and on-reserve taxpayers. However, institutional training in these unique subject areas, specific to a First Nation setting, was not previously available. ITAB has worked to fill this void.

Today, ITAB offers five courses. They are designed to improve the overall accountability to on-reserve taxpayers and First Nation members and help implement labour-saving technology, reduce disputes, improve administrative efficiency and facilitate First Nation tax administrator labour mobility. ITAB expanded this initiative by launching an on-line program in 2004-2005.

Budget-Based Real Property Tax Rates Training

In accordance with statutory requirements for the setting of annual property tax rates, the Board adopted a national policy whereby First Nations must establish real property tax rates on reserve based on an annual expenditure plan derived from an approved Band Council budget. The setting of property tax rates based on a property tax budget parallels the methodology used by virtually every local government in Canada. This system replaces the former method of setting tax rates based on those in an adjacent municipality.

A real property tax rates training course was developed in 1998 to teach First Nation property tax administrators the skills required to implement the policies, methodologies, systems and software operations of a budget-based real property taxation system.

The budget-based tax rates methodology is now used by 30 First Nations. It is estimated that 39 First Nations will require training in 2005-2006. Although more tax administrators have been trained, training is an on-going requirement to service the expanding tax system, communicate policy changes, and address the high turnover rate of tax administrators.

The budget-based system is a requirement of the FSMA.

Client Lands Assessment Services System (CLASS)

The Client Lands Assessment Services System is a database management system for the administration and management of property tax folios including the calculation of property taxes. It is the result of research, development and consultation with First Nation tax

administrators. The objective is to establish standards for all First Nation property tax systems in Canada. It eliminates the variety of methods of processing tax notices and payments, interests and penalties. CLASS is helping to define national tax administrative standards, while accommodating regional variations, improving accountability to taxpayers and First Nation citizens, and further helping to increase the capacity of First Nation governments.

A comprehensive curriculum and cost recovery training course was developed to implement CLASS. To date, 89 individuals have been certified to operate CLASS software. One additional CLASS trainee was certified in 2004-2005 and support was provided to First Nations utilizing the CLASS system.

Financial Administration and Management Bylaw Certificate Program

The Financial Administration and Management Bylaw Certificate Program is a course presented to members of council and senior administration who work on the development of a draft financial administration and management bylaw based upon ITAB and other First Nation models. Transparency, accountability and redress are central themes in the week long course. One of the elements of the training is the development of a consultation strategy to assist First Nations in the presentation of the concept and draft bylaw to their membership.

ITAB continued its work on the development of financial administration and management bylaws and supporting First Nations interested in developing their own accountability regimes. In the last fiscal year training and related support was provided to the following First Nations: North Thompson (BC), Temagami (ON), Tsawwassen (BC), Pheasant Rump Nakota (SK), Lower Kootenay (BC), Campbell River (BC), Upper Nicola (BC), and Mount Currie-Lil'wat Nation (BC).

In 2004-2005, 23 certificates were awarded to candidates representing 2 First Nations for completing the Financial Administration and Management Bylaw Certificate Program.

Distance Learning

First Nations collecting property tax on reserve are located in every region across Canada. It is imperative that on-going training is provided to these communities in respect of the evolving policy, legal and political environment. Accordingly, ITAB has undertaken the development of a program to support "distance learning."

The development of an on-line course on financial administration and management bylaws (FAM) was completed in July 2004. The program is an 8 module course designed to build capacity in drafting and implementing financial administration and management bylaws at

the community level. Its focus is to train students to provide “on-site” expertise and ongoing support to those First Nations which want to develop FAMs. The trainees will develop skill and knowledge to assist Chiefs, Councils, staff and membership of taxing First Nations.

ITAB selected four participants to participate in the project. The pilot of the ITAB On-Line Training Course for Financial Administration and Management Bylaws was launched in March 2005. The pilot has the four participants guided by an instructor and will run for 16 weeks.

This is ITAB’s first on-line training course, and is expected to emerge as the prototype for future ITAB remote learning opportunities.

Alberta Tax Administrators Training Initiative

In order to facilitate efficient First Nation property tax administration in Alberta, ITAB made significant upgrades to its property tax software to accommodate Alberta First Nation property tax requirements. These upgrades, as well as an Alberta-focussed Budget Based Tax Rates Training Module, were part of the materials prepared for an Alberta Tax Administrator’s training course.

The training course is scheduled for April 26, 2005. The one day of training will focus on budgeting property tax revenue and provide an introduction to the Alberta version of the CLASS/MRW software.

3. Public Education

Through its various communications activities, the Board builds public awareness and understanding of First Nation property taxation on reserve lands.

www.itab.ca

The ITAB web site is maintained to provide the general public with user-friendly, easy-to-access information about ITAB. It allows visitors to access ITAB’s mandate, programs and services, and a list of taxing First Nations. In addition, the site contains the *First Nations Gazette*, the ITAB-DIAND Memorandum of Understanding, previous annual reports and other publications. Finally, the site houses sample bylaws, research and policies, and links to the FNTC web site. The ITAB web site received 48,823 visits last year.

www.fntc.ca

The FNTC web site was launched in August 2002. It provides information on current issues and includes a media room. The site also allows visitors to access the First Nations Fiscal Institutions Initiative web site (www.fnfi.ca), which offers access to the web sites of the other institutions as created by the FSMA: the First Nations Finance Authority (www.fnfa.ca), the First Nations Financial Management Board (www.fnfmb.com), and the First Nations Statistical Institute (www.firststats.ca). The FNFI site received 3071 visits last year. The FNTC site received 1988 visits.

First Nations Gazette

The *First Nations Gazette*, is published semi-annually as a joint partnership of ITAB and the Native Law Centre, University of Saskatchewan. The *Gazette* is a tool for notifying the public of First Nation laws. Publication of these laws is intended to increase awareness of First Nation taxation initiatives among First Nations and the general public, and to help First Nations enforce their tax laws by ensuring that regular notice is provided and that a register of all current tax bylaws is readily accessible. The target market is the judiciary, members of the legal profession, First Nations and their citizens, provincial and municipal governments, on-reserve taxpayers and academic institutions. The *First Nations Gazette* is distributed by subscription. Ninety-five bylaws were gazetted in 2004-2005.

Clearing The Path

ITAB's newsletter, *Clearing the Path*, is published regularly to keep readers informed of real property taxation issues on reserve. Its circulation exceeds 2,000 subscribers. It is also available electronically at www.itab.ca.

4. Mediation

Community Support

The smooth transition of real property taxation jurisdiction to First Nation control is one of the Board's highest priorities. For some, the concept of a First Nation administering the taxation of real property on reserve can be controversial. The process of reaching an agreement between a First Nation and a municipal government for the continuation of services on reserve to taxpayers, and the resulting cost structure, can be complex.

A new First Nation property tax regime will, in many cases, replace the previous provincial or municipal property tax system in the collection of revenues and the delivery of services to taxpayers on First Nation land. Since most First Nations do not have the service delivery infrastructure or capacity required, a service agreement is necessary to continue providing the same level of services to taxpayers. ITAB, in accordance with its mandate, provides mediation services where necessary.

The Board has worked with a number of First Nations during this past fiscal year to ensure that the rate setting and budget process included consultation with taxpayers. The mediation process has included communications training for First Nation tax administrators to support their efforts.

The Board has provided support to service agreement negotiations between First Nations and other parties. The support has included facilitation of meetings, development of negotiation protocols and the use of ITAB's service agreement software to determine the cost of services for the benefit of both governments involved in the negotiations.

The following are some areas where ITAB has provided support:

(a) Canadian National Railway Taxation (BC)

Negotiations are progressing for the development of a revenue sharing agreement between the Province of British Columbia and First Nations with respect to CNR taxation.

The Province of BC and CNR completed the analysis of assessed values and revenue sharing potential for First Nations with CNR interests through the reserve.

The provincial government and CNR jointly contributed \$50,000 to support the CNR/First Nations negotiation process.

ITAB will be facilitating further negotiation discussions.

(b) Opaskwayak Cree Nation (MB)

The Opaskwayak Cree Nation (OCN) is a member of the Manitoba First Nations Homes Network. These First Nations have responsibility for personal care homes on reserve. As part of its responsibility, OCN has taken the lead in exercising legislative jurisdiction by way of the licensing power. ITAB is working with OCN to develop a sample licensing bylaw for consideration by all of the Network First Nations. A separate DIAND-First Nations Homes Network process is to establish an agreement on standards and the regulatory framework. Work on the licensing initiative will continue in 2005-2006.

(c) Sto:lo Nation Joint Reserve (BC)

The ITAB has continued to meet with Sto:lo Nation representatives to consider the best option for applying property tax jurisdiction to reserve land held jointly by twenty-two Sto:lo communities. With Royal Assent of the FSMA, new avenues and also new challenges present themselves. Work towards a resolution will continue in 2005-2006.

(d) BC Treaty Agreement-In-Principle (AIP) Tables

In May, 2004, the BC Treaty AIP tables (formerly lead tables), invited ITAB to make a presentation about First Nations real property taxation and the services ITAB provides. The

four communities in attendance were Lheidli T'enneh, Sliammon, Maa-Nulth First Nations, and Tsawwassen. The materials distributed resulted in considerable interest from the AIP representatives. ITAB was asked to provide some support with regard to: the fiscal benefits and the source of authority for real property tax; taxation and representation; and homeowners grants.

Further discussions with the AIP tables and other First Nations in the treaty process will be held upon request.

(e) Sto:lo Nation: Squiala First Nation (BC)

ITAB facilitated a service agreement negotiations planning meeting with the Squiala First Nation (BC) on August 26, 2004. The First Nation and the City of Chilliwack have begun preliminary discussions with respect to servicing, development cost charges and other related issues. The Squiala First Nation and the City of Chilliwack have jointly requested ITAB's further assistance in continuing these negotiations.

(f) Province of New Brunswick

In 2004-2005, ITAB began discussions with the Province of New Brunswick for the provision of assessment services to First Nations by the New Brunswick assessment authority. Talks have been progressing favourably and ITAB fully expects a positive outcome. Provincial assessors provide services to First Nation tax authorities in other provinces including British Columbia, Saskatchewan and Ontario.

Mediation Training

ITAB and the Canadian Energy Pipeline Association (CEPA) partnered to provide a program of four courses for First Nations and energy pipeline taxpayers on the mutual gains process. 411 participants attended the courses offered between 1998 and 2003. The program was credited with changing the culture of negotiations and created new options for negotiators leading to successful agreements.

ITAB has held discussions with CEPA to continue with projects through its partnered working group on property taxation.

5. Policy

Policy Objectives

(a) Promote and Protect Jurisdiction

A key objective of ITAB is to “clear the path” for First Nations wishing to occupy on-reserve tax jurisdictions. Challenges to First Nation property tax jurisdiction have come from municipal, provincial and federal jurisdictions and court decisions. ITAB addresses the issues behind these challenges through effective, proactive communication strategies.

(b) Balance Interests

ITAB policies are intended to prevent or mitigate local disputes. The tax policy interests of the First Nation government should be reconciled with the tax policy interests of the taxpayers.

(c) Expand Revenue Jurisdiction

ITAB policies create trust and capacity in First Nation property tax systems to facilitate future expansion into other revenue-raising jurisdictions.

(d) Encourage Economic Development

ITAB policies should promote tax administrative capacity and tax expenditure efficiency, thereby increasing local returns to investment through tax rate and tax revenue stability.

(e) Protect Tax System Integrity

ITAB policies seek to ensure that the tax policies of one First Nation enhance the tax policy environment of other First Nations.

(f) Promote Efficiencies

Property tax policies seek to achieve economic, technical and administrative efficiency throughout the First Nation property tax system.

Policy Development

In 2004-2005, ITAB initiated and continued to work on several policy initiatives dealing with taxpayer relations, development cost charges, alternative dispute resolution, financial management, and local improvements. While these policies were developed under the authority of section 83 of the *Indian Act*, all of them have been designed to meet the requirements of the FNTC once it is established.

The Board also reviewed existing ITAB policies to update and ensure they satisfied the requirements of the FNTC upon transition. As well, a draft bylaw review standards and guidelines project was initiated.

The following is a brief description of the policy work under development:

(a) Taxpayers Relations Policy

Initiated in 2001, the Taxpayer Relations Policy project was developed in response to the needs of the First Nations property tax system and, in particular, the concerns expressed by residents of Musqueam First Nation during the Musqueam Lease crisis. Improving taxpayer relations remains a key objective for all First Nation tax authorities and members of the Canadian Property Tax Association.

The project's objective was to elicit views from varying interests in order to establish an ITAB policy. Technical papers on the matter were developed by legal and policy consultants, BC Civil Liberties Society and Dr. Jon Kesselman. First Nations tax authorities from across the country reviewed the papers and attended a policy development session where issues were discussed and options were debated.

In 2002, two focus group sessions were held and attended by taxpayers, First Nation representatives, policy, legal, and economic advisors, as well as ITAB board members and staff. A draft policy framework was completed after the first session and submitted for comment during the second session. An important consideration for the focus group was the introduction of the FSMA which among other things would provide statutory protection for taxpayer interests.

A final report of the focus group findings was completed in 2003 and a subsequent draft policy was developed. Further refinements to the draft policy were made in 2004 upon consultation with the Consensus Building Institute, the Kalona Group, and Fiscal Realities Economists. An ITAB presentation on the draft policy was given to a meeting of First Nation Tax Administrators in October 2004.

The draft policy balances the interests of First Nations and taxpayers. It is based on guiding principles and reflects concerns expressed during focus group sessions. Overall, it emphasizes the need for on-going communication between First Nation tax authorities and all First Nation taxpayers, and strongly advocates the use of Advisory Committees to ensure taxpayer issues are represented.

The policy focuses on such requirements as the First Nations having to notify taxpayers when enacting, repealing or making material amendments to a taxation law. In addition, First Nations should allow taxpayers to access annual budgets, municipal service contracts, audits, the assessment roll, Council resolutions related to property taxation, bylaw and other documents directly relevant to First Nation taxation. Finally, First Nations should establish procedures to ensure that taxpayers have an annual opportunity to provide comment on the property taxation budget and any bylaw relating to the rate of tax to be imposed or the expenditure of tax funds to be collected, prior to their approval by Council. Tabled in January 2005, the draft policy is expected to receive Board approval at the beginning of 2005-2006.

(b) Development Cost Charges (DCC) Policy and Bylaw Review Checklist

A critical element to local government development financing and primarily used to finance new infrastructure, development cost charges (DCCs) are levied against developers through a DCC bylaw. Over the last several years, ITAB has developed policy and a draft sample bylaw. During the course of the last fiscal year, ITAB refined the Development Cost Charge checklist and discussed outstanding DCC policy issues. Several issues were clarified, for example technical advisors concluded that a DCC paid to a First Nation should be deposited by the First Nation into a separate DCC reserve fund. This fund would be established for each purpose for which the First Nation imposes the DCC. The expenditures of each fund would be set so that they may only be made in relation to the specific infrastructure project to which they were collected. A financial firewall would be established around DCC reserve funds until the infrastructure projects to which the reserve funds are related to, are completed.

Given that several First Nation jurisdictions are interested in enacting a DCC bylaw and the policy work is nearly completed, it is anticipated that the sample DCC bylaw and the ITAB DCC policy will be approved by the Board early in fiscal year 2005-2006.

(c) Alternative Dispute Resolution Policy

The Consensus Building Institute completed a research paper for ITAB on alternative dispute resolution. Entitled, *Conflict Prevention, Facilitation, and ITAB's Role in Alternative Dispute Resolution in First Nation Property Taxation*, the paper has been a source document for the development of a mediation policy.

In October 2004, a draft version of the ITAB Alternative Dispute Resolution Policy was completed by the Board. The draft policy is intended to govern ITAB's and First Nation taxing authorities' role in promoting and utilizing alternative dispute resolution for tax disputes. Among the items addressed by the policy are: ITAB's role in facilitating alternative dispute resolution, First Nation dispute resolution processes, ITAB dispute resolution processes, and ITAB's commitment to keeping an inventory of mediators who have the requisite experience in dealing with property tax disputes.

A draft policy is expected to be approved in 2005-2006.

(d) Financial Administration and Management Policy

ITAB has been working on developing policy and a review checklist for Financial Administration and Management bylaws. A key policy issue relates to enforcement mechanisms available under section 83 of the *Indian Act*, and the role and use of First Nation government administrative bodies in financial management decision-making. A draft Financial Administration and Management policy is expected to be completed in early 2005-2006.

(e) Local Improvement Policy

An emerging area of First Nation development financing is the use of local improvement charges (LIC). These bylaws are used for existing developments which require improvements such as sewer, sidewalks, etc. LIC are site-specific improvements that are initiated by affected interest holders or by the local government. Construction costs are front-ended by the local government and then reimbursed by charging benefitting property owners a set rate over a specified area of time.

To meet the need of First Nations wishing to implement LIC, ITAB initiated research to lay the groundwork for a specific ITAB LIC policy, review criteria, and a model bylaw. Board approval of the policy and a model bylaw is expected in mid 2005-2006.

III. SPECIAL INITIATIVES**1. *First Nations Fiscal and Statistical Management Act***

Parliamentary Process

The FSMA received Royal Assent on March 23, 2005.

(a) History

Bill C-20 is the third version of this legislation and incorporates a number of amendments to bills introduced in previous Parliamentary sessions (Bill C-19 and Bill C-23).

Bill C-19, introduced on December 2, 2002, was preceded by a consultative draft, released in August of that year and had made it through four days of hearings in the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources. During its study, the Committee heard from a strong list of witnesses who supported the legislation, as well as a few who opposed. The Committee had concluded its study by proposing amendments to the bill, including the addition of a non-derogation clause. Parliament rose shortly thereafter and Bill C-19 died on the Order Paper.

The legislation was introduced again, on March 10, 2004, as Bill C-23, with the previously proposed amendments preserved and another amendment added by then Minister of Indian Affairs, Andy Mitchell, aimed at clarifying the optional nature of the legislation. This was the key concern raised by opposing witnesses. Bill C-23 also died on the Order Paper as the brief Parliamentary session was ended with the general election called in May 2004.

(b) Bill C-20

The FSMA was introduced in Parliament on November 2, 2004 as Bill C-20, again with previously requested amendments intact.

Bill C-20 was debated on November 19, 2004 and was unanimously referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development that same day. The Committee's study of the legislation included hearing from witnesses on December 7, 2004, a clause by clause review of the legislation on December 9, 2004 and its report back to the House of Commons with an amended Bill C-20 later that day.

On December 10, 2004, the House of Commons accepted the Committee's report and, with unanimous consent, voted that Bill C-20 be referred to the Senate. The FSMA was read a first time in the Senate on December 13, 2004. Parliament broke shortly thereafter, leaving the bill on the Senate's Order of Business when they returned in February 2005.

On February 15, 2005, Liberal Senator Ross Fitzpatrick, the sponsor of the legislation in the Senate, spoke to Bill C-20 at second reading. Senator Gerry St. Germain spoke on

behalf of the Conservative Party on February 16, 2005. The bill was referred to the Senate Standing Committee on Aboriginal Peoples that day.

The Standing Committee scheduled hearings for February 22-23, 2005 and March 8-9, 2005. They heard from 17 witnesses during that time, including the First Nation proponents of the Bill, the Minister, taxpayers who will be affected by the legislation, First Nations members (some spoke in support and others voiced concerns), bankers and debt financing experts. The Committee recorded the concerns raised, while acknowledging that most had been previously addressed by amendments already included in the legislation. Satisfied by the testimony given by the witnesses, and recognizing the value of the legislation, the Senate Committee completed their study with the clause-by-clause consideration of Bill C-20 on March 9, 2005. The Committee Chair, Senator Nick Sibbeston, tabled the Committee's report in the Senate Chamber on March 10, 2005.

Third Reading in the Senate occurred on March 21, 2005, when Senator Fitzpatrick rose to speak to the legislation and was followed with a supporting speech by Conservative Senator Terry Stratton. The legislation was passed by the Senate that day - again with unanimous consent. The *First Nations Fiscal and Statistical Management Act* officially received Royal Assent on March 23, 2005.

First Nations Fiscal and Statistical Management Act:

PARLIAMENTARY HISTORY

Date	Parliamentary Study (House of Commons & Senate)
August 15, 2002	Notice (Release of Consultative Draft)
December 2, 2002	Introduction and First Reading in the House of Commons (Bill C-19)
February 25, 2002	Second Reading and Referral to a Committee
June 9–12, 2003 and September 16-22, 2003	Study by House of Commons Standing Committee on Aboriginal Affairs, Northern Development, and Natural Resources
September 24, 2003	Report by Committee (Tabled with Amendments)
Prorogation of the 2 nd session of the 37 th Parliament ended the debate at Report Stage of Bill C-19 . The legislation was reinstated at that same stage in the next Parliamentary session as Bill C-23. Bill C-23 included a revision, requested by then Minister of Indian Affairs, The Hon. Andy Mitchell, to clarify the optionality of the legislation. The debate officially ended with an election call on May 23, 2004.	
November 2, 2004	Introduction and First Reading in the House of Commons (Bill C-20 was introduced with amendments, one of which included a non-derogation clause proposed by the House of Commons Committee during its study of Bill C-19)
November 19, 2004	Second Reading and Referral to House of Commons Standing Committee on Aboriginal Affairs and Northern Development
December 7-9, 2004	Study by Committee
December 10, 2004	Report (Tabled with Amendments)
December 10, 2004	Third Reading and Referral to Senate (Passed with All-party support)
December 14, 2004	First Reading in the Senate
March 16, 2005	Second Reading
March 21, 2005	Third Reading (Passed with All-party support)
March 23, 2005	ROYAL ASSENT

FSMA Communication Activities

Communications representatives of each of the fiscal institutions coordinated messaging

and developed a variety of materials for the purpose of keeping stakeholders and the general public informed on the proposed *First Nations Fiscal and Statistical Management Act*.

ITAB worked closely with representatives of the other institutions, First Nation leadership, taxpayer representatives and DIAND/Ministerial officials to ensure Parliamentarians were well informed in their consideration of the legislation.

The following is a list of key activities completed in 2004-2005:

(a) Newsletter (FNFI Update)

The *FNFI Update* is directed to First Nations, Parliament, and the general public. Two editions of the *FNFI Update* were drafted and made available to all via the FNFI web site. The first newsletter was prepared for a meeting of the First Nations Summit in BC in June 2004 and also made available at the July 2004 Assembly of First Nations Annual General Meeting. The second newsletter provided an update on the progress of the legislation in February 2005.

(b) Web sites

The www.fnfi.ca web site is a tool used to provide information on the First Nations fiscal institutions initiative. News releases, background information, answers to frequently asked questions, and other key information pertaining to the FSMA can be found on the site. The FNFI web site will host the regulations associated with the legislation during the consultation period, scheduled for the fall of 2005. Regulations associated specifically with the First Nations Tax Commission will also be found on the FNTC web site during this time.

(c) Information Booklet

An FNFI information booklet, "*Building a Better Future...through investment and economic growth*", was mailed to all First Nations and Parliamentarians in 2004-2005. The booklet provides a detailed history of the initiative, an overview of each institution and of the legislation, and answers some frequently asked questions.

(d) Mailouts

Consistent with ITAB's Parliamentary outreach strategy, information packages (booklet, news release, updated materials, and copy of legislation) were sent to all Members of the House of Commons and the Senate upon introduction. These materials were also sent to all First Nations.

National Meeting for First Nation Taxation Authorities

On March 17, 2005, ITAB hosted a national meeting of leading First Nation taxation authorities from every region across Canada. The goal of the one-day meeting was to offer a detailed overview of the FSMA to First Nations who will most likely “opt in” to the legislation once it comes into force. Seventeen First Nations were represented, with 47 participants in total.

The overview presentation had four themes: strengthening the First Nation tax system (FNTC); creating debentures (FNFA); supporting taxation and debentures (FMB); and the role of statistics (FNSI).

A roundtable discussion followed which provided an opportunity for First Nation representatives to discuss the legislation. Some First Nations presented Band Council Resolutions requesting they be added to the schedule of the FSMA. Others indicated that they intended to pass such resolutions. Representatives noted the opportunities offered by the FSMA and expressed gratitude for the information provided and the work that had been done on the legislation.

ITAB plans to hold a second meeting in 2005-2006 to provide information about the FSMA to all First Nation taxation authorities, and to discuss the associated regulations.

Other Meetings

ITAB, in partnership with the representatives of the First Nations Finance Authority, First Nations Financial Management Board and First Nations Statistical Institute, held extensive information sessions, meetings, trade shows and presentations with various stakeholders to fully explain the requirements and objectives of the *First Nations Fiscal and Statistical Management Act*. Other engagements included meetings with the Canadian Property Tax Association, First Nations Tax Administrators Association, Canadian Energy Pipeline Association and many more.

With the FSMA in the House of Commons as Bill C-20, ITAB's focus in 2004-2005 was to inform all Parliamentarians of the immediate need for, and benefits of, the legislation. Meetings were held with many Members of Parliament, including all DIAND critics, and Senators to ensure they had a complete understanding of Bill C-20. These extensive information sessions and debriefs played a key role in ensuring all-party support in both the House of Commons and the Senate.

A list of meetings and information sessions ITAB held with First Nations, Aboriginal Organizations, and stakeholders during the last fiscal year is attached as APPENDIX B.

2. First Nations Tax Commission

Transition

Transition discussions played a large role in ITAB planning in the last fiscal year. With the legislation moving quickly through Parliament, ITAB accelerated activities in order to ensure its smooth transition to the FNTC and to ensure it is fully operational by the anticipated “coming into force” date of April 2006.

It is expected that at least 20 First Nations will be scheduled on the FSMA by next year and will require that the full range of FNTC law review services be available on April 1, 2006. This gives the FNTC one year to become operational.

With section 83 of the *Indian Act* left intact, and the property tax provisions under the FSMA now federal law, current and future taxing First Nations can now pick the system they wish to use. Their choice notwithstanding, the FNTC will be responsible for maintaining two parallel and national on-reserve property tax systems. To meet this challenge, ITAB has formulated a transition plan and has begun negotiations with DIAND officials. The transition plan details the activities and deliverables required to ensure that the FNTC is operational by April 2006.

The transition plan consists of a number of specific projects that have been divided to correspond to the functions and services in the FNTC business plan. These projects include:

(a) Policy Development

ITAB will research, draft and review 40 policies and proposed standards. ITAB policies will be revised and updated to meet FSMA requirements. This includes policies and procedures for FNTC review of s.83 laws and FSMA laws. New policies will be required for new FSMA requirements such as those associated with complaints procedures, notification of taxpayers and specialized review of First Nation borrowing laws. The policy framework will be used to support the development of draft standards required by the legislation.

(b) Local Revenue Laws

As per FSMA requirements, ITAB will begin the development of the nine sample FSMA laws required for the FNTC. To assist First Nations in converting their laws to the FSMA requirements, ITAB will also administer a First Nation Bylaw Conversion Program.

(c) Compliance and Regulation

ITAB will continue to work with departmental officials to produce and consult on six FNTC regulations required before FSMA comes into force. To meet FSMA requirements, ITAB will also prepare to expand the *First Nations Gazette* and develop an on-line capability.

(d) Education and Training

ITAB will begin to develop course materials for the First Nation School of Taxation and begin to establish the competency program for tax administrators.

(e) Communications

ITAB will hold a national meeting with First Nation tax authorities and provide presentations to the Canadian Property Tax Association, other taxpayers and other governments in 2005-2006. Many First Nation tax authorities will require follow-up to discuss the transition from ITAB to FNTC. Transition materials to facilitate these communications will be developed. The corporate identity for the FNTC will be created. ITAB will also develop a plan to guide policy consultations with First Nations and stakeholders in 2006.

(f) Dispute Management

ITAB will develop the policy and basis for a roster of mediators that will be available to serve the First Nation tax system and identify roster candidates and mediator training for the FNTC dispute management system.

(g) FNTC Planning & Management

ITAB will ensure that all requirements for the Treasury Board submission are complete. This includes a revised business plan, the Results-based Management Accountability Framework, evaluation framework, Access to Information and Privacy, gender equality, and compliance with official languages assessment. Existing ITAB management policies will be updated and new policies will be developed. ITAB will develop the FNTC corporate and capital plans for 2006-2007. FNTC training will also be provided to its staff and commissioners. ITAB will identify the Information Management/ Information Technology and capital infrastructure required to support the FNTC.

To ensure a smooth transition to the FNTC while, at the same time, maintaining two property tax systems, a memorandum of understanding to cover off ITAB's current advisory role in the approval of section 83 bylaws, has been proposed. It is based on the MOU that has long governed ITAB's relationship with the department.

Regulations

The *First Nations Fiscal and Statistical Management Act* has a number of associated regulations which will govern the development, approval and implementation of local revenue laws and the carrying out of the associated responsibilities of the First Nations Tax Commission.

Over the past fiscal year, a series of meetings were held between officials of ITAB, the DIAND and Department of Justice. These meetings focussed on the consideration of guidelines and a policy framework for the required regulations. Meetings were also held to prepare a strategy for public consultation on the regulations and co-ordinate with ITAB's federal partners on the development of a plan to best communicate the content of the draft regulations.

The regulations developed for the FNTC are:

1. First Nations Tax Commission Review Procedures Regulations;
2. First Nations Assessment Appeal Regulations;
3. First Nations Rates and Expenditure Laws Timing Regulations;
4. First Nations Taxation Enforcement Regulations;
5. First Nations Assessment Inspection Regulations; and
6. First Nations Tax Commissioner Appointment Regulations.

ITAB has sought input from its stakeholders to assist in the development of the above proposed regulations. Consultations on the draft regulations will take place in 2005-2006. This will include general public consultations, as well as focussed meetings with interested parties. The regulations will be published in the *Canada Gazette* and the *First Nations Gazette* as part of the process, as well as being posted to the website of the First Nations fiscal institutions initiative, www.fnfi.ca.

IV. SUPPORTING PROGRAMS

1. Research and Policy Development

Introduction

Over the last 7 years, ITAB has conducted 11 research projects on First Nation economic development. ITAB pursued this research to support the development of First Nation economies and help expand the First Nation property tax base.

The focus of this research has been to unlock First Nation economic potential. In this regard, most First Nations have the capacity to attract investment because they have at least one of the following competitive advantages: location, human resources, technological or innovative strengths, or access to natural resources. In those few cases where no competitive advantage exists on First Nation land, the possibility of settling outstanding land claims or adding land to existing reserves or integrating into markets in other jurisdictions provides hope. In other words, ITAB research did not identify a lack of opportunity as the barrier to First Nation prosperity. Moreover, to the extent that First Nations can translate their existing competitive advantages to markets outside First Nation communities, the potential for First Nation economic development is much higher.

The barrier to prosperity on First Nation land is an inability to provide public institutions that can facilitate private investment and support economic development. As proof, one of the first findings of the ITAB research was that the costs of doing business on the most advantaged First Nation lands were four to six times higher than it was off First Nation land. The costs of doing business are principally a function of economic and governance institutions and systems, economic infrastructure, regional partnerships, land management regime, investor certainty and readily available and reliable information. The ITAB research found all these factors uncompetitive or sub-standard for the majority of First Nations. Making these factors competitive would unlock the potential of First Nation economies. In particular, ITAB research has pointed out the following:

Economic Infrastructure – First Nations would benefit by having the same economic infrastructure financing tools as other governments in Canada – debentures, development cost charges, government partnerships and dedicated infrastructure programs. Legislation is required to enable this. Four of the ITAB research papers related to this subject ultimately formed the policy and part of the design rationale for the *First Nation Fiscal and Statistical Management Act*.

Fiscal Certainty – First Nation self-government is an important element of improving First Nation economies. More local decision-making reduces the cost of doing business with First Nations. First Nation governments require the fiscal certainty of their own source

revenues to implement their governments. Four ITAB research papers were devoted to this subject. This research has been instrumental in the development of new First Nation fiscal relationship.

Economic and Governance Systems – First Nations require practical advice on how to establish model leases, service agreements, designate lands and effectively plan for development. Three ITAB research papers have focussed on implementing and designing governance elements and systems that support economic development. In this regard, the ITAB represents a mechanism to transfer this technology to First Nations.

In the past year, ITAB research has focussed on investor certainty. The first paper focussed on the elements of investor certainty. The second paper focussed on a practical method to provide that investor certainty; investor codes. Each is summarized briefly below.

Creating Certainty in the First Nation Investment Climate

This paper concerns the importance of investment “certainty” in developing First Nation economies. The term “certainty”, in this context, refers to the confidence that investors have about the positioning of those key factors that will influence the profitability of an investment into the future. The particular focus of this paper is the extent to which First Nation jurisdictions are able to provide investors with confidence that the conditions, which will produce a profitable investment, will prevail over the life of an investment. In addressing these themes the paper, of necessity, touches upon the parameters, which determine the fiscal and jurisdictional certainty, afforded the First Nation itself under existing arrangements. The reasons are straight forward - a First Nation’s ability to provide certainty concerning future tax rates and service provision is bound by the fiscal certainty that it itself has been provided; a First Nation’s ability to provide various types of legal certainty is dependent upon the extent to which its own jurisdiction is defined and also recognized by the Courts and other jurisdictions.

The paper discusses all the sources of potential investor uncertainty relating to First Nations. It concludes that the objective criteria, which inform investors’ perceptions of certainty, fall into four basic categories: (1) uncertainty created by gaps in the law or assignment of jurisdiction among governments; (2) uncertainty created by the possibility of policy change; (3) fiscal uncertainty; and (4) uncertainty regarding property rights. A number of recommendations were made to address these types of uncertainty.

Expanding the First Nation Private Sector: The Rule of Investor Codes

First Nation investor codes are part of the solution to improving the investment climate on First Nation lands. An investor code is a legal framework for economic transactions that seeks to encourage, facilitate, and streamline private investment projects through the creation of investor certainty. The benefit of this is lower costs of doing business. This results in stimulated economic activity, which leads to economic growth, increased employment, improved productivity, and ultimately economic development.

In general, investor codes reduce the level of uncertainty potential investors face. These codes provide details on issues important to investors, including tax rates and services, and the dispute resolution process. Providing necessary clarity in these areas improves certainty and reduces the costs of doing business.

This paper recommends that interested First Nations require a mechanism to transfer the knowledge and technology related to investor codes among communities throughout the country. The paper recommends that ITAB help interested First Nations design and implement investor codes as part of an improved climate for investment and expanded property tax base.

2. Legal Issues

In 2004-2005, various court cases concluded with decisions that could potentially affect the work of ITAB. Below are brief descriptions of some legal issues/decisions from 2004-2005 with explanations of their potential implications. The court cases specifically affect three different sections of the *Indian Act*: sections 83, 87, and 89.

Section 83 of the Indian Act

(a) *Beattie v. Squamish Indian Band*, [2005] F.C.J. No. 391 (FCTD)

This case involved an appeal by the occupant of a unit in a mobile home park on the Squamish reserve. The Appellant was a Status Indian, but not a member of the Squamish Band. She argued that she could not be taxed because she could have no lawful interest in the reserve as a result of section 28 (1) of the *Indian Act* which provides that no lease, contract, instrument or agreement of any kind can give a lawful right to occupy or use reserve land except with the consent of the Minister. Further, the appellant argued that her mobile home was not a fixture which could be assessed and taxed under the Band's taxation bylaw.

The Court rejected both of these arguments. It found that section 83 of the *Indian Act* and the Band's bylaw properly gave authority to tax the mere use and occupancy of reserve land. It did not require a formal document approved by the Minister. There was no dispute that the Appellant did actually use and occupy the lands. Further the Court held that the mobile home was a fixture properly assessable and taxable by the Band.

On its own motion, the Court considered the statutory basis for an appeal from a decision of a Board of Review established under a Band taxation bylaw to the Federal Court.

Section 87 of the Indian Act

In a recent decision of the Tax Court of Canada, the Court continues the trend of narrowly interpreting and applying section 87 of the *Indian Act* to deny tax exemption in most cases.

(a) Giguere v. The Queen, [2005] TCC 257 (CanLII)

The case addressed whether or not certain business income was exempt from taxation pursuant to section 87. The facts were that the appellants were status Indians who lived on reserve. They earned their business income from harvesting timber on Crown land adjacent to the reserve. The evidence disclosed that the office of the business was located on reserve, that the trucks were parked there over night and serviced there, that administrative work and some business decisions were taken at these offices, but that the bulk of the actual income earning work was done off reserve. Further the one customer of the business was off reserve and not a Status Indian.

The Court found that the place where the income generating activities actually took place was the primary factor to be considered and concluded that the business income was not exempt from taxation.

Section 89 of the Indian Act and Garnishment

There are conflicting decisions out of Manitoba and Ontario as to whether or not the “connecting factors” test is applicable to sections 89 and 90 of the *Indian Act*. The Manitoba Court of Appeal has opted for a narrow reading of both sections 89 and 90, while the Ontario courts appear to be taking a more flexible approach to the interpretation of section 90.

(a) McDiarmid Lumber Ltd. V. God’s Lake First Nation, 2005 MBCA 22 (CanLII) reversing [2004] 3 C.N.L.R. 192

In this case the Court considered whether funds which were derived from a Comprehensive Funding Agreement (“CFA”) between the Band and the Crown and were held in a Band bank account at a branch not located on reserve were exempt from garnishment.

The Court below had held that the funds were exempt from garnishment. The trial court held that the funds were intimately connected to the Band’s ability to continue to use, occupy and benefit from their reserve lands. Further the trial Court held that in any event the funds were deemed to be always on reserve pursuant to section 90 of the *Indian Act* because they were provided to the Band under agreement with the federal Crown pursuant to the Crown’s constitutional obligations to Status Indians under section 91(24) of the *Constitution Act, 1867*.

The Court of Appeal reversed the trial Court’s decision on all grounds.

The Court held that the fact that the funds were located at a branch off reserve was determinative. The importance of the funds to the Band's continued enjoyment of their reserve lands was irrelevant to whether or not they were "situated on reserve" for the purposes of section 89.

Dealing with the issue of whether or not the funds were "deemed" to be on reserve pursuant to section 90 of the *Act*, the Court of Appeal held that section 90 only applied to agreements between the Crown and Indians which related directly to treaty obligations. Although the CFA was an "agreement" between the federal Crown and the Band and provided moneys appropriated by Parliament for the use and benefit of Indians or Bands, it was not related to a specific treaty obligation and therefore did not fall within section 90.

(b) *Choken v. St. Martin Indian Band*, [2004] 4 C.N.L.R. 39 (FCA) decided June 28, 2004

This is another case dealing with garnishment of funds payable under a Comprehensive Funding Agreement ("CFA"), however section 89 of the *Indian Act* does not appear to have been argued and was not considered by the Court. Here a third party trustee had been appointed to hold and administer the funds payable under the CFA. The funds at issue were in the trustee's bank account and had been subject to a garnishment notice pursuant to Rule 449 of the Federal Court Rules which permitted attachment of a "debt owing or accruing" to the debtor. The issue that the Court considered was whether the funds in the hands of the trustee were an unconditional debt owing or accruing to the Band such that they were subject to attachment under Rule 449.

The Court held that under the circumstances of this case the money paid under the CFA remained "Crown money" even in the hands of the third party trustee until such time as the money was actually spent on the programs and services contemplated by the Third Party Management Agreement. The Court specifically states that it was not considering whether or not money paid under a CFA would remain Crown funds when deposited into a Band bank account rather than into an account of a third party manager/trustee.

(c) *Peace Hills Trust Co. v. Salteaux First Nation*, [2005] S.J. No. 143 (Sask. C.A.), reversing [2004] S.J. No. 662 (SKQB)

In this case the Band received funds from the federal government to purchase additional reserve lands to make up its treaty entitlement ("Shortfall Acres"). The funds were held in the Band's general account and if it had money left over after the purchase of the lands it could use those funds as it pleased. The Band took out several loans with Peace Hills Trust Co. and pledged the Shortfall Acres money as security. When the Band defaulted on the loan, Peace Hills Trust sought a summary judgment. In resisting the summary judgment application the Band argued that the loans were void because they pledged the Shortfall Acres money as security in violation of sections 89 and 90 of the *Indian Act*. The

Court rejected this argument holding that while sections 89 and 90 might make it difficult for Peace Hills Trust to realize on its security (an issue which was not before the Court at this stage), they did not render the underlying debt itself void. Thus Peace Hills Trust was entitled to its default judgment.

(d) *David Electrical Contractor v. Garden River First Nation*, [2004] O.J. No. 4943 (Ont. S.C.J.)

Here the Court considered whether certain funds held by the Band in a bank account in a branch located off reserve could be subject to garnishment. Looking first at section 89 of the *Indian Act* the Court concluded that the physical location of the funds was determinative of whether they were situated on reserve within the meaning of section 89.

Turning to section 90, the Court concluded that even if located at a branch off reserve funds would be deemed on reserve if there was a “sufficient nexus” between the funds and the federal government’s treaty or constitutional obligations.

The Court then embarked upon an analysis of the various sources of funds in the Band’s account to determine whether or not they were sufficiently connected to the reserve to be exempt from attachment pursuant to section 90.

The Court conceded that monies received from the federal government (or its agencies) and deposited into the general operating account in question were exempt from attachment. Most of the other funds in the accounts were also exempt because of connecting factors that easily characterize them as integral to or intimately connected with the life of the Reserve or the use of Reserve lands. These other funds included bingo and spiritual lodge funds, fire department fundraising revenues, gravel and timber revenues, park revenues, Ontario Ministry of Transportation payments, and the rental of heavy equipment. The Court found that the nexus between these revenues and the use or enjoyment of reserve lands and treaty rights seemed obvious.

However, the Court found that substantial funds in the account had been received by the Band from the operations of Casino Rama under agreement with the provincial Crown. The Court held that there was not a sufficient nexus between these funds and the reserve for them to be exempt from garnishment. The Court ruled that while the funds are derived from a casino operation on First Nation lands, they are *not* Garden River First Nation’s lands, and they have nothing to do with Garden River First Nation’s treaty or treaties with the federal government. Therefore, it concluded that they have nothing to do with constitutional obligations owed to First Nations.

It is important to note that the approach to section 90 of the *Indian Act* taken by the Court here is at odds with the more recent decision of the Manitoba Court of Appeal in *McDiarmid*

Lumber where the Court rejected the application of the “connecting factors” or “substantial nexus” tests and went with a very narrow interpretation of sections 89 and 90.

APPENDIX A: FIRST NATIONS WITH SECTION 83 BYLAWS**Newfoundland (1)**

Miawpukek First Nation

Nova Scotia (3)

Eskasoni Band
Millbrook Band of Indians
Pictou Landing First Nation

New Brunswick (2)

Kingsclear First Nation
Metepenagiag Mi'kmaq Nation

Quebec (3)

Innu Takuaihan Uashat mak
Mani-Utenam
Conseil des Montagnais de Lac-
Saint-Jean
Nation huronne-wendat

Ontario (14)

Beausoleil First Nation
Chippewas of Georgina Island
First Nation
Chippewas of Kettle and Stony
Point
First Nation
Chippewas of Mnjikaning First
Nation
Dokis First Nation
Fort Severn First Nation
Kasabonika Lake First Nation
Lac La Croix First Nation
Michipicoten First Nation
Mississaugas of Scugog Island
First Nation

Nipissing First Nation
Serpent River First Nation
M'Chigeeng First Nation
Whitefish Lake Indian Band No. 6

Manitoba (2)

Fairford First Nation
Opaskwayak Cree Nation

Saskatchewan (6)

Carry The Kettle First Nation
Flying Dust First Nation
Muskeg Lake Band of Indians
Ocean Man First Nation
White Bear First Nations
Whitecap Dakota/Sioux First
Nation

Alberta (18)

Alexander First Nation
Bigstone Cree First Nation
Dene Tha' First Nation
Duncan's First Nation
Enoch First Nation
Fort McKay First Nation
Fort McMurray First Nation
Little Red River Cree Nation
Mikisew Cree First Nation
Alexis Nakota Sioux Nation
O'Chiese First Nation
Paul Indian Band
Piikani First Nation
Siksika Nation
Stoney Tribal Council
Sturgeon Lake Band of Indians
Tsuu T'ina Nation
Whitefish Lake First Nation

British Columbia (77)

Adams Lake Indian Band
 Akisqnuq First Nation
 Ashcroft Indian Band
 Blueberry River Indian Band
 Bonaparte Indian Band
 Boothroyd Indian Band
 Boston Bar First Nation
 Burns Lake Indian Band
 Campbell River Indian Band
 Chawathil Indian Band
 Cheam Indian Band
 Chemainus First Nation
 Coldwater Indian Band
 Cowichan Indian Band
 Cook's Ferry Indian Band
 Doig River Indian Band
 Fort Nelson Indian Band
 Kamloops Indian Band
 Kanaka Bar Indian Band
 Kwantlen First Nation
 Kwaw Kwaw Apilt First Nation
 Lake Babine First Nation
 Leq'á:mel First Nation
 Lheidli-T'enneh Band
 Little Shuswap Indian Band
 Lower Kootenay Indian Band
 Lower Nicola Indian Band
 Lower Similkameen Indian Band
 Matsqui First Nation
 McLeod Lake Indian Band
 Moricetown First Nation
 Musqueam Indian Band
 Nadleh Whut'en Indian Band
 Nak'azdli Indian Band
 Neskonlith Indian Band
 Nicomen Indian Band
 Osoyoos Indian Band
 Seabird Island Indian Band
 Scowlitz First Nation
 Shuswap Indian Band
 Shxw'owhamel First Nation

Shxwhá:y Village
 Siska Indian Band
 Skawahlook First Nation
 Skeetchestn Indian Band
 Skidegate Indian Band
 Skowkale First Nation
 Skuppah Indian Band
 Sliammon Indian Band
 Snuneymuxw First Nation
 Soda Creek Indian Band
 Songhees Indian Band
 Spuzzum Indian Band
 Squamish Nation
 St. Mary's Indian Band
 Stelat'en First Nation
 Sumas First Nation
 T'it'q'et First Nation
 Tla-o-qui-aht First Nations
 Tl'azt'en Nation
 Tobacco Plain Indian Band
 Tsawout Indian Band
 Tsawwassen First Nation
 Ts'kw'aylaxw First Nation
 Tsleil-Waututh Nation
 Tzeachten First Nation
 Upper Similkameen Band
 Westbank First Nation
 West Moberly First Nations
 Whispering Pines/Clinton Indian Band
 Williams Lake Indian Band
 Yale First Nation
 Yekooche First Nation

Northwest Territories (1)

Hay River Dene Band

**APPENDIX B: INDIAN TAXATION ADVISORY BOARD
MEETINGS AND INFORMATION SESSIONS****April 2004**

April 28, 2004 - Canada Aboriginal People's Roundtable, Ottawa, ON

April 28, 2004 - Federal Treaty Negotiations Office, Kamloops, BC

April 29, 2004 - Conference Board of Canada, Cranbrook, BC

May 2004

May 18-20, 2004 - Assembly of First Nations (AFN) Confederacy, Saskatoon, SK

May 27, 2004 - British Columbia Utilities Advisory Council, Kamloops, BC

May 31 and June 1, 2004 - Canadian Property Tax Association (CPTA),
Vancouver, BC

June 2004

June 1, 2004 - Canadian Energy Pipeline Association, Calgary, AB

June 2, 2004 - Canadian Property Tax Association, Calgary, AB

June 3, 2004 - Northwest Tribal Treaty Nations, Prince Rupert, BC

June 7, 2004 - Shuswap Nation Tribal Council, Chase, BC

June 7, 2004 - Skeetchestn Indian Band, Savona, BC

June 18, 2004 - Alberta Chamber of Commerce, Calgary, AB

June 19-21, 2004 - AFN / National Congress of American Indians, Uncasville,
CT, USA

June 22, 2004 - AFN Governance Workshop, Ottawa, ON

June 24, 2004 - Aboriginal Forum, Calgary, AB

June 28, 2004 - Campbell River Indian Band, Campbell River, BC

June 29, 2004 - Tsawout First Nation, Victoria, BC

June 29-30, 2004 - Atlantic Area Chiefs Meetings, Moncton, NB

July 2004

July 7, 2004 - Shuswap Nation Tribal Council, Kamloops, BC

July 15, 2004 - North Thompson Indian Band, Barriere, BC

July 20-22, 2004 - Assembly of First Nations AGA & Tradeshow, Charlottetown, PEI

July 26, 2004 - AIP Treaty Tables, Vancouver, BC

July 27, 2004 - Kamloops Indian Band, Kamloops, BC

August 2004

August 19, 2004 - Burnt Church First Nation, Burnt Church, NB

August 25, 2004 - Aboriginal Financial Officers Association, Vancouver, BC

August 26, 2004 - Squiala First Nation, Chilliwack, BC

August 27, 2004 - Snuneymuxw First Nation, Nanaimo, BC

August 28-29, 2004 - Tsawout First Nation, Victoria, BC

August 31, 2004 - St. Mary's Indian Band, Cranbrook, BC

September 2004

September 3, 2004 - Westbank First Nation, Westbank, BC

September 3, 2004 - Union of British Columbia Municipalities, Westbank, BC

September 7, 2004 - Bonaparte Indian Band, Bonaparte, BC

September 7, 2004 - Metepenagiag Mi'kmaq Nation, Red Bank, NB

September 9, 2004 - Simon Fraser University / Treaty Workshop, Vancouver, BC

September 20, 2004 - Sliammon First Nation, Powell River, BC

September 27, 2004 - Atlantic Policy Congress, Dartmouth, NS

September 27, 2004 - Millbrook First Nation, Truro, NS

September 28, 2004 - Canadian Property Tax Association, Charlottetown, PEI

September 29, 2004 - Shuswap Nation Economic Development Conference, Kamloops, BC

October 2004

October 1, 2004 - Mashteuiatsh Innu First Nation, Mashteuiatsh, QC

October 5 and 7, 2004 - Northwest Tribal Treaty Nations, Terrace, BC

October 13-15, 2004 - First Nations Tax Administrators Association, Vancouver, BC

October 20, 2004 - Essipit Innu First Nation, QC, Essipit, QC

October 21, 2004 - Aboriginal Financial Officers Association Alberta Chapter Conference, Edmonton, AB

October 21, 2004 - Nuu-chah-nulth Economic Development Conference, Parksville, BC

October 21, 2004 - Alberta Environmental Appeals Board, Edmonton, AB

October 22, 2004 - Statistics Canada, Ottawa, ON

October 26, 2004 - Tsleil Waututh First Nation, North Vancouver, BC

October 28, 2004 - First Nations Alliance 4 Land Management Conference, Richmond, BC

November 2004

November 1, 2004 - Osoyoos Indian Band, Oliver, BC

November 16, 2004 - CPTA Western Chapter, Calgary, AB

November 17, 2004 - Eel River Bar First Nation, Eel River Bar, NB

November 18, 2004 - Strategic Conversations, Vancouver, BC

November 22, 2004 - Assembly of First Nations, Ottawa, ON

December 2004

December 8, 2004 - AFN Special Chiefs Assembly, Ottawa, ON

December 13 and 14, 2004 - Canada -Aboriginal Peoples Roundtable Sectoral Session, Ottawa, ON

January 2005

January 19, 2005 - Tsuu T'ina Nation, Edmonton, AB

February 2005

February 1, 2005 - Fort William First Nation, Fort William, ON

February 2, 2005 - Canadian Property Tax Association, Calgary, AB

February 8, 2005 - Adams Lake Indian Band, Chase, BC

February 10, 2005 - Aboriginal Financial Officers Association of Canada, Ottawa, ON

February 24, 2005 - Federation of Saskatchewan Indian Nations, Regina, SK

March 2005

March 4, 2005 - Ogemawahj Tribal Council, Rama, ON

March 10, 2005 - Aboriginal Financial Officers Association of BC, Burnaby, BC

March 15, 2005 - Nicola Valley Tribal Administration, Merritt, BC

